THE CANADIAN PACIFIC RAILWAY COMPANY, (PLAINTIFFS) .. } APPELLANTS;

AND

THE OTTAWA FIRE INSURANCE COMPANY, (DEFENDANTS) ..... } RESPONDENTS.

1906
*Nov. 7, 8.
1907
**June 3-5.
**Dec. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law—Provincial companies' powers—Operations beyond province—Insurance against fire—Property insured—Standing timber—Return of premiums—B.N.A. Act, 1867, *s.* 92(11).

Held, per Idington, Maclennan and Duff JJ., Fitzpatrick C.J. and Davies J. *contra*:—That a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits.

Per Fitzpatrick C.J. and Davies J.—Sub-sec. 11 of sec. 92, B.N.A. Act, 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates a limitation as to the objects of a company so incorporated but confines its operations within the geographical area of the province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. ch. 28 (R.S. 1906, ch. 34, sec. 4) authorizing it to do business throughout Canada is of no avail for the purpose.

Girouard J. expressed no opinion on this question.

An Insurance Company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine, "against loss or damage caused by locomotives

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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

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to property located in the State of Maine not including that of the assured." By a statute in that state the railway company is made liable for injury so caused and is given an insurable interest in property along its line for which it is so responsible.

Held, affirming the judgment of the Court of Appeal (11 Ont. L.R. 465) which maintained the verdict at the trial (9 Ont. L.R. 493) that the policy did not cover standing timber along the line of railway which the charter of the insurance company did not permit it to insure.

Held, also, Fitzpatrick C.J. and Davies J. dissenting, that the policy was not on that account of no effect as there was other property covered by it in which the railway company had an insurable interest; therefore the latter was not entitled to recover back the premiums it had paid.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the verdict at the trial(2), in favour of the defendants.

The Ottawa Fire Insurance Co. is incorporated under "The Ontario Insurance Act." It issued a policy to the Canadian Pacific Railway Co. insuring the latter in the following terms. "On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured or upon land owned, leased or operated by the assured." The Railway Co., a portion of whose line ran through the State of Maine, had by the law of the state an insurable interest in property along its line for loss of which, by fire from its locomotives, it might be liable.

The railway company sued on this policy to recover the amount it had been obliged to pay for loss of standing timber on its line in Maine through fire from its locomotives, claiming, in the alternative, a return of the premiums paid if it was held that the insurance company had no power-

(1) 11 Ont. L.R. 465. (2) 9 Ont. L.R. 493.

to insure standing timber. The defendant company pleaded, and the courts below held, that, under its charter, it could not insure standing timber and that the plaintiff could not recover the amount paid for premiums as the policy covered other property in which it had an insurable interest. The plaintiff company appealed to the Supreme Court from the decision of the Court of Appeal to this effect.

Ewart K.C. and *MacMurchy,* for the appellants. This is not the usual case of insurance on property but is a guarantee or contract of indemnity against liability to property owners.

If it is an insurance on property it covers standing timber. See *London* v. *Southwell College*(1); *Hamilton Mfg. Co.* v. *Massachusetts*(2).

The statute law of the State of Maine does not assist the defendants as the insurance effected was not that contemplated by the statute. See *North British & Mercantile Ins. Co.* v. *Liverpool, London & Globe Ins. Co.*(3), at pages 581 and 584.

Standing timber was what the plaintiffs intended to insure and if it is not covered by the policy the parties were never *ad idem* and the consideration for the contract fails. Therefore the premiums should be returned. See Chand on Consent, pp. 1 and 2; *Wilding* v. *Sanderson*(4); Pollock on Contracts, 7 ed. p. 486; *Burson* v. *German Union Ins. Co.*(5).

Shepley K.C. and *F. A. Magee,* for the respondents. The word "property" used in the policy must be construed with regard to the statutory powers of the

(1) Hobart 303.
(2) 6 Wall. 632.
(3) 5 Ch.D. 569.
(4) [1897] 2 Ch. 534.
(5) 10 Ont. L.R. 238.

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respondents, which do not authorize the insurance of standing timber.

The policy covered other property in which appellants had an insurable interest and the premiums were earned. See *Moran, Galloway & Co.* v. *Uzielli* (1); Bunyon on Fire Insurance, 4 ed. p. 13.

The court reserved judgment and, in the following term (19th Feb., 1907), made an announcement in the following terms:—

"The argument in this case at bar raised some important questions as to the power of the provincial legislatures to incorporate companies and as to what, if any, limitations upon that power are contained in the words "provincial objects" in sub-section 11 of section 92 of the British North America Act.

"It also raises other questions of public importance as to the effect and meaning of the existing Dominion legislation authorizing licenses to be issued permitting provincial insurance companies to carry on their business throughout Canada.

"As these questions involve the powers alike of the Dominion Parliament and provincial legislatures to legislate, we think that the case upon these points should be re-argued and that the Attorney-General of the Dominion and the Attorneys-General of the several provinces should be notified so that such of them as desired might be heard upon the question of the powers of the respective Governments they represent.

"The questions to be specially argued are:

"1st. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limi-

(1) [1905] 2 K.B. 555.

tation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

"2nd. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act carry on extra-provincial or universal insurance business, *i.e.*, make contracts and insure property outside of the province or make contracts within to insure property situate beyond?

"3rd. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

"4th. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?"

Pursuant to such direction the case was re-argued in the ensuing May term, counsel appearing as follows:—

Ewart K.C. and *J. D. Spence* for the appellants.

Shepley K.C. and *F. A. Magee* for the respondents.

Newcombe K.C., Deputy Minister of Justice, for the Dominion of Canada.

Nesbitt K.C., *C. H. Ritchie K.C.* and *Mulvey K.C.* for the Province of Ontario.

Lanctot K.C., Assistant Attorney-General, and *Gervais K.C.* for the Province of Quebec.

Jones K.C., Solicitor-General, for the Province of New Brunswick.

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Nesbitt K.C. for the Province of Manitoba.

Mulvey K.C. for the Province of Saskatchewan.

Before any of the counsel were heard, Mr. Justice Girouard stated that as he had not heard the previous argument on the issues between the original parties to the appeal he did not think he should sit unless the whole case was re-opened and the hearing not be confined to the constitutional questions propounded by the court. He was informed by the Chief Justice, that the whole case was open on the present hearing and remained on the bench.

By direction of the court the constitutional questions involved in the questions propounded were first argued, counsel for the Dominion of Canada being directed to begin.

Newcombe K.C. By the construction which the decisions of the Judicial Committee of the Privy Council have placed on sections 91 and 92 of "The British North America Act, 1867," the legislative powers of a province, being restricted to matters of a local and private nature within such province, cannot I submit, extend to legislation the operation of which goes outside of its geographical limits. See *Attorney-General of Ontario* v. *Attorney-General for Canada*(1), at pages 359 *et seq.; Citizens Ins. Co.* v. *Parsons*(2), at pages 116-7; *Dobie* v. *Temporalities Board*(3), at pages 151-2; *Colonial Building & Investment Association* v. *Attorney-General of Quebec*(4), at page 165. The first question should, therefore, be

(1) [1896] A.C. 348.
(2) 7 App. Cas. 96.
(3) 7 App. Cas. 136.
(4) 9 App. Cas. 157.

answered in the affirmative and the second in the negative.

In view of the decisions I would answer the third question in the affirmative, subject to the qualification that the conditions and restrictions do not affect the trade or business of such companies beyond the limits of the province which would be an interference with the powers of Parliament to regulate trade and commerce between provinces, or generally throughout Canada. See *Attorney-General of Ontario* v. *Attorney-General for Canada*(1).

The fourth question should be answered affirmatively.

C. H. Ritchie K.C. for the Province of Ontario. By section 92 of sub-section 11 of "The British North America Act, 1867," the legislature of a province may incorporate companies with "provincial objects." The latter words do not constitute a limitation within the geographical area of the province as is contended by counsel for the Dominion and for the appellants, but gives the legislature power to incorporate companies for purposes not assigned to the federal Parliament.

Moreover the objects of the companies are not, necessarily, to be "provincial" only. If a company has provincial objects within the scope of its operations this provision of the Act is complied with though other objects may be included. See *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*(2); *Boyle* v. *Victoria Yukon Trading Co.*(3); *Duff* v. *Canadian Ins. Co.*(4).

(1) [1896] A.C. at p. 363.
(2) Q.R. 19 S.C. 434; 11 K. B. 251; [1903] A.C. 59.
(3) 9 B.C. Rep. 213.
(4) 27 Gr. 391; 6 Ont. App. R. 238.

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It is submitted, therefore, that the questions propounded should be answered in favour of the power of provincial companies to do business outside the Province in which they are incorporated.

Nesbitt K.C. is heard for the Province of Manitoba.

Mulvey K.C. is heard for the Province of Saskatchewan.

Ewart K.C. is heard for the appellants.

Shepley K.C. for the respondents.

Newcombe K.C. in reply.

THE CHIEF JUSTICE (dissenting). — I agree with Sir Louis Davies. The jurisdiction of the legislature by whose authority the company respondent was brought into existence is limited as to subjects and area. The subjects with respect to which it can legislate are enumerated in section 92 of "The British North America Act, 1867," and the area of its legislative jurisdiction is confined to the Province of Ontario. By paragraph 11 of section 92, a provincial legislature is authorized to incorporate companies but not all companies, only those with provincial objects, *i.e.*, such objects as are within the legislative jurisdiction of a province to effect. A company can take no power from the legislature to which it owes its existence which it is not in the power of that legislature to grant. Admittedly the Dominion Parliament has the right to create a corporation to carry on business

throughout the Dominion and it appears to me impossible to maintain that a provincial legislature, if it can deal with the incorporation of insurance companies at all, can create a company with powers coextensive with those conferred by the Dominion on a company incorporated for the purpose of carrying on the business of insurance, and this appears to me the necessary logical result of the submission of the provincial Attorneys-General. The Dominion Parliament and the provincial legislature cannot both occupy the same legislative field at the same time.

Mr. Blake, when Minister of Justice, in his report on "The Act of Incorporation" of the Merchants Marine Insurance Co. said (page 261, Hodgin's Provincial and Dominion Legislation) :—

> By the second section it is provided that the company shall have power to make with any person or persons contracts of insurance connected with marine risks against loss or damages either by fire or by peril of navigation of or to any vessel, etc., either sea-going or navigating upon the lakes, rivers, or navigable waters. It appears to the undersigned that under the express language of the clause, it is attempted to give the company power to do an insurance business with persons not residents of the province in respect of risks on vessels not touching provincial ports, in a word to do a universal insurance business. The power of provincial legislatures to incorporate insurance companies is to be found, if at all, in the 11th sub-section of the 92nd section of the British North America Act, 1867, which gives to the local legislatures authority to make laws for the incorporation of companies with provincial objects. It appears to the undersigned that the powers attempted to be conferred upon this company are beyond any fair construction of these words, and he recommends that the attention of Prince Edward Island be called to the Act with a view of its amendment by such limitation of the powers of the company as may obviate this objection.

