Privy Council Appeal No. 36 *of* 1931.

The Attorney-General of Quebec - - - - - *Appellant*

v.

The Attorney-General of Canada - - - - - *Respondent*

AND

Belding-Corticelli, Limited, and others - - - - *Interveners*

The Attorney-General of Canada - - - - - *Appellant*

v.

The Attorney-General of Quebec - - - - - *Respondent*

AND

Belding-Corticelli, Limited, and others - - - - *Interveners*

(*Consolidated Appeals*)

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND OCTOBER, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* VISCOUNT DUNEDIN.]

Under one of the provisions of the statutes of Quebec the Lieutenant-Governor in Council may refer to the Court of the King's Bench for hearing and consideration any question he deems expedient. Acting under that provision and upon the

narrative that several foreign or British insurers had obtained licenses under the Quebec Insurance Act and that the Department of Insurance of the Dominion was endeavouring to force these companies to obtain a license under Sections 11 and 12 of the Insurance Act of Canada, R.S.C. 1927, c.101, and to recover from persons who insure with these insurers the tax imposed by Sections 16, 20 and 21 of the Special War Revenue Act, R.S.C. 1927, c.179, the Lieutenant-Governor in Council referred to the Court of King's Bench the following questions :—

1. Is a foreign or British insurer who holds a license under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to Sections 11, 12, 65 and 66 of the Insurance Act of Canada, or are these Sections unconstitutional as regards such insurer ?

2. Are Sections 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada ? Would there be any difference between the case of an insurer who has obtained or is bound to obtain under the Provincial law a license to carry on business in the Province and any other case ?

Sections 11 and 12 of the Insurance Act of Canada are as follows :—

" 11. It shall not be lawful for,

(*a*) any Canadian Company ; or

(*b*) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

" 12. It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt or policy of insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding or filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act."

Sections 65 and 66 need not be quoted as they only prescribe penalties for contravention.

The case was heard before five Judges. There was some difference of opinion between them as to the answer to the first question, but the judgment of the majority gave answer as follows :—

In the case of a foreign insurer, " yes " to the first part, " no " to the second.

In the case of a British insurer, " no " to the first part and " yes " to the second.

As to the second question, they were unanimous and the answer was " yes " to the first part and " no " to the second.

In the presentation of the case appearance has been entered by the Attorneys-General of Quebec, Ontario and British Columbia and also by certain Companies which insured their property against fire and other risks with various Insurance Companies and underwriters of Canadian, British and foreign origin carrying on insurance business in Canada. These parties all contended that the sections cited were unconstitutional and *ultra vires*. The Attorney-General for Canada, who also appeared, contended that they were constitutional and *intra vires*. Success being divided the Attorney-General for Quebec appealed and the Attorney-General for Canada cross-appealed to H.M. in Council. This case is, it may be hoped, the last of the series of litigations between the Dominion and the Provinces with regard to insurance. It is not in their Lordships' opinion necessary for them as it was for the Judges in the Courts below, to examine in detail the various cases that have arisen in the Canadian Courts. They think that the questions raised can be conclusively dealt with in the light of four cases which have reached this Board. These are in chronological order :—(1881) *Citizens Insurance Company* v. *Parsons*, 7 App. Cas. 96, *John Deere Plow* v. *Wharton* [1915], A.C. 330, *Att.-Gen. of Canada* v. *Att.-Gen. of Alberta* [1916], 1 A.C. 588 and *In re Reciprocal Insurers Reference* [1924], A.C. 328.

The case of the *Citizens Insurance Company* v. *Parsons* was not fought directly between the Dominion and the Provinces, either as parties or intervenants. It was an action by a private individual to recover money under an insurance contract for a loss by fire. The defence was non-compliance on the part of the insured with certain statutory conditions imposed by a Provincial Ontario Act and applicable to insurers, to which the answer was made that the provisions were *ultra vires* as trespassing on the province of Dominion legislation. It was held that the conditions were not *ultra vires*, and the defence was good. The arguments turned on what may be called the competing claims of Sections 91 and 92 of the British North America Act. The principle laid down was clear. It is within the power of the Dominion legislature to create the person of a company and endow it with powers to carry on a certain class of business, to wit, insurance ; and nothing that the Provinces can do by legislation can interfere with the status so created ; but none the less the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on. This distinction was clearly acted on in the next case, which was not an insurance case.

