THE CITIZENS' INSURANCE CO.....APPELLANTS; 1879

AND *Nov. 17, 18.

WILLIAM PARSONS.....RESPONDENT. 1880

THE QUEEN INSURANCE CO.....APPELLANTS; *April 9.

June 21.

AND

WILLIAM PARSONS.....RESPONDENT.

THE WESTERN ASSURANCE CO.....APPELLANTS;

AND

ELLEN JOHNSTON.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Jurisdiction of Local Legislature over subject matter of Insurance—British North America Act, 1867, *secs.* 91 and 92—*Statutory conditions—R. S. O., ch.* 162—*What conditions applicable when statutory conditions not printed on the policy.*

The Citizens' Insurance Company, a Canadian Company, incorporated by an Act of the parliament of *Canada*, since the passing

*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J.J. Strong, J., was present when *The Citizens' Insurance Co.* v. *Parsons* and *The Queen Insurance Co.* v. *Parsons* were argued, but not when *The Western Insurance Co.* v. *Johnston* was argued, nor when judgment was delivered in the three cases.

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of *R. S. O.*, ch. 162, issued in favor of *P.*, a policy against fire which had not endorsed upon it the statutory conditions (*R. S. O.*, ch. 162,) but had conditions of its own, which were not printed as variations in the mode indicated by the Act.

The Queen Insurance Company, an English Company carrying on business under an Imperial Act, issued in favor of *P.*, after the passing of *R. S. O.*, ch. 162, an interim receipt for insurance against fire subject to the conditions of the Company.

The Western Assurance Company, a Canadian Company, incorporated by the parliament of *Canada* before Confederation, issued a policy of insurance against fire in favor of *J.*, the conditions of the policy, which were different from those contained in *R. S. O.*, ch. 162, not being added in the manner required by the statute.

The three companies were authorized to do Fire Insurance business throughout *Canada* by virtue of a license granted to them by the Minister of Finance under the Acts of the Dominion of *Canada* relating to Fire Insurance Companies.

The properties insured by these companies were all situated within the province of *Ontario*, and being subsequently destroyed by fire, actions were brought against the companies.

The Supreme Court of *Canada*, after hearing the arguments in the three cases, delivered but one judgment, and it was—

Held,—That "The Fire Insurance Policy Act," *R. S. O.*, ch. 162, was not *ultra vires* and is applicable to Insurance Companies (whether foreign or incorporated by the Dominion) licensed to carry on insurance business throughout *Canada*, and taking risks on property situate within the province of *Ontario*.

2. That the legislation in question, prescribing conditions incidental to insurance contracts passed in *Ontario* relating to property situate in *Ontario*, was not a regulation of Trade and Commerce within the meaning of these words in sub-sec. 2, sec. 91, *B. N. A. Act*.

3. That an insurer in *Ontario*, who has not complied with the law in question and has not printed on his policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up *against* the insured his own conditions or the statutory conditions, the insured alone, in such a case, is entitled to avail himself of any statutory condition.

[*Taschereau* and *Gwynne*, J. J., dissenting.]

Per *Taschereau* and *Gwynne*, J. J.:—That the power to legislate upon the subject-matter of insurance is vested *exclusively* in

the Dominion parliament by virtue of its power to pass laws for the regulation of Trade and Commerce under the 91st sec. of the *B. N. A. Act.*

APPEALS from judgments of the Court of Appeal for *Ontario*, which maintained three actions brought by the respondents upon policies of insurance against the appellants.

In the case of *Parsons* v. *The Citizens' Insurance Company*, the action was brought upon a policy of insurance, dated the 4th of May, 1877, issued by the defendants, who are a corporation incorporated by Act of the Dominion of *Canada*, insuring a building of the plaintiff in the town of *Orangeville*, *Ontario*, in the sum of $2,500. The building was destroyed by fire on the 3rd of August, 1877. The action was tried by *Patterson*, J. A., with a jury at the *Guelph* Assizes in the spring of 1878. The jury answered certain questions put to them by the judge (not material to the appeal), who thereupon entered a verdict for the plaintiff for $2,575. It was proved that at the time of the issuing of the policy by the defendants, the plaintiff had another policy for $1,000 on the building in the *Western Assurance Company*, which was not disclosed to the defendants. This it was submitted was a clear breach of the Company's conditions printed on the policy, and also of the eighth condition of the "Fire Insurance Policy Act," Revised Statutes of *Ontario*, ch. 162. The company's conditions were printed on the policy, but not in coloured ink as directed by that Act, nor were the statutory conditions printed on the policy. The judge reserved all questions of law for the court *in banc*. A rule was taken out to enter a non-suit pursuant to leave reserved or for a new trial, which was afterwards discharged. The defendants then appealed to the Court of Appeal for *Ontario*. The defendants were incorporated by the late province of *Canada*, 19 and 20 *Vic.*, ch. 124, (1856), and by 27 and

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28 *Vic.*, ch. 98 (1864) their powers were enlarged, and by Dominion statute 39 *Vic.*, ch. 55 (1876), these Acts were amended and their name changed to its present name.

The policy of insurance on plaintiff's building, occupied as a general hardware store, was issued to the plaintiff after the passing of the provincial Act of *Ontario*, 39 *Vic.*, ch. 24, and did not contain the conditions made necessary by that statute. The Court of Queen's Bench held in accordance with a previous decision of that court, in *Ulrich* v. *The National Insurance Company* (1), "that insurance companies incorporated by the Dominion of *Canada* are, as regards insurance effected by them in the province of *Ontario*, bound by the provincial statute, subject to all the consequences of non-compliance with its provisions;" and also in accordance with another previous decision of that court, in *Frey* v. *The Mutual Fire Insurance Co. of the County of Wellington* (2): "That a policy of insurance issued after the passing of the Act, but not in compliance with its provisions, is to be deemed *as against the assurer* as a policy without conditions." From this decision, the defendants appealed to the Court of Appeal for *Ontario*.

The reasons of appeal were to the following effect:

1. That the Policy sued upon is not to be deemed, as against the assured or otherwise, to be a policy without any conditions; that it was clearly not the intention of either party, plaintiff or defendants, to enter into an absolute unconditional contract of Insurance; that the said policy must be treated either as subject to the conditions therein endorsed, or as subject to the statutory conditions, in which case defendants were entitled to succeed upon the issue joined upon the pleas alleging that respondent had effected

(1) 42 U. C. Q. B. 141. (2) 43 U. C. Q. B. 102.

other or prior insurances on the same property, without having notified the company of such insurance, and having had the same endorsed on the policy, or otherwise acknowledged by the company. The defendants refer to *Ulrich* v. *The National Insurance Company* (1); *Frey* v. *The Mutual Fire Insurance Company of the County of Wellington* (2).