Subsequently, Sir Oliver Mowat, when Minister of Justice, page 33, Provincial Legislation, 1896-1898, reporting on the status of the Mississquash Marine Company, a company incorporated for the purpose of

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carrying on certain operations in Nova Scotia, New Brunswick and elsewhere, said:—

> The undersigned construes this authority (that is the incorporation of companies with provincial objects) to mean objects provincial as to the province creating the corporation.

Sir Oliver Mowat, at page 17 of the volume just quoted, said:—

> The powers which, in regard to the business of fire and marine insurance, this Act purports to confer upon this company are practically unlimited; and with regard to marine insurance the company is expressly empowered to insure property in any part of the world. The jurisdiction of a provincial legislature to incorporate companies is in the British North America Act expressed to be to incorporate "companies" with provincial objects, and this has been construed to mean objects located within the province and to be locally carried on by such companies within the province. In this connection the undersigned begs leave to refer to the remarks of the Honourable Edward Blake upon certain statutes of the Province of Nova Scotia, 38 Victoria, chapters 76, 77, 78 and 79, and upon a statute of the Province of Quebec, intituled "An Act to incorporate the Atlantic Insurance Company of Montreal," 38 Vict. ch. 61; also to the observations of the Right Honourable Sir John Thompson upon a statute of the Province of Nova Scotia, intituled "An Act to incorporate the Fisherman's Insurance Company of Lunenburg, Limited," 56 Vict. ch. 167 (approved reports of the Ministers of Justice of 25th October, 1875, 19th September, 1876, and 27th January, 1894, volume of reports upon provincial legislation, 1867-1895, at pages 263, 264, 265, 491 and 635).
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> A statute of Nova Scotia incorporating a company for the purpose of running steamers on the coast of the province and elsewhere was disallowed upon the recommendation of the late Mr. Justice Fournier, when Minister of Justice, because there was no limit to the operations of the company within the province, and because of the word "elsewhere." (See his approved report 31st March, 1875, on page 488 of the volume of Dominion and provincial legislation.)
>
> The question, however, not being free from doubt, the undersigned is not prepared to recommend the disallowance of the Act now under consideration, but recommends that a copy of this report, if approved, be transmitted to the Lieutenant-Governor of the province.

A careful examination of the reports made by the Ministers of Justice since Confederation shews that the unanimous opinion held and many times ex-

pressed by them was that a provincial legislature has no power to create a company with authority to do business outside of the limits of the incorporating province. I refer to those reports not as authorities binding in any sense on this court but as expressing the opinions of men familiar with the working of our constitution, and more particularly to shew that the attempt made at different times by the provinces to usurp jurisdiction with respect to the incorporation of companies has been resisted by the Dominion authorities, and that there has been no acquiescence in the construction alleged to have been put by the provinces on the words "provincial objects."

Dealing with the last question:—

Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

If a company is within the exclusive jurisdiction of a province, then the Dominion Parliament cannot interfere to extend or limit its powers so long as it remains a provincial company. I concede that the Dominion might make the company a Dominion company; but so long as a company is subject to the provincial legislature the Dominion has no authority or power to extend or restrict. The Dominion cannot enlarge the constitution of an Ontario company or limit the powers locally conferred. The same company cannot be subject at the same time to the legislative jurisdiction of the Dominion and of a provincial legislature with respect to its corporate powers.

I would allow the appeal.

GIROUARD J.—I agree with the respondent that this is not a case where the great constitutional ques-

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tions raised by the order for re-hearing can be fairly determined by this court. I do not propose to go over the authorities bearing upon the point which is one more of substantial justice than of procedure; they are all collected by Mr. Shepley K.C. in his factum and his exhaustive re-argument, and it would serve no practical purpose to repeat them here.

They satisfy my mind at least that the *ultra vires* questions cannot be fully considered without proper issues and trial, so as to have definite statements of facts and of law involved in the case, which interest the provincial governments of the Dominion and commercial corporations and the public at large to such an enormous extent that we cannot fully realize the consequences. I quite understand that evidence might be essential with regard to the place of the completion of the policy, whether in Montreal or Ottawa, and also as to the Canadian license which, although not in issue, it is admitted was granted by the Dominion Government, and such other matters as parties might advise.

I thought first that the record could be remitted to the trial court for the purpose of making amendments, adducing additional evidence and taking such other proceedings as might be necessary to avoid surprise and secure a final adjudication, as was done by the Privy Council in *Connolly* v. *The Consumers Cordage Company* and other cases. I am afraid that by so doing we would authorize a fresh and totally different action, and for that reason I believe we have nothing else to do but to dismiss the appeal purely and simply with costs, reserving to the plaintiff such further recourse as he may have in the premises.

DAVIES J. (dissenting).—The respondent company (defendant) is an Insurance Company incorporated

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by Letters Patent issued under the provisions of "The Ontario Insurance Act," R.S.O. (1897), ch. 203, under which letters patent it is declared to be capable of exercising all the functions of an incorporated company

> for the transaction of such insurance (fire) as if incorporated by a special Act of the Legislature of Ontario.

The Canadian Pacific Railway Company is incorporated under the laws of the Dominion of Canada, and a portion of its line of railway between Montreal and St. John, N.B., passes through the State of Maine.

The policy of insurance on which this action was brought purported to have been signed by the president and general manager of the company and to have had its corporate seal affixed at Ottawa, Ontario, and to have been countersigned by Carson Bros., the chief agents of the defendant company at Montreal, in the Province of Quebec.

The property or risk insured was stated in the policy to be as follows:—

> On property as per wording hereto attached Canadian Pacific Railway Company $75,000. On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured or upon land owned, leased or operated by the assured.

The plaintiffs' claim was in the alternative for the recovery of $4,698.94, being the value of certain timber burnt upon lands adjoining the railway by fire caused by locomotive sparks, or in the event of the policy being held invalid as a guarantee policy only and not an insurance policy, a return of all the premiums of insurance they had paid as upon an entire failure of consideration.

The defendants contended that the only property in question, the loss of which the plaintiffs had paid

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for or incurred was standing timber and that their statutory powers of insurance and their policy issued thereunder did not extend to nor cover standing timber and so they were not liable.

I agree with the judgment of the Court of Appeal for Ontario confirming that of the trial judge that so far as the questions raised before those courts are concerned the action must be dismissed. I do not think it necessary to add any reasons to those given by Mr. Justice Osler speaking for the Court of Appeal on the points there raised.

On appeal to this court some quite new and important questions were raised for the first time by the appellants and I confess they have raised doubts and difficulties not by any means easy of solution.

The points substantially taken by Mr. Ewart were that this Insurance Company was one incorporated by the Province of Ontario; that there was a constitutional limitation in the British North America Act, 1867, upon the powers of legislation assigned in the 92nd section to the provinces of the Dominion, and that the words of the 11th sub.-sec. of that sec. 92

> the incorporation of companies with provincial objects,

meant a territorial limitation co-extensive with the the territory of the province incorporating the company; that this statutory and constitutional limitation confined the powers and operations of the company to insurance on property in Ontario, and that as this policy sued on covered only property located in the State of Maine, United States of America, it was *extra vires* of the company quite irrespective of the question whether the policy was held to have been executed in Ontario the "home" or habitat of the company, or in Montreal, Province of Quebec, the insur-

ance intended to be effected never attached, the policy being void *ab initio,* and the premiums paid being without any consideration could be recovered back by the railway company. He accompanied his argument with the admission that the insurance company had at the time of its issuance of the policy in question a license from the Dominion Government to carry on the business of fire insurance throughout Canada, but contended that this license and the statute under which it issued in no way validated the policy.

A question as to the right of the company to raise such a question as this for the first time in this court was raised, but we were of the opinion that as the question was one of law which involved the validity of the contract sued on and sufficiently appeared upon the face of the record and was accompanied by the admission of the Dominion license to carry on its business throughout Canada, so that the defendant could not be prejudiced, the appellant was within his rights, even though the point had not been explicitly argued in the courts below. *Devine* v. *Holloway*(1); *McKelvey* v. *The Le Roi Mining Co.*(2).

With respect to the legal effect to be given to the Dominion license granted to the defendant insurance company under the Dominion statute, 49 Vict. ch. 45, intituled "An Act respecting Insurance" as amended by 51 Vict. ch. 28, it is necessary to see just what the Parliament of Canada professed to do. The 3rd section of the "Insurance Act" above referred to, as amended, enacted that its provisions should not apply *inter alia*:—

(*c*) 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

(1) 14 Moo. P.C. 290. (2) 32 Can. S.C.R. 664.

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province now forming part of Canada, which carries on the business of insurance, wholly within the limits of that province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province; but any such company may, by leave of the Governor in Council, on complying with the provisions of this Act, avail itself of the provisions of this Act, and if it so avails itself, the provisions of this Act shall thereafter apply to it, and such company shall have the power of transacting its business of insurance throughout Canada.

The questions to be determined by us therefore are, first, what, if any, are the constitutional limitations upon the powers of the Provincial Legislatures to incorporate companies ? And next, are these limitations, if territorial or provincial, removed in the cases of companies so incorporated, which have obtained licenses to carry on business throughout Canada under the Dominion Statute, so as to enable them to carry on such business throughout Canada? And thirdly, if so, can a provincial company, acting under its provincial charter and its Dominion license, carry on business in foreign countries by or under the comity of nations, in the same way and to the same extent as a company incorporated without limitations as to area?

At the conclusion of the argument, it being apparent that important constitutional points were involved, and would probably have to be determined in order to reach a decision upon the questions raised, the court ordered that a re-argument should be had, and that the Attorney-General of the Dominion and the Attorneys-General of the several provinces should be notified of such re-argument, and invited to discuss the questions following, should they desire to be heard upon them:—

1. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to

the company to carry on business beyond the limits of the province within which it is incorporated?

2. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act, carry on extra-provincial or universal insurance business, *i.e.*, make contracts and insure property outside of the province or make contracts within to insure property situate beyond?

3. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

The Attorney-General of the Dominion as well as counsel representing the Attorneys-General of most of the provinces, appeared and argued these questions exhaustively. Counsel for the several parties to the cause were also again heard.

The distribution of legislative powers between the Dominion Parliament on the one hand and the Provincial Legislatures on the other by "The British North America Act" is referred to in the judgment of the Privy Council in *Citizens Ins. Co. of Canada* v. *Parsons*(1), at page 116, as follows:—

> In the first place it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power (Trade and Commerce in section 91). The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being the "incorporation of companies with provincial objects" it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows * * * that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion, that it alone has the right to regulate its contracts in each of the provinces.