John Deere Plow was a company incorporated under Dominion

legislation to carry on the business of trading in agricultural implements throughout Canada. The Parliament of British Columbia sought means to restrain any such trade by enacting that the trader should have no power to sue unless he had obtained a license to trade from the Provincial authorities. It was held that this was *ultra vires* of the Province, as being an attempt to interfere with the status of the company.

Then came the case of *the Att.-Gen. of Canada* v. *the Att.-Gen. of Alberta*. This was the first direct trial of strength between a Province and the Dominion. By Section 4 of the Dominion Insurance Act of 1910 it was provided that no company or person should do insurance business unless they had received a Dominion license so to act. This provision was fortified by a penalty for contravention under Section 70. Two questions were put to the Court :—

(1) Are Sections 4 and 70 of the Act or any part thereof *ultra vires* of the Parliament of Canada ?

(2) Does Section 4 operate to prohibit a foreign company carrying on business without a license even though its business is confined to one province ?

The Board answered the first question in the affirmative. Here again the arguments turned on the competing claims of Sections 91 and 92 and the decision on this question conclusively and finally settled that regulations as to the carrying on of insurance business were a Provincial and not a Dominion matter. It really only carried to their logical conclusion the two cases already cited.

As to the second question, Lord Haldane said :—

> " The second question is in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister even in a case where the company desires to carry on its business only within the limits of the single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada by properly framed legislation to impose such a restriction. It appears to them that such a power is given by the heads in Section 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

The first question in the present Appeal really turns upon whether the sections impugned fall within the sentence of the Board just quoted. But before discussing this it will be well to examine the remaining case mentioned, viz. :—

In re Reciprocal Insurers Reference. After the decision against them on the first question in the last case in 1916, the Dominion legislation on this subject was altered. A new Act was passed in 1917. In place of the old Section 4, which had been declared *ultra vires* by the decision, there were now enacted Sections 11 and 12 in these terms :—

> " 11. It shall not be lawful for
>
> (*a*) any Canadian company ; or
>
> (*b*) any alien, whether a natural person or a foreign company,

within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act." 1917, c.29, s.11.

"12.—(1) It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt, or any policy of insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding, or of filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

"(2) A company shall be deemed to immigrate into Canada within the meaning of this section if it sends into Canada any document appointing or otherwise appoints any person in Canada its agent for any of the purposes mentioned in subsection one of this section.

Contravention of these provisions was dealt with by sections imposing penalties. But besides that, there had been inserted in the Criminal Code two new sections, 508C and 508D, which constituted as a criminal offence the doing of insurance business without a Dominion license. Meantime Ontario had passed an Act dealing with mutual insurance. This led to the case in which the questions proposed were as follows :—

1. Is it within the legislative competence of the legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922 ?

2. Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of sections 508C and 508D of the Criminal Code as enacted by Chapter 26 of the Statutes of Canada 7 and 8 George V. in the absence of a license from the Minister of Finance issued pursuant to section 4 of the Insurance Act of Canada 7 and 8 George V. Chapter 29 ?

3. Would the answers to questions 1 or 2 be affected, and if so, how, if one or more of the persons subscribing to such Reciprocal Insurance contracts is: (*a*) a British subject not resident in Canada immigrating into Canada ? (*b*) an alien ?

Mr. Justice Duff, who delivered the judgment of the Board, expressed himself thus :—

"The provisions relating to licenses in the Insurance Act of 1910, which [by the judgment of 1916] was declared to be *ultra vires*, and the regulations governing licenses under the Act and applicable to contracts and

to the business of insurance did not in any respect presently material substantially differ from those now found in the legislation of 1917. But the provisions of the Statute of 1910 derived their coercive force from penalties created by the Insurance Act itself. The distinction between the legislation of 1910 and that of 1917 upon which the major contention of the Dominion is founded, consists in the fact that section 508c is enacted in the form of an amendment to the statutory Criminal Law and purports only to create offences which are declared to be indictable and to ordain penalties for such offences. The question now to be decided is whether in the frame in which the legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the Criminal Law. It has been formally laid down in judgments of this Board that in such an enquiry the Courts must ascertain 'the true nature and character' of the enactment (*Citizens Insurance Co.* v. *Parsons sup. cit.*), and its 'pith and substance' (*Union Colliery Co.* v. *Brydon* [1899], A.C. 580)."