2. That the Revised Statutes of *Ontario*, ch. 162, "An Act to secure uniform conditions in Policies of Fire insurance," is *ultra vires* of the legislative assembly of the province of *Ontario*, so far as regards the defendants, a company incorporated by the parliament of the Dominion of *Canada*, and that it is inoperative therefore to affect the said policy or the conditions thereon endorsed.

The principal reasons against the appeal were:

"1. The plaintiff contends that the defendants, having wholly omitted the statutory conditions from their said policy, and having adopted a variation thereof, or a new condition instead thereof, without complying with the requirement of the Fire Insurance Policy Act, cannot set up the statutory conditions which they have not printed in their policy, or the variations or new conditions not in accordance with the Act. The condition relied upon is therefore not legal or binding on the plaintiff.

"2. The plaintiff submits that the Revised Statute of *Ontario*, ch. 162, is not *ultra vires* of the legislature of the province of *Ontario* as regards the defendants."

The Court of Appeal held the plaintiff's contention well founded and dismissed the appeal with costs. *Spragge*, C., in delivering judgment said: "I incline

(1) 42 U. C. Q. B. 141. (2) 43 U. C. Q. B. 102.

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to agree, contrary, I confess, to my first impression, that the policy in this case must be regarded as a policy without any express condition."

In *Parsons* v. *The Queen Insurance Company*:

This action was brought upon an interim receipt alleged to have been issued by an agent of the defendants, on the 3rd August, 1877, insuring against loss by fire to the extent of $2,000, a general stock of hardware paints, oils, varnishes, window glass, stoves, tinware, castings, hollow-ware, plated and fancy goods, lamps, lamp glasses, and general house furnishing goods.

The interim receipt was as follows:—

"Fire Department. Interim Protection Note.

QUEEN FIRE AND LIFE INSURANCE COMPANY,

Chief Office, Queen Insurance Buildings, *Liverpool*, No. 33.

Canada Head Office, 191 St. James St., *Montreal*. The Queen Insurance Co., *Orangeville* Agency, 3rd Aug., 1877.

"Mr. *William Parsons*, having this day proposed to effect on insurance against fire, subject to all the usual terms and conditions of this Company, for $2,000, on the following property, in the town of *Orangeville*, for twelve months, namely: on general stock of hardware, paints, oils, varnishes, window glass, stoves, tinware, castings, hollow-ware, plated fancy goods, lamps, lamp glasses and general house-furnishing goods, and having also paid the sum of forty dollars as the premium on the same, it is hereby held assured under these conditions until the policy is delivered, or notice given that the proposal is declined by the Company, when this interim note will be thereby cancelled and of no effect.

"(Signed), A. M. KIRKLAND,
"Agent to the Company.

"N. B.—The deposit will be returned, less the pro-

portion for the period, on application to the agent signing this note, in the event of the proposal being declined by the company. If accepted, a policy will be prepared and delivered within thirty days. If a holder does not receive a policy during the specified time he should apply to the head office in *Montreal*."

The case was tried at the Spring Assizes, 1878, at *Guelph*, before *Macdonald*, Judge of the County Court of the County of *Wellington*, sitting at the request of Mr. Justice *Patterson*.

The only question submitted by His Honor to the jury was whether there were more than 25 lbs. of gunpowder on the premises containing the property assured at the time of the fire.

The jury found in favour of the plaintiff; and a verdict was thereupon entered for $2,070, the learned Judge holding the defendants' conditions not to be part of the contract.

In Easter term, 41 *Victoria*, a rule nisi was granted by the Court of Queen's Bench, calling upon the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, for mis-direction of the learned judge, there being further insurances on the property insured; a greater quantity of gunpowder was contained in the premises containing the insured goods than permitted by, and contrary to, the terms of the defendants' contract with the plaintiff; and the proof of loss required by the contract was not filed in due time, and which said mis-direction was in telling the jury there was no question for them except the quantity of gunpowder on the premises.

The Court of Queen's Bench, not being able to discover any ground either upon the law or evidence for setting aside the verdict, discharged the rule.

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Defendants appealed from this judgment to the Court of Appeal for *Ontario*.

The reasons of appeal raising the points in this case different from those in *Parsons* v. *The Citizens' Insurance Company* were:

"4. The *Ontario* Revised Statute, ch. 162, does not apply to this contract, because this action is brought upon an interim receipt, and no policy of insurance had been entered into or was in force between the appellants and the respondent. The conditions to be taken as part of the contract are the appellants' ordinary conditions; and it being admitted by the respondent that he had more than 10 pounds of gunpowder on the premises containing the subject insured, at the time of the fire, the appellants are entitled to succeed on the 8th plea, and a verdict should have been entered in their favor thereon.

"5. The *Ontario* Act cannot affect the contract of an English Company doing business under an Imperial Charter, as is the case of the present appellants (1).

The Court of Appeal dismissed the appeal, with costs.

In the case of *Johnston* v. *The Western Assurance Company*, the action was also brought upon a policy of insurance against fire. The only point raised on this appeal different from those raised in *Parsons* v. *The Citizens' Insurance Company* was that the Act 39 *Vic.*, ch. 24, *Ont.*, was *ultra vires*, because it was not within the power of the provincial legislature to legislate regarding an Insurance Company incorporated before Confederation by a charter granted to it by the parliament of the old province of *Canada*, and since amended by the Dominion parliament.

In the case of *Parsons* v. *The Citizens' Insurance Company*, Mr. *Robinson*, Q. C., and Mr. *Bethune* were

(1) 7 & 8 Vic. (Imp. Act), ch. 110.

heard for appellants, and Mr. *Dalton McCarthy*, Q. C., for respondent.

In the case of *Parsons* v. *The Queen Insurance Company*, Mr. *Robinson*, Q. C., (and Mr. *J. T. Small* with him) appeared on behalf of the appellants, and Mr. *Dalton McCarthy*, Q. C., on behalf of the respondent.

In the case of *Johnston* v. *The Western Assurance Co.*, Mr. *Bethune* was heard for appellants, Mr. *Mowat*, Q.C., Attorney General of *Ontario*, was heard on the question of the jurisdiction of the provincial legislature, and Mr. *Dalton McCarthy*, Q. C., for respondent.

The arguments of Counsel and the authorities relied upon were as follows :—

For appellants :

The *Ontario* legislature had no power to deal with the general law of insurance; the power to pass such enactments was within the legislative authority of the Dominion parliament, under sec. 91, sub-sec. 3, *B. N. A. Act*, "The regulation of trade and commerce."