In the subsequent case of *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(2), their Lordships referring to the case of *Citi-*

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.

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zens Insurance Company v. *Parsons*(1), at page 165 say:—

> Their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies.

Now in what sense did their Lordships use the word "provincial" in the above extract I have made from their judgment? Did they use it in a territorial sense as embracing the area of the province, or did they use it in a legislative sense as embracing the "subject matters" assigned to the exclusive jurisdiction of the provincial legislatures, irrespective of territorial area? Or did they use it in the double sense of being alike a territorial and a legislative limitation? Reading their judgment as a whole carefully, I should have little hesitation in concluding that they intended to use the word "provincial" in a territorial sense and as opposed to Dominion in the same sense. If, however, it is held that notwithstanding the observations quoted from the judgment of the Judicial Committee the question of the true meaning of the limitation embodied in the words "provincial objects" is still open, my opinion would be that the only reasonable meaning to give to them is a territorial limitation.

The constitutional Act itself in which the words are used, which creates a Dominion out of a union of many scattered provinces and divides or apportions complete legislative power between that Dominion and the several provinces, and the section where the words are found specifically assigning to the provinces the subject matters on which they can exclusively legislate, and defining those subject matters,

(1) 7 App. Cas. 96.

leaving the residuum of legislative power not so assigned with the Dominion, the fact that the phrase used by way of limitation "provincial objects" was used in the assignment of subject matters to the provinces, to distinguish it from Dominion objects which latter were embodied in the phrase "peace, order and good government" of Canada, generally, combine with the plain natural meaning of the words to convince me that the Imperial Parliament intended to assign to the provincial government the exclusive right to incorporate companies to carry on or out, business or objects within the province only, and no others. The addition of the word "only" or the words "no others" would not, it seems to me, alter or change the nature or extent of the limitation. The power is an exclusive one. The limitation is as to area. It must be provincial as distinguished from Dominion or general, and as the *residue* of legislative power is given to the Dominion, and this power to legislate for provincial objects is exclusive, it seems to follow that it must mean for provincial objects only, or for provincial objects and no others. This view is much strengthened by a critical examination of the 16th sub-section of section 92 assigning legislative powers to the provinces. These several subject matters are either so clearly provincial as not to require additional words of limitation, or in those cases where not so clearly provincial, have the necessary words of limitation "within the province" or "in the province" attached to them. The one case before us, sub-sec. 11, was of a class in which these words of limitation used in the other sub-sections would not suffice. The incorporation of companies "within" or "in the province" would not have made the limitation sufficiently clear. They would leave the meaning ambiguous and

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doubtful, and so the draftsman properly introduced other and more definite words, "companies for provincial objects," not companies for provincial subjects which would be meaningless, or companies on subjects within its legislative jurisdiction, which was not intended, but companies for provincial objects only, as I construe it. If the limitation has not a territorial meaning what does it mean? Two suggestions were made, one that it was merely surplusage and meant substantially nothing. The other that it meant provincial subject matters or matters which have been exclusively assigned to the provincial legislatures as their own, within and over which they alone could legislate, and that this limitation of provincial subject matters had nothing to do with territorial area.

Now the first thing which strikes one with reference to this suggestion is that if the framers and draftsmen of the Act had any such intention as is ascribed to them, they would have used apt language to express it.

Alike in section 91 as in section 92, the phrase "classes of subjects" is used several times over. If it was intended that the incorporation of companies should be limited to the "classes of subjects" assigned to the provinces one would have imagined that so favourite a phrase would have been repeated and all doubt set at rest.

Mr. Nesbitt in supporting the substitution of the phrases, provincial subjects or subjects over which the province had legislative jurisdiction, for "provincial objects" invoked the specific power given in the 15th sub-section of section 91 to the Dominion Parliament to incorporate banks, as authority in support of the argument that by assigning to the Dominion Par-

liament the power to incorporate banks under sub-section 15 of section 91, but not any other kind of company or corporation, it must be assumed that it was intended to give the provincial legislatures the power to incorporate all other companies under the 13th sub-section of section 92 "Property and civil rights in the province," leaving to the Dominion the power to incorporate companies under the peace, order and good government clause of section 91 alone.

But the obvious reason why the incorporation of banks was assigned to the Dominion and not left with the provinces was that the whole subject of banking and its adjuncts was being assigned to the Dominion, and if the provinces were allowed to incorporate provincial banks with the right properly and necessarily belonging to a bank the whole subject of banking would have been left in inextricable confusion. And so far from having a national banking system to-day of which we are justly proud, we would have a series of systems some conservative and others more in accordance with what western ideas are popularly supposed to advocate. So far from affording weight to the argument for the most extended provincial jurisdiction, I am inclined to think that the assignment to the Dominion of the power to incorporate all banks, Dominion as well as provincial in their object or character, is evidence that with regard to all other provincial companies or companies limited in the object or business to the province, the jurisdiction of the province is exclusive. And so with respect to the very next subject of savings banks, the exclusive power to incorporate provincial saving banks remains intact with the provinces, while the general jurisdiction over saving banks remains with the Dominion.

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Then again this object-subject theory so strenuously pressed by Mr. Nesbitt, is open to the serious objection that it would, if adopted, open the sluice gates to doubt and confusion.

If the dividing line between the two legislative jurisdictions was well marked so that, as Mr. Ewart put it in his argument, the subject matter of legislation could in each case, as it arose, be assigned to one or the other, the difficulties would not be so great. We know, however, that this is not so, that the jurisdiction of Parliament trenches upon that of the provinces and *vice versâ*, so that we have what counsel aptly called a checker-board constitution.

A subject matter that in some aspects and for some purposes comes under Dominion legislation, in other aspects and for other purposes comes under provincial. I need not elaborate the point. I think the contention called the object-subject theory, if adopted, calculated to introduce endless trouble and confusion.

The powers granted the Dominion and the provinces are frequently found to interweave and overlap and one need only read the carefully considered and acute analysis of the two sections 91 and 92 of "The British North America Act" to be found in the judgment of the Judicial Committee delivered by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1), to satisfy himself how uncertain and unstable would be the results if this object-subject theory was adopted.

Mr. Nesbitt argued that inasmuch as the older provinces before joining in Confederation had an absolute unlimited right to create an artificial person or corporation, so after Confederation these rights

(1) [1896] A.C. 348, at p. 355.

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remained intact except upon such subject matters as were expressly assigned to the Dominion Parliament. And as the only subject matter relating to the incorporation of companies expressly assigned to the Dominion was that of banks, and the special classes of works and undertakings connecting one province with another or with a foreign country or extending beyond the limits of a province or declared by the Parliament of Canada to be for the general advantage of Canada or two or more provinces as specified in the exceptions to sub-section 10 of section 92, the field was left clear for provincial legislation to take possession of.

With the subject of banks I have already dealt, and I was quite unable to follow Mr. Nesbitt in his argument arising out of the place in the Act where these exceptions to sub-section 10 of section 92 are found. I think the true answer was given to his argument on this point by Mr. Ewart who called our attention to the fact that these three exceptions attached to sub-section 10 of section 92 were placed in the "Quebec Resolutions," if we might look at them in construing the Act, amongst the subject matters specifically assigned to the legislative jurisdiction of the Dominion Parliament and that their transfer from their original place in these resolutions to their present place as exceptions to sub-section 10 of section 92 by no means altered their character or meaning. It was really a bit of inartistic drafting made doubtless with the object of removing doubts as to whether a work or undertaking lying beyond a province or, if wholly situate within a province were declared by the Parliament of Canada at any time to be for the general advantage of Canada, might not be contended nevertheless to be or continue to be a provincial work.

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With regard to the questions as to the place where this contract of insurance was made, whether in the Province of Quebec or in the Province of Ontario, I do not think it of any importance on the questions before us, if the view I have already presented of the meaning of the limitation contained in the words "provincial objects" is correct. If the defendant company had no power at all to enter into an insurance contract with respect to property in the State of Maine, it matters little whether their contract was made in Ontario or Quebec.

I understood it to be conceded at the argument that it made no difference whatever whether the limitation upon the powers of the company was contained in the charter of the company or in the constitution or powers of legislation of the legislature granting the charter. And of course that is obviously so. Once the position is reached that the limitation contained in the words "provincial objects" is geographical or territorial, then it must be given effect to just the same if contained in the constitution of the province which grants the charter as if expressly incorporated in the charter itself. That being so, I take it that it is not open to argument since the decision by the House of Lords in the case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), that a company incorporated by special Act of Parliament or under a "General Companies Act," is not thereby created a corporation with inherent common law rights, but is controlled and limited by and within the express powers granted and those necessary and incidental powers which flow from them, and that a contract made by such a company upon a matter not within

(1) L.R. 7 H.L. 653.

its powers is not binding upon the company nor can it be rendered so binding, though afterwards expressly assented to at a general meeting of shareholders. The question is not one as to the legality of the contract but as to the power and competency of the company to make it. As Mr. Justice Blackburn said in the judgment there appealed from, quoted with approval by Lord Chancellor Cairns, and which saying Lord Cairns observed "sums up and exhausts the whole case":—

> I do not entertain any doubt that if upon the true construction of a statute creating a corporation it appears to me to be the intention of the legislature expressed or implied that the corporation shall not enter into a particular contract, every court, whether of law or equity is bound to treat a contract entered into contrary to the enactment as illegal and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

And Lord Selborne in his speech says:—

> I only repeat what Lord Cransworth, in *Hawkes* v. *Eastern Counties Railway Company*(1), (when moving the judgment of this House) stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the "Companies Act of 1862," appears to me to be statutory corporations within this principle.

And again at page 694:—

> I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association, are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do.

If therefore my conclusion as to the meaning of the limitation "provincial objects" is correct, if the

(1) 5 H.L. Cas. 331.

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legislature of Ontario could only incorporate companies to do insurance business within the province, it seems to me to follow as a consequence that any contract made by them insuring property out of the province was wholly void, and that neither the place where the contract was made nor the ratification of the shareholders, had such been given, nor any comity or consent or license given by any foreign state or province could inject vitality into that which in its substance and essence was void and dead.

A great deal was said about the comity of nations and the right of a company to do business in a foreign state by virtue of that comity. But it does not to me seem arguable that any comity of nations could enlarge the powers of a limited corporation or enable such corporation to do that abroad which would be illegal and *ultra vires* if done at home, or extend the area within which even unlimited powers were to be exercised.

The true rule with respect to a company created by the legislature of one country attempting to carry on the business for which its charter created it in another country is that while acting within the scope of its statutory powers it may by the permission or comity of the state where it attempts to do business legally carry on such business. Its right to do so does not depend upon the law of the state creating the corporation, but on the extent to which the foreign country chooses to recognize the law creating the corporation. (See Lindley's Law of Companies, (6 ed.) Appendix No. 1, page 1222).

