CONSTITUTIONAL ASPECT OF INSURANCE LEGISLATION.

The old controversy between the Dominion and the provinces in regard to the respective powers of the Dominion and the provinces over the subject-matter of insurance was revived at the 1932 session of the parliament of Canada when the Right Honourable Arthur Meighen introduced three government bills in the Senate which were objected to by the provinces as being a fresh assertion of jurisdiction by the Dominion and ignoring the real significance of the recent decision in re The Insurance Act of Canada on October 22, 1931 (1932 A.C. 41), hereinafter referred to as the 1931 decision which had been thought conclusive in favour of the provinces. To appreciate the situation adequately, a review of some of the leading previous cases and the history of prior legislation is necessary.

There has been for many years a marked difference of opinion between the provincial and federal authorities as to the length to which each may go in legislative action towards the regulation of the business of insurance. The main contention may be said to hinge on conflicting views as to the respective powers of the two legislative bodies under the British North America Act. The federal authorities have, on more than one occasion, in furtherance of their jurisdiction to incorporate companies having objects other than provincial, sought to vest in these companies powers and duties, which from the provincial view, trench upon the jurisdiction of the provinces with regard to property and civil rights within the province. Dominion legislation with regard to the status and rights of British and foreign corporations has sometimes produced similar conflict. The Dominion has also asserted its right to uphold its insurance legislation under "Trade and Commerce" which subject is assigned to the Dominion by the British North America Act.

1. Appeals to Privy Council.

These unfortunate differences have been the foundation for many appeals to the Privy Council in England which is, of course, the final Court of Appeal for Canada, and while a large number of decisions on the subject have related to insurance legislation, yet that alone by no means exhausts the grounds of difference. The purpose of this article is to deal with the subject only so far as it concerns insurance and to attempt a brief analysis of the situation at present.

The question first came up for review in the famous case of *Citizens Insurance Co.* v. *Parsons* (1881), 7 A.C. 96. The action was

by a private individual. The defence was non-compliance with the Statutory Conditions of Ontario to which it was replied that such provisions were *ultra vires* the province as trespassing on those of the Dominion.

It was held that the provincial Act, even though purporting to affect the contracts of corporations, whatever their origin, foreign, British or colonial, was within the powers of the province. It was pointed out by their Lordships that the powers as to "regulation of trade and commerce," confided to the Dominion by that Act, while including regulation of trade in matters incidentally of inter-provincial concern, and possibly the general regulation of such trade over the whole Dominion, did not include the regulation of the contracts of a particular trade or business such as the business of insurance within the province. Further, this decision holds that the Ontario Act was not inconsistent with the Dominion Act then existing by which all insurance companies, however incorporated, were required to obtain a license which could be forfeited for failure to observe the conditions on which it was granted. The right of the Dominion to require a license was not discussed. On the actual facts of the case before it the Committee held that, while the company's conditions, apart from existing Ontario statutory conditions, could not avail in themselves, yet the Ontario legislation permitted such where same did not conflict with the Ontario statutory conditions and if worded as variations thereto in the manner required by the Ontario Statute.

Thus an ordinary fire loss raised such important constitutional issues that the final decision of the Privy Council became a great precedent in the constitutional law of Canada and a landmark in the history of insurance regulation.

The next decision was that of *Atty.-Gen. of Canada* v. *Atty.-Gen. of Alberta* (1916), A.C. 588 and hereinafter called the 1916 case. In that case the insurance legislation by the federal house under discussion was sec. 4 of the Dominion Insurance Act, 1910, which purported to prevent any company, underwriter or other person, from soliciting or accepting risks, issuing policies or in fact from doing virtually anything in the nature of insurance business, unless under license of the federal authorities. The Dominion sought to uphold this legislation by the contention that, viewing the Dominion Insurance Act as a whole, its attempt to regulate the "trade" of insurance was extra-provincial in character and of national importance and so would come within the powers allotted to the federal house by sec. 91(2) of the B.N.A. Act under the heading "The regulation of trade and commerce." In the view of the several provinces which associated them-

selves in the case the legislation affected civil rights within the provinces and, in any event, they contended that insurance was not "a trade." This contention was upheld and the secs. 4 and 70 of the Dominion Act held *ultra vires.*

In the 1931 case the Privy Council referred to this 1916 case and said . . . "the decision . . . conclusively and finally settled that regulations as to the carrying on of insurance business were a provincial and not a Dominion matter," but also pointed out that the Privy Council had then said that the Dominion "by properly framed legislation" had jurisdiction to require a foreign company to take out a license from the Dominion, even in a case where the company desires to carry on its business within the limits of a single province.