Insurance is a trade or business which may be and is in some of its branches carried on by individuals, and such persons are deemed to be traders in consequence of their following such trade or business. The hundreds of millions of insurances now effected, the usage of insurance which obtains, and the importance, or rather necessity of insurance to the conduct of other branches of trade, business and commerce, (in which insurance is now treated as part of the cost of merchandise, besides being a means of credit) all bring it within the definition of trade or commerce; and it has been so declared and recognized by the parliament of *Canada*, in the numerous private acts authorizing companies to carry on the trade or business, in the public acts controlling the business and providing for its being conducted under license, and in the Insolvent Act of 1875, which provides that it shall apply amongst

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others to * * * "trading companies" * * "except incorporated insurance companies," and in the Act of 1878, applying to insurance companies the provisions of the Insolvent Act.

The *British North America Act* expressly reserves for the Dominion exclusively certain matters, and all matters, in fact, not especially named and assigned by section 92 to the province: *L'Union St. Jacques* v. *Belisle* (1); *Dow* v. *Clarke* (2); *Attorney General* v. *Queen's Insurance Company* (3); *Hansard* (4).

The Dominion powers are exclusive, from their nature, without any express prohibition of the exercise of the same powers by the provincial legislatures.

The words "property and civil rights" used in the ninety-second section *British North America Act* when granting their respective powers to the provincial legislatures, are evidently used in that Act with a much more restricted meaning than in the provincial Act 32 *Geo. III.*, Con. Stat. *U. C.*, ch. 9; for the *British North America Act* divides into numerous sub-divisions the powers which were held to pass under these words in the Act of 32 *Geo. III.* See *Anderson* v. *Todd* (5).

Upon the view taken in the court below of the powers of the legislature of *Ontario*, it would be competent for that legislature to enact regulations, in effect, prohibitory of their business, as lawfully authorized by the Canadian parliament, a consideration fatal to that view.

The decision in *Paul* v. *Virginia* (6), so much relied on by the Court of Appeal, is not an authority here, and the appellants submit that the reasoning is not applicable to this case.

(1) L. R. 6 P. C. 31, 36.
(2) Ibid. 272.
(3) L. R. 3. App. Cases 1090.
(4) 3rd series, vol. clxxxv. p. 566.
(5) 2 U. C. Q. B. 82.
(6) 8 Wallace 168.

The relative positions of the parliament of the Dominion of *Canada* and the legislatures of the various provinces are so entirely different from those of Congress and the legislature of the several States that no analogy can safely be drawn from a decision of the *United States* courts. The powers vested in Congress to "regulate commerce with foreign and *among* the several States" is a very different thing from the general powers to legislate with respect to "trade and commerce," which words are used without limitation or restriction in the *British North America Act*, thus giving to the parliament of the Dominion exclusive jurisdiction over all matters of trade and commerce, domestic as well as foreign, not only *among* the provinces, but in them. The difference alluded to is plainly shewn by the language of the Supreme Court, at p. 183: "Such contracts are not *inter*-state transactions, though the parties may be domiciled in different states." * * * "They do not constitute a part of the commerce *between* States any more than a contract for the purchase and sale of goods in *Virginia* by a citizen in *New York*, whilst in *Virginia*, would constitute a portion of such commerce." See also *Severn* v. *The Queen* (1).

The counsel for appellants in the case of *Parsons* v. *The Queen Insurance Company* contended further, that the *Ontario* statute was *ultra vires* of the legislature with respect to an English Company doing business under an Imperial charter, as is the case of the present appellants. Imp. Stat. 7 & 8 *Vic.*, ch. 110 (*Chitty's* Stat. vol. I, 649), and "The Company's Act," 1862 (*Chitty's* Stat. vol. I, 725.) The *British North America Act* was not intended to abrogate or diminish the powers already granted to English corporations doing business in *Canada*, under Imperial Acts. *Smiles* v. *Belford* (2); *Rutledge* v. *Low* (3).

(1) 2 Can. Sup. Ct. R. 104. (2) 1 Ont. App. R. 436.
(3) L. R. 3 H. L. 100.

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That the statute did not apply to a case in which a policy had not been actually delivered. The directions contained therein, with respect to printing, show that it never was intended to apply to the contract entered into by an interim receipt, such as is known to the public and insurers. The ordinary statutory conditions printed on such a document would be practically illegible from the smallness of the type necessarily employed. And, moreover, the language of the statute is explicit, the word "policy" alone being employed. As regards the temporary insurance by means of an interim receipt, the parties are at liberty to make such conditions as they may choose. *McQueen* v. *Phœnix Mutual Insurance Company* (1).

In any event the appellants are entitled to the benefit of the conditions against further insurance, whether their own conditions or the statutory makes no difference, as both are practically the same. *Geraldi* v. *The Provincial Insurance Company* (2).

In the case of *Parsons* v. *The Citizens' Insurance Company of Canada*, the counsel relied also on the fact that appellants company were incorporated by the late province of *Canada* and authorized to make *contracts* of insurance throughout the late province of *Canada*, and also on the fact that the respondent had effected a further insurance, which was contrary to the statutory conditions as well as to the appellants' ordinary conditions.

In the case of *Johnston* v. *The Western Assurance Company*, it was also contended that the appellants, having been incorporated by the parliament of the old province of *Canada*, and their charter having since been varied and amended by the Dominion parliament—the Company in fact being a creature of the parliament of *Canada*—the legislature of the province of *Ontario* cannot curtail or limit or put any restriction on the power of

(1) 29 U. C. C. P. 511, 521. (2) 29 U. C. C. P. 321.

the Company to do business in any province of *Canada*. It never was intended, under the *British North America Act*, that the provincial legislature should alter, vary or restrict corporate powers already possessed by companies doing business at the time of the passing of the Act.

For respondents :

The first question involves the constitutionality of the Act of *Ontario*, 39 *Vic.*, ch. 24, respecting uniform conditions on policies of Insurance. This Act is constitutional and within the powers of the *Ontario* legislature : *B. N. A. Act*, sections 91, and 92, sub-secs. 11, 13 and 16 ; *Billington* v. *Provincial Insurance Company* (1) ; *Dear* v. *The Western Insurance Company* (2) ; *Ulrich* v. *The National Insurance Company* (3) ; *Parsons* v. *Citizens' Insurance Company* (4) ; *Frey* v. *The Mutual Fire Insurance Company of the County of Wellington* (5) ; *Parsons* v. *The Queen's Insurance Company* (6).

The making of a policy of Insurance is not a transaction of commerce within sec. 91 (sub-sec. 2) of the *B.N.A. Act*, but is a contract of indemnity. *Paul* v. *Virginia* (7) ; *Nathan* v. *Louisiana* (8). The matter in question here comes within sub-secs. 11, 13 and 16, or one of them, of sec. 92 *B. N. A. Act*. Sub-sec. 2 of sec. 91, giving power to the parliament of *Canada* to regulate trade and commerce, refers to general legislation applicable to the Dominion, and does not withdraw from the provinces the right to legislate respecting private property and contracts within the province.