But I take it no permission or comity of any foreign state would enable a corporation specifically limited in its powers either with regard to the nature or class of business it may carry on or otherwise, to

carry on business or enter into contracts which were either expressly prohibited or by implication necessarily prohibited by its charter. Such increase of power would require legislative authority, and practically amount to the creation of a new charter. Mere permission or comity certainly could not suffice to invest the company with powers beyond those of its charter.

It by no means follows from this, however, that everything the company does beyond the area of the province within which it is limited to do business, in furtherance of or ancillary or incidental to its main objects or purposes, is necessarily *ultra vires*. On the contrary applying the principles frequently stated by the Judicial Committee of the Privy Council to the question, it would seem to me that while the objects and purposes of the company must be confined to the province, things might be legally done outside of the province strictly in furtherance of those objects. For instance, a company chartered for the manufacture of any article, cotton, tobacco, woollen goods, iron, steel, etc., might well, in order to carry out the very purpose for which it was chartered, purchase outside of the province in England or elsewhere, the machinery necessary to enable it so to manufacture, and it may be, though it is not necessary for me to express an opinion on the point, that for the same purpose it might be alike necessary and legal for it to purchase abroad its raw material required to manufacture the articles for which it was incorporated. I put it upon the principle that everything necessary to enable a company to carry out properly and efficiently the purposes for which it was incorporated is impliedly granted to them, and that if it is necessary for a provincial company in order fully

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and effectively to carry out the object and purposes for which it was incorporated, to purchase abroad the machinery or other articles necessary to enable it to manufacture, including in such the raw material, it could legally do so. But I squarely challenge the proposition that a provincial manufacturing or trading or insurance company has the world for its market or business or that it can carry on its business at all beyond the province excepting to the extent and for the legitimate purpose of enabling it efficiently to carry out the functional purposes of its incorporation within the province by which it was incorporated.

A good deal was said at the bar as to the general practice which has prevailed since Confederation and the general construction put upon the statute by provincial authorities, and acted upon by the commercial and financial communities in taking out provincial charters, and the evils which may follow if it was to be held that these provincial charters limited the companies chartered by them in the exercise of their functional powers to the areas of the province. From much of what was said I dissent. My experience in the House of Commons for many years led me to form quite other impressions as to what the general belief and practice was, and I am confirmed in these impressions by the continuous and practically unbroken series of opinions officially expressed by a long line of Ministers of Justice when reporting year by year upon the legislation of the several provinces. The plain, obvious and simple course, if I am right in my construction of the Act, is for a corporation desirous of carrying on its business outside of the province and throughout the Dominion and elsewhere, to obtain its charter from the Dominion.

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There remains yet to be considered the effect of the license obtained by the defendant company under the Dominion Statute, 51 Vict. ch. 28, which authorizes provincial companies by leave of the Governor in Council and on complying with certain provisions of the Act

to have the power of transacting its business throughout Canada.

So far as the Dominion is concerned it must be considered in some respects at least, with respect to the provinces, as a foreign state. I am quite unable to understand where the Dominion Parliament obtains its power to add to, or supplement, or take from the powers granted to any company incorporated by any province. Such legislation is practically either an amendment of the charter of the provincial company extending its powers far beyond those given to it by the province, or a legislative declaration of the extent to which it desires to extend what is known as the comity of nations. I cannot see how, or by what authority, the Dominion Parliament could alter, extend or abridge a provincial company's charter. "The Imperial Act" divides legislative power between the Parliament of the Dominion and the legislatures of the provinces. Whatever powers the latter have are exclusive. The Dominion Parliament cannot amend that Imperial statute, and without amending it I cannot see how they can add to the powers or objects of a provincial company which have been defined and circumscribed by the Imperial statute. It seems to me that only by the creation of a new entity or corporation could the object sought for be achieved. Comity cannot extend the circumscribed powers of an incorporated company, nor can a foreign legislature by any legislation or system of licensing enlarge

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such powers or make that legal which the charter did not warrant or authorize. It would not be argued that assuming the powers of this company to be confined to the Province of Ontario that the State of Maine could by any possible legislation enlarge those powers short of creating a new company. Nor can I see how the Dominion Parliament has any other or greater power to enlarge a provincial company's charter than one of the States of the United States would have.

Lastly, it was submitted by Mr. Shepley with great force that it was not open to the plaintiff company to recover back the premiums it had paid, on the ground that the policy was void, because outside of the contention that the point was not now open to them with which I have previously dealt, the contract was one already completed and performed at the time the action was brought and so the case was brought within the principle of the decision of *Lowry* v. *Bourdieu* (1) that it was not open to an insured party "after the risk had been completely run" to use the words of Mr. Justice Buller, to recover back premiums paid on the ground that the policy was void. It does not seem to me that this case comes within that principle. This was a continuing policy on certain property in the State of Maine renewed from time to time, and at the time the action was brought the risk was not completely run, but was then actually running. So far from the event or contingency having happened, which would, if the policy insured upon had been a valid one, have created a liability, the contention of the defendants, and on which they succeeded in the court below, was not that

(1) 2 Doug. 468.

the risk had never attached, or that the risk had once attached and had at the time of the loss ceased to do so, but that while the risk or contingency insured against was a continuous one at the time of the alleged loss it did not attach to the particular kind of property lost. In other words, that the contract was an executory not an executed one, but the special event or risk insured against had not occurred. Under no circumstances can I understand how the contract could be said to be an executed contract so far as the year or period is concerned when the fire took place and which period was covered by the premium paid. In my opinion the rule appealed to in order to prevent the plaintiff recovering back the premiums paid cannot be held to apply. On the assumption that I am correct in my holding that there never was any binding contract between the parties, that the contract entered into was *ultra vires,* then under those assumptions there never was anything done by the insurance company or any liability incurred by them under it, and the event contemplated on which the moneys insured might become payable, never did happen and never could happen. *Hermann* v. *Charlesworth*(1).

This case stands just as if the plaintiff company had not sued to recover for a loss upon the property at all, but had sued alone on the alternative claim made by it for the recovery back of the premiums while the policy, if it had been good, was actually running.

The appeal, therefore should be allowed and judgment entered for the plaintiff on its alternative claim for the premiums paid on the policy.

(1) [1905] 2 K.B. 123.

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IDINGTON J.—I accept the reasoning of Mr. Justice Osler on all the questions argued herein, in the Court of Appeal for Ontario. Nothing need be added thereto. However, for the first time in the case, counsel for appellants formulated and claimed the benefit of, the proposition of law, that no insurance company, only incorporated, as this one, by virtue of provincial legislative authority can insure against risks beyond, or enter into a contract therefor beyond the limits of the province incorporating it. I fear we erred in allowing this ground to be argued on such pleadings as appear, but in view of all the circumstances, including our direction for a re-argument, I reluctantly conclude the effect thereof to be as if we had under section 54 of "The Supreme Court Act" given leave to amend.

As to this new ground, I assume the contract to have been entered into by the insurance company at Ottawa, where the insurance company had its head office, and its chief officers, and where its seal was kept, and affixed to the contract, which was also signed there by these executive officers.

Even if the counter-signing in Quebec were void, which I do not think, that would not so impair the contract as to render it a nullity and thereby entitle appellants to claim as here a return of the premiums. If insured and insurer had both been domiciled in the same province, the question raised, would not, I think, have been open to appellants. But the head-office of the insured being here in one province, whilst the contract was executed in another province, entitles the appellants to have the broader question raised squarely decided, if considered at all.

I therefore deal with the issues thus raised in their widest sense.

As such, they turn upon the interpretation of "The British North America Act." I do not think we must, in disposing of them, look only at sub-section 11 of section 92 thereof, and try to determine the exact grammatical meaning of the words thereof which are as follows:—"11. The incorporation of companies with provincial objects."

It is conceded on all hands that this phrase was not intended to apply to, or have any relation to the executive powers of the government, or of the institutions relative to the carrying on of the government of the province, as distinct from the usual commercial or industrial business of the inhabitants of the province.

Yet what can the words "provincial objects" in their strict grammatical sense, mean, if not of that first class? Coupled with the word "companies" they can, as is properly conceded, mean nothing of the kind.

It is thus shewn to be an ambiguous phrase, that cannot be properly construed here, by what is the strictly grammatical rule of construction.

We are driven by that to look at the whole purview of the Act. We are, in order to properly comprehend that, again driven to resort to the history that preceded this legislation, in order that we may be placed just where we can, as nearly as possible, look at it from the like point of view that its framers had to consider it from.

Moreover, we must never forget what kind of instrument this is which we are called upon to interpret.

In trying to do so, I would like ever to abide by the following language, attributed to Vattel, as quoted with approval by the late Chief Justice Spragge in

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the case of *The Queen* v. *Hodge*(1), at page 253, as follows:—

> He says, Book 2, ch. 17, secs. 285, 6: The most important rule in cases of this nature, is that a constitution of government does not and cannot, from its nature, depend in any great degree upon verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stand well with the context and subject matters it must yield to the latter. While then we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe; and as has been already stated, that must be the truest exposition which best harmonizes with its designs, its objects, and its general structure.

The present Province of Ontario, when named Upper Canada, had by virtue of the simple words "peace, welfare and good government" from 1792 to 1840 the power to incorporate for any purpose that any of its citizens might desire to venture upon.

That power was, from the year 1840 to the coming into effect in 1867, of the Act now under consideration, merged in the united power of Upper and Lower Canada, but existent in the joint legislature of these provinces, under and by virtue of the same comprehensive words "peace, welfare and good government."

A similar history was true of the powers of the Province of Quebec in that regard. I need not dwell on details. I need not enlarge as to the Maritime Provinces respecting which the details differ from those.

Confederation was begotten of the intense desire, perhaps need, of Upper and Lower Canada, for provincial autonomy.

Under such conditions it is hardly likely, that representatives of either intended lightly to surrender

(1) 7 Ont. App. R. 246.

the right to incorporate any of their citizens, for any purpose that incorporation might serve.

What reason is there to suppose it was intended to exclude from any legislative treatment by a provincial legislature of any of the subject matters assigned to the provinces, the right to use in such treatment the power or any part of the power of incorporation so far as hitherto enjoyed and so far as the exercise of that power might by any of the provinces be deemed expedient?

This contention, if it means anything, means that the provincial corporate bodies cannot, if of farmers, carry their crops across a line to market them; or if of merchants, step across the line to buy; or if of miners, import their machinery; or export their ores, for refining them; or if of manufacturers, send abroad their agents to buy, any of the raw materials they need; and that if they or any of them venture in any such case to do so, their securities as creditors or debtors would be worthless.

I cannot believe that such paralysing isolation was ever dreamt of by those who framed this Act.