This reservation in their Lordships' judgment is of peculiar importance for the very point just mentioned came up squarely for decision in the following year in *Farmers' Mutual Hail Insurance Association* v. *Whittaker,* 37 D.L.R. 705, where the Supreme Court of Alberta held that a foreign company, not in possession of the license required by sec. 4 of the 1910 Act could not recover judgment for the premium at issue in the action and to that extent sec. 4 was valid. This same principle was recognized in the Supreme Court of Canada in considering said sec. 4 (as amended in 1917) in *Matthew* v. *Guardian Assurance Co.* (1918), 58 S.C.R. p. 47 and was to be the question at issue in the 1931 case.

In the meantime, the same point arose in *Atty.-Gen. for Ont.* v. *Reciprocal Insurers* (1924), A.C. 328—hereinafter called the 1924 case. The reader will recollect that in this case the Reciprocal Insurance Act of Ontario (1922) was under review. The provisions as to license and other conditions with which the provincial Act sought to surround the business of reciprocal insurance were claimed by the Dominion to be beyond the jurisdiction of the province and furthermore that the province had no authority to restrict the operations of alien persons or corporations or Dominion companies in reciprocal insurance contracts or otherwise. It was held that since the provisions of the Ontario Act of 1922 were capable of receiving a meaning by which, whether enabling or prohibitive, they applied only to persons and acts within the limits of the province, and although the legislation might incidentally affect aliens or Dominion companies, yet it did not deal with them as such, but was an act dealing with contracts of insurance within the province and therefore valid. It was also held that sec. 508(c) of the Criminal Code (which made it an indictable offence to solicit or accept insurance except when in possession of a license under the 1917 Dominion Act) was

of no effect as it was "not a genuine amendment of the criminal law but was really an attempt by a *soi disant* amendment of the criminal law to subject insurance business in the province to the control of the Dominion that which had exactly been determined to be *ultra vires* by the judgment of 1916." The principle of the decision was further stated to apply even though the person or corporation subscribing to reciprocal insurance was (a) a British subject not resident in Canada, immigrating into Canada, or (b) an alien. The question as to aliens was destined to be considered again in the 1931 case.

This decision was a victory of great consequence to the province, but it is worth noting that the Judicial Committee were careful to express no opinion as to the competence of the Dominion to enact subsecs. 11 and 12 of the 1917 Act whereby certain restrictions were imposed upon aliens and British companies in the matter of carrying on insurance business in Canada. It does seem to be unquestionable that the decision placed substantial difficulties in the path of the federal insurance authorities and, in the opinion of many, a body of law which had up to the time of this decision been thought to have been fairly well ascertained, was by this judgment rendered rather uncertain and nebulous, viz.: as to the powers of the Dominion over the subject-matter of insurance by "properly framed legislation" as to Dominion companies and aliens.

In the 1931 case the Privy Council said that the question as to "properly framed legislation" was still open and proceeded to deal with it. The headnote of the case expresses the conclusion of the Privy Council concisely:

"A foreign or British insurer licensed under the Quebec Insurance Act to carry on business within the province can do so without being also licensed under the Insurance Act of Canada. Sections 11 and 12 of that Act requiring them to be licensed thereunder are *ultra vires* under the B.N.A. Act 1867, since, in the guise of legislation as to aliens and immigration matters within the Dominion authority, they seek to intermeddle with the conduct of insurance business, which was declared in *Atty.-Gen. for Canada* v. *Atty.-Gen. for Alberta,* 1916, 1 A.C. 558, to be a subject exclusively within provincial authority. Section 16 of the Special War Revenue Act of Canada is also *ultra vires.* In the guise of legislation imposing Dominion taxation it in reality deals with the provincial subject above mentioned. *Atty.-Gen. for Canada* v. *Reciprocal Insurers,* 1924, A.C. 328 followed."

The Court also made another very significant remark—

"A Dominion license so far as authorizing transactions of insurance business in a province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with provincial legislation has not already got, if he has complied with provincial requirements."

It was also held that the Dominion legislation was "not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, *i.e.*, the Provincial Code."

