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IN THE MATTER OF SECTIONS FOUR AND SEVENTY OF THE CANADIAN "INSURANCE ACT, 1910."

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Insurance—Foreign company doing business in Canada—Dominion license—9 & 10 Edw. VII. c. 32, ss. 4 and 70.

Held, per Fitzpatrick C.J. and Davies J., that sections 4 and 70 of The Act 9 & 10 Edw. VII. ch. 32 (the "Insurance Act, 1910") are not *ultra vires* of the Parliament of Canada. Idington, Duff, Anglin and Brodeur JJ., *contra.*

Held, per Fitzpatrick C.J., and Davies J., that section 4 of said Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province.

Per Idington J.—Section 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.*

Per Duff, Anglin and Brodeur JJ.—The section would effect such prohibition if it were *intra vires.*

REFERENCE by the Governor General in Council of questions respecting the "Insurance Act, 1910," to the Supreme Court of Canada for hearing and consideration.

The following are the questions so submitted.

P.C. 1259.

Certified Copy of a Report of the Committee of the Privy Council, approved by His Excellency the Administrator on the 29th June, 1910.

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*PRESENT:—Sir Charles Fitzpatrick C.J., and Davies, Idington, Duff, Anglin and Brodeur JJ.

On a memorandum dated 8th June, 1910, from the Minister of Justice, recommending that the following questions be referred to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of section 60 of the "Supreme Court Act":—

1. Are sections 4 and 70 of the "Insurance Act, 1910," or any or what part or parts of the said sections *ultra vires* of the Parliament of Canada ?

2. Does section 4 of the "Insurance Act, 1910," operate to prohibt an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province ?

The Committee submit the above recommendation for Your Excellency's approval.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

The following were the counsel who appeared at the hearing.

Newcombe K.C. and *Lafleur K.C.* for the Attorney-General of Canada.

Nesbitt K.C., Aimé Geoffrion K.C., Bayly K.C. and *Christopher C. Robinson* for the Provinces of Ontario, Quebec, New Brunswick and Manitoba.

S. B. Woods K.C. for the Provinces of Alberta and Saskatchewan.

Wegenast for the Manufacturers' Association of Canada.

Gaudet for the Canadian Insurance Federation.

THE CHIEF JUSTICE.—The question in this reference is a narrow one, namely, whether section 4 of

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the "Insurance Act, 1910," 9 and 10 Edw. VII. ch. 32, and section 70 which fixes the penalty for violations of section 4 are *ultra vires* of the Parliament of Canada.

Section 4 reads as follows:—

> In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.

It is quite obvious that this Act is intended merely to regulate the business of insurance in Canada and in the *Prohibition Case*(1), Lord Watson said that in *Citizens Insurance Company* v. *Parsons*(2), the business of fire insurance was admitted to be a trade.

A review of the insurance legislation of Canada from 1868 downward, which is all set out in Mr. Newcombe's factum, shews that the law as it was at the time of *The Citizens Ins. Co.* v. *Parsons*(2), contains substantially the same provision as section 4 now in question. The court is not called upon to consider the question as to how far the Parliament of Canada could override the statutory conditions of any province by legislating with respect to the conditions which should attach to all contracts of insurance in Canada. The question narrows itself down apparently to this: Assuming that under property and civil rights the provincial legislatures have jurisdiction to legislate generally with respect to insurance companies doing

(1) *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, at p. 363.

(2) 7 App. Cas. 96.

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business in the province, in view of the fact that insurance is a class of business in which it is essential that the public interest should be safeguarded, and this business has always been of great importance and particularly in recent years has grown to be of enormous magnitude, cannot the Dominion Parliament legislate with respect to this subject under the head of "Peace, Order and Good Government," just as it has been held to have jurisdiction in the matter of intoxicating liquors? The following references in support of this proposition are of importance.

In *The Citizens Ins. Co.* v. *Parsons*(1), at page 114, Sir Montague Smith says:—

> It was further argued on the part of the Appellants that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 38 Vict. ch. 20, which requires fire insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, and that it was beyond the competency of the provincial legislature to subject companies who had obtained such licenses, as the appellants companies had done, to the conditions imposed by the Ontario Act. But the Legislation does not really conflict or present any inconsistency. The statute of the Dominion Parliament enacts a general law applicable to the whole Dominion requiring all insurance companies, whether incorporated by foreign, Dominion or Provincial authority to obtain a license from the Minister of Finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the Dominion Parliament, as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the legislature of the Province of Ontario to legislate in relation to the contracts which corporations may enter into in that province.

Sir Montague Smith in the same judgment refers to the weight to be attached to the exercise of jurisdiction by the Federal Parliament.

In the argument of the *Dominion Liquor License Case*(2), at p. 67, Sir Farrer, afterwards Lord, Her-

(1) 7 App. Cas. 96. (2) Cf. 6 Can. Gaz. 152.

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schell, in his argument, referring to the Dominion "Insurance Act," says:—

I do not think it was questioned that the Dominion Act was a perfectly good Act, which did require all insurance companies throughout the Dominion to take out a Dominion license but it was held that the Ontario legislation was not inconsistent with it.

Sir Montague Smith remarked:—

I forget what the facts were, but I suppose that the case did not interfere with the license to be taken out under the Dominion Act.

In short it may be safely stated that the whole report of the *Parsons Case*(1) shews that it was assumed by both sides that it was within the power of the Parliament of Canada to grant licenses.

Again, at p. 165, Sir Farrer Herschell says:—

Take the statute which was under consideration in the *Citizens Ins. Co.* v. *Parsons* (7 App. Cas. 96), which was in no way disapproved by that judgment. The Dominion Parliament of Canada had said, in order for the general safety and to prevent people from being swindled by bubble companies, no insurance company shall carry on business in the Dominion without a license; that license being granted by the Dominion government. Of course, these insurance companies carried on their business in the provinces; there was nowhere else for them to carry it on, it may in one or it may in all. But the Parliament said: you shall not carry on your business without a license from the Dominion Government, and certainly no suggestion was made by this Board in that case that the law was invalid, because that would have been an easy solution of the matter. Instead of that, the court proceeded to shew that the legislation in the particular case was not inconsistent with the general Dominion legislation.

It appears by the last returns published by the Insurance Department under the authority of Parliament and of the legislatures of Ontario, Quebec and Manitoba that:—

1. The amount of fire insurance in force in Canada at December 31, 1912, in companies licensed by the Dominion was $2,684,355,895, and in companies licensed by the provinces, $949,863,538.

(1) 7 App. Cas. 96.

The premiums paid for this insurance in 1912 amounted to $30,144,264.

The amount of life insurance in force at the said date in companies licensed by the Dominion was $1,070,308,669, and in companies licensed by the provinces, $14,700,988, the number of Dominion policies being 1,497,397.

The premiums paid in 1912 on this insurance amounted to $36,092,719.

The amount of premiums paid to companies licensed by the Dominion in 1912 for insurance other than fire and life amounted to $10,262,049.

2. No figures are available shewing the amount of insurance in force at the time of Confederation. The earliest report is that for the business of the year 1872 from which I take the following:—

The amount of fire insurance in force in December 31, 1872, was $251,725,940.

The amount of premiums paid in 1872 was $2,653,612.

The amount of life insurance in force at December 31, 1872, was $61,365,648.

The amount of premiums paid in 1872 on this insurance was $2,068,953.

So far as appears from this report no return was made of business other than fire and life insurance.

That the Parliament of Canada may legislate with respect to matters which affect property and civil rights when they have attained such dimensions as to affect the body politic of the Dominion, is clearly established. See *Russell* v. *The Queen*(1), at page 839. Also, and particularly, see the judgment of Lord

(1) 7 App. Cas. 829.

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Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), at pages 359 and 360.

My answer to the first question is, No.

My answer to the second question is, Yes.

DAVIES J.—I do not desire in these reasons for my answers to the questions put upon this reference to repeat what I have already said in the reasons for my answers to the questions on the reference respecting companies generally.

It is impossible, however, to avoid some repetition if one is to make one's opinion in the special questions submitted at all clear.

The Dominion Parliament has doubtless the right to impose restrictions upon companies of its own creation enacted in section 4 now under discussion. That I understand is not questioned.

It is conceded on the other hand that the exclusive legislative control over provincial insurance companies carrying on their business wholly within the province rests with the province creating such companies. The legislation here in question recognizes this and exempts from its operation and application every such provincial company.