Nor can I conceive that they intended, as within the scope and purpose of such a decentralizing scheme, of the functions of government, as this federal conception implies, that each and all of those possible corporate bodies I have mentioned, and all others of a like kind, should seek for their authority something emanating from the Dominion Parliament, to give them that capacity and efficiency the like bodies had before then enjoyed. Moreover, how can anything to recreate or to help them emanate from that Parliament when the whole subject matter is by being exclusively assigned elsewhere excluded from the jurisdiction of the Dominion?

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To those who reply "it matters not what was intended or may reasonably be supposed to have been intended it is not expressed" I venture to say it is clearly expressed. It is only, I respectfully submit, by trying to extract, from an ambiguous phrase, something even it won't bear, and discarding all else in the Act that this clear expression is missed.

Blot sub-section 11, I have quoted, out of section 92, is the language that remains not quite as comprehensive as and effective for conferring the power of incorporation in relation to anything pertaining to any of the several subject matters exclusively assigned to the provinces and in regard to which such a power might be appropriately and serviceably exercised, as had been the simple words "peace, welfare and good government" that had hitherto alone endowed the respective legislatures therewith in regard to the more numerous subject matters?

We have this exemplified in many ways in the Act. Sub-section 8 of section 92 merely reads "municipal institutions in the province."

We do not find anything in the Act referring to the incorporation of any such institutions.

Sub-section 11 only relates to "companies" and obviously has no relation to municipal corporations.

It may be said that of necessity municipal institutions must be corporations. I answer, not at all. municipal institutions might be conducted by a province, or by means devised by a province, other than by means of a corporation. Indeed their management by commissioners is now advocated in many quarters. Ontario boards of health are possessed of wide municipal powers yet once were not and, possibly, still are not corporations. But if it be that the nature of the subject matter thus assigned implies the power

of incorporation, I say then that illustrates and emphasizes my argument. For if the assignment of property and civil rights is to be the basis of the measure of the power there surely then must be an end to the contention.

Again, section 98 gives, save in one thing, exclusive control of education to the provinces by using language quite as remote from touching upon the power to incorporate as can well be. Yet does anyone for a moment suppose that the common every day creations by provincial legislative authority of corporations, to carry out the "laws in relation to education," are unauthorized? If either municipal or school corporations, directly authorized, as they respectively are, by the Ontario Legislature, to buy supplies (without any direction where) claim by virtue thereof to cross a street, a river, or a line, into a foreign State to contract respectively for these big and little things, can we deny them the right to do so? Why? What foundation can there be for distinguishing any of them from other corporations in regard to the right to buy where they choose?

Why should these corporations be discriminated against? Why should they be restricted in the marketing of their securities for borrowed money or buying supplies?

Again, hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals, are assigned to the exclusive jurisdiction of the provinces. Nothing is said of their incorporation.

Yet knowing how many of them stood in need of and got incorporation before, are we to suppose that mode of dealing ceased at Confederation? Were such corporations, if created at all, thereafter to be crip-

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ples? Why should these incorporated institutions not get supplies abroad? Were any of these corporations intended to be confined for the supply of their respective needs within the limits of a province? They or some of them daily go beyond the province of their domicile for some such purpose. Have they erred in law? Are they liable when so persistently offending to have their charter attacked for violating the law of their being? Must they limp along with their usefulness impaired? Or must they become re-incorporated by the Dominion. And how can that be done for they and all concerning them are exclusively assigned to the legislative authority of the province?

Sub-section 11, I repeat, has nothing to do with municipal or public school or public charitable corporations; neither endows nor restricts them.

If by virtue only of these several texts relating respectively to each of these subjects, this right of contracting abroad must be conceded to each of such corporations, what of the corporation that the business men require?

Is it not part and parcel of the ordinary civil rights of men to form such alliances? Could incorporating power necessary therefor springing from the exclusive control "of property and civil rights in the province" not have been exercised, if sub-section 11 of section 92 had never existed?

Blot all direct references to incorporating powers out of the Act and what would be the proper interpretation of it in this regard?

Can any one deny that it would when bereft of any such express authority, still carry in it ample power and authority to incorporate? Can anyone suppose that where authority over a subject matter was exclusively assigned to one or other legislative author-

ity, that the plenary corporating power in relation to everything within that subject matter, did not inherently exist also there? Without a word expressing it? Without a word restricting it? It is or would be clearly implied. It is part and parcel of the power granted by exclusive authority.

The constitution of the United States of America never gave the Federal Government express authority to incorporate or any wider power than the words "exclusive authority over" * * * "property and civil rights in the province" import. Yet the corporations created by that power have developed extensively. The language of Chief Justice Marshall in the case of *McCulloch* v. *State of Maryland*(1), is so apposite thereto and to what we have in hand that I cannot forbear quoting it:—

> The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. * * * * The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but means by which their objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

(1) 4 Wheaton, 316, at pp. 410, 411.

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The range of authority of a provincial legislature was said in the case of *Hodge* v. *The Queen* (1), at page 132, to be within the limits prescribed by the statute which created it

> an authority as plenary and as ample * * * as the Imperial Parliament in the plentitude of its power possessed and could bestow.

This language is quoted with approval in the recent case of *The Attorney-General of Canada* v. *Cain* (2), at page 547.

This striking language uttered in 1883 and reiterated in 1906 seems to apply to such cases of trading corporations as must be admitted to fall within the lines of the subject matters assigned exclusively to the provinces.

Can effect be given to such language by the creation of a lot of low grade corporations? Is not the very idea that such limited creations were intended, repugnant to this language and the principle it enunciates?

If the Act, without sub-section 11, would have carried with each of the other sub-sections of section 92, where and when needed the power of incorporating, if and so far as corporations might serve any purpose in relation thereto, is there anything in sub-section 11 to restrict that power in the manner now claimed?

I have shewn that the phrase "provincial objects" cannot relate to, or be confined within what its strict literal meaning might require.

It seems difficult and I would have said impossible, but for the contention here set up and heed given to it, to extract from such a phrase any restric-

(1) 9 App. Cas. 117. (2) (1906) A.C. 542.

tive meaning save that involved in distinguishing the subjects exclusively assigned to the provinces, from those assigned to the Dominion as the line of incorporating power given. That restriction may reasonably be found in the phrase. It may even have been one of the purposes of using it, to save possibility of conflict with or embarrassment, in that regard, in the Dominion's exercise of the power of incorporating.

In view of the civil rights and property (which are the essential elements to be controlled in creating any company) within the provinces being *exclusively* assigned to the provinces it might have been but for sub-section 11 said that the Dominion had to look to the provinces for incorporating power to subserve its exercise of its powers.

The exclusive legislative control over property and civil rights in the province is of such a sweeping and comprehensive character that even the final part of section 91 might not have sufficed for its restrictive purpose unless the corporating power of section 92 were thus restricted by something to indicate that when the province undertook to incorporate it should keep to that field that was provincial in its character.

But how does that affect the question of the quality of power inherent in a corporation? Sub-section 11 clearly was pointed at something in the nature of a partition of the sovereign legislative powers between the Dominion and the provinces.

But how could that help in regard to a power that neither of them possessed, neither of them could acquire, neither of them modify, but which either of them might without consulting the other exclude from their corporate creatures the right to exercise? I refer to the power to enjoy rights given by virtue of the comity of nations which I refer to hereafter.

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Such restriction as I have indicated of subject matter is, however, an entirely different thing from a restriction upon the kind of incorporating power that is assigned to the province to give. Why should the provinces be restrained thus in regard to trading corporations needing the use of such power, and in dealing with others of the subject matters assigned to it be not restricted though less urgently needing the power? The phrase is presented by the argument of the appellants' counsel as restricting all provincial corporations to acts within the province. It is said, if I understand the argument, because a province implies a certain territorial area, therefore its objects must be confined within that area, therefore the concerns of any of its people when they become incorporated as a company must not relate to anything of a mercantile or contractual nature that can by any possibility extend beyond the confines of the province. The province has to go abroad to borrow. It may so contract. But none of its creatures dare venture to do so. Its corporate creatures must be of a kind rarely met in the business world, and of little use therein, to their corporators or to anybody else. And no one discovered that restrictive meaning hidden in these words until forty years after their adoption and first use, when the hard necessities of this appeal has arisen. And to be consistent, saving banks, marine hospitals and other corporations for subject matters exclusively assigned to the Dominion, save banks, etc., in sub-section 15 of section 91, may, it is argued, if confined within a province be incorporated by it. I cannot assent to these propositions. To state them is to refute them.

Much as sub-section 11 of section 92 has been dwelt upon in argument, I have come to the conclu-

sion that it is for present purposes after all, if not the least, at all events, not the most important part, of the two sections calling for consideration in the adjudication of this case. The substance of what gives vitality to the incorporating power in question must be sought elsewhere in section 92 and this sub-section 11 is but the confirmation thereof, and an index finger that points the way where we can find the limits of that power.

Some of the other sub-sections might without sub-section 11 confer the incorporating power, but sub-section 11 alone would be hopelessly ineffective in a statute that did not otherwise assign exclusive powers of legislation to a province.

The phrase "provincial objects" as an apt substitute for the old one of "peace, welfare and good government," may, I submit, comprehend the well being of each inhabitant of the province; the promotion of the business prosperity of the inhabitants, or of any number or class of such inhabitants, as a means to the end of that well being; the incorporation of any two or more of such inhabitants, to carry on business, and thus become conducive to the successful development of such desired business prosperity, and hence also, the business of fire insurance. How does all that, however, confer the power on a provincial corporation of contracting abroad? It does not. It merely shews that there are things within the scope of the phrase in one of its natural meanings that so far from restricting the corporate power in the way contended for, demand, if possible, its widest operation. If there is no restriction by virtue of this phrase, there is no doubt of the right of a provincial corporation to contract abroad.

What happens, once the corporation is thus

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created, is, that other provinces and foreign states either by the comity of nations, or perchance, in case of treaty, by force thereof, recognize the existence of such a corporate body as a legal entity, doing the like kind of business for the carrying on of which it was created.

Its contracts are thus recognized, when made beyond, or in relation to property beyond, the bounds of its parent province. It may plead and be impleaded beyond such bounds, as effectually as in its home.

It may, however, by the laws of the foreign province, or state, where it attempts to carry on business, be prohibited in whole, or in part, or conditionally.

The organic law which brings it into being, may also prohibit it from contracting abroad, or impose any limits desired; restricting its power of contracting abroad.

Such limits of a restrictive nature imposed by the parent province or state must be observed. That province or state may, in this regard, disable, but cannot enable. Its express enactment, to enable its corporate creation to carry on business abroad, would be futile.

Once incorporation, for some specific purpose, within the field or sphere of subjects assigned to the exclusive jurisdiction of a province, has been effected, the comity of nations may and generally does all that is required, beyond the province.

