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June 24.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE EASTERN TERMINAL ELEVATOR COMPANY ..... } DEFENDANT.

Constitutional Law—Canada Grain Act, subsection 7, section 95, 9-10 Geo. V—Ultra vires—Property and civil rights—B.N.A. Act, sections 91 and 92—Ancillary provision.

Held, that subsection 7 of section 95 of the Canada Grain Act, 9-10 Geo. V, c. 40, providing that:

"In the month of August in each year, stock shall be taken of the quantity of each grade of grain in the terminal elevators; if in any year after the crop year ending the thirty-first day of August, 1919, the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year, such excess surplus shall be sold annually by the Board of Grain Commissioners and the proceeds thereof paid to the said Board * * *."

deals with a subject-matter falling within the powers exclusively assigned to the provincial legislatures by the B.N.A. Act, namely, property and civil rights, and is *ultra vires* of the Dominion Parliament.

2. That said section is not in the nature of an ancillary provision, which whilst encroaching upon matters assigned to the provincial legislatures, is required to prevent the scheme of a Dominion law being defeated; nor is it a case where in order to operate a validly enacted law, procedure must be adopted to make effective that law even though it invades the legislative fields of the provinces in respect of property and civil rights.

ACTION to recover from defendant certain surplus grain, or the value thereof, under subsection 7 of section 95 of the Canada Grain Act.

April 15th and 16th, 1924.

Action now tried before the Honourable Mr. Justice Maclean, the President at Fort William.

E. L. Taylor, K.C., and *F. P. Varcoe* for the Crown.

A. E. Hoskin, K.C., and *E. W. Ireland* for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., this 24th June, 1924, delivered judgment (1).

This is an information exhibited by the Attorney General of Canada against the defendant for the delivery of definite quantities of certain grains, or alternatively, for

(1) An appeal has been taken to the Supreme Court of Canada.

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the payment of the sum of $43,431.20, under the provisions of subsection 7 of section 95 of the Canada Grain Act, as enacted by chapter 40, Statutes of Canada, 1919, and which is as follows:—

> In the month of August in each year, stock shall be taken of the quantity of each grade of grain in the terminal elevators; if in any year after the crop year ending the thirty-first day of August, 1919, the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year, such excess surplus shall be sold annually by the Board of Grain Commissioners and the proceeds thereof paid to the said Board. Such proceeds shall be applied towards the cost of the administration of The Canada Grain Act in such manner as the Governor in Council may direct.

The defendant company was incorporated under the provisions of The Manitoba Joint Stock Companies Act, and was empowered, *inter alia,* to carry on the business of general warehousing in all its branches, to carry on all business generally transacted by the owners of elevators and grain warehouses, to issue certificates and warrants negotiable to persons warehousing goods with the company, to acquire and operate elevators, mills and property of all kinds in which grain and other products are handled, manufactured or used, to receive, buy, store, sell, crush and manufacture grains of all kinds and the products thereof. The defendant was engaged in operating terminal elevators, at Fort William and Port Arthur, in the province of Ontario, during the period within which the claim referred to in the plaintiff's information, originated and accrued, that is for the crop year ending August 31, 1920. The defendant was authorized to carry on its business, and generally exercise its corporate powers, in the province of Ontario, by the issuance of a license by the Lieutenant Governor in Council of that province, under a statute of that province respecting the licensing of extra-provincial corporations.

A considerable amount of evidence was received explanatory of the operations of the Canada Grain Act and the practices of the grain trade, in respect of the storage, inspection, grading, cleaning, weighing, shipping and exporting of grain, from the point of production, until the same was ready for marketing, or for export from Canada. It is perhaps therefore desirable to summarize the principal provisions of the Grain Act, and such of the evidence as is

descriptive of the manner in which these provisions function in actual operation.