Contracts of insurance are matters relating to property

(1) 24 Grant 299.
(2) 41 U. C. Q. B. 553.
(3) 42 U. C. Q. B. 141 ; S. C., in Appeal, 4 Ont. App. R. 84.
(4) 43 U. C. Q. B. 261 ; S.C., in Appeal, 4 Ont. App. R. 96.
(5) 43 U. C. Q. B. 102.
(6) 43 U. C. Q. B. 271 ; S. C., in Appeal, 4 Ont. App. R. 103.
(7) 8 Wallace 168.
(8) 8 Howard 73.

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and civil rights within sec. 92 (sub-sec. 13), *B. N. A. Act*, and are matters of a merely local or private nature in the province within sub-sec. 16, sec. 92.

These contracts are peculiarly local in their nature, inasmuch as they relate exclusively to the protection and security of property within the province. They are as clearly within the power of the local legislature as the many other classes of contracts admittedly within such power, and in respect of which the legislature of *Ontario* has always legislated without question as to its power to do so; such as the forms and solemnities of the instruments of title and conveyance of property; statutes requiring certain promises to be in writing; statutes of limitations by which titles and contracts are extinguished; statutes relating to married women and their dealings with such property; these and all other statutes of a similar character, are binding upon all persons and corporations, both foreign and domestic, contracting in *Ontario*.

So far as relates to the interpretation of the *B. N. A. Act*, that Act must be interpreted in the light of the established principles of public law. By that law, as held both in *England* and *America*, contracts are local matters; as to their nature, validity and obligation, they are governed by the law of the place where made and where they are to be executed. They are treated as matters of domestic legislation. See *Story* on Con. of *U.S.* (1); 2 *Kent's* Com. (2); *Robinson* and *Bland* (3); *Wheaton* Int. Law (4); *Westlake* Private Int. Law (5).

The appellants are a private corporation. It is merely a company of private persons with corporate powers; the business is carried on solely for the private benefit

(1) Sec's 279, 280, 364, 541 and cases referred to in the text.
(2) 3 Edn. sec. 37, pp. 393, 394, sec. 39, pp. 457, 459.
(3) 2 Burr. 1079.
(4) Eng. Ed. 1878, p. 194, sec's. 145, 146.
(5) Art. 208, 208, pp. 195, 196.

and profit of the individuals composing it; it has no connection with government; it is not an instrument of Government created for its own purposes, such as national banks in the *U.S.*

There is no analogy here to the case of a province taking national property, or salaries paid by government, or other acts, the effect of which might impede or hamper the operations of Government. See *Story* on Con. of *U. S.* (1).

There is no express provision in any of the statutes relating to the appellants company exempting them from the jurisdiction of *Ontario* to regulate insurance contracts and prescribe their forms and conditions, and such exemption cannot be implied: *Pomeroy* Con. Law 380; and the above principle applies even in the *U.S.*, the constitution of which contains a provision that "no State shall pass any law impairing the obligation of contracts," to which no similar enactment is found in the *B. N. A. Act.* The provincial legislatures are not in any accurate sense subordinate to the parliament of *Canada:* Each body is independent and supreme within the limits of its own jurisdiction: so that even if contracts are considered a kind of commerce, they are still governed by sec. 92, the powers in which should be read as exceptions to those conferred upon parliament by sec. 91, *B. N. A. Act:* *Severn* v. *The Queen* (2); *Re Slavin and Orillia* (3); *Reg.* v. *Boardman* (4); *Reg.* v. *Longee* (5); *L'Union St. Jacques de Montreal* v. *Belisle* (6).

If the local legislature has jurisdiction respecting the subject-matter of insurance contracts at all, it has the most full and ample jurisdiction—*plenum imperium* —it has sovereign power within its own limits. This principle requires that the legislature of a province

(1) Secs. 1262, *et seq.*
(2) 2 Can. Sup. Ct. R. 110.
(3) 36 U. C. Q. B. 172.
(4) 30 U. C. Q. B. 553.
(5) 10 C. L. J. N. S. 135.
(6) L. R. 6 P. C. 35.

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has power to prescribe or limit the conditions of insurance contracts made within the province, respecting property situate within its limits, whether such contracts are made by citizens of the province or provincial corporations, or by foreigners or foreign corporations. The provincial legislature has power to incorporate insurance companies; these are bound by local laws, but the argument of the appellants would enable the foreign corporation to claim immunity from provincial laws while enjoying the protection of these laws; to be "a law unto itself," while reaping the benefit of local business; thus, giving it a position more favourable than its local rival: a most curious and startling anomaly, and, it is submitted, contrary to all principle and authority.

The fact that certain powers have been assumed by parliament hitherto prove little, for the provinces have not power to disallow these Acts, and can only look to the courts for defence against the encroachments of the Federal power, whereas Acts passed by the local legislatures might be disallowed by the Dominion parliament. As to the contention of the appellants that the *Ontario* Act in question does not extend to them, there is nothing in the Act shewing or implying that the appellants are exempt from its provisions; and the authorities quoted above, and the reasons already given, shew that the Act extends to all policies of insurance made within the province, respecting property within the province.

Next, as to the construction of the statute in question —39 *Vic.*, ch. 24, *Ont.* The object of the Act was to protect the insured, not to benefit the insurer. The stand point of the legislature was this: the ends of justice were often defeated, and the insured defrauded by the multitude of conditions, many of them obscure and unfair. The intention was to confine the insurers

to fair and reasonable conditions by placing them under legislative or judicial control; and this object was to be attained as follows: As to certain specified conditions the legislature decided a *priori* that they are fair and reasonable and authorize the insurer to use them if he choses, these are called the statutory conditions, and he is directed to print them on the policy; further or different conditions may be used, provided they are printed in the manner directed, and provided they are fair and reasonable in the opinion of the proper tribunal upon the trial of any case. So far the object is to *limit the insurer to fair conditions*, but not to ordain that these conditions are to be part of every insurance contract. But still further in pursuance of the object of the Act to protect the insured, who, in many cases, would know nothing of the statute, the insurer is required to print the conditions on the policy if he desires the benefit of them, and to prevent him benefiting by his own omission it is ordained that, *as to him*, these conditions shall apply, whether printed or not. Notwithstanding the words of section 1 as to printing the conditions, the appellants contend that they may print them on the policy or omit them at their option, and that the effect is the same in either case: it is submitted such a construction is untenable, and that the true construction is that the conditions are not binding on the insured unless printed in compliance with the Act.

As to the construction of sec. 2: The legislature is there dealing with *variations*, it there assumes that the statutory conditions are printed as directed, because otherwise there could be no variation; then the statutory conditions being on the policy, and the variations not being made in the manner directed, it is provided that, *as against the insurer*, the variations are void and the policy subject to the statutory conditions only.