The Board proceeded to decide that the amendment of the criminal law by Section 508c was not a genuine amendment of the criminal law, but was really an attempt by a *soi-disant* amendment of the criminal law to subject insurance business in the Province to the control of the Dominion, that which had exactly been determined to be *ultra vires* by the judgment of 1916. This decided the main question.

As regards question 3, it was answered in the negative, but there was added the following addendum :—

"Their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact sections 11 and 12 (1) of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, considered it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board, in *Attorney-General of Canada* v. *Attorney-General of Alberta* (*supra*), to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament."

Following on this judgment, the Dominion Parliament, by an amending statute in 1924, repealed Sub-section 2 of Section 12 of the Act of 1917. The Act of 1927, which is the Act with which the present case has to do, reproduces, as has been seen, sections 11 and 12 and the corresponding penal sections renumbered as 66 and 67, and in the Criminal Code of 1927 the old 508c reappears as 507, but with an exception as to Reciprocal Insurance Companies so as to avoid the direct result of the judgment of 1924.

Their Lordships are now in a position to address themselves directly to the first question in this case. It is clear from the quotations from *In re Reciprocal Insurers* that the question is technically still open and it is clear from the judgment in the 1916 case that the sections in question can only be justified if to them can be applied what was there said by Lord Haldane in his answer to query 2. Their Lordships will repeat it.

> "To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in section 91, which refer to the regulation of trade and commerce and to aliens."

Now the state of opinion in the Court below was as follows :— Two learned judges thought that the sections were *ultra vires*, whether applied to British or to foreign insurers; but three Judges, while holding the sections *ultra vires* as to British subjects, held that they were *intra vires* as to aliens. Now so far as British subjects were concerned the view was that Lord Haldane's dictum showed clearly that the only power of restriction given rested upon its being possible to connect it with alien legislation, and that therefore it was impossible to bring British subjects within the scope of the dictum. So far as this argument goes, their Lordships think it is sound, but at the same time they think it unnecessary, because they think it is swallowed up in the wider consideration which makes the sections bad as regards both aliens and British subjects. Their Lordships consider that although the question was studiously kept open in the ***Reciprocal Insurers*** case, it was really decided by what was then laid down. The case decided that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, viz., to dominate the exercise of the business of insurance. And in the same way it was decided that to try by a false definition to pray in aid Section 95 of the British North America Act, which deals with immigration, in order to control the business of insurance, was equally unavailing. What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation." Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, *e.g.*, to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to provincial law. Their Lordships have, therefore, no hesitation in declaring that this is not "properly framed" alien legislation.

As regards British subjects, who cannot be styled aliens, once the false definition is gone, the same remark applies as to alien immigrants. This is not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, *i.e.*, the Provincial Code.

Passing now to the second question, it seems to their Lordships that precisely the same line of reasoning applies. The only section that need be quoted is Section 16, the other sections being only concomitants thereto.

"16. Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks,

(*a*) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada ; or

(*b*) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada ;

shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year."

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall. Section 16 clearly assumes that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so ; that a Dominion license so far as authorising transactions of insurance business in a province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with provincial legislation has not already got, if he has complied with provincial requirements. It is really the same old attempt in another way. Their Lordships cannot do better than quote and then paraphrase a portion of the words of Mr. Justice Duff in the *Reciprocal Insurers* case. He says :—

"In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot by purporting to create penal sanctions under Section 91 (27) appropriate to itself exclusively a field of jurisdiction in which apart from such a procedure it could exert no legal authority ; and that if when examined as a whole legislation in form criminal is found in aspects and for purposes exclusively within the provincial sphere to deal with matters committed to the provinces it cannot be upheld as valid."

If instead of the words "create penal sanctions under Section 91 (27)" you substitute the words "exercise taxation powers under Section 91 (3)" and for the word "criminal" substitute "taxing," the sentence expresses precisely their Lordships' views.

Their Lordships will, therefore, humbly advise His Majesty to declare that the proper answers to the questions put are : to the first part of question 1, "No" ; and to the second part, "Yes" ; to the second question in both branches, "No"—and that the appeal and cross-appeal should be dealt with in accordance with the said declaration.

In the Privy Council.

THE ATTORNEY-GENERAL OF QUEBEC

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DELIVERED BY VISCOUNT DUNEDIN.

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