The Canada Grain Act, ch. 27, Statutes of Canada, 1912, and as amended, is administered by a Board, called the Board of Grain Commissioners. For inspectional purposes Canada is divided into two divisions, the Western Division including all that part of Canada lying west of, and including the city of Port Arthur; the Eastern Division including that portion of Canada lying east of Port Arthur. The board is clothed with authority to appoint chief inspectors, and inspectors of grain, whose duty it is to establish official standard grades, to grade grain in accordance with the grades defined in the Act, and to issue certificates of inspection, specifying the grade of grain so inspected. The Act authorizes the appointment by the Board, of weighmasters, who have control of the weighing of grain inspected, or subject to inspection, or received into or shipped out of any terminal elevator. The elevator is required to issue a certificate of the receipt of grain to the owner, shewing the amount and the grade thereof. Grain of the same grade must be kept together, and stored in elevators with grain of a similar grade. Grain to be stored or stored in a terminal elevator in the Western Division must be inspected both inwards and outwards, and grain grown in the Eastern Division must be inspected in that division in the same manner. Grain inspected in the Western Division need not be inspected again, except for special reasons, if it is later stored in an elevator in the Eastern Division. All grain produced in the provinces of Alberta, Saskatchewan and Manitoba, passing through Winnipeg en route to the head of the Great Lakes, must be inspected as prescribed by the Act at Winnipeg, which inspection is final. The Act establishes the various grades of the various grains, designating the same by names and numbers, and provides what shall be the quality or characteristics of such grades.

A terminal elevator or warehouse under the Grain Act, is one which receives grain from the public for storage, or cleaning or both, and which ships out graded grain in a marketable condition, by rail or water, and is located at such points as are declared terminal points by the Gov-

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ernor in Council. Terminal elevators in the Western Division are chiefly located at Port Arthur and Fort William, being the first shipping ports available for grain shipment by water, after leaving Winnipeg and eastward bound, though from those points grain may be forwarded by rail. Much the greater part however is forwarded by water to other Canadian ports, and American ports. A terminal elevator, though representing private capital, is required by the Grain Act to procure from the board annually, a license before transacting business, and is prohibited from buying or selling grain by the Grain Act. Private elevators are permitted to buy and sell grain, as may elevators used in connection with flour mills. At Port Arthur and Fort William private elevators greatly exceed in number terminal elevators, and at the present time handle a much greater volume of grain. When the cause of action arose the defendant's elevators were terminal elevators, though they are now operated as private elevators.

Specifically in respect of the Western Inspection District, the Act prescribes that grain marked by the inspectors at Winnipeg for cleaning, shall be cleaned at a terminal elevator under the supervision of an inspector, who has also the direction and supervision of the binning of the same, and such officers are granted quite extensive powers to enforce and ensure the proper cleaning of grain, and the board is empowered to make regulations regarding the same. No grain shall be shipped out, transferred or removed from terminal elevators without the supervision of the inspecting officers, and the inspectors are authorized during business hours to examine grain stored in terminal elevators. Grain shipped from any terminal elevator shall be shipped out only as graded into such elevator, and certificates of inspection and grade are to accompany the grain to its destination. In the case of unclean grain inspected in the Western Inspection Division, at Winnipeg, the inspector is required to state in his certificate the percentage of foreign matter to be removed therefrom, in order to clean the grain to the certified grade.

There are other sections of the Act dealing with such matters as hospital elevators, flat warehouses, railway, appeal boards, loading platforms, the supply of railway

cars, grain buyers and dealers, etc., but it is not necessary I think to make any extended reference to the same.

It might be helpful here to state what in actual practice occurs in the case of grain produced in the Western Division, from the time it leaves the farm until it reaches a terminal elevator at say Port Arthur. The producing farmer usually sells, or stores, his grain to, or in what is termed a country elevator, the business of which is to store grain for a charge, or to purchase the same outright. He may store on the basis of receiving the identical grain, or grain of the same grade, at a terminal elevator. He may also load his grain on a car consigned to a commission agent to sell for his account. In due course, the grain is forwarded to a terminal elevator at say Port Arthur, and in transit thereto, passes through Winnipeg, where the first inspection under the Grain Act takes place. An inspection certificate issues from the office of the chief inspector of grain of the Western Division, setting forth for whose account the grain was inspected, the number of the car, the railway station shipped from, the kind of grain, the grade, and the percentage of dockage, if any, "dockage" meaning the inspectors' estimate of unmarketable grain and foreign matter in the carload, which must be removed by the terminal elevator when cleaning the same. This non-commercial grain and foreign matter when separated from the grain at the terminal elevator is called, "screenings." If the grain is considered sufficiently clean by the inspector, or is estimated not to contain more than three-fourths of one per cent of foreign or unclean matter, the carload is marked as "clean," and is stored with grain of the same kind and grade when it reaches a terminal elevator.

