IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF SECTION 16 OF THE SPECIAL WAR REVENUE ACT, AS AMENDED

1941
* Nov. 17, 18, 19.
1942
* Oct. 6.

Constitutional law—Section 16 of the Special War Revenue Act—Contracts of insurance with British or foreign companies or foreign exchanges—Tax imposed on insured on premiums payable by him—Whether section 16 ultra vires—Special War Revenue Act, 1932 (D.), c. 54, s. 1, and amendment, 1940-41 (D.), c. 27, s. 4—Canadian and British Insurance Companies Act (D.), 1932, 22-23 Geo. V, c. 46, s. 2 (b), and ss. 116, 117, 118, 142—The Foreign Insurance Companies Act, (D.) 1932, 22-23 Geo. V, c. 47, as amended by (D.) 1934, 24-25 Geo. V, c. 36.

Section 16 of the *Special War Revenue Act* enacted, in substance, that "every person resident in Canada who, after the 31st day of December, 1931, insures or has insured his property situate in Canada * * *

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

(1) [1915] A.C. 740.

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with any British or foreign company, or with any (foreign) exchange * * * which * * * is not authorized under the laws of the Dominion of Canada to transact the business of insurance, shall * * * in each year * * * pay to the Minister (of Finance) * * * a tax of ten per centum of the premiums paid or payable by such person."

Held that this section is *ultra vires* of the Parliament of Canada.

This section is, in point of law, so related to the insurance legislation affecting British and foreign companies and extra Canadian exchanges that, such insurance legislation being invalid, the section must fall with it. Assuming that the Dominion, in exercise of its control of trade and commerce under section 91 (2) B.N.A. Act, may regulate the business of insurance carried on by British companies as a branch of external trade and commerce, this does not give the Dominion authority to regulate their strictly provincial business; and sections 116, 117 and 118 of the *Canadian and British Insurance Companies Act*, if valid, do effect the regulation of such business. The principle of exclusive provincial control of the business of insurance within the province lies at the foundation of the judgment of the Privy Council *in re The Insurance Act of Canada* [1942] A.C. 41.

The corresponding enactments in the *Foreign Insurance Companies Act*, being also legislation in relation to the business of insurance within the province, are not *intra vires;* and the case of extra Canadian exchanges is not distinguishable.

REFERENCE by His Excellency the Governor General in Council, pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), to the Supreme Court of Canada, for hearing and consideration, of certain questions which are cited in full at the beginning of the reasons for judgment of the Chief Justice of this Court.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney-General for Canada.

G. D. Conant K.C., C. R. Majone K.C. and *H. D. McNairn K.C.* for the Attorney-General for Ontario.

Aimé Geoffrion K.C. for the Attorneys-General for Quebec and British Columbia.

J. A. Mann K.C. for the British Canadian Insurance Co. and others.

V. E. Gray K.C. for the Mutual Boiler Insurance Company of Boston.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The interrogatory referred to us is in the following terms:—

Is section 16 of the Special War Revenue Act, as enacted by section 1 of chapter 54 of the Statutes of 1932 and amended by section 4 of chapter 27 of the Statutes of 1940-41 *ultra vires* of the Parliament of Canada either in whole or in part, and if so in what particular or particulars or to what extent?

The said section 16, as amended, reads as follows:—

16. (1) Every person resident in Canada who, after the thirty-first day of December, 1931, insures or has insured his property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, or renews or has renewed any such insurance, against risks other than marine risks,

(*a*) with any British or foreign company; or

(*b*) with any exchange, the chief place of business of which exchange or of its principal attorney-in-fact is situate outside of Canada,

which, on or before the first day of July, 1932, or at the time such insurance is effected or renewed if after the last mentioned date, is not authorized under the laws of the Dominion of Canada to transact the business of insurance, shall, on or before the first day of March, 1933, and on or before the first day of March in each year thereafter, pay to the Minister, in addition to any other tax payable under any other existing law or statute, a tax of ten per centum of the net premiums paid or payable by such person in respect of such insurance for the next preceding calendar year.

(2) For the purpose of this section, every corporation carrying on business in Canada shall be deemed to be a person resident in Canada.

I have given to the arguments advanced in support of the validity of this enactment, as well as to those against it, the most prolonged and, I must admit, anxious consideration. Some of the arguments relied upon by the provinces seem to open up rather far reaching topics touching the powers of the Parliament of Canada concerning intercourse with other countries. I find it unnecessary to discuss such topics, because I think the question raised by the reference falls to be dealt with upon comparatively narrow ground.