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By the above construction of the Act, both sections are made to harmonize and to effectuate the legislative intent, and this construction has been adopted by the various courts in *Ontario*. *Ulrich* v. *The National Insurance Company* (1); *Dear* v. *The Western* (2); *Parsons* v. *The Citizens Insurance Company* (3); *Parsons* v. *The Queen's Insurance Company* (4); *Frey* v. *The Wellington Mutual* (5).

The question as to the constitutionality of the *Ontario* statute 39 *Vic.*, ch. 24, having been raised in each case, the following judgments were delivered applicable to the three appeals.

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RITCHIE, C. J.:

There never, probably, was an Act, the validity of which was questioned, that came before a Court so strongly supported by judicial and legislative authority as this Act. It was legislation suggested as necessary by the Court of Queen's Bench of *Ontario*, in the case of *Smith* v. *Commercial Union Insurance Co.* (6).

The legislature of *Ontario*, adopting the suggestion, passed, 38 *Vic.*, ch. 65, authorizing the issue of a commission to three or more persons holding judicial office in the province, and by section 2, enacted in these words, that:

> A commission is to be issued by the Lieutenant-Governor, addressed to three or more persons holding judicial office in this province, for the purpose of determining what conditions of a fire insurance policy are just and reasonable conditions, and the commissioners may take evidence, and are to hear such parties interested as they shall think necessary; and a copy of the conditions settled, approved of and signed by the Commissioners, or a majority of them, shall be

(1) 42 U. C. Q. B. 141.
(2) 41 U. C. Q. B. 553.
(3) 43 U. C. Q. B., 261; S. C. 4 Ont. App. R. 96.
(4) 43 U. C. Q. B. 271; S. C. 4 Ont. App. R. 103.
(5) 43 U. C. Q. B. 102.
(6) 33 U. C. Q. B. 69.

* PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

deposited in the office of the Provincial Secretary; and in case, after the Lieutenant-Governor, by proclamation published in the *Ontario Gazette*, assent to the said conditions, any policy is entered into or renewed, containing or including any conditions other than or different from the conditions so previously approved of and deposited; and if the said conditions, so not contained or included, is held by the Court or Judge before whom a question relating thereto is tried, not to be just and reasonable, such conditions shall be null and void.

This Act was not disallowed, and a commission by the Government of *Ontario* was duly issued in accordance therewith to learned judges, who reported what they deemed just and reasonable conditions, whereupon the *Ontario* legislature passed the 39 *Vic.*, ch. 24: "An Act to secure uniform conditions in Policies of Fire Insurance," which is the Act now questioned, and which, after reciting that under the provisions of the Act, 38 *Vic.*, ch. 65., the Lieutenant-Governor issued a commission to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies, on real or personal property, in this province (*Ontario*), and, after reciting that a majority of the Commission had settled and approved of the conditions set forth in the schedule of the Act, and that it was advisable that the same should be expressly adopted by the legislature as the statutory conditions to be contained in the policies of fire insurance entered into, or in force in this province, the first sections enact:—

1. The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereinafter entered into or renewed, or otherwise in force in *Ontario*, with respect to any property therein, and shall be printed on every policy with the heading "Statutory Conditions;" and if a company (or other insurer) desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added, in conspicuous type, and in ink of different color, words to the following effect: "Variations in conditions."

This policy is issued on the above statutory conditions, with the following variations and conditions:—These variations (or as the

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case may be) are, by virtue of the *Ontario* statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the Company.

2. Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition or omission shall be legal and binding on the insured, and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, and, on the contrary, the policy shall, as against the insurers, be subject to the statutory conditions only, unless variations, additions or omissions, are distinctly indicated and set forth in the manner or to the effect aforesaid.

This Act was never disallowed, but has since its passage been acted on; and the *Ontario* reports show that questions as to its construction have been before the Courts of *Ontario*, without its validity having been impugned by either Bench or Bar, and, when the point was raised, its validity was affirmed by the unanimous opinion of the Court, to whom the question was first submitted; it was so held and acquiesced in in two cases unappealed from, and, when again raised in the present cases, the Court of Queen's Bench unanimously reaffirmed its former decision, and, on appeal, the Appeal Court of *Ontario* unanimously affirmed that decision. But this is not all; we have the Dominion parliament recognizing, by expressed statutory terms, the right of the local legislature to incorporate insurance companies and deal with insurance matter.

So far back as the 31 *Vic.*, ch. 48 (1868), when the intention of the parliament of *Great Britain*, in enacting the *British North America Act*, must have been fresh in the minds of the leading men who first sat in the Dominion parliament, and who had taken the most prominent part in discussing and agreeing on the terms of Confederation and the provisions of the *British North America Act*, and who, we historically know, watched its passage through the parliament of *Great Britain*, we

find the Dominion parliament in that year (1868) passing "An Act respecting Insurance Companies," and in that Act, by section 4, thus clearly affirming the right of the local legislature to incorporate insurance companies, after fixing the amount to be deposited by Life, Fire, Inland Marine, Guarantee or Accident Insurance Companies, certain companies are excepted in these words:—

Except only in the case of companies incorporated before the passing of this Act by Act of the parliament of *Canada*, or of the legislature of any of the late provinces of *Canada*, or *Lower Canada* or *Upper Canada*, or of *Nova Scotia* or *New Brunswick*, or which may have been or may *hereafter be incorporated* by the parliament of *Canada*, *or by the legislature of any province of the Dominion, and carrying on the business of Life or Fire Insurance.*

And, as if to place this beyond all doubt, and to show that companies, which might be so incorporated by the local legislature, were local incorporations and its business should be confined within the province incorporating them, we find it enacted in section 25:—

That the provisions of this Act as to deposit and issue of license shall not apply to any insurance company incorporated by any Act of the legislature of the late province of Canada, or incorporated, *or to be incorporated, under any Act of any one of the provinces of Ontario, Quebec, Nova Scotia, or New Brunswick*, so long as it shall not carry on business in the Dominion *beyond the limits of that province* by the legislature or government of which it was incorporated, but it shall be lawful for any *such company to avail itself* of the provisions of this Act.