The inspected car then proceeds to Fort William or Port Arthur, the inspectors' certificate reaching there at the same time or earlier, and then being in the possession of an officer of the board. The grain is subsequently weighed into an elevator, and pursuant to the Grain Act a certificate of weight is issued. This certificate shews: the number of the car, the place where weighed, the date, the kind of grain and the weight of the carload of grain. Thereupon, and in conformity with the Grain Act, the receiving elevator company issues to the owner of the grain, a ter-

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minal warehouse receipt to the effect that it has received and holds subject to the order of the owner, a specified quantity of a definite kind of grain expressed in bushels, of an inspected and designated grade, to be stored with grain of the same grade. The quantity is the weight of the carload, less the deduction for dockage. This grain, or grain of the same grade, is deliverable upon the return of the warehouse receipt, properly endorsed by the holder thereof, and upon payment of storage and other charges. The certificate further states that the grain will be kept stored and insured for the benefit of the person to whose order the receipt is issued, or his assignee, and in conformity with the provisions and conditions of the laws of Canada relating to the warehousing of grain. The evidence shews that Canadian grain is usually sold in international markets, on the certified grades established by the inspection under the Grain Act, and the certificate shewing the grade, accompanies the shipment to the ultimate market. Grain exported from Australia, India or Argentina is usually purchased on the basis of, fair average quality on arbitration.

At the trial there was filed three specimen exhibits, indicating the actual results of the inspection of a carload of wheat at Winnipeg after arrival there, the subsequent weighing into an elevator at Port Arthur, and the ultimate result as expressed in the certificate of the terminal warehouse receipt. The inspection certificate at Winnipeg shews the car number as being No. 303015, consigned to Pioneer Grain Company, Limited, the station shipped from being Kamsack, the grade being Manitoba Three Northern, and the dockage 4½ per cent. The certificate issued from the office of the weighmaster, shews the car was weighed at Port Arthur, at the defendant's elevator, the kind of grain, and the weight, 72,100 pounds. The terminal warehouse receipt was issued by the Eastern Terminal Elevator Company, Ltd., the defendant, and shews the quantity to be 1,147 bushels and 40 pounds, which is the weight stated in the weighmaster's certificate, after the deduction of the dockage of 4½ per cent as stated in the inspector's certificate.

After the issuance of the terminal warehouse receipts, which are registered with the board at Fort William, they are forwarded to the board's office at Winnipeg, for delivery to the proper parties, and they are then bought and sold on the Winnipeg Grain Exchange. In actual sales of grain and for which delivery must be made, these warehouse receipts must be purchased by the grain dealer or shipper. There is an association of grain dealers, known as the Lake Shippers Clearance Association, at Port Arthur, to which the grain shipper forwards his warehouse receipts when making a shipment by rail or water, and the association procures the necessary grain from the elevator, by surrender of receipts representing the amount of grain required for any shipment.

Section 246 of the Act provides that the expense of the administration of the Act shall be paid for by the imposition of such fees as are necessary for that purpose, and the board shall fix such fees, and determine how and by whom they shall be paid. The board also fixes the tariff charges for storing, cleaning, etc., of grain by terminal elevators. If there is a dockage of three per cent or over, on a carload of wheat, the receiving terminal elevator, under the tariff prescribed by the Board of Grain Commissioners, is obliged to make a return to the owner of the wheat for the screenings, that is the dockage screened from the grain, after deducting one-half of one per cent of the gross weight of the car for waste, and the owner pays the elevator for cleaning his wheat. Where there is a dockage of less than three per cent, the screenings are retained by the elevator in lieu of cleaning charges. Where the wheat contains other recoverable commercial grain, such as oats, there is an additional charge for this separation. In the case of oats, barley and rye carrying a dockage of five per cent or more, a return is to be made to the owner for the screenings, after deducting one-half of one per cent of the gross weight of the car for loss and waste. When the dockage is less than five per cent, the screenings are retained by the elevator in lieu of cleaning charges. If there is no dockage on a carload of wheat the elevator is allowed thirty pounds per car to cover invisible loss, in the case of oats and barley, fifty pounds per car, and in the case of flax and