I have already, in the *Companies Reference* (2), expressed the opinion that the limitation upon the provincial objects is amongst other things territorial and that the Dominion statute professing to confer upon them extra territorial powers by means of a license is *ultra vires.*

If I am right, the Act does not apply at all to provincial companies. Of course, if there is no territorial limitation upon the powers of those companies, and

(1) [1896] A.C. 348. (2) 48 Can. S.C.R. 331.

they can legally carry on their business extra territorially and throughout the Dominion, they would not come within the exception of the Act.

My object in mentioning this is to have it clearly understood that the Act, the section of which is in question and under review, exempts from its application provincial companies confining their business to the provinces creating them which in my opinion they are bound to do.

The exemption is based upon the implication that the limitation upon the exclusive powers given to the provinces to incorporate companies "with provincial objects" is at any rate a territorial one, and the Dominion Parliament proceeding upon that implication and assumption and conceding that such exclusive power should not be invaded by its legislation, declares that the Act shall not apply to such companies. It was evidently not the intention of the Dominion Parliament to entrench upon this exclusive power given to the local legislatures, but while carefully excluding from the operation of the Act all provincial companies created by virtue of it, to enact Dominion legislation which should as far as possible effectively regulate and control the business of insurance as carried on generally throughout the whole Dominion by Canadian and foreign companies alike.

Counsel for the Dominion at bar submitted that the legislation in question could be supported on several of the enumerated powers of legislation assigned to the Dominion in the 91st section of its Constitutional Act. They relied upon the criminal law and the subject of aliens, but I am clearly of the opinion that the legislation cannot be supported under either of these enumerated powers. Parliament when enacting this insur-

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ance legislation was not dealing with the subject-matter of "aliens" as such or with criminal law as such. It was dealing with the subject-matter of insurance attempting to regulate that business so far as it was not within the exclusive powers of the province and as part of such regulations requiring insurance companies within its legislative jurisdiction to take out a license and make certain deposits of money with the Finance Minister and be subject to inspection while carrying on such business.

It was the regulation and not the prohibition of a business that Parliament was dealing with and I shall subsequently attempt to shew the distinction is of vital importance on one at least of the grounds on which the power of the Dominion to enact the legislation is concerned.

The other enumerated powers of the Dominion under which it was sought to uphold the validity of this legislation was that of "the regulation of trade and commerce." If section 4 in question can be brought within that enumerated power all doubt as to its validity would at once be ended.

In the case of *City of Fredericton* v. *The Queen*(1) this court held that the provisions of the "Canada Temperance Act, 1878," prohibiting the traffic in intoxicating liquors came within this enumerated power. On appeal to the Judicial Committee of the Privy Council, *sub nomine Russell* v. *The Queen*(2), this judgment was not sustained as coming within the regulation of trade and commerce, but was sustained, as I understand the judgment, on the ground that the Act in question came within the general powers of

(1) 3 Can. S.C.R. 505. (2) 7 App. Cas. 829.

legislation respecting peace, order and good government and not within the class of subjects assigned exclusively to the provincial legislatures. In the later prohibition case, *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1), at pp. 362-3, Lord Watson, in stating the opinion of their Lordships on the case before them, said that the decision in *Russell* v. *The Queen*(2) must be accepted as an authority that the respective provisions of the "Canada Temperance Act, 1886," must receive effect as valid enactments relating to the peace, order and good government of Canada and he went on to explain that as these enactments were prohibitive and not regulative their Lordships were unable to regard them as regulations of trade and commerce. He further explains that the object of the Act was

> not to regulate retail transactions between those who trade in liquors and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted.

In other words, because the aim and purpose of the Act was not regulation but prohibition, their Lordships could not agree that it was legislation under the "Regulation of Trade and Commerce." The inference I draw from the language of the judgment is that if the provisions of the enactment there in question had been regulation instead of prohibition they would have been sustained as valid under the enumerated sub-section.

In the Judicial Committee in *Citizens Ins. Co.* v. *Parsons*(3), Sir Montague Smith said, at p. 113:—

(1) [1896] A.C. 348.
(2) 7 App. Cas. 829.
(3) 7 App. Cas. 96.

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Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.

In this view of the case it became unnecessary to consider how far the general power to make regulations of trade and commerce when competently exercised by the Dominion Parliament might legally modify or affect property and civil rights. But I take it as settled law now at any rate that regulation of trade and commerce when competently exercised by the Dominion Parliament may legally modify and affect any of the exclusive powers of the legislatures of the provinces.

The point decided in the *Citizens Ins. Co.* v. *Parsons*(1), was of an extremely limited character and to the effect that the regulation of insurance contracts within a province as to the terms and conditions of the contract was within the legislative power of the province as a matter of property and civil rights and did not affect the regulations of trade and commerce.

It is conceded that the Judicial Committee has never yet expressly assigned to this power over trade and commerce, any Dominion legislation which has come before it. The furthest they have gone in that direction is I think to be found in the above quotation

(1) 7 App. Cas. 96.

from the judgment of the Judicial Committee in the *Citizens Insurance Company Case*(1),

it may be the words would include general regulation of trade throughout the whole Dominion.

It seems to me that such a general regulation of trade though confined to one particular branch of trade would also come within the jurisdiction of the Dominion and that this special legislation now in controversy may well be held within that enumerated power.

That insurance is a trade in one sense at least seems clear, and that it is one affecting the whole Dominion and all classes and conditions of its people is beyond controversy. That in some of its branches at least, such as the insurance of cargoes or property carried from one province to another by land or sea or both, it is a subject-matter of interprovincial concern which could only properly be legislated upon by the Dominion Parliament would, on the construction I put upon the powers of provincial companies, seem also clear. My general conclusion in the absence of any distinct authority is that the subject-matter of insurance generally throughout the Dominion but not including provincial insurance limited to the province may well be held as within the regulative power of Parliament under the enumerated clause relating to trade and commerce. The legislation in question here is assuredly of a character that no provincial legislature could competently enact. So far as provincial legislatures can competently deal with the subject-matter of insurance companies the Act in question in terms does not apply or interfere. The section under consideration would seem undoubtedly good so far as it applied to interprovincial trade insurance and my conclusion

(1) 7 App. Cas. 96.

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on the whole subject is that it may fairly on the authority of the decision of the prohibition case respecting the validity of the "Canada Temperance Act" be held good as a regulation of trade.

If I am wrong in that then I hold that it comes within the Dominion Parliament's general power of legislation for the peace, order and good government of Canada. Holding as I do the view that the limitation upon the provincial power to incorporate companies is territorial and confined to the provinces, then all other legislative power upon that subject-matter must be vested in the Dominion Parliament. If on the general question of the incorporation of companies the power of the provinces to legislate is strictly limited to their respective territorial areas, then it would necessarily follow that all companies with power larger than provincial must be incorporated by the Dominion Parliament and of course be entirely subject to its jurisdiction and control.

If the legislation in question is sustainable only on the general powers of the Dominion relating to peace, order and good government then in my opinion the subject-matter of it is one which to-day has become of national interest and importance, affecting the body politic of the Dominion as a whole and being so would on the authority of the *Prohibition Case*(1), be paramount legislation.

It would seem strange indeed if the Parliament of Canada, on a subject-matter affecting directly the lives, property and interests of a very large proportion of its inhabitants could not legislate either to prohibit foreign companies which may or may not be respon-

(1) [1896] A.C. 348.

sible or reliable from engaging in the business at all in Canada; and still more strange if such Parliament could not regulate these companies in the carrying on of their business in Canada by requiring them to make deposits of money as an assurance of their reliability and take out a license and subject themselves to inspection or otherwise as Parliament may decide.

As a fact ever since the year following Confederation, now more than forty years ago, Parliament has assumed the right so to legislate and the legislation for the past 25 years at least has been substantially in the form the constitutionality of which is now challenged.

The subject-matter of the legislation in question is of a Dominion and not of a provincial character. In its Dominion aspect it is not certainly within any of the exclusive powers of the provincial legislatures and so far as companies incorporated by these legislatures can competently and legally operate and carry on their business they are exempted from the operation of the legislation.

The policy of regulating the business of insurance throughout Canada by foreign companies as well as Dominion companies to the extent of requiring deposits from them as a guarantee of their responsibility and subjecting them to inspection and to the obligation of obtaining a license to operate has been a feature of Dominion legislation since 1868, the year following the Union. It is beyond doubt regulative legislation only and its subject-matter may, I think, be appropriately described as the trade or business of insurance. The fact that with provincial companies

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excepted the legislation applies to foreign companies and to Dominion companies only and that it has remained unchallenged as to its constitutionality until now is not without significance and weight.