This doctrine of the comity of nations, carrying with it, subject to those limitations I have mentioned, this recognition of a foreign corporation, is as firmly embedded in, and an ever growing part of, international law as anything can well be.

Short of treaties, securing a more definite basis, these legal entities, of the greatest nation, and the

humblest province, stand on the same level, and receive but the same sort of recognition from a foreign state.

This comity is but an extension of the earlier recognition of the individual foreigner.

The corporation is but a combination of individuals.

The recognition abroad of either the individual or the corporation, is begotten of the needs of civilized men. The alien individual or corporation formerly had no rights abroad.

The lines upon which recognition now proceeds, doubtless differentiate in the details, applicable to individuals and corporations respectively. Yet, we must never forget, in trying to ascertain the law, in relation to the rights either may have, springing out of what is contracted for, or suffered abroad, and the remedies properly applicable for enforcing such rights that this recognition is subject to many and varying limitations, which have arisen from the needs I have referred to; and grown with the growth thereof.

The lines within which it had, in 1867 or has since become operative, may not be so apparent, as to be easy of definition in every case that arises, and the policy of some states may be backward in that regard. The United States are not. The United Kingdom is not.

Lest it may be said that the present prevalent recognition by a foreign state of the corporate creations of another state did not obtain at the time of the passing of "The British North America Act," I would refer to the case of *Howe Machine Co.* v. *Walker*(1), wherein is to be found the able and exhaustive

(1) 35 U.C.Q.B. 37.

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judgment of the first Chief Justice of this court, then Chief Justice of the Court of Queen's Bench in Ontario.

The judgment was delivered in 1873. It contains a review of all the leading authorities, including that of *Bank of Augusta* v. *Earle*(1), which stands prominently forth in the historical development of the principle, and had been decided in the Supreme Court of the United States in the year 1839.

Principles as well recognized (long before, and immediately after, the enactment of "The British North America Act") as these cases and the respective authorities upon which they rest shew, must have formed part of the common knowledge of the statesmen who framed the Act in question, and the language used must be read in light thereof.

Are we to impute to these men the intention of prohibiting the operation of this principle in regard to provincial corporations? If we can conceive them possessed of such an intention, so fraught with the absurdities I have pointed out, then we must suppose them to have been stricken with a strange poverty of the power of expression.

Assuredly we do not find such intention in the words. The legal implications are all against it.

I venture to add that so much has been done ever since, both by legislators and representative men of business, on the faith of the power of provincial corporations to assert their right to act upon the principle, that if the expression be doubtful in this regard, which I deny, we ought not to accept lightly such disturbing propositions as are here presented to us.

(1) 13 Peters 519.

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A distinction was sought to be drawn between the powers of the Dominion Parliament and the provincial legislature, in regard to this status of their corporate creations abroad.

I have not been able to find any reason for such distinction, save that which may spring from the nature of the subject matter over which their respective powers may have such control as to enable either to form a corporate body in respect thereof.

The Dominion Parliament has, by virtue of its exclusive powers, and reservation to it of all powers not expressly conceded to the provinces, impliedly the power of creating corporations within such sphere of action. Many of those possible creations may be extra-provincial or inter-provincial, and thus of necessity, requiring a wider scope than it would be possible for any legislature of a province to confer upon a corporation, even of a like character. Railway and telegraph and ferry company charters exemplify these cases very well, and as each is intra or extra-provincial, so may be their respective powers.

That does not, however, confer, or necessarily imply, relatively greater power beyond the confines of the Dominion, as part of the domain of the Dominion Parliament, in contradistinction to the jurisdiction of the legislature of a province.

Either Dominion or provincial corporation stands upon the same footing in a foreign state.

The proposition of distinction when it goes beyond this, is, I am convinced, destitute not only of judicial authority but also of legal principle to support it.

That which is assigned exclusively either to the domain of the Dominion or province, must in the last resort be measured by the powers of the Dominion or the province respectively over the subject matter so

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assigned, and can only receive recognition to the extent of such respective limitations and not beyond.

Along the line of the history of the comity of nations, ever since the contractual rights of corporations abroad have been recognized, I have not been able to find a single instance in a country where the doctrine prevailed, that any question was raised of the nature of the constating power that created the corporation claiming recognition.

The sole questions are; is it a corporation? Was it given power to carry on this kind of business; to form this kind of contract in question? If so, and given it at home then it is always presumed to be implied as given elsewhere, wherever the comity of nations prevails.

Nor has the recognition abroad and force of that recognition depended on a provision, express or implied, in the charter or Act creating the corporation anticipating its going abroad to do business.

It simply depends on the kind of business it was incorporated to do. If that business can be done abroad as well as at home in addition to or as part of the home business, the right is inherent in the corporation to go there to do it unless recognition there is denied it.

The very word corporation implies and implied in England at the passing of "The British North America Act," a right to trade abroad for the purposes for which the corporation was created, unless restricted, just as much as the words "free citizen" implies in modern times his right to go abroad.

It is not that the comity adds to the power of the corporation as some seem to suggest this theory implies.

It is that any state creating a corporation without restricting its power is supposed to know as a matter of international law that the same kind of business it enables it to do can then legally be done abroad by this creation, in states that choose to accord it recognition.

When statesmen frame a law, its language must be read in light of that international law and unless clearly repugnant thereto or expressly excluding its operation both must be read together.

It becomes more imperative to do so in the case of a piece of legislation that itself is in its fundamental nature akin to what is commonly known as international law. An instrument such as "The British North America Act" is essentially of this character. In attempting as it does to define the relations of former independent provinces, and the relations of these thenceforward, to the inhabitants thereof, and those of each of the others, and of all to the common central power being created, regard ought to be had, and I venture to think, was had, to the former relations between each provincial legislature and the people of its province and the manifold relations of every kind then had with foreign neighbours whether as individuals or as states.

The assignment of residual power to the Dominion instead of to the provinces as in the United States federation suggested the argument that therefore the corporations created by the former have more inherent capacity for foreign business than those created by the provinces.

Yet strangely enough the converse case of the United States has never suggested to any one that the corporate creation of a State had greater power in this regard than the Federal Government.

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In conclusion, I think, that the lowly origin of a provincial corporation is of itself no more reason in law for excluding it from the benefits of international trade than for distinguishing between the rights in the same regard of a Liliputian and a Brobdingnagian freeman and discriminating against the former.

I have tried to confine my reasoning to the single issue of the presumptive right of a provincial corporation, properly constituted, for the purpose of endowing it with the right to execute any one or more of the purposes comprehended in the several subject matters assigned by "The British North America Act" to the exclusive legislative jurisdiction of each of the provinces, to go abroad to do that kind of business it was incorporated to do, so far as permitted by a foreign state.

I am not oblivious of the possibility of many more or less intricate questions arising, before the relations of the Dominion and the provinces and they with each other are finally settled; as to the rights of the corporate creation of either.

I desire to abstain from going further than I think absolutely necessary.

In this case there was no law of Quebec relied upon as prohibitive of its people or corporations contracting in the way these appellants contracted. Invited as their counsel were to press such a point if open, they refrained from doing so.

Nevertheless the contract being as stated already between two corporations domiciled in different provinces, it seems to me it raises the broad issue I have discussed, just as much as if the appellant company had entirely belonged to a foreign State where there existed no prohibitive law against such a contract.

In the 91st number of The Law Quarterly Review at page 296 *et seq.* is to be found the most complete collection I have seen of decisions bearing upon the position of foreign juridical persons in England.

Besides bearing out what I have urged as the law, I notice also the significant statement that to provide for the fulfilment of the several conventions concluded by England with almost every power in Europe for the mutual admission of commercial associations to civil rights, no legislation had been found necessary in England.

The spontaneous operation thus evinced of English law, confirms my impression and argument of there being presumed to be inherent in every corporation created under that law, a capacity to do such business abroad as consistent with the purposes of its creation.

"The British North America Act" ought, therefore, to be interpreted in the light of that and the nature of a corporation to be created thereunder be viewed in accord therewith unless expressly restricted.

I think the appeal should be dismissed with all the costs incurred not only by the respondents, but by the Dominion and provinces taking part in the second argument.

MACLENNAN J.—On the merits of this case as presented and argued in the court below, I agree with the reasons and conclusions of Mr. Justice Osler, delivering the judgment of the Court of Appeal.

When the case came before us an additional argument was made, viz.: that the defendants as a company incorporated under a provincial statute, could

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not insure against a risk on property in the State of Maine, inasmuch as the power of the provincial legislature to incorporate companies is confined to companies with provincial objects. "British North America Act," section 92 (11).

I do not find this objection mentioned or referred to in the courts below, either in the pleadings or proceedings, or in the judgment at the trial, or in the reasons of appeal, or in the judgment of the Court of Appeal, and it is not mentioned or referred to in the appellant's factum in this court.

On the contrary the action is founded on the policy and it is pleaded and relied upon, from first to last, as a valid instrument, and as an instrument which in terms insured the plaintiffs in respect of their losses upon property, in the State of Maine.

It is true that the plaintiffs did plead and contend that if the policy was, as the defendants contended, confined to buildings, etc., and did not cover standing timber, it ought to be held invalid, on the ground of mutual mistake, and that they were in that case entitled to recover the premiums which they had paid. But that is a very different thing from pleading that the policy was void in toto, as *ultra vires,* by reason of "The British North America Act," and of the insured property being in a foreign country.

This new contention is inconsistent with the record, and with all subsequent proceedings down to the argument before us, and for that reason cannot in my opinion have effect given to it, even if we thought it well founded. *The Queen* v. *Poirier* (1), at pages 38-9, and other cases cited in Coutlee's Digest, at pages 118, 119; Cameron's Supreme Court Practice, pages 310-18.

(1) 30 Can. S.C.R. 36.

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But if this point be regarded as open, I am of opinion that it cannot prevail.

If the construction contended for of the words "provincial objects" is well founded, then it follows that while an individual or a partnership in Ontario may contract to do many things in a foreign country, a provincial corporation could do none of them; as for instance, the making of promissory notes, or the acceptance of bills of exchange payable in England or France, or in another Canadian province. A business corporation in Ottawa, on that interpretation, could not, unless incorporated by Parliament, make a valid contract for the purchase of goods in Montreal, or Hull; or give promissory notes for the price, payable in either place.

I think such a result as that never could have been intended, and that the words used do not require or admit of such a construction.

I think all that was intended was that as between the Dominion and the provinces the powers of the latter in incorporating companies should be analogous to those of independent countries; and that if a corporation desired to acquire extraordinary rights or powers of any kind, to be exercised in more than one province, those rights and powers must be obtained from Parliament, instead of from the other province or provinces, as would be required to be done in the case of independent countries.