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rye, fifty-six pounds per car. A warehouse receipt usually in practice issues for the screenings. In this particular case, the returns to the owners for such balances of screenings for which the defendant elevator company was liable, was made by paying the owner for the same in cash at the current market price. It is admitted that for the crop year ending August 31, 1920, the defendant company commuted its liability for the return of all balances of screenings to owners, by cash payments, amounting to $33,384.17, the amount of screenings for which such payments were made, aggregated 3,186,894 pounds. In practice an actual return of the screenings to the owners by an elevator is impracticable, and the screenings returnable to the owners are purchased by the elevators and by them sold, at current market prices.

It is necessary to refer briefly to the causes leading up to the enactment of subsection 7 of section 95 of the Grain Act, evidence of which was given on behalf of the plaintiff. In 1919 and prior thereto, much dissatisfaction existed among grain growers in respect of the earnings of the terminal elevators at Port Arthur and Fort William, it being claimed they were in receipt of undue profits from grain surpluses. An investigation or audit, in respect of certain named terminal elevators at Fort William and Port Arthur, was then caused to be made by the Government of Canada, through a reputable accounting firm, covering the capital investment, cost of operation and maintenance, cost of depreciation, sources of revenue and amount thereof, gross and net profits, etc., of such elevators. The Order in Council passed providing for the audit, March 12, 1918, states that the purpose of the same was:—

> to assist the Government in deciding as to whether the grain surpluses which annually result in the operation of the said elevators shall be continued in whole or in part as a source of necessary income to enable the elevators efficiently equipped to make any addition to their other earnings as a reasonable compensation on the outlay of capital and business management put into the enterprise.

A consequence of the audit was the enactment in 1919, of subsection 7 of section 95, of the Grain Act which I have already textually quoted, the audit or investigation having apparently sustained the claim which was the genesis of the inquiry. The report of the auditors is an exhibit in the cause.

The question for determination is the liability of the defendant under this legislation. In August, 1920, the Board of Grain Commissioners, pursuant to subsection 7 of section 95 of the Grain Act took stock of the quantity of each grade of grain in the defendant's elevators. The total receipts by the defendant's elevators of all grains for the crop year ending July 31, 1920, was 5,247,862 bushels, the surplus was 39,224 bushels of all grains, and the value of that surplus was $49,027.07. These figures are not in dispute, though, in the admissions it will be found that the defendant contends that the net surplus quantity and value, and its net liability, are not properly calculated, but I shall later refer to this.

The defendant submits that in respect of its elevator operations for the crop year ending July 31, 1920, it delivered to the owners all grain inspected and weighed into its elevators, according to the certificates of the inspectors and weighmen respectively, and as represented by its issued terminal warehouse receipts. That the difference between what came into its elevators and the issued terminal warehouse receipts must be attributable to grain recovered from the dockage or screenings, and which was earned by the elevators as payment in kind in lieu of the tariff charges as already explained, and from screenings purchased from the owners, and for which as already explained the elevators were obliged to make a return, and from the other allowances permitted by the regulations of the board, to cover invisible losses on each car of wheat, barley, oats, etc., when there is no dockage. The defendant claims that having extinguished the right and title of all persons in both the grain and screenings, the remainder is its property, earned under and by virtue of the tariff charges set up and allowed by the Grain Act, and which tariff the defendant acted upon, or in the ordinary course of its business as warehouseman, or purchased by it from the owners, or by whatever circumstances accrued, and that the title to the same cannot be taken from it by any legislation enacted by the Parliament of the Dominion of Canada.