The business of life insurance alone in Canada carried on by the companies Dominion and foreign which come within the purview of the Act in question has to-day reached proportions which may well be described as enormous if not colossal. As to the mere amount of this assurance, it runs up into hundreds of millions of dollars. The ramifications of such business extend to every city, town, village and hamlet of the Dominion. The beneficiaries of these assurances are constantly moving from one part of the Dominion to the other. The failure of one or more of these companies carrying the enormous obligations their contracts assume in Canada would be a national disaster. Their proper regulation and the conditions on which foreign companies should be permitted to operate in Canada would seem necessary therefore from a Dominion or national standpoint. The fact that any such foreign company may limit its operation for the time to a single province would not in my opinion relieve it from compliance with the law. It is the subject-matter of its operation which brings it within the control of the Dominion legislation and not the amount of those operations or the limits within which they are carried on. This observation would also apply to persons and not companies engaging in the insurance business.

But it is not alone because the companies to which the section extends are Dominion and foreign, nor because of the enormous proportions and extent to which the business covered by the legislation has

grown in volume and with respect to persons and properties which the subject-matter embraces affecting greatly the happiness, comfort and welfare of such a large and yearly increasing proportion of the Dominion's population, nor because some of its branches are clearly interprovincial, nor because the Dominion has exercised unchallenged legislative power with respect to it substantially in the form now before us for so many years that I hold this legislation to be valid but because the combination of these various facts and reasons convince me that the regulation and control of these insurance companies is necessary in the interests of the inhabitants of the Dominion as a whole and because I do not see how it would be possible for provincial legislation effectively to deal with the subject.

Lastly it seems to me that if the legislation is upheld under the Dominion general powers and not its enumerated ones the *Prohibition Case*(1), is authority that when so legislating on subject-matters which have attained national importance and affects the body politic of the Dominion the legislation is *plenary* and must be given effect to even if it affects subject-matters within the exclusive powers of the local legislatures.

As I have said, I think the subject-matter of this legislation has reached this state of national importance and in fact to a greater extent that had the sale of liquors prohibited by the "Canada Temperance Act" of 1886 and the legislation with regard to the form which the regulation should take is entirely within the province of the Dominion of Canada.

(1) [1896] A.C. 348.

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Having reached this conclusion as to the 4th section, it follows of course that section 70 providing sanctions for its due enforcement would also be valid.

For these reasons, I answer the first question in the negative and the second question in the affirmative.

IDINGTON J.—To answer any questions involving, as these now submitted do, an accurate apprehension of the power of Parliament, we must first ask ourselves whether the power asserted can be rested upon any of the enumerated legislative powers specifically assigned by section 91 of the "British North America Act" or by other sections thereof to the exclusive legislative authority of Parliament.

Whatever enactment can be rested thereon is maintainable. When it cannot be so maintained we must then ask if it touches upon any of the subject-matters assigned by section 92 or other section of the said Act to the exclusive legislative authority of the provincial legislatures.

If in any such case it trenches upon any of the powers thus assigned these legislatures, it is to that extent *ultra vires*.

If it can be maintained as resting solely upon the power given Parliament in section 91, over the "peace, order and good government" of Canada, without invoking any of the enumerated powers therein, and without trenching upon any of these powers given the legislatures, then it is *intra vires*.

What thus rests in this limitation of these words "peace, order and good government" in said section, I shall hereinafter refer to as the residual power of Parliament.

In a sense it is exclusive, but it is not what I refer to as the exclusive power of Parliament. This latter term I apply to what may be used to override all other powers conferred by said Act.

My observation of the needless confusion of thought which so often exists in the minds of those dealing with the "British North America Act," is my excuse for venturing to set out what seems elementary.

Counsel in submitting the question herein and supporting the legislation challenged, correctly apprehended the great value it would be in the way of maintaining same if he could bring it within the enumerated legislative powers I first referred to and sought to rest it upon sub-section 2 of section 91, specifying "The regulation of Trade and Commerce."

Notwithstanding all the learning gathered so carefully from dictionary, literary and legal authorities, I cannot find that the demonstration of what may in some instances be called a trade, even if insurance business fell within them in some such cases, does much to help us to interpret this phrase.

It has never struck me that the phrase "Trade and Commerce" could be properly broken into two or more pieces in order to give this sub-section its correct interpretation; and still less to make every trade, as such, subject to the exclusive authority of Parliament as a way out of the difficulty of finding an appropriate meaning for the whole phrase.

I do not think the busy insurance agent following his trade or calling, falls any more within the scope of this sub-section than the farmer, or fisherman, or blacksmith, or grocer, or anybody else following his trade; not even the lawyer following his honest trade, and undoubtedly having much to do with commerce.

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Life insurance as a whole hardly seems more fitted to be classed as within the ordinary meaning of trade and commerce. And accidents, against which insurance may be had, will happen outside of acts or transactions involved in trade and commerce. Guarantees are needed in many forms, but are not entirely confined to business involving trade and commerce.

And the chief branch of marine insurance, most closely related of all insurances to trade and commerce, seems to be excepted from the Act.

It is to be observed that this very legislation, so far as its principle of dealing with insurance companies foreign to a province is concerned, was before the court in the case of the *Citizens Ins. Co.* v. *Parsons* (1). And this very power over trade and commerce was there invoked to shew that the Ontario Act intituled "An Act to secure uniform conditions in Policies of Fire Insurance" was *ultra vires* a local legislature. The nature of the power is discussed on pages 112 and 113 of that case, and on page 114 the relation of the Ontario Legislature thereto is dealt with.

Can any one imagine that, if this power and its exclusive character overriding all local powers had been deemed to be what we are now asked to hold, the decision in that case would have been what it was and the judgment have stood so long the sheet anchor of provincial rights? I need not repeat here, but adopt what is said on pages 112 and 113, and refer in addition thereto to section 121. Why was that inserted if the Dominion Parliament was to have the sole interprovincial regulative power relative to trade and commerce?

(1) 7 App. Cas. 96.

In this connection we may refer with profit to the cases in the Supreme Court of the United States interpreting the section of their Constitution giving Congress its powers, and which reads thus in subsection 3:—

> To regulate commerce with foreign nations and among the several States and with the Indian tribes.

The latest decision thereon relative to this question of insurance seems to be *New York Life Ins. Co.* v. *Cravens*(1), and the court there held that the subject-matter of insurance did not fall within the term "commerce" as there used. See also *Paul* v. *Virginia* (2).

The decisions of the Judicial Committee of the Privy Council upon the subject of prohibition relative to the liquor traffic in the case of *Russell* v. *The Queen*(3), and *The Attorney-General for the Dominion* v. *The Attorneys-General for the Provinces*(4), seem to have proceeded upon the residual power in Parliament, though the court was invited there, as we are now, to rest upon the power to regulate trade and commerce.

It is true that in the first of these cases the court declined to specify on which ground it rested and intimated it was not to be taken as having discarded the power of trade and commerce. The chief point to be noticed in both cases is a reluctance to rely upon any of such specific powers though the subject-matter of the legislation in question there lent itself much more readily to give place to such an argument than does this Act dealing with all sorts of insurance. True

(1) 178 U.S.R. 389.
(2) 8 Wall. 168.
(3) 7 App. Cas. 829.
(4) [1898] AC. 700.

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it was said that Act was prohibitive and not regulative. Quite so, but must we assume that except by way of criminal legislation Parliament may prohibit anything it sees fit? Whatever may be well said of some kinds of insurance and their close relationship to the subjects of trade and commerce as being conceivably assignable in such an instrument as the "British North America Act" under the description used in and for the purpose of sub-section 2, when we consider the composite character of this insurance Act it seems impossible to rest it as an entirety upon the said sub-section. And if it were permissible for purposes of interpretation to trace the genesis of its drafting we should find the present pretensions were still more unfounded than they appear from what I have urged.

I am afraid we must put aside for the present this sub-section which has been brought out so often in despair to support doubtful arguments.

I think the old residual power of Parliament to make laws for the peace, order and good government of Canada, must alone be relied upon in this emergency.

I now turn to the first question and find the sections submitted apply to persons as well as companies, and the many questions involved in this first one may be simplified and best answered by testing the validity of such legislation when applied to the individual.

The section 4 reads thus:—

4. In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or

file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.

Can I say that Parliament is acting *intra vires* when enacting that

no * * * person shall * * * grant any annuity on a life or lives * * * unless it be done by or on behalf of (some one) holding a license from the Minister?

Surely if there is any civil right everybody has been supposed to have enjoyed, it is that of doing this very thing and no person but the local legislature can take it away. If it be answered, this is an insurance Act and it is not within the purview of the Act to deal with wills or ordinary contracts, I ask how or where am I to draw the line?