Could words or provisions in recognition and affirmance of the powers of the local legislatures be stronger? And in 38 *Vic.*, ch. 20 (1875), "An Act to amend and consolidate the several Acts respecting insurance, in so far as regards Fire and Inland Marine business," we find, by section 2, a distinct recognition of companies incorporated under any Act of the legislature of any province of the Dominion of *Canada:*

Section 2.—This Act shall apply only to companies *heretofore* incorporated by any Act of the legislature of the late province of

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Canada, or by any Act of the legislature of any of the provinces of Canada, and which, upon the day of the passing of this Act, were also licensed, under Act of the parliament of *Canada*, to transact business of insurance in *Canada, and also to any Company heretofore or which may hereafter be incorporated by Act of parliament of Canada*, and to any foreign insurance company *as hereinbefore defined*; and it shall not be lawful for the Minister of Finance to license any other company than those in this section above mentioned; and no other company than those above mentioned, shall do any business of fire or inland marine insurance throughout the Dominion of *Canada*; but nothing herein contained shall prevent any insurance company incorporated by, or under, any Act of the legislature of the late province of *Canada, or of any province of the Dominion of Canada*, from carrying on any business of insurance within the limits of the late province of *Canada or of such Province only*, according to the powers granted to such insurance company within such limits as aforesaid, without such license as hereinafter mentioned.

But the Dominion statutory recognition of the rights of the local legislation, strong as it is, does not rest here. As late as 1877, by the 40 *Vic.*, ch. 42, "An Act to amend and consolidate certain Acts respecting insurance," we find it thus enacted by section 28:

This Act shall not apply to any company *within the exclusive legislative control of any one of the provinces of Canada unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall have the power of transacting its business of insurance throughout Canada.*

So again, in the year 1878, the Dominion parliament distinctly recognized the incorporation by the *Ontario* legislature of the *Ontario Mutual Life Assurance Company, incorporated and carrying on business in the province of Ontario*, under the Act, ch. 17 of the statutes of said province, passed in the 32 *Vic.*, and incorporated the said company to enable it to carry on business of life assurance on the mutual principle, and doing all things appertaining thereto or connected therewith, *as well in the said province of Ontario as in the other provinces of the Dominion.*

We find, then, legislation in the direction carried out

by this Act recommended in a solemn judgment of the Queen's Bench of *Ontario*; we find the matter referred to a commission of Judges who reported to the Government of *Ontario* the conditions and provisions which, in their opinion, should be enacted by the legislature of that province, and form, as against the insured, the statutory conditions of a policy of insurance in force in *Ontario* with respect to any property therein, and the means necessary to be adopted by the insured if he desire to omit or vary any of such conditions. Here, then, we have the legislature of *Ontario* assuming the right to deal with insurance companies and insurance business, their legislative action not disallowed. We find this particular Act in several cases acted upon by the bar and bench of *Ontario* without its validity being questioned by either, and when at last questioned, we find its validity sustained by all courts and judges of original jurisdiction who have been called on to adjudicate on this point, and, finally, by the unanimous opinion of the Court of Appeal; and last, but not least, we have the express legislation of the parliament of *Canada*, expressly recognizing that the local legislatures have power to deal with matters of insurance.

I do not put forward these considerations as conclusive of the questions in this Court of Appeal, because, if we were clearly of opinion that under the *B. N. A. Act* the legislature of *Ontario* had not the power to pass the law, we would be bound to say so and to overrule the decisions of the courts below and disregard the legislation of the Dominion parliament, for, if not within the *B. N. A. Act*, neither the affirmance of the power by the local legislature nor the legislative recognition of it by the Dominion parliament could confer it. Still I am individually well pleased that I am enabled satisfactorily to arrive at a conclusion which relieves me from the necessity of overruling the Acts and decisions

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of so many learned Judges, and the legislative actions of the legislature of *Ontario* and the repeated statutory declarations of the parliament of *Canada*.

But this does not relieve me from the duty of showing immediately to the parties interested, and through them to the parliament of *Canada* and the legislatures of the provinces, by what process of reasoning I have arrived at that conclusion.

Is, then, such legislation as this with respect to the contract of insurance beyond the power of local legislation? I think at the outset I may affirm with confidence that the *B. N. A. Act* recognizes in the Dominion constitution and in the provincial constitutions a legislative sovereignty, if that is a proper expression to use, as independent and as exclusive in the one as in the other over the matters respectively confided to them, and the power of each must be equally respected by the other, or *ultra vires* legislation will necessarily be the result.

It is contended that the local legislature not only cannot incorporate a local insurance company, but cannot pass any Act in reference to insurance, inasmuch as it is contended such legislation belongs exclusively to the Dominion parliament, under the power given that parliament to legislate in relation to "the regulation of trade and commerce."

As to the incorporation of insurance companies, this point is not directly, though it is perhaps indirectly, involved in the questions raised in these cases. It may be remarked that, in the enumeration of the powers of parliament, the only express reference to the power of incorporation is under No. 15, "Incorporation of Banks," though it cannot be doubted that, under its general power of legislation, it has the power to incorporate companies with Dominion objects.

But it is said that insurance companies are trading

or commercial companies, and therefore within the terms "trade and commerce;" but we have matters connected with trade and commerce, such as navigation and shipping, banking incorporations, weights and measures, and insolvency, "and such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the provinces," and these and the other enumerated "classes of subjects shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of the subjects by this Act assigned exclusively to the legislatures of the provinces."

This shows inferentially that there may be matters of a local and private nature with which the local legislatures may deal, and which, but for the exclusive power conferred on the local legislatures, might be comprised under some of the general heads set forth in section 91, as belonging to the Dominion parliament. This is made very apparent in respect to navigation and shipping.

By section 91 the exclusive legislative authority of the parliament of *Canada* is declared to extend to all matters coming within the classes of subjects next hereinafter enumerated, of which "navigation and shipping" is one. When we turn to the enumeration of the exclusive powers of the provincial legislatures, we find "local works and undertakings, other than such as are of the following classes: (*a*) Lines of steamers and other ships, railways, canals, telegraphs and other works and undertakings" connecting the province with any other or others of the provinces, or extending beyond the limits of the province. (*b*) Lines of steamships between the provinces and any British or foreign country. (*c*) Such works, as although wholly situate within the province, are, before or after their

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execution, declared by the parliament of *Canada* to be for the general advantage of *Canada*, or for the advantage of two or more of the provinces"—and then follows the incorporation of companies with provincial objects.

Here, then, are matters immediately connected with navigation and shipping, trade and commerce.

If the power to legislate on navigation and shipping and trade and commerce, vested in the Dominion parliament, necessarily excluded from local legislatures all legislation in connection with the same matters, and that nothing in relation thereto could be held to come under local works and undertakings, or property or civil rights, or generally all matters of a merely local or private nature in the province, or the incorporation of companies with provincial objects, what possible necessity could there be for inserting the exception "other than such as are of the following classes as above" (*a*, *b*, *c*). On the contrary, does not this exception show beyond all doubt, by irresistible inference, that there are matters connected with navigation and shipping, and with trade and commerce, that the local legislatures may deal with, and not encroach on the general powers belonging to the Dominion parliament for the regulation of trade and commerce, and navigation and shipping, as well as railways, canals and telegraphs? Can it be successfully contended that this is not a clear intimation that the local legislatures were to have, and have, power to legislate in reference to lines of steamers and other ships, railways, canals, and other works and undertakings wholly within the province, subject, no doubt, to the general powers of parliament over shipping and trade and commerce, and the Dominion laws enacted under such powers, as, for instance, the 31st *Vic.*, ch. 65 (1868), "An Act respecting the inspection of steamboats, and for the greater safety of passengers by them," or the Act 36 *Vic.*, ch. 128, "An Act relating to shipping?"