I think the expression *provincial objects* is used in contradistinction to *Dominion objects,* and means no more than this: that just as Parliament in incorporating companies must confine itself to Dominion objects as between the Dominion and other countries, so each province not only as between itself and other countries, but between itself and the provinces, must

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confine itself to provincial objects; and as Parliament cannot empower a company to go into another country and there construct a railway or canal or a telegraph or telephone line, so neither can a provincial legislature confer any such powers on a company incorporated by it. And as a Dominion company, desiring to exercise such powers in Maine or Michigan, must obtain them from those states, so a company desiring to exercise such powers in more than one province must be incorporated by Parliament, instead of being first incorporated by a province and then applying for the required powers to the other province or provinces.

It is not questioned that the defendants were lawfully incorporated, and capable of making lawful and valid contracts of insurance, and their charter contains no limitation or restriction as to the locality or situs of the property to be insured. That being so, I do not see what possible difference it can make where the subject to which the contract relates was situated.

At common law an individual or a partnership could make such contracts, and in such cases it must be clear that the situs of the property is altogether immaterial.

In insuring property in Maine the defendants were not assuming any power or jurisdiction in that country. They simply made a contract with the plaintiffs to pay them a sum of money on a certain event.

The confusion arises from treating the property to which the contract relates as the subject of it, whereas the subject of the contract is the risk, or more exactly, the possible loss, which the assured may happen to suffer by injury to his property by fire. More than a century and a half ago Lord Hardwicke said:

> It cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage.
> *Sadlers Co.* v. *Badcock*(1).

And in *Rayner* v. *Preston*(2), Cotton L.J. said the contract of insurance was not a contract, in the event of a fire, to repair the insured buildings, but a contract, in that event, to pay a sum of money which the assured might apply as they thought fit.

At common law, in my opinion, an individual, or a company of individuals, in one country, could insure a person in another country, against loss by fire to property in a third country, and in the absence of legislation, to property anywhere in the world. And I think there is nothing in "The British North America Act" which would prevent an individual or a partnership in any province of the Dominion from making insurance contracts with the same freedom and scope as before, and it would be a strange thing if it were enacted that a company incorporated by a province simply for doing such business should be restricted to property within the province while individuals and partnerships were left free.

For these reasons I am of opinion that the appeal should be dismissed with costs.

DUFF J.—The question to be determined on this appeal is whether or not a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is inherently incapacitated from entering into, outside the boundaries of its province of origin, a valid contract of insurance relating to property also outside those

(1) 2 Atk. 554. (2) 18 Ch. D. 1 at p. 6.

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limits. For the reasons I shall presently mention I think the answer to this question depends upon the construction of sub-section 11 of section 92 of "The British North America Act" which is in these words: "The incorporation of companies with provincial objects." Admittedly, indeed, the appellant company cannot succeed unless it can make good its contention that no company is within the description "companies with provincial objects" whose constitution permits it to enter into such contracts.

In this sub-section the word "objects" seems to be used in the sense in which it is commonly used in relation to the subject dealt with—the incorporation of companies; the sense in which, for example, it is used in "The Companies Act of 1862" (Imperial); and to denote the purposes for which a company is established, or its undertaking as defined by its constitution. The substantial controversy turns therefore upon the meaning of the word "provincial."

As we are, I think, relieved from the examination of some points elaborately discussed during the argument by a decision of the Judicial Committee, (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1)), it will be convenient, first to state what I conceive to be the effect of that decision. In the discussion of that topic a preliminary observation or two on the enactments of section 92, relating to the subject of the creation of corporations will, I think, be conducive to clearness. Sub-section 11 of that section, which I have already quoted does not, it is obvious, define exhaustively the legislative authority of the provinces in relation to that

(1) 9 App. Cas. 157.

subject. The power to create corporations of a special character is plainly, I think, conferred upon them by sub-sections 7 and 8; *Attorney-General of Ontario* v. *Attorney-General of Canada*(1), at page 364. To them is also committed (with certain exceptions) by sub-section 10, legislative control over local works and undertakings; and although not expressly, it may be that—I express no opinion upon it—by a necessary implication, the provinces derive from the sub-section last mentioned (independently of any other provision of section 92) authority to constitute corporations for the purposes of such works and undertakings—including the authority to endow such corporations with such powers as may be necessary or incidental to such purposes. The authority to create corporations for educational purposes is also, I think, implied in the enactments of sec. 93. See *Re Christian Brothers' Schools*(2).

But sub-section 11 professes to deal with the subject of the incorporation of *companies* generally; and in so far as that subject—the creation of that species of corporations which the enactment describes as "companies"—is not encroached upon by the sub-sections (7, 8 and 10) to which I have just referred, nor by sec. 93, sub-section 11 must, I think, be taken to define the powers of the local legislatures in relation to it. There may be other classes of corporations—not within the scope of sub-sections 7, 8 and 10 or of sec. 93—which, as not within the term "companies," are also outside the scope of sub-section 11; ecclesiastical corporations sole for example. With regard to such corporations the province must resort for its legislative authority to sub-section

(1) [1896] A.C. 348. (2) Cout. Cas. 1.

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13 of section 92 relating to property and civil rights generally, or to sub-section 16 of that section, relating to matters merely local and private within the province. But with respect to the creation of corporations which are "companies" within the meaning of sub-section 11 these last mentioned sub-sections cannot, I think, be resorted to. The authority in relation to the creation of such corporations having been made by the legislature the subject of a special provision of section 92, it would, I think, be a departure from elementary principles of statutory construction, to hold that in relation to that subject, a broader authority is conferred by other more general provisions of the same section.

It is not open to dispute that the defendant company does not belong to any of the classes of corporations assigned to the legislative control of the Dominion, by the enumerative clauses of section 91, or that it is a company of the class which is the subject of legislation in sub-section 11; and consequently, if the view I have just expressed be correct, the measure of legislative authority of the province respecting its status and powers must be found in that sub-section. Of the corporations under discussion in *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1) and in the earlier decision therein referred to (*The Citizens Insurance Co.* v. *Parsons*(2)), it may also be said that they were corporations of the species which the Act—in that sub-section—describes as companies; it is to such companies that the observations I shall quote from these cases must I think be taken to be confined, and it is in that sense that I wish the

(1) 9 App. Cas. 157. (2) 7 App. Cas. 96.

word "company," when used in what follows, to be understood.

To come then to *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1); the appeal which led to that decision arose out of an action brought in the Province of Quebec in the name of the Attorney-General of that province praying a declaration that the defendant company's "Act of Incorporation" was *ultra vires* of the Dominion Parliament. That Act professes to incorporate the company for the purpose of carrying on various kinds of business and provides (*inter alia*) section 11.

That the chief office of the association shall be in the City of Montreal, and that branch offices or agencies may be established in London, England, in New York, in United States of America, and in any city or town in the Dominion of Canada, for such purposes as the directors may determine, in accordance with the Act, and that bonds, coupons, dividends or other payments of the association may be made payable at any of the said offices or agencies.

Sir Montague E. Smith delivering the judgment of the Judicial Committee said, at page 164:—

Their Lordships cannot doubt that the majority of the court was right in refusing to hold that the association was not lawfully incorporated. Although the observations of this Board in *The Citizens Insurance Co. of Canada* v. *Parsons*, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies.

And at page 165:—

The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers.

(1) 9 App. Cas. 157.

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The observations of the Board in *Citizens Ins. Co.* v. *Parsons*(1), thus made a part of its judgment in *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(2), indicated very clearly the ground upon which it was held that the incorporation of such a society is within the legislative powers of the Dominion.

> The authority would belong to it (it is said) by its general power over all matters not coming within the class of its subjects assigned exclusively to the legislatures of the provinces and the only subject on this head assigned to the provincial legislatures being the incorporation of companies with provincial objects, it follows that the incorporation of provincial companies for objects other than provincial falls within the general powers of the Parliament of Canada.

This decision then would appear to establish that the words "provincial objects" imply a territorial restriction; and that, by reason of that restriction, incorporated companies (of the species under consideration) which derive their corporate status and powers from a provincial legislature under the authority of sub-section 11 of section 92, are constitutionally incapable of "carrying on their business" (in the sense in which Sir M. E. Smith uses the words) "throughout the Dominion."

This view of the effect of *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1) was during the argument assailed on two grounds. First, it was said that the passage I have quoted from the judgment of the Board was a dictum only. This objection is I think without foundation. The subject of the appeal before their Lordships was a judgment of the Court of Queen's Bench containing a declaration that the defendant company had no legal right to act as a cor-

(1) 7 App. Cas. 96 (2) 9 App. Cas. 157.

poration in the Province of Quebec in respect of any of the kinds of business which by its "Act of Incorporation" it was authorized to engage in; a judgment pronounced upon a petition claiming (*inter alia*) a declaration that the "Act of Incorporation" was a nullity as being *ultra vires* of the legislature which had enacted it. Their Lordships allowed the appeal and reversed the judgment. This would hardly have been possible if their Lordships held the view that the legislation was *ultra vires*. It was necessary to consider, and their Lordships accordingly did consider—as a question to be determined for the purpose of arriving at their decision—whether the Dominion Parliament had power to incorporate such a company. They proceeded on a well-settled principle that if the incorporation of such a company were not within the power of the provincial legislatures it must be within the powers of Parliament, and their conclusion was the necessary result of the opinion they expressed that the legislative authority of the provinces does not include the power to incorporate a company endowed with such powers. The judicial committee having selected this as the principle of their judgment, it would hardly seem to be doubtful that we are not entitled to disregard that principle as unnecessary to their decision.

The second ground of attack is that the decision has no bearing upon any question of corporate capacity; that, in other words, the scope of the decision in so-far as it affects provincial corporations is limited to this—that the law of its province cannot *ex proprio vigore* confer upon a provincial corporation a corporate status or any civil right outside the limits of the province. It is true that the judgment of the Quebec court, while denying it

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the legal right to exercise its corporate powers in that province, acknowledged the legal existence of the corporation. But the judgment of the Judicial Committee, as we have seen, is based expressly upon the proposition that "The Act of Incorporation," which is treated by the Committee as in its essence an Act conferring certain corporate capacities, was *intra vires* of the Dominion Parliament because it was of such a character as to be *ultra vires* of a province. This "Act of Incorporation," so held to be beyond the legislative powers of a province, is thus described in the judgment, at page 166:—

> What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz.: throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

Hence I conclude that the last mentioned objection is untenable also.