I know of no such urgent situation as to take away from men their ordinary civil right even if some should expand the operation thereof beyond its daily use, and do so for other considerations than usually move thereto.

And if insurance can be so treated why not everything else men engage in or can engage in?

This assertion of power to put everyone under the license of the Minister, does not seem to me a thing that falls, as of course by mere assertion of Parliament desiring it, within the only power whereby it may try to invade the civil rights of one living in a province.

And what is true of the rights of a dweller in a province, must be true also regarding the rights of all his agents acting in the same province. Each is protected by the law of the province in regard to his contracts made within same province. Their contracts in these regards as well as in every other regard

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are good, and cannot be invalidated by anything Parliament may try to enact but cannot.

All that is involved therein and in the several ways specified in said section 4, I must hold as *ultra vires* Parliament.

Then as to insurance companies incorporated by a province, I think they must be held to have whilst acting in the province the same rights as the individuals I have referred to dwelling therein.

It was held in the case of *Citizens' Ins. Co.* v. *Parsons*(1), already referred to, that it was competent for the provincial legislature to so enact relative to the contracts of a foreign company, or of one which might be the creation of Parliament, when made in a province so enacting, that it must comply with the conditions imposed by the legislature for the form of contract, and the company be bound by what the legislature specified such contracts were to be held to mean and could not contract itself out of such act. Much more must a home company the creation of the legislature be so bound. It seems futile to suggest that Parliament can by such legislation as this invade such exclusive jurisdiction of the provinces.

It is answered, that as to such companies the Act excepts them from its operation. I do not so read the Act. In the Act of 1868 there was an excepting provision, which was changed by the Act of 1886, 49 Vict. ch. 45, sec. 3, sub-sec. (*e*), so as to read more stringently in that regard and that was later amended to read as it does now in sub-sec. (*b*), of sec. 3, of the present Act, which is as follows:—

to any company incorporated by an Act of the legislature of the late Province of Canada, or by an Act of the legislature of any province

(1) 7 App. Cas. 96.

now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province.

The clear effect of that is to exclude from the exception in favour of provincial companies, such of them as might choose, though acting within their corporate powers, to do business, for example, in the United States, and thus leave them subject to the penalties added as sanctions of the Act and make their contracts illegal if the sanction is valid.

In the case of *The Canadian Pacific Railway Co.* v. *The Ottawa Fire Ins. Co.*(1), the question of the right of a corporate creation of a province to do anything beyond its limits was raised, in an incidental manner only, but thought to be so relevant to the issues in the case that a second and special argument was had in this court in regard thereto.

I examined the matter then in as thorough a manner as I knew how, and came to the conclusion that corporate creations of a local legislature acting under section 92, sub-section 11, had inherent in their creation and must always have been intended to have inherent in their creation the same rights as other corporations to do business wherever it was to be found so far as the doctrine of the comity of nations would carry them unless specially restricted by the creating provision or prohibited by the foreign state or province where attempted.

I have found no reason to change my opinion, and I adhere to the conclusion I then reached and have just re-stated. The argument is too long for repetition here even in an abbreviated form, indeed was

(1) 39 Can. S.C.R. 405.

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thought by myself too long for what I was tempted (but for difference of opinion in this court and respect due thereto) to have considered as elementary law.

Even if I was and am wrong and my reasoning therein worthless in itself, I would commend the quotation from Vattel which appears therein at page 438 as deserving the attention of any one concerned in the questions raised herein.

If I am right in regard to the inherent right of a provincial company to go abroad, then the attempt in this Act now in question to restrict the powers, or the exercise of the powers, so conferred is quite unwarranted.

The Dominion Parliament has no power to take away indirectly what it could not interfere with directly. And the curious thing is that by this very Act it clearly appears Parliament considered these provincial corporations had an inherent power to go beyond the limits of the province creating them.

The draftsman of the Act clearly held the same view of their capacity as I have expressed.

Else why offer to extend to them the license of the Minister to do business throughout the Dominion? There is no thought of a re-incorporation by virtue of a license, but only of the control over and permission to a presumably duly constituted corporation competent to do business throughout the Dominion.

On the face of the Act the possession of such competency is attributable solely to the power of the local legislature.

I think that section 4 so far as it thus strikes at such creations is *ultra vires*.

When I called attention to this objection counsel

did not argue that Parliament had any power to restrict the right of the provincial corporation from going abroad into a foreign state, but argued that the Act did not mean so to interfere. The language seems to me too clear to mean anything else.

To enable any provincial corporation doing any business in the parts of the Dominion outside its home province, this enactment requires a license. It need not get such license if its operations are confined wholly to its own province. But if it does such foreign business then it cannot be within the exception. Provincial companies doing such foreign business would, if this section were held valid, be restricted in such case from doing any business in the Dominion, including, of course, their own province. I can see no reason for the amendment unless this was its purpose.

I must, therefore, answer the first question in the affirmative, subject to what I have to say relative to the second question and hypothetically of the whole.

It would be exceedingly difficult if we applied to the interpretation and construction of these sections the rule that prevails relative to illegality in a contract, to say that any one part of this section 4 could be severed from the rest. It, however, seems to me in passing upon the question of whether a statute is *ultra vires* or *intra vires* that it may sometimes be held operative so far as the power extends, and inoperative beyond, though the language used may not in its terms be clearly capable of such separation as to divide the good from the bad. This result, I suggest, may be reached by the test of its applicability to a given object or purpose. The penal clause 70 may

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not be quite so susceptible of such a mode of treatment.

However that may be I will assume for argument's sake my construction may be wrong, and that the purpose of this first question may be to be advised relative to the power of Parliament to control by means of prohibiting contracts, or suit upon contracts, otherwise inoffensive and legal, the business of insurance by individuals domiciled in, or companies incorporated by, a province when carrying on such business in other provinces of the Dominion.

If anything ever has been settled relative to the powers of the Dominion and the provinces, there are two things which seem clearly so. One is that so far as the form and validity of any contract depend on the law of the place of making, they must, save in those cases arising out of and incidental to the exercise of the exclusive legislative authority embraced in the enumerated or specific powers of Parliament, conform to what the provincial legislature of that place has enacted. The other is that in regard to the form and validity of contracts so far as necessary to the full exercise and operative effect of such exclusive legislative authority as has been so assigned to Parliament, the will of Parliament is supreme, and it may rely upon or supplement or so modify the operation of the local law as (but only so far as) such exigencies require in order to accomplish its purpose.

The first is established by the case of *The Citizens' Ins. Co.* v. *Parsons*(1), already referred to. The second is also established by many authorities. The effect given to the use of warehouse receipts author-

(1) 7 App. Cas. 96.

ized by the "Banking Act" may illustrate this branch of these things.

But no decision determines how far, if at all, Parliament resting only on what I have called the residual power, as I hold it must in enacting section 4, can interfere with the power of the provincial legislatures over contract.

The liquor prohibition decision of necessity affected the law of contract so far as regards the sale of liquor.

The right to legislate relative to contracts, as now presented, was never directly touched upon in the argument so far as I can see, and the subject of property and civil rights including same, was only touched upon incidentally to finding a place for the local legislature to rest its right to prohibit, which seems to have been found in sub-section 16 of 92 relative to local matters. In the *Russell Case*(1) the regulation of trade and commerce was not abandoned, the criminal law was hinted at, the right to prevent dangerous things being done suggested. What all these meant or might mean was not decided. But if these measures had been treated as part of the criminal law many men would have approved that treatment as sound sense and I certainly do not see from the point of view of constitutional law, what answer could have been set up thereto. It might have fallen there quite as appropriately as the restraint of trade clauses in the Criminal Code upon which we decided the case of *Weidman* v. *Shragge*(2).

Hence I am not disposed to attach undue importance to the bearing on this question of contract of the

(1) 7 App Cas. 829. (2) 46 Can. S.C.R. 1.

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last of these liquor cases so recent as 1896 and only perhaps a mere advisory opinion which the first was not.

The struggle in 1896 was a peculiar one. It would not, I suspect, have suited either party arguing to have the subject treated as part of the criminal law. And as to property and civil rights I would call attention to the remarks of Lord Macnaghten in the case of *The Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*(1), at page 78, from which, as it bears directly upon what I am now dealing with, I quote the following:—

> Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

In passing I may note that at this period in *Anctil* v. *Manufacturers' Life Ins. Co.*(2), art. 2590 of the Quebec Code was held to have so fixed what might be an insurable interest that a condition in the policy making it incontestible at the end of a time which had elapsed at the death, could not validate it.