With reference to insurance companies, and the business of insurance in general, it is contended that insurance companies are trading companies, and therefore the business they transact is purely matter of trade and commerce, and therefore local legislatures cannot in any way legislate either in reference to insurance companies or insurance business.

As to such a company being a trading company, *Jessel*, M. R., in the case of *in re Griffith* (1), did not seem to think the question so abundantly clear as is supposed; he says:—

> I come now to the next point, which is, what is this company? Is it a trading or other public company? * * *
>
> So that we have it that it must be a public company, whether it is a trading or other company; therefore it seems immaterial to consider whether a particular company is or is not a trading company, and I am glad of it, because, though I think an insurance company might be called a trading company, many people might take the opposite view of the word "trade." I take the larger view, and think it would be called a trading company, but it is immaterial. If it is a public company at all, and not a trading company, it comes under the term "other public company (2)."

But in the view I take of this case, I am willing to assume that insurance companies may be considered trading companies, and yet that it by no means follows that the legislation complained of is beyond the powers of the local legislatures.

With reference to section 91, and the classes of subjects therein enumerated, Lord *Selborne*, in *L'Union St. Jacques de Montreal* and *Belisle* (3), says:

> Their Lordships observe that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any in-

(1) L. R. 12 Ch. 655.

(2) See also *Paul* v. *Virginia*, 8 Wallace 168, where it was held that issuing a policy of insurance was not a transaction of trade and commerce.

(3) L. R. 6 P. C. 36.

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stance of anything being contemplated, except what may properly be described as general legislation.

It may be difficult to draw the exact line between the powers of the Dominion parliament to regulate trade and commerce and the powers of the local legislatures over "local works and undertakings," "property and civil rights in the province," and "generally all matters of a merely local or private nature in the province."

No one can dispute the general power of parliament to legislate as to "trade and commerce," and that where, over matters with which local legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion parliament may prescribe. I adhere to what I said in *Valin* v. *Langlois* (1), that the property and civil rights referred to, were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion parliament, and that the power of the local legislatures was to be subject to the general and special legislative powers of the Dominion parliament, and to what I there added: "But while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the local legislatures; and, therefore, the Dominion parliament would only have

(1) 3 Can. Sup. Ct. R. at p. 15.

the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of *Canada*."

I think the power of the Dominion parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the local legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the enjoyment and preservation of property in the province, or matters of contract between parties in relation to their property or dealings, although the exercise by the local legislatures of such powers may be said remotely to affect matters connected with trade and commerce, unless, indeed, the laws of the provincial legislatures should conflict with those of the Dominion parliament passed for the general regulation of trade and commerce. I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because parliament, in the plenary exercise of its power to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the local legislatures of their powers—the exercise of the powers of the local legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe.

The Act now under consideration is not, in my opinion, a regulation of trade and commerce; it deals with the contract of fire insurance, as between the insurer and the insured. That contract is simply a contract of indemnity against loss or damage by fire, whereby one party, in consideration of an immediate fixed payment, undertakes to pay or make good to the other any loss or damage by fire, which may happen during a fixed period to specified property, not exceeding the sum named as the limit of insurance. In *Dalby*

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v. *The India & London Life Insurance Co.* (1), *Parke*, B., delivering the judgment of the court, says:

The contract commonly called "life insurance," when properly considered, is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and when once fixed is constant and invariable. This species of insurance in no way resembles a contract of indemnity.

How this, as between the parties to the contract, can be called a matter of trade and commerce, I must confess my inability to comprehend; but the process of reasoning, as I understand it, by which we are asked to say that fire insurance is a matter of trade and commerce, would make life assurance equally so.

In this same case, *Parke*, B., says:—

Policies of assurance against fire and against marine risks are both properly contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 *Geo.* 2 ch. 37, and put an end to in all except a few cases. But at common law, before this statute with respect to maritime risks, and the 14 *Geo.* 3 ch. 48, as to insurance on lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts, and so it is stated by the Court in the case of *Causens* v. *Nantes* (2), to have been solemnly determined in *Lucena* v. *Craufurd* (3), without even a difference of opinion among all the Judges. To the like effect was the decision of the Court of Error in *Ireland*, before all the Judges except three, in the *British Insurance Co.* v. *Magee* (4), that the insurance was legal at common law (5).

I do not understand that by the Act now assailed

(1) 15 C. B. 364.
(2) 3 Taunt. 315.
(3) 2 B. & P. 324.
(4) C. & Al. 182.
(5) See also *The Edinburgh Life Assurance Co.* v. *The Solicitor of Inland Revenue, and The Scottish Widows' Fund and Life Assurance Co.* 12 Sc. L. Reporter, 275; and *Bank of India* v. *Wilson*, L. R. 3 Ex. Div. 108.

any supreme sovereign legislative power to regulate and control the business of insurance in *Ontario* is claimed. As I read the Act, it deals only with this contract of indemnity; it does not profess to deal with trade or commerce, or to make any regulation in reference thereto. In my opinion, this Act has no reference to trade and commerce in the sense in which these words are used in the *British North America Act*. It is simply an exercise of the power of the local legislature for the protection of property in *Ontario*, and the civil rights of the proprietors thereof in connection therewith, by securing a reasonable and just contract in favor of parties insuring property, real or personal, in *Ontario*, and deals therefore only with a matter of a local and private nature. The scope and object of the Act is to secure to parties insuring a just and reasonable contract, to prevent the exaction of unjust and unreasonable conditions, and to protect parties from being imposed upon by the insertion of conditions and stipulations in such a way as not to be brought to the immediate notice of the insured, or capable of being easily understood, or by the insertion of conditions calculated practically in many cases to deprive the parties paying the premiums of indemnity, though justly entitled to it, and, if the statutory conditions are omitted or varied, to compel the terms of the contract to be so plainly and prominently put on the contract that the attention of the assured may be called to them, and so that he may not be misled, judicial experience having proved that the rights of the insured, and legitimate indemnity in return for the money paid, demanded that the insured should be thus protected.

As the case of *Smith* v. *Commercial Union Insurance Company* (1) proves that the judicial tribunals found that legislative protection was required in *Ontario* against

(1) 33 U. C. Q. B. 69.