The defendant further submits that grain is forwarded to it as warehouseman in the usual course of business, by grain shippers for the purpose of cleaning and warehous-

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ing, and subject to the order and direction of the consignor. That the inspecting, grading, weighing and binning of the grain are matters which the grain shipper, by direction or implication, requests or requires to be done for his benefit, as is his right, and these matters the defendant must observe, as warehouseman, in so far as it is necessary or possible for it so to do, all of which are requirements relating to the grain so stored, and not to the elevator or its business. Again the defendant in substance contends that the owner of the grain ships the same to a terminal elevator upon the understanding, and in conformity with the established practice that the elevator will adopt and observe the tariff of charges for services set up by the board, and if the defendant adopts and observes that tariff in its business relations, as warehouseman, with its customers, and thus earns these charges with the consent of its customers, the same cannot be taken away by any legislation of the Parliament of Canada. The defendant specifically challenges the validity of subsection 7 of section 95 and says it is beyond the competence of the Dominion Parliament under the British North America Act and is an invasion of the legislative powers assigned exclusively to the provincial legislatures by that Act. The plaintiff's submission on this point is that under several heads of section 91 B.N.A. Act, the Dominion is empowered to enact the legislation upon which this action is based.

Number 17 of section 91 is invoked by the plaintiff. The jurisdiction there assigned to Parliament, is in respect of weights and measures, which is quite a different thing from weighing and measuring, as involved in the transactions already described, or the things weighed or measured. I do not think this contention can be seriously entertained. The concurrent powers of Parliament under the head of agriculture, section 95, are invoked, as also the powers reserved to the Dominion under head 10 (*a*), (*b*), (*c*) of section 92, to control certain local works and undertakings. I am of the opinion that the legislation in question cannot be sustained under the former power, upon the ground that grain is an agricultural product. When it reaches the railways, or at least the terminal elevators, it has become an article of commerce, and traded in daily.

I do not think therefore that the legislation in question can be brought within the powers assigned to Parliament by section 95. Neither in my opinion can it be successfully urged, that because railways of the class defined in section 92 (*a*), (*c*) and which have been declared works for the general advantage of Canada, carry grain into and out of elevators, that therefore the legislation in question dealing with surpluses, can be upheld as coming within the legislative powers of Parliament. True, grain enters into and departs from elevators, by transportation agencies, such as defined in section 92, No. 10 (*a*), (*b*), (*c*), but if Parliament can thus acquire jurisdiction to legislate in respect of what railways carry as freight, it would have little difficulty in absorbing much of the legislative field expressly assigned to the provincial legislatures. I cannot conclude that this contention is entitled to weight.

It was contended before me that the export of Canadian grain was a matter of national concern, by reason of its value and volume, by itself, and in relation to the total export trade of Canada; that such grain was sold in international markets as inspected and graded under the Grain Act, much to the advantage of Canadian grain growers and exporters, and that the whole enactment should be regarded in its entirety as a legislative scheme evolved in the interest of a primary industry of great magnitude, and for high national interests, and it was urged that under head 2 section 91, "regulation of trade and commerce," there was legislative authority for the Grain Act, and the particular section under consideration. This view is not without force, and must be seriously considered. The validity of the Grain Act as a whole is not challenged and I am not called upon to decide whether the more prominent features of that Act, such as the inspection, grading, and weighing of grain, are within the legislative competence of Parliament by virtue of section 91 (2) or otherwise.

It appears to me that such provisions of the Grain Act as might be said to constitute its main purposes and objects might stand, while others might fall for want of jurisdiction, and without destroying the vital parts of the legislative scheme. The general scheme of the Act may be of paramount national concern and of national dimensions,

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and assuming its principal provisions to be within the legislative authority of the Dominion Parliament, such as inspecting, grading, weighing, cleaning, railway car facilities, etc., it does not, I think, follow that subsection 7 of section 95 is a necessary factor in that scheme. That is to say the Grain Act might operate in the way of a regulation of trade and commerce, as well without this section as with it, as in fact it did for many years. If the general scheme of the Act comes within the head of "regulation of trade and commerce" or any other part of section 91, that might stand and function by itself, without subsection 7 of section 95. That legislation it seems to me assumes to do something, unrelated to the general scheme and purpose of the Grain Act.