This insurance company was not a local company of Quebec creation.

Having already shewn why a man domiciled in a province must be held entitled to contract as an insurer according to the law of the province, how can one residing in one province be prevented from going into another to do likewise? Certainly there is no power given any province to prohibit a man coming there from another province for a lawful purpose. And when there he is entitled to avail himself of the

(1) [1902] A.C. 73. (2) [1899] A.C. 604.

protection of any law existing where he so finds himself to make any contract unless and until he has by reason of some general law of the province applicable to all men become deprived of such right.

There may be a local law requiring license or special qualifications to carry on his business as in the case of professional men. Or the province may possibly in general terms so limit the right of non-residents to transact a specified business as to exclude him, but yet that does not help the Dominion Parliament to assert authority to set aside or override the local law. What right has it to restrain men from passing from one province to another ? Section 121 giving the absolute right to transfer the product of one's labour from one province to another free, may be incidentally referred to and imply that those doing so cannot be restrained from personally doing every act necessary to enjoy the benefit of the provision. How can Parliament or legislature interfere ?

Then in this regard where does the prohibitive power rest which every corporation is subject to when going beyond the limits of the state which created it ? Is it in the province or is it in the Dominion ? Or is it in both ? Or is it in the former but only so until the latter has signified its will ?

It is not difficult to distinguish between the right of the individual and the corporation. The former, as I have said, has *primâ facie* the right to pass the line, but it is only by virtue of comity the latter can. And surely the power of the province to enact as to what contracts may be valid and what not, must end the matter for all practical purposes so far as the exclusive power over property and civil rights extends.

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As between the Dominion and foreign corporations, I can easily see how the Dominion can under its residual power prohibit the foreign corporations. But on what can it rest its alleged power to direct the admission of said corporations into the provinces against their will? And when attempting to deal with rival corporate creations of a province the difficulty seems much greater.

Suppose, as men have advocated, the fire insurance business should be given by a province to the municipalities to undertake, just as the water supply and lighting are now so generally undertaken, and it became an object of local importance that each municipality or group of municipalities should enjoy the monopoly thereof, can it be said such a plan would be beyond the powers of a province acting under subsections 8 and 16?

I am not prepared to say that such a thing is beyond the powers given to the provinces. And I cannot see why such an exercise of power should be controlled or trenched upon by the Dominion by virtue of anything to be found in this "British North America Act."

It has been frequently said that what cannot be enacted by a local legislature must of necessity be found within the competence of Parliament to enact. This I respectfully deny. It is in my humble opinion, beyond the scheme of our federal system to give operative effect thereto, no matter how high may be the authority laying down such dogma. It would be indeed a very simple formula for solving knotty questions.

Uniformity of law may be a most desirable thing. In the instrument creating our system this very thing

is provided for by section 94, within certain limits, but subject to such conditions and limitations as to demonstrate the impossibility of such a conception being within the power of Parliament. Our school systems vary, our municipal systems vary still more. Our systems of land tenure also vary, as do our laws of inheritance and succession. Yet Parliament cannot meddle therewith.

No man would be bold enough to say we might create by and through Parliament, a State Church, and against the will of the legislature levy in support thereof tithes in the provinces upon property in same, though the oldest of civilized countries deem such an establishment essential. No more could Parliament in pursuance of such an establishment, add to or trench upon provincial mortmain Acts. Yet every one of these things could be dealt with by virtue of this doctrine if correct.

If we will bear in mind that our federal scheme has first assigned to the exclusive power of Parliament the authority to legislate on twenty-nine subject matters enumerated in section 91, besides some other things found in other sections; that subject thereto it has assigned to the legislatures the exclusive legislative authority over sixteen other matters, and only beyond these, but subject thereto and limited thereby, on such other subjects as may, without infringing thereon, be legislatively dealt with for the peace, order and good government of Canada, we will have cleared our minds on these matters and cease assuming that because a better state of law is conceivable, it must of necessity rest in Parliament.

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In regard to some things the power of legislation does not rest in this country.

In regard to other things desirable results are conceivable as possible by the co-operation of both legislatures and Parliament.

So far as the corporate creations of the Dominion rest upon one or more of the twenty-nine enumerated subjects over which Parliament has exclusive legislative authority, there can be no doubt of its power to authorize them to do such business as within the ambit of or resting on such basis of authority either throughout the entire Dominion or such part thereof as Parliament may choose to specify and every statute of any legislature or other law of a province though possibly operative and helpful so far as adaptable in that regard must be held null before the expression of the Parliament will in such cases when and so far as in conflict therewith.

When we reflect that there go with such powers the incidentals thereof which interpretation has implied as a necessary part of same, we may faintly realize over what a vast field of possible corporate activity Parliament is supreme.

Men are apt to be led by contemplation of these operations on that field which meet us at every turn, to the conclusion that all Dominion corporations must possess the same inherent power in relation to provincial laws or in competition with provincial corporations.

So far as I can see those Dominion corporations which cannot be said to rest upon one or more of the exclusive powers of the Dominion Parliament indicated above are as corporate creations of no higher order and possess no greater inherent power or right

than any other, when brought in conflict with any law enacted by a legislature of a province acting within the sixteen enumerated powers in section 92 or other specific power.

Whether Parliament may have or not under its powers over "the regulation of trade and commerce" the authority for directing corporations, directly related to the subjects covered by said phrase, to be permitted to enter all or any one or more of the provinces with the right to transact business therein notwithstanding there may be local regulations to the contrary, is a subject upon which I express no opinion. Indeed, I have none sufficiently accurate and comprehensive to satisfactorily express myself, and can conceive of none unless springing from some trade convention over or in respect of which Parliament might legislate.

My present purpose in referring thereto is merely to eliminate from the problem I am considering at least as much as possible, if not all, of what is entirely irrelevant to its solution.

The difficulty in this submission is that the legislation in question directly trenches upon the field of contract, and upon that field when and where not in subjection to the supreme powers of Parliament, but is to be viewed in relation only to what emanates from a residual power apt to be (and sometimes I fear has been) confused with the other yet supreme Parliamentary powers and their products.

Subject to what I have said I think Parliament can, resting merely on its residual power, enact that any of its corporate creations may enter and transact business anywhere in the Dominion so far as in doing so it does it conformably with such laws as have been

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or may be enacted by any province under and pursuant to the subject matters assigned to the exclusive legislative jurisdiction of the provinces.

The purpose of the legislation before us no doubt is so commendable that it has, therefore, stood a long time unchallenged. It had its origin in legislation of Old Canada existent at Confederation. See 23 Vict. ch. 33, and 26 Vict. ch. 43. Its purpose can be attained by the provincial legislatures each taking away from men and corporations or such class as specified, acting within the province so enacting, the power of contracting with insurers, unless and until the Dominion shall have given a license therefor.

Then this kind of Dominion legislation if otherwise unobjectionable, having the field so cleared, could be so fitted thereto as to be made undoubtedly operative in the provinces so enacting or could be enacted conditionally upon provincial legislation being provided or found existent. This plan need not interfere with the operation of the provincial companies in their own provinces or with them being licensed by the Dominion to go elsewhere.

I put it forward as illustrative of what may be done within the undoubted powers of Parliament and legislatures, when combined, and to shew that there is no such necessity for straining the residual power of Parliament as seems to be assumed in the theory that because we have a very large measure of self-government with distributed powers of legislation, therefore, we must only ask whether or not a given measure is within the power of the local legislatures, and if not found in its entirety there, conclude it must rest in Parliament.

It may be said the method I have suggested as

within our powers of self-government is clumsy or difficult of execution. I answer that if the alternative of stretching the residual power of Parliament to cover all these defects is open, then there is an end of, or at least a means of ending, the federal system.

I answer further that we already have analogous legislation in the adoption of the provincial franchise however variant it be as the basis for Parliamentary elections. Other illustrations exist.

It would seem very absurd to have had so many struggles renewed herein to try and bring any exercise of the power of Parliament within any of the enumerated powers of Parliament, if it has always had the power the easy formula I have referred to says it has. It, however, should never be forgotten that it was out of the need there was found for abridging the powers of Parliament that the federal scheme was begotten.

Notwithstanding all I have said, when I seek to apply it to the case in hand I am confronted by the judgment in the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion* (1), which at foot of page 581 and top of page 582, surely assumes that if it is desirable to legislate in respect of something which a province cannot, then Parliament must have the power. I quote the following therefrom:—

> In the present case, however, quite a different contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court, is an evasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at

(1) [1912] A.C. 571.