2. Taxation.

A similar statement was made in regard to the attempt to support the legislation on the ground of taxation for, after pointing out the undoubted right of the Dominion to impose taxes, the judgment adds, "but if the tax as imposed is linked up with an object which is illegal, the tax for that purpose must fail." In other words, it was definitely held that it was impossible to have a tax in respect to a license which was illegal.

Notwithstanding all these decisions the Dominion Insurance Department is still carrying on and issuing licenses and still trying to evolve some "properly framed legislation" which will enable it to justify its activities. Ontario, however, has not been idle, for on January 26, 1931, the province obtained an order from the Supreme Court of Ontario, (*Atty.-Gen. for Ont.* v. *Atty.-Gen. for Canada,* 1931, O.R. p. 5), declaring sec. 4 as to licenses and other sections of the Dominion Act were *ultra vires* and declaring that the Dominion Minister of Finance and the Dominion Superintendent of Insurance were not entitled to act under or enforce sections of the Dominion Insurance Act. No appeal was taken, probably in view of the matter being before the Privy Council. The Dominion, however, issued an order-in-council dated December 31, 1931, passed under the powers conferred by "The Unemployment and Farm Relief Act 1931," requiring every insurance company in Canada to have a "certificate of solvency" issued through the Dominion Superintendent of Insurance and at the last session of the Dominion Parliament an amendment was passed to one of the said 1932 bills (The British and Canadian Insurance Companies Act, 22-23 Geo. V, ch. 46).

3. Position of Provinces.

So the matter stands at the present time, the provinces contending the bills introduced by Senator Meighen and duly passed are also *ultra vires,* but in justice to the provinces it must be said that

they are trying to adjust the questions so that provincial rights as outlined in the decisions may be protected, but at the same time according to the Dominion some regulation as to solvency and centralization tending to uniformity in requirements for companies throughout Canada. As the Attorney-General for Ontario said in the Legislature in 1932:

"The province has not been content with destructive criticism. It has pointed a way out. So long as its rights are recognized and preserved it will co-operate in every possible way. Concrete proposals have actually been submitted. But they do not recognize what the Dominion apparently desires to retain, *i.e.*, the power to regulate the insurance business, to license insurance companies, to say what companies shall and what companies shall not do business in this province. Nevertheless they do show how a central bureau might be established, supported by the authority of provincial statutes, to which all companies carrying on business in the several provinces could be required to submit returns and demonstrate their solvency, and from which reports could be submitted to the provincial insurance departments for their guidance in the issue and renewal of licenses to transact business."

4. Centralization.

No doubt a good deal can be said for the point of view of the Dominion in regard, for instance, to the solvency of companies being determined by one authority and one licensee for all Canada and other features of centralization which would probably be welcomed by the companies and it would not seem to be impossible to devise some method whereby the conflict as to insurance contracts and the licensing of companies may be reconciled and indeed two of the Dominion Acts passed at the 1932 Session actually provide that "The Governor-in-Council shall have power to make such orders or regulations as he may deem necessary or advisable, for amending, suspending, repealing or adding to any of the provisions of this Act to give effect to any arrangements which may be arrived at between the Government of Canada and the governments of the provinces or any of them for co-operation in respect to insurance legislation or administration."

5. Dominion Licenses for Foreign Companies.

These bills came into effect on May 26, 1932, and so the road was left open for some mutually satisfactory arrangement, but it is to be noted that the Dominion is still apparently taking a firm stand, at least as far as the Dominion Superintendent of Insurance is con-

cerned, because one sees in his annual report under date of July 20, 1932, the 1931 decision is fully discussed and this comment made:

"The decision re-affirms the right of the Parliament of Canada, to impose the requirement of a license from the Minister of Finance upon British or foreign companies entering Canada to transact insurance business."

No doubt the Dominion could require from all foreigners a license as a condition of doing business in Canada, but it is the attempt to impose other obligations as to the terms and conditions upon which the insurer, when licensed, may contract which causes the dispute, which attempt Mr. Justice Garrow held in *Atty.-Gen. for Ont.* v. *Atty.-Gen. for Canada* (*Supra*) was precluded by the 1916 decision. Consequently the above statement of the Dominion Superintendent seems a bold one to make in view of that decision and the other decisions reviewed in this article, but, as the matter is apparently still one of controversy, the writer expresses no view of his own but leaves the question with the pious hope expressed by Viscount Dunedin in the 1931 case when, speaking for the entire Privy Council, he said, "This case is, it may be hoped, the last of the series of litigations between the Dominion and the Provinces with regard to insurance."

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