I am unable to accept the argument that the enactment is *prima facie* valid as such and that the invalidity of the existing legislation relating to the transaction of the business of insurance is immaterial. In view of the decision in the Insurance Case of 1932 (*In re The Insurance Act of Canada*) (1), I see no escape from the proposition advanced by the provinces that section 16 of the *Special*

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War Revenue Act, as amended by the statutes of 1940 to 1941, is, in point of law, so related to the insurance legislation affecting British and foreign companies and extra Canadian exchanges that if the insurance legislation is invalid section 16 must fall with it. In this respect I see no admissible distinction between the two cases.

The point of substance, therefore, is whether this insurance legislation is invalid as a whole, or in such degree as to strike section 16 with sterility.

It is convenient first to refer to the Act relating to British companies. By section 2 (*b*) a British company is thus defined:—

> "British company" means any corporation incorporated under the laws of the United Kingdom of Great Britain and Northern Ireland or any British Dominion or possession other than Canada or a province of Canada for the purpose of carrying on the business of insurance.

Sections 116 and 117 are in these words:—

> 116. There shall be established and maintained in the Department of Insurance a register in which shall be entered the names of all British companies registered under this Part and to which certificates of registry are granted.
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> 117. No British company shall transact the business of insurance in Canada, save as hereinafter expressly provided, unless it is registered and holds a certificate of registry from the Minister.

Section 118 requires, *inter alia,* as a condition of registration, that a British company shall make a deposit with the Minister in any of the securities specified in section 55 of the Act in the following sums, namely:—

> (1) for a certificate of registry to transact the business of life insurance or fire insurance, the sum of one hundred thousand dollars, and
>
> (2) for a certificate of registry to transact any other class of insurance business, such sum as the Treasury Board may determine.

It appears then that by this legislation a British company is prohibited from making any contract of insurance in Canada, that is to say, in any province of Canada, and from performing in any such province any act of inducement to enter into any such contract or any act relating to the performance of any such contract, or rendering any service connected with any such contract in any such province, unless it is registered, and among the conditions of such registration is that just mentioned.

One must consider the effect of these enactments in practice. Prior to the passing of this statute a British

company has an agency in Toronto. It has complied with the provisions of the provincial law, whatever they may be, in respect of giving security for the benefit of its policy holders. The Dominion enactment comes into operation and the British company and its agents immediately come under the prohibition of section 117 and the company and its agents become subject to the penalties prescribed by section 142, which become exigible on the performance of any one or more of the acts constituting by definition the "business of insurance", unless and until it becomes registered under the Dominion statute.

I do not perceive any valid reason for holding that it would be beyond the powers of a province, in exercise of its authority to regulate the business of insurance in the province, to require the registration of insurers, and to exact as conditions of obtaining such registration the deposit of security of a character similar to that required by section 118.

Assuming that the Dominion, in exercise of its control of trade and commerce under the second clause of section 91, may regulate the business of insurance carried on by British companies as a branch of external trade and commerce, this does not give the Dominion authority to regulate their strictly provincial business; and it is my opinion that sections 116, 117 and 118, if valid, do effect the regulation of such business. The general principle is well-settled and well-known. (*The King* v. *Eastern Terminal Elevator Co.* (1); *Attorney-General for Canada* v. *Attorney-General for Ontario* (2)). The judgment of Lord Dunedin in the Insurance Case of 1932 (3) does not explicitly deal with the provisions of the statute then under review that correspond with sections 116, 117 and 118. Nevertheless, I think when that judgment is read as a whole its language points rather to the conclusion that, in the view of the great and lamented Judge who delivered it, these provisions stood in the same category as those relating to the forms of contracts and those governing transactions between an insurance company and its

(1) [1925] S.C.R. 434. (2) [1937] A.C. 326.
(3) [1932] A.C. 41.

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agents. It is not necessary, however, to consider whether this point is strictly ruled by Lord Dunedin's judgment in the sense that these particular provisions were passed upon. The principle of exclusive provincial control of the business of insurance within the province lies at the foundation of the judgment.

From this, it follows also that the corresponding enactments in the *Foreign Insurance Companies Act* are not *intra vires*. Those enactments, being legislation in relation to the business of insurance within the province, are not (it flows from the reasoning of that judgment) alien legislation in the sense contemplated by the judgment in *The Attorney-General for Canada* v. *Attorney-General for Alberta* (1). On this point I think the words of Lord Dunedin at p. 51 of the report (2) are conclusive:—

> 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 licence, 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 declaring that this is not "properly framed" alien legislation.

The case of extra Canadian exchanges is not distinguished. It follows that section 16 is *ultra vires*.

It is perhaps unnecessary to add that nothing I have said is in any way inconsistent with the principle which precludes a province from impairing by legislation the status and powers of a Dominion company.

The interrogatory referred to us should be answered "Yes, in its entirety".

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(1) [1916] 1 A.C. 588. (2) [1932] A.C. 41.