The reason for the enactment of the section in question, as is I think obvious, was to limit the amount and value of grain surpluses to be earned or acquired by terminal elevators in any one crop year, and was an attempt to regulate profits, or dealings which gave rise to profits. The legal title to the grain surplus in question in this case was vested in the defendant. The defendant, as contended, had extinguished every other right or title in the surplus, and no other claim or title therein is put forward, or can be put forward, except by the board under this legislation. The legislation I think attempts to deal with a subject matter, falling within one of the enumerated legislative powers assigned to the provincial legislatures, property and civil rights. This is not it seems to me the case where the Grain Act purports to do something coming within the powers assigned to Parliament by section 91 of the B.N.A. Act, but which incidentally and necessarily in its operation, comes in conflict with property and civil rights, a power assigned to the legislatures. It is not the case of an ancillary provision, encroaching upon matters assigned to the provincial legislatures, but required, to prevent the scheme of such a law, being defeated, nor is it the case, where in order to operate a validly enacted scheme, procedure must be adopted to make effective that law, even though invading the legislative field of the legislatures, in respect of property and civil rights.

By section 92 Nos. 11 and 13, the provincial legislatures are granted the exclusive power to make laws in relation to "property and civil rights in the province," and "the incorporation of companies with provincial objects." The defendant was incorporated under a provincial statute, to engage in the business of warehousing grains, etc., as already referred to and licensed by another province, Ontario, to carry on its business within that province, and its business of warehousing was wholly carried on within that province. While the defendant submits to other provisions of the Grain Act and observes its directions in many respects during the course of its business in the warehousing of grains, as do the owners of the grain, still these provisions do not attempt to legislate upon the ownership of, or title to the property itself dealt in by the warehousing elevators, which I think would come within the definition of "property and civil rights." If the scheme of the Act is of national concern, and an authorized and prudent regulation of trade and commerce, that end is I think achieved and consummated under other provisions of the Act, and is ended when the grain is for the last time inspected, and is loaded into a ship or car, and is in transit to a consuming market. Then the elevator has discharged its last liability as bailee to the owner of warehoused grain.

If it were once conceded that the Parliament of Canada had authority to make laws applicable to the whole Dominion, under the legislative powers assigned to it under section 91 No. 2, upon property or rights in property which represented the subject matter of commercial transactions, and which were substantially of a local or private nature, there would ensue such a curtailment of the powers enumerated under section 92 as to leave the provincial legislatures almost without a legislative field. The subject matter of warehouses and warehousing of goods, is clearly I think one for provincial legislation, and in the province of Ontario, wherein the defendant's elevators are located, there is legislation upon the subject. There may well be Dominion legislation which the elevator in the course of its business must nevertheless observe, for example the weights and measures used in weighing. To the legislatures of the provinces is given the power of regulating

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or restricting property and civil rights, and within that ambit their power is supreme. The words "regulation of trade and commerce" must be so restricted in their meaning as to give scope for the exercise of the powers which are given exclusively to the provincial legislatures. Without that restriction, all classes of business would fall within the legislative jurisdiction of the Dominion, which clearly was not intended in the structure of the federal system created by the British North America Act. The legislation in controversy may have a relation to the regulation of trade and commerce, but the important consideration is whether it is a regulation within the legislative competence of Parliament. Is not this regulative enactment one strictly referable to the rights of property as intended in section 92 No. 13, rather than an enactment to regulate trade and commerce, as provided in section 91 No. 2? In the case of *The City of Montreal* v. *Montreal Street Railway* (1), it was in effect laid down that the authority to deal with trade and commerce ought not to be so construed and applied, so as to enable the Parliament of Canada to make laws applicable to the whole Dominion in respect of matters which, in each province, are subjects of local or private interests, and in particular in relation to matters which, in each province, come within the legislative subject matters assigned to the provinces. The authority given by this legislation is somewhat on a parity with the legislation constructed by the Privy Council in the *Board of Commerce Act Case* (2), in that it seeks to limit the measure of and control the profits which any terminal elevator may make, in the course of a business coming within the legislative jurisdiction of the provincial legislatures. I cannot avoid the conviction that subsection 7 of section 95 of the Grain Act is in essence legislation dealing with property and civil rights, and is not a regulation of trade and commerce within the meaning of section 91 No. 2 of the British North America Act.