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all. This is the feature of the present appeal, which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter of affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

In support of such doctrine we were referred by counsel to the judgment in the case of *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(1), which uses terms which, taken literally, might go far to support any Parliamentary legislation. It does not seem to me that the expressions thus relied upon were so clearly necessary for the decision of the case in either instance on the facts there respectively presented. But if that language (which is to be found also elsewhere) so used and referred to in these cases is to be taken as if they were final decisions demonstrating the true doctrine, the matter is ended.

What I have said relative to the predominance of the enumerated exclusive powers of Parliament rests upon the declaration at the end of section 91, as follows:—

> And any matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

I refer to this and the remarks thereupon of Lord Watson in *The Attorney-General for Ontario* v. *Attorney-General for the Dominion*(2), at page 359, and top of page 360, as justification for the position I take. I prefer thinking his exposition there given is correct

(1) [1909] A.C. 194. (2) [1896] A.C. 348.

and do so all the more readily because of his high authority and unusual experience in dealing with our federal system.

The benefit of that is well illustrated by his correction in those pages of an earlier expression of opinion by the same court.

The proposition I quote above happened to be used in a case where it ought to have been present to the mind of the court that it was dealing with a subject to part of which the powers of the Dominion and the Province of Ontario through their respective legislatures had been addressed and had by concurrent action attempted a method of solving grave constitutional questions involving the limits of the power of either.

That seemed to me a sane method capable of expansion when public opinion had become ripe therefor. The serious part of the business so far as I am just now concerned is that Parliament having taken the matter in hand had so expanded, independently of the will of the provinces, its assertion of authority as to cover the entire ground. That assertion of authority is rested upon the grounds stated in above quotation.

It is largely justified in the judgment referred to by the long unquestioned use of some such power. The actual concurrence or assent of the provinces had in fact appeared in the cases of the interrogation of this court in regard to matters affecting the provinces.

That acquiescence was turned into an argument to maintain the propositions I have quoted.

I am only concerned now with all these things to demonstrate the clear parallel between that instance of the assertion of Parliamentary authority and this now in hand.

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Each rests on the residual power of Parliament. Each has long been unquestioned. Each has been acted on for a long period. Each has had added to it as the years rolled on new legislative enlargements of accretions, if I may use such expression. Properly speaking I cannot say strength was thereby added unless I assent to the foundation as well laid. The supports of age and acquiescence seem more to favour the Act now questioned than the other.

My opinion has long been that there is a wide field for possible legislation which can only be effectively overtaken and good accomplished therein by such concurrent legislative action as I have adverted to and no doubt in my mind that was contemplated by our statesmen who framed this scheme of government.

Am I to set this opinion aside in deference to expressions such as I have adverted to in the court above? Am I to adopt the easy formula I have referred to ? Or may I say these judgments might have been supported on other grounds ? I have already suggested such possibility but am far from being quite sure that my conception thereof in either case could meet the approval of the court.

I can here do no more than point out the difficulty created and say that case is not this case.

I think I must adhere to the old way which I have expressed above, of reading this written constitution.

The co-operative method of proceeding by concurrent legislation seems to be approved by the court above in the case of *City of Montreal* v. *Montreal Street Railway Co.*(1), at page 346.

(1) [1912] A.C. 333.

Yet in the *Marriage Laws Case*(1), where the terms of the instrument, as it seems to me, lent itself in a peculiar manner to such a mode of treatment, no countenance was given my suggestion in that regard and its application was swept aside so far as a mere advisory opinion can do so.

The criminal law jurisdiction of Parliament was also relied upon herein. My suggestion of its aid in the *Marriage Laws Case*(1) does not seem to have evoked much enthusiastic support, though in that connection it seemed to me much more appropriate than here.

The truth is this "Insurance Act" was obviously not a piece of criminal legislation or intended as such. The mere penal sanction given to it cannot add to its jurisdictional strength, unless clearly resting upon that subject of jurisdiction. Local legislatures are given the like power and their Acts were given by 31 Vict. ch. 71, sec. 3 (Dom.) even greater sanctions. I may observe that that itself was a very early instance of what I am calling, for want of a better phrase, concurrent or co-operative legislation.

If the power to enact the section now in question existed, probably a wilful contravention of it might be indictable. But that jurisdiction to enact has to be found first in such aspect.

I must answer, for reasons given above, the first question in the affirmative, and pass now to the second question.

It is quite clear without any elaborate argument that an Act dealing with insurance which may or may not have any relation to trade and commerce and

(1) 46 Can. S.C.R. 132.

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securing the people of Canada from the possibly disastrous affects of trusting entirely to the honour of foreign companies over which they have no control and of which they may know little, can be enacted by Parliament. Parliament in so enacting does not trench upon any of the subjects assigned to the provinces and, therefore, in so far as a legitimate subject of legislation, seems to act within its powers.

The distinction between the right of one dwelling in or being within a province, and the right of a foreign company, or an alien dwelling in a foreign country, to come or send his agents into Canada against the national will as expressed by Parliament, seems as broad as it is possible to conceive of, relative to such things as involved in settling the limits of jurisdiction of the Dominion and the provinces.

The right to contract does not exist until the would-be actor is in the province.

I see no infringement of any local law relative to contract which can be implied in this aspect of the matter, and such restriction of civil right as there may be is implied in the residual power or it is useless.

For the sake of brevity, clearness and simplicity, I have used contracts as a test, but only as emblematic of all that exclusive domain assigned the legislatures over the sixteen enumerated subjects in respect of which they, in my opinion, by the express language of the Act are paramount over everything that may rest in the residual power of Parliament when the twenty-nine enumerated subjects of section 91 and other specific powers have been exhausted, though Parliament may by virtue of such residual power enact any law a colony can, conditional and dependent upon and to be given vitality and operative

efficiency by the legislatures in their respective provinces, or by their existent legislation.

I must answer the second question in the affirmative, if and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.*

Subject to the qualifications and limitations expressed in the foregoing opinion, I answer the questions herein submitted as follows:—

(1) Are sections 4 and 70 of the "Insurance Act, 1910," or any or what part or parts of the said sections *ultra vires* of the Parliament of Canada ?

Answer—Yes.

(2) Does section 4 of the "Insurance Act, 1910," operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of business is confined to a single province ?

Answer—I must answer the second question in the affirmative if and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies, as well as others within the terms of which is embraced so much that is clearly *ultra vires.*

DUFF J.—It is contended on behalf of the Dominion that the enactments in question can be supported as a valid exercise of the legislative authority of the Dominion either (1) under the introductory clause of section 91, or (2) under No. 2 of the enumerated

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heads of that section "the regulation of trade and commerce." First, as to the power of the Dominion under No. 2 of section 91:—

I think this does not embrace the regulation of occupations as such. "Trades," the pursuit of which constitutes a part of the trade and commerce of the country, may very well be subject to regulation under this power but only as branches of trade and commerce. The regulation of occupations as such seems in its nature to be a matter rather of local than of general importance and I think it requires some straining of the language of No. 2 to bring that matter within it. I do not think that the various kinds of business which are comprehended under the term "insurance" as used in the Act in question can be said to be part of the trade and commerce of the country; or that the transactions dealt with by section 4 of the Act are operations of trade or commerce in the sense in which those words are used in this provision.

As to the introductory clause: I think the Act cannot be sustained as having been passed in exercise of this power for two reasons. I think that the legislature of any one of the provinces could have passed an Act containing provisions substantially identical with the provisions in question (limited, of course, in its application to the province) under the authority given by section 92 to make laws in relation to "property and civil rights in the province."

I think that legislation declaring the qualifications required to enable persons—natural or artificial—in any given province to enter into contracts of the various kinds embraced under "policy of insurance" as defined in section 2 would be legislation in relation to civil rights. If I am correct in this the exception

found in the introductory clause of section 91 excludes the subject-matter of this section from the general authority of the Dominion.

If the Act is not an Act relating to civil rights then it is, in my judgment, an Act relating to matters which in each province are "merely local or private," as those words have been construed by the Judicial Committee in the Privy Council in different cases. On behalf of the Dominion it is said that the object of the Act is to require companies and persons engaged in carrying on the business of insurance to provide security for the performance of their obligations; and that this being a subject of general importance the Dominion is entitled to deal with it by legislation applying uniformly to all the provinces. The decisions upon the "drink legislation" are relied upon as authorities for this proposition.