It is, however, important not to attribute to the language of the Judicial Committee a meaning more far reaching than that which it fairly conveys. And I do not think we can deduce from the judgment any broader principle than this—that a company authorized by its constitution to establish itself in any or all of the provinces of the Dominion, and in any of those provinces to carry on the whole of its business or as much of it as it shall see fit, is not a company of the class to which the authority of the provincial legislatures, under the sub-section referred to, (No. 11), can be held to extend. The company, whose Act of Incorporation was

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under consideration, was, as we have seen, endowed with just such powers, and it was with reference to those powers that the expressions were used which I have quoted from the judgment. Those expressions must therefore be read and construed with reference to that circumstance. We are not to seize upon the statement that only companies incorporated by the Parliament of Canada have the capacity to carry on their business throughout the Dominion, detach it from its context, from the subject matter under discussion, and imputing to it the broadest signification which it will bear, give effect to it in that sense as expounding a binding rule of law. Some observations made by Lord Herschell in the course of the argument in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1), are so apt here that (although not authoritative) I take the liberty of quoting them.

> The language that this Board used is used *secundum subjectam materiem*, and to detach a phrase that in a concrete case is used with reference to a particular matter, and which it may be perfectly proper to treat in that way, as a sort of phrase that determines something with reference to another matter, I rather protest against.

(See the stenographer's note of the argument on the "Liquor Prohibition Appeal," page 239.)

It would, I think, be a misapplication of the passages I have quoted from their Lordships' judgment to treat them as decisive of the question whether an insurance company incorporated by a provincial legislature can by an agent enter into a valid contract of insurance outside the boundaries of its province. Their Lordships had before them no such question. The actual decision was that Parliament only can endow a company with capacity to carry on its busi-

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

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ness throughout the Dominion in the unlimited way I have just described. And it is in that sense and in that sense only, I think, that the phrase "carry on its business" is used by Sir M. E. Smith in the passages I have quoted.

It may be material to observe that the use of that phrase with reference to a given area as implying the maintenance of a fixed place of business within that area is a use very familiar to lawyers. It is commonly said, for example, that corporations carrying on business in England are subject to service of process as persons within the jurisdiction. Eminent judges have said that in such cases the test of liability to service is the answer to the question; Does it carry on its business in England? (See *Haggin* v. *Comptoir D'Escompte De Paris*(1), at page 522, per Cotton L.J.; *L'Honeux, Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation* (2), at page 448, per Bacon V. C.)

Everybody knows that by this language is meant, that the liability to service depends upon the result of the inquiry whether the corporation is resident, in the only way in which it can be resident, by having within the jurisdiction a fixed place at which it carries on its own business. See *"La Bourgogne"*(3). And in a case recently decided in this court an Ontario company which consigned its goods to a dealer in Halifax who, under his agreement had the sole right to sell them as the agent of the company and did sell them as such, but did this in the course of carrying on his own business and as a part of it, was held not thereby to be "doing busi-

(1) 23 Q.B.D. 519. (2) 33 Ch. D. 446.
(3) [1899] A.C. 431.

ness" in Halifax within the meaning of the statute authorizing the Municipal Council to impose license fees. See *City of Halifax* v. *McLaughlin Carriage Co.* (1).

The company whose powers are in question on this appeal was incorporated under the authority of the Legislature of Ontario, and is not by its constitution expressly empowered or forbidden to engage in business beyond the boundaries of that province; and it is therefore subject in that regard only to the disabilities affecting it, *ipso facto,* as a corporation owing its existence to a provincial legislature.

To support the validity of the contract in question it is not necessary to maintain the view that such a company is permitted to carry on business throughout the Dominion in the manner authorized by the constitution of The Colonial Building Society; it is not even necessary to hold that such a company may maintain any fixed place of business without the Province of Ontario or in any manner establish itself outside that province. It is sufficient if, given that as a provincial corporation it is disabled from so carrying on its business or maintaining any such fixed place of business, and that as such a corporation it is, as to its local habitation, confined to the province where it originated—it is sufficient if such a corporation so disabled and confined may nevertheless be empowered to enter into such a contract of insurance abroad without thereby becoming excluded from the class of corporations described by sub-section 11 as "company with provincial objects."

The characteristic "provincial" which is to mark the objects of such a company is not necessarily, I

(1) 39 Can. S.C.R. 174.

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think, to be found in every act or transaction of the company—but in the undertaking of the company viewed as a whole. If the company is one formed for gain, then the "objects of the company" is only another expression for the business of the company—the business by means of which the company, under its constitution, is permitted to acquire that gain; and the question;—Are such and such objects—regarded as the objects of a "company" as these words are used in sub-section 11—"provincial objects" ? is another form of the question;—Would the business of a company constituted with such objects, regarded as a whole, fairly come within the description "provincial"? If, taken as a whole, a given undertaking would fall within the description "provincial," I do not know on what ground one could challenge the competence of the legislature to constitute a company having such an undertaking, or to invest its creature with such capacities and faculties as it should see fit—not of course incompatible with the character of its undertaking as a provincial undertaking.

There is I think a very real distinction between a company whose undertaking is limited in the manner I have indicated and a Dominion company having power to establish itself and conduct its business to any extent in any one or more of the provinces it may select. And the distinction is important in two aspects. It affects not only the company and the shareholders or corporators of it. The constitution and powers of such a corporation might well be regarded as constituting a single subject of Dominion concern which would be fitly reserved as a subject of legislation to the Dominion. It may well too have been thought that the legislative control of Canadian com-

panies having authority without restriction to carry on business abroad, should for the same reason be a single control vested in the Dominion. Not only is the undertaking of such a company outside the description "provincial" in the territorial sense, but I find it difficult to fasten upon any characteristic of such a company appertaining to its corporate capacity which permits the application of that description.

On the other hand, the constitution and powers of a corporation restricted as to its residence or places of business to one province are mainly the concern of that province; and it seems impossible to find any ground upon which to deny the character "provincial" to such a company, confined in its administration and as to its residence to the province of its origin; elsewhere always a foreigner and a non-resident foreigner; whose business in fact originates in that province and as an organization must always be in substance a "provincial" undertaking—and such a company seems, consequently, to satisfy the description "company with provincial objects."

If I am right in this view, it is plain that the power to incorporate such a company resides in the province; and it is a question for the legislature creating it whether any and what restrictions shall be imposed upon it respecting the places where its contracts may be entered into. Sub-section 11 does not in terms touch that subject; and to read the word "provincial" as imposing a limitation respecting it is I think unnecessarily, and therefore wrongly, to enlarge the application of that word.

The opposite view—which Mr. Ewart in his supplementary factum abandoned—the view that a provincial company cannot in the prosecution of its undertaking enter into contracts abroad leads to results

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which I think it is most unlikely that the framers of "The Confederation Act" could have contemplated. As regards a very numerous class of such companies, hitherto in Canada, in the vast majority of cases, incorporated under the authority of provincial legislatures—companies I mean engaged in mercantile business—the results may fairly be summed by saying that this view would, for practical purposes, so curtail the powers of the provinces with respect to the incorporation of such companies as to deprive the exercise of that power almost wholly of any practical utility. The charter of a mercantile company handicapped by its incapacity to contract abroad either for buying or selling would, I should think, seldom be worth the cost of obtaining it. Certainly any form of association known to result in such disabilities would rarely be resorted to by persons engaging in mercantile enterprises. In point of fact it is well known that a very considerable part of the internal trade of the Dominion is carried on by companies organized under "The General Companies Acts" of the various provinces; and when one considers the circumstances in which "The Confederation Act" was passed it is difficult to believe that this is contrary to the intentions of the authors of that Act. It is to be remembered that that Act provided not only for the union of the four original provinces but for the entry into the Union of British Columbia, Prince Edward Island and Newfoundland. Having regard to the remote situation of the first and last of those colonies with the relation to the seat of the Government of the Dominion and recalling the imperfect means of communication it seems unlikely that Parliament intended, while conferring the power to create companies,

to deprive the legislatures of provinces so situated of authority to constitute corporations having full power to carry on business of an ordinary mercantile or commercial character in the ordinary way. If that authority was withheld, one naturally asks why a power which it was thought worth while to confer upon the provinces in any degree was so limited as to be for practical purposes so largely futile?

For the reasons I have given I do not think that the language of the clause in question effects such a limitation.

Nor do I think there is any sufficient reason for holding that a provincial insurance company is inherently incapable of engaging in contracts of insurance relating to extra provincial property. The contract of fire insurance is a contract of indemnity under which one party assumes an obligation to pay a sum of money on the happening of a specified event. The fact that the event so specified in some of the contracts of such a corporation will happen if it happen at all outside the province where its business is carried on is a circumstance which does not, I think, for the purpose in hand, determine the essential character of that business—the character, that is to say, of the objects of the corporation as "provincial" or non-provincial within the meaning of subsection 11. To test the point let us assume a corporation empowered to make contracts of insurance within the province of its origin only. That this is a fair test is not denied. Indeed on the second argument it was candidly conceded by Mr. Ewart that he must in order to succeed on this branch of his argument maintain that such a contract, wherever made, is *ultra vires* of a provincial company. Now it seems to me too clear for argument that the business of such a cor-

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poration is aptly described as provincial. Can it be said that such a business suffers a loss of its provincial character in cases where by the constitution of the corporation such contracts may relate to property not within the province? If so it must be upon the principle that in determining the character of a company's undertaking for this purpose you are to ascertain as the governing factor in the inquiry whether the company may in the prosecution of its undertaking engage in contracts under which its rights or its liabilities depend upon the happening of an event outside the province; for it is obvious that no sensible distinction can in this regard be drawn between rights and liabilities. That I cannot accept because, as I have already said, you are for this purpose to look at the character of the undertaking as a whole. And the practical results of this view, I think, condemn it. Consistently with it, no provincial life insurance company could insure against a death, no accident company against an accident occurring outside the province; a similar disability would attach to companies carrying on the business of marine insurance. In effect no provincial company could engage in the business of life, accident or marine insurance except upon conditions which would in practice make it impossible or almost impossible for it to obtain any business to do. The results become more startling still when one attempts to apply such a rule to companies engaged in trading, shipping or financial business.

The contention has, moreover, no support from authority. In the case of *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*(1), an insurance company incor-

(1) (1903) A.C. 59.

porated under the legislation of the Province of Quebec, sought to resist a claim under one of its policies relating to property in Toronto on the ground that such a policy was *ultra vires*. The Court of Queen's Bench, though dismissing the action on another ground, rejected this defence. On appeal to the Privy Council, where the plaintiffs succeeded, the defence does not appear to have been abandoned; but is referred to apparently in the judgment of the Privy Council as one of a number of defences not "seriously argued at the bar." Conceding that this case ought not upon this point to be regarded as a decision of the Privy Council, it would at least seem that the eminent counsel who appeared for the insurance company did not think it worth while seriously to challenge the view of the Quebec courts upon it; and it is obvious that the action must have been dismissed if the defence could have been maintained. This seems to be the only case in which the point has ever been raised.

Appeal dismissed with costs.

Solicitor for the appellants: *Angus MacMurchy.*

Solicitors for the respondents: *Hogg & Magee.*