It was urged upon the trial, on behalf of the plaintiff that the object of the legislation in question was to raise revenue to defray the costs of administration of the Grain Act and to encourage the cleaning of grain to grade. I

(1) [1912] A.C. 333 at p. 344. (2) [1922] 1 A.C. 191.

cannot concur in this view. This was already anticipated by section 246 already referred to, and which enacts that the expenses of the administration of the Act shall be paid by the imposition of such fees as are necessary for that purpose and the Board is authorized, with the approval of the Governor in Council, to fix such fees. This power has been exercised by the board. If the legislation was primarily designed as a taxation scheme, more specific and appropriate language would I think have been employed to express that intention. The legislation was in reality designed to limit the profits of terminal elevators. It was the result of a public inquiry into the profits of terminal elevators. Subsection 7 of section 95 seems to anticipate a "surplus" of grain as being a probable event at the end of a year's operation of terminal elevators, and enacts that any surplus over one quarter of one per cent shall be sold by the board. It is with the surplus grain the statute deals with, and that seems altogether the purpose of the legislation, and not taxation, and the evidence supports that view. Private elevators, that is elevators which buy and sell grain, as well as store grain, and country elevators, are not subject to this legislation. If the legislation was intended to be merely a taxing statute, it is improbable these classes of elevators would be relieved of the tax, and only terminal elevators made subject thereto. Taxing laws should not only be for a public purpose, but should ensure uniformity in assessment and contribution, and should operate with the same effect in all localities in respect of the same class of property. I am of the opinion it was not intended as taxing legislation, and that its validity cannot be upheld as an exercise of the powers of Parliament in respect of the matter of taxation.

Neither can I attach weight to the contention that it was enacted to encourage the cleaning of grain to grade. The Grain Act purports to make ample provisions to secure this end by its inspectional clauses, and that is presumed to be done, and any evidence given upon the trial would affirm this presumption. I am bound to assume from the evidence given on behalf of both parties that the grain is cleaned to grade, or as nearly so as mechanical devices can accomplish that result, and apparently this must be the

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conclusion of the plaintiff's officers inspecting the grain in and out of the defendant's elevator during the crop year in question.

The defendant pleads that section 119 of the Canada Grain Act is *ultra vires*. This section provides that all licenses issued under this Act shall expire on the 31st of August in each year, and such annual licenses are required to be taken out by owners and operators of elevators, warehouses and mills. This point was not urged at the trial by the defendant, and I think was but casually mentioned. The plaintiff did not contend that the defendant was in any way estopped from challenging the validity of section 95 subsection 7 by having taken out a license for the crop year 1920. The plaintiff in his original reply pleaded that the defendant was estopped from denying the constitutional validity of the Canada Grain Act or any part thereof. Subsequently and pursuant to order, this reply was struck out and a simple joinder of issue pleaded. With this reply struck out and the plaintiff not having contended on the trial, that the defendant was in any way estopped by having taken out a license under section 119, and the defendant not having pressed its plea, I do not think it necessary to discuss the point.

In the event of an appeal from this judgment and section 95, subsection 7 of the Grain Act being held *intra vires* of Parliament, it is perhaps desirable that I dispose of the question of the amount recoverable by the plaintiff in that event, and the manner of computing the *total surplus of grain* under that section.

[His Lordship here deals with the *quantum*, and manner of arriving at same.]

Altogether I am of the opinion that the plaintiff's action must fail upon the ground that subsection 7 of section 95 of the Canada Grain Act is beyond the legislative competence of the Dominion Parliament. The action is dismissed with costs.

Judgment accordingly.