I have already given my reasons in my opinion in the Companies' Reference for thinking that the decisions on the "drink legislation" afford no positive rule of general application. They do lay down, however, a negative rule that the Dominion cannot under the general power validly legislate for the whole Dominion in respect of matters which in each province are substantially of local interest. I have not been able to understand upon what ground it can be contended that the matter of the qualifications necessary to entitle a corporation or natural person in any single province to engage in transactions of the kind dealt with in section 4 (read in the light of section 2) is not a matter of substantially local interest in that province. The Act, it must be observed, exempts from its operation any company incorporated by the legislature of a province for the

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purpose of carrying on the business of insurance within that province alone; but section 4 has its full operation with regard to individuals and unincorporated associations; that is to say, with respect to the carrying on of the business of insurance wholly within a single province the Act draws a distinction between incorporated companies and natural persons acting either individually or in association with others leaving the former free to do the things mentioned in section 4, but with regard to the latter requiring that they shall comply with the regulations of the Act. Such legislation seems clearly to be directed to these matters as matters of "substantially local" interest in each of the provinces.

I do not think that the fact that the business of insurance has grown to great proportions affects the question in the least. The importance of some such provisions as this Act contains may be conceded. The question is: On what ground can it be contended that this is a matter which because of its importance has ceased to be substantially of local interest? The matter of the solvency and honesty of persons assuming fiduciary relations is at least as important as the matter of the solvency of the insurance companies. It would be difficult to argue that the qualifications of trustees and executors and financial agents is a matter with which the Dominion could deal by a uniform law applicable to the whole Dominion. The Act before us illustrates the extremes to which people may be carried when acting upon the theory that because a given matter is large and of great public importance it is for that reason a matter which is not substantially local in each of the provinces. The business of "guarantee insurance" by section 2(*w*) in-

cludes the executing of "bonds in legal actions and proceedings," and section 4 would appear to prohibit the making of such contracts by persons who are not licensees under the Act. That seems very obviously a purely local matter when the proceedings are in the provincial courts; but if it once be admitted that the Dominion can prescribe the qualifications necessary to entitle anybody to enter into a contract of life insurance or fire insurance it is very difficult to see why it cannot also regulate the qualifications of persons entitled to enter into contracts of suretyship. Such legislation, in my judgment, involves a degree of interference with matters "substantially local" that could not have been contemplated by the framers of the Act. The fact that this legislation has been in force since 1868 was dwelt on by Mr. Newcombe. It is a circumstance for consideration, no doubt, (although the law as it now stands is very much broader than it was down to 1910,) but it must be observed that when the Act was introduced it was opposed by Mr. Mackenzie and Mr. Blake on the ground that the subject of insurance was a subject committed exclusively to the provinces, and the Act passed through Parliament on the assumption that the business of insurance carried on locally, that is to say, in a single province, was not interfered with. The Act, in truth, has until recently, at all events, never been enforced except as against Dominion companies and extra-Canadian companies.

The contention that the Act is criminal legislation is disposed of by the report of the Judicial Committee(1) upon the reference relating to the Dominion Licences Act, 1883. Precisely the same argument

(1) 6 Can. Gaz. 265.

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was with much greater reason (see preamble to the Act) there advanced and rejected, the legislation being held to be *ultra vires*.

To the first question my answer is "Yes."

To the second question my answer is "Yes" if *intra vires*.

ANGLIN J.—The subject of insurance is not specifically enumerated as a head of legislative jurisdiction either in section 91 or in section 92 of the "British North America Act." The right to carry on that business is (at all events *primâ facie*) a civil right in each province of Canada within the meaning of "civil rights" in clause 13 of section 92.

Section No. 4 of the "Insurance Act, 1910," undoubtedly purports to interfere with and to regulate the exercise of that civil right by "companies, underwriters and persons." Section 70 is ancillary to, and has been passed as a means of enforcing, and to provide a sanction for, section 4. It is not an independent enactment and it is conceded that if section 4 is held to be *ultra vires* section 70 must fall with it.

A provincial company which carries on its business "wholly within the limits of the province by the legislature of which it was incorporated" is the only material exception from the prohibitions imposed by section 4. A provincial company which does business in any foreign country, although it should not operate in any part of Canada other than the province by the legislature of which it was incorporated, is not excepted. Neither is a person nor an association of underwriters whose operations are confined strictly within the province of which he or they are residents.

It is sought to uphold this incursion by the Do-

minion Parliament into the field of civil rights on the ground that it is legislation either

(*a*) In respect of aliens, (*b*) in the nature of criminal law, (*c*) in regard to trade and commerce, or (*d*) upon a matter which is "of Canadian interest and importance."

If it can be fairly brought under (*a*), (*b*), or (*c*), subject perhaps to what Lord Atkinson recently said in regard to (*c*) in the *Montreal Street Railway Case*(1), at pages 343-4, with which, however, must be compared Lord Watson's language in the *Prohibition Case*(2), at pages 362-3, the paramount jurisdiction of the Federal Parliament in regard to the subjects of legislation enumerated in section 91 might properly be invoked to support it. If, however, the legislation in question is not properly ascribable to (*a*), (*b*), or (*c*) and it becomes necessary to resort to (*d*) the case for the validity of the statute is vastly more difficult.

It is only necessary to read the "Insurance Act, 1910," very cursorily to realize that in passing it nothing was farther from the mind of Parliament than an exercise of its jurisdiction in respect to "Aliens." The Act does not distinguish between alien companies and companies incorporated by the Parliament of the United Kingdom or by the Legislatures of the Canadian provinces (subject to the exception noted above) nor between citizens of Canada or subjects of the Empire and those of foreign states. "The leading feature"—"the pith and substance of the enactments" of section 4 is wholly foreign to legislation in respect of "aliens and natur-

(1) [1912] A.C. 333. (2) [1896] A.C. 348.

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alization," and that head of power may not be invoked to sustain it. *Union Colliery Co. of British Columbia* v. *Bryden*(1), at page 587.

Neither can the provisions of sections 4 and 70 be ascribed to the exercise of legislative jurisdiction over "criminal law." No criminal offence is created. Fitting penalties are attached to breaches of prohibitions of a regulative character, not as providing for the punishment of crimes, but as incidental to the regulative legislation, much as a provincial legislature may provide for the contravention of its enactments under clause 15 of section 92 of the "British North America Act." This legislation is not criminal law in the sense in which that phrase is used in clause 27 of section 91.

The argument based on "the regulation of trade and commerce," while perhaps more plausible, appears upon consideration to be equally fallacious. Whether the business of insurance can ever properly be spoken of as a trade is at least doubtful. But, read, as it must be, in connection with the word "commerce," with which it is associated, I think it reasonably clear that the word "trade" in clause 2 of section 91 of the "British North America Act" does not cover the business of insurance. The weight of authority certainly supports that view. If, however, insurance is a trade in the ordinary sense of that term, having regard to what has been said as to the scope and meaning of clause 2 of section 91, in such cases as *Citizens' Ins. Co.* v. *Parsons*(2), I think that under it Parliament is not empowered to regulate the conduct of any single trade or business in the pro-

(1) [1899] A.C. 580. (2) 7 App. Cas. 96.

vinces or to prescribe the conditions on which it may be carried on. That seems to me to be so purely a matter of civil rights in each province, something so essentially local that it appertains exclusively to provincial jurisdiction. The regulation of trade and commerce in clause 2 of section 91 should be given a construction which will preclude its being invoked to justify Dominion legislation trenching upon the provincial field. This I take to be the meaning of Lord Atkinson's observation in the *Montreal Street Railway Case*(1), at pages 343-4; so read it is reconcilable with what Lord Watson said in the *Prohibition Case* (2). I am, therefore, of the opinion that the validity of sections 4 and 70 of the "Insurance Act, 1910," cannot be upheld under the power conferred on the Dominion for "the regulation of trade and commerce."

In the *Prohibition Case*(2) Lord Watson laid down very clearly the proposition that Dominion legislation not ascribable to one of the enumerated heads of jurisdiction under section 91, but dependent wholly on the "peace, order and good government" provision

ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92.

In the *Montreal Street Railway Case*(1), at pp. 348, 360, Lord Atkinson repeats and emphasizes this view. Yet in the *Prohibition Case*(2), after pointing out that the jurisdiction of the Dominion Parliament to enact the "Canada Temperance Act" had been rested on the "peace, order and good government" provision rather than on "criminal law" and could not be sup-

(1) [1912] A.C. 333. (2) [1896] A.C. 348.

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ported under "the regulation of trade and commerce," Lord Watson says, at p. 367, that in so far as the provisions of the provincial "Local Option Act" (upheld as an exercise of legislative power by the Province of Ontario under either clause 13 or clause 16 of section 92) come into collision with the provisions of the Canadian Act they must yield and remain in abeyance until the Canadian Act is repealed. In the same judgment his Lordship had already said (p. 361) that

> some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great care must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada.

This judgment rests upon the view that when a matter primarily of civil rights has attained such dimensions that it "affects the body politic of the Dominion" and has become "of national concern," it has, in that aspect of it, not only ceased to be "local and provincial," but has also lost its character as a matter of "civil rights *in the province*" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.

As I understood him, counsel for the Dominion contended at bar that if there would, upon any state of facts, be jurisdiction to enact the legislation in question the existence of that state of facts must be assumed in favour of its validity. Had Parliament expressly declared the existence of such a state of

facts, whatever might be the awkwardness, inconvenience and difficulty of inquiring into and passing upon the truth of such a declaration, in the absence of such a facultative provision as is found in clause (*c*) of sub-section 10 of section 92 of the "British North America Act" in regard to "Works," I incline very strongly to the view that the declaration of Parliament could not be taken as conclusive upon the question of its jurisdiction. The "Insurance Act," however, does not contain such a declaration. Without it, although according to the view of it expressed by Lord Watson in *The Prohibition Case*(1), the decision upholding the "Canada Temperance Act" would appear to rest upon a somewhat similar assumption, I know of no ground upon which it can be even plausibly argued that, merely because such an assumption is essential to the validity of an Act of Parliament, a matter so distinctly of civil rights in the province as the right to carry on a particular business and the conditions upon which that right may be exercised should, without any evidence of facts justifying such an inference, be deemed to have lost that character and to have become so much a matter of national concern that exclusive provincial jurisdiction over it had been superseded by Dominion control under the power to legislate for the "peace, order and good government" of Canada. If such an assumption should be made—if indeed the Parliament of Canada could by an appropriate declaration conclusively establish the existence of a state of facts upon which such a transfer of legislative jurisdiction would occur — the autonomy of the province would be entirely

(1) [1896] A.C. 348.

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at its mercy and there would be few subjects of civil rights upon which it might not displace the provincial power of legislation.

For these reasons I am of the opinion that section 4 of the "Insurance Act, 1910," taken as a whole, is at all events *primâ facie, ultra vires* of the Parliament of Canada. Excluding their application to Dominion companies and to certain companies incorporated by, or under the authority of, the legislature of the late Province of Canada, which is of comparatively slight importance, I find no sufficient ground for distinguishing between its several prohibitions which would all appear to be tainted with the vice of unwarranted interference with the exclusive jurisdiction over civil rights conferred on the provincial legislatures. Section 70, as already stated, falls with section 4.

I would, therefore, upon the case as submitted, answer the first question in the affirmative as to the whole of sections 4 and 70, except in their application to companies incorporated by or under the authority of the Dominion Parliament, and to companies incorporated by or under the authority of the legislature of the late Province of Canada for the purpose of carrying on business in a territory not wholly comprised either within the Province of Ontario or the Province of Quebec.

To the second question I would answer—It would do so if *intra vires.*

BRODEUR J.—The question that we have to consider is whether the Dominion Parliament can regulate the insurance business.

The business of insurance is not necessarily a

trade. The large companies that are carrying out that business are, generally speaking, commercial ventures with an object of gain or profit for their shareholders. But alongside of that we have the Mutual Benefit Insurance Association, which is entirely beneficial, we have also in the large railway and other companies an insurance fund for the employees to which the employees themselves and their employers contribute that could certainly not rank as commercial enterprise and there is the contract of indemnity made by insurers which can scarcely be considered a trading contract.

It is true that the Dominion insurance law as it stands to-day does not undertake to control those mutual companies incorporated by local statutes. But if the existing law is declared constitutional nothing then would prevent the Federal Parliament undertaking to regulate those insurance associations in the same way as they are legislating to-day with regard to individuals. The contention on the part of the Dominion Parliament is that their legislative power rests on their right to regulate trade and commerce, to legislate with regard to aliens and naturalization and the criminal matters.

The claim as to criminal legislation was not strongly pressed at bar, but was simply mentioned. It cannot be stated that this insurance legislation has in view the creation of any new crime. It is not so worded. We might say the same thing concerning the naturalization idea. That legislation has certainly not for its object to give rights and powers to aliens, and the fact that foreign insurance companies could come and do business in Canada under certain conditions could certainly not be considered as legislation of a naturalization nature.

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The only strong claim that can be made for the validity of this law is that it falls under sub-section 2 of section 91 of the "British North America Act," "The regulation of trade and commerce."

It is contended on the part of the provinces that the insurance contract is essentially a civil right and the Dominion insurance legislation virtually wipes out the sub-section 13 of section 92 as far as insurance business is concerned.

If the power to regulate trade and commerce gives the power to regulate a particular trade and commerce then it follows that the Federal Parliament would have the authority to determine the nature of the insurance contracts and the laws of the province in that respect would be of no concern. (*Tennant* v. *Union Bank*(1).) It has been decided by the Privy Council on the contrary in *Citizens' Ins. Co.* v. *Parsons*(2), that statutory provincial legislation may be passed to determine the nature of the contract that insurance companies may make.

It seems to me that if the authors of the "British North America Act" intended to put insurance under federal control they would have mentioned it as they have done for banking, weights and measures, bills of exchange, interest, patents and copyrights. The special enumeration of those subjects does not necessarily preclude any others being included in the provisions of section 91 of the "British North America Act," but it goes a long way to shew how the insurance question was considered. Besides the existing legislation at the time of Confederation and the proceedings of the Quebec Conference shew very con-

(1) [1894] A.C. 31.

(2) 7 App. Cas. 96.

clusively that the matter of insurance pertains to provincial legislation.

Under the Union of Upper and Lower Canada the matter was considered so much a question of local interest that those two provinces had each their own mutual insurance law. See Consolidated Statutes of Lower Canada, 1860, ch. 68; and Consolidated Statutes of Upper Canada, 1859, ch. 52.

The chapter 68 of the Lower Canada Statutes was under the title "Joint Stock Companies," and the Upper Canada legislation was under the title "Municipal Institutions."

The Commissioners appointed for the Codification of civil laws of Quebec in their 7th report dealt with the insurance law and enacted the articles 2468 and following of the Code, which cover the whole subject.

They considered the insurance law as a matter of civil law.

That report was made and discussed in Parliament at about the same time the Confederation resolutions were framed and discussed.

It is to be noticed that in 1864, at the Quebec Conference of the delegates of the provinces the question of insurance was mentioned. A proposition which carried was at first made that the regulation and the incorporation of fire and life insurance companies should be under the legislative control of the Federal Parliament; but a few days later that proposition was struck out. (Pope, Confederation Documents, pp. 30 and 88.)

The only inference to be drawn from those facts is that the insurance laws are pertaining to civil rights and that the subject was in the opinion of the

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Fathers of Confederation a matter that should be under the legislative control of the provinces.

What is the scope of the power to regulate trade and commerce? The regulation of trade and commerce in sub-section 2 of section 91 refers to political arrangements or interprovincial trade and perhaps to the trade generally. *Citizens Ins. Co.* v. *Parsons*(1), at page 111. The commercial relations with foreign nations or with the British Empire are of Federal concern. The question whether our country should be under a free trade or a protectionist policy pertains to the central Parliament; but the regulation of a particular trade could not be done under that section and we have in that regard the authority of the Imperial Parliament. By the Act of Union of England and Scotland (6 Anne, ch. 6) it is provided that all subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation," and that all parts of the United Kingdom should be under the same prohibitions, restrictions and regulations of trade.

The Imperial Parliament has passed laws affecting and regulating specific trades in one part of the United Kingdom only, without it being supposed that it violated the Union. Laws like those relating to bankruptcy and sale of liquors vary in Scotland and England.

I am of the opinion that under the sub-section 2 of section 91, of the "British North America Act," the Canadian Parliament cannot undertake to regulate any specific trade.

The section 4 of the Dominion "Insurance Act" that requires all persons to take a permit before mak-

(1) 7 App. Cas. 96.

ing any contract is *ultra vires* and the section 70 which imposes a penalty on those that would carry on the business of insurance without taking that license is also illegal.

We are asked by a second question to state whether the above section 4 applies to foreign companies. I think there is no doubt as to this section applying to foreign companies.

Then my answers to questions referred to us would be as follows:—

QUESTION I.	ANSWERS.
Are sections 4 and 70 of the "Insurance Act of 1910," or any and what part or parts of the said sections *ultra vires* of the Parliament of Canada ?	Those two sections are *ultra vires.*
QUESTION 2.	
Does section 4 of the "Insurance Act, 1910," operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province ?	Yes, if *intra vires.*