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unreasonable and unjust conditions imposed on the assured by the assurers; should experience show that over-insurance was of frequent occurrence, and led to fraudulent burning, whereby not only fraud was encouraged, but the neighbouring properties of innocent parties, wholly unconnected with the insurance, were jeopardized, can it be said that it would be *ultra vires* for the legislature of a province, with a view to stop such practises, to enact that in every case of over insurance, whether intentional or unintentional, the policy should be void, or to make any other provisions in reference to the contract of insurance as to value as would, in the opinion of the local legislature, prevent frauds and protect property? Could such legislation be held to be *ultra vires*, as being an interference with trade and commerce, because it dealt with the subject of insurance? Or for preventing frauds and perjuries, would it be *ultra vires* for the local legislature to enact that, as to all contracts of insurance entered into in *Ontario*, no insurance on any building or property in *Ontario* should be binding, or valid in law or equity, unless in writing? Or, take the first section of the 38 *Vic.*, ch. 45, can it be that the local legislature cannot make provision to provide against a failure of justice and right by enacting, as the first section of that Act did, that:

> Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the Insurance Company after the occurrence of a fire have not been strictly complied with; or where, after a statement or proof of loss has been given in good faith by or on behalf of the insured in pursuance of any proviso or condition of such contract, the Company, through its agent or otherwise, objects to the loss upon other grounds than imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the insured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time;

or where, from any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions; no objection to the sufficiency of such statement or proof, or amended or supplemented statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the Company on such contract of insurance whenever entered into; but this section shall not apply where the fire has taken place before the passing of this Act.

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How can this be said to be an interference with the general regulation of trade and commerce? Yet it deals as effectually with the matter or contract of insurance in these particulars as this Act does in reference to the matters with which it deals. If the legislative power of the provincial legislatures is to be restricted and limited, as it is claimed it should be, and the doctrine contended for in this case, as I understand it, is carried to its legitimate logical conclusion, the idea of the power of the local legislature to deal with the local works and undertakings, property and civil rights, and matters of a merely local and private nature in the province is, I humbly think, to a very great extent, illusory.

I scarcely know how one could better illustrate the exercise of the power of the local legislatures to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of incorporation, whereby a right to hold or deal with real or personal property in a province is granted, and whereby the civil right to contract and sue and to be sued as an individual in reference thereto is also granted. If a legislature possesses this power, as a necessary sequence, it must have the right to limit and control the manner in which the property may be so dealt with, and as to the contracts in reference thereto, the terms and conditions on which they may be entered into, whether they may be verbal, or shall be in writ-

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ing, whether they shall contain conditions for the protection or security of one or other or both the parties, or that they may be free to deal as may be agreed on by the contracting parties without limit or restriction.

Inasmuch, then, as this Act relates to property in *Ontario*, and the subject-matter dealt with is therefore local, and as the contract between the parties is of a strictly private nature, and as the matters thus dealt with are therefore, in the words of the *British North America Act*, "of a merely local and private nature in the province," and as contracts are matters of civil rights and breaches thereof are civil wrongs, and as the property and civil rights in the province only are dealt with by the Act, and as "property and civil rights in the provinces" are in the enumeration of the "exclusive powers of provincial legislatures," I am of opinion that the legislature of *Ontario*, in dealing with these matters in the Act in question, did not exceed their legislative powers.

I am happy to say I can foresee, and I fear, no evil effects whatever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision "recognizes and sustains the legislative control of the Dominion parliament over all matters confided to its legislative jurisdiction, it, at the same time, preserves to the local legislatures those rights and powers conferred on them by the *B. N. A. Act*, and which a contrary decision would, in my opinion, in effect, substantially, or, to a very large extent, sweep away.

I carefully and advisedly abstain from expressing any opinion as to the validity or invalidity of any Act of the Dominion of *Canada*, or of the province of *Ontario*, save only as to the Act now immediately under consideration. It will be time enough to discuss and decide on the validity of other statutes, whether Do-

minion or provincial, when properly brought before us for judicial decision. To do so now, or to express any opinion as to the effect of this decision on other legislation not before us, and without argument or judicial investigation and consideration, would be, in my opinion, extra-judicial.

As to the construction which my brother *Gwynne* has put on section 3rd of the Act, in the case of *Giraldi* and *Provincial Insurance Company* (1), though the arguments used by him in that case, and in the judgment he is about to deliver, which he has kindly afforded me the opportunity of reading, and which I have most attentively considered, are very cogent and plausible, yet I have been unable to arrive at the same conclusion that he has. I think the history and phraseology of the Act shows it was passed for the protection and benefit of the insured, and "as against the insurer," that the insured may insure without conditions if he pleases, except those conditions which the law implies, but that in such a case, as against the insurer, the insured may claim the benefit of these conditions. But if the insurer wishes to avail himself of the statute and the statutory conditions, he must pursue the course pointed out by the statute; he cannot, in my opinion, disregard the requirements of the statute, and at the same time claim its benefits; and if he desires other conditions than the statutory conditions, he can only have them by varying the statutory conditions, or add to them in the manner pointed out by the statute. I can add nothing to what C. J. *Moss* and Judge *Burton* have said in their judgments on this point.

It is urged that the provisions of this statute do not apply to an insurance by what is called an interim receipt. When that contains an *agreement to insure*, it is, in my opinion, a policy within the meaning of the

(1) 29 U. C. C. P. 321.

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Act. A policy of insurance is a written instrument containing the contract. Whether it be contained in what is usually called an interim receipt, or a more formal document, it is equally the instrument containing the contract, and so the statutory definition of the term policy, in 33 and 34 *Vic.*, ch. 97 Imp., is:—"Every writing whereby any contract of insurance is made, or agreed to be made, is evidence."

As at present advised, I think the interim receipt should be treated as the policy. It would be an entire evasion of the statute if companies could insure by a document not in the usual form of a policy, and by calling it by another name impose their own conditions and escape from the provisions of the statute for the protection of the insured, but it is not necessary to discuss or finally decide this point, as in this case of *Parsons* v. *The Queen Insurance Company*, both the court of first instance and the Court of Appeal treated the case in the way most favorable for the defendants, and they have nothing to complain of.

As to the contention that the statute of *Ontario* can only apply to local companies and not to foreign companies, or companies incorporated by the Dominion of *Canada*, in my opinion any company, whether foreign, or incorporated by the Dominion legislature to carry on the business of fire insurance in any part of the Dominion of *Canada*, must do so subject always to the laws of the province in which the business is done, in the same way that a merchant carries on his trade or commerce within a province; but because he is a merchant or trader he is not exempt from an obligation to obey the laws of the province in which he carries on his business, if he enters into a contract within the province, and the law of the province prescribes the form of the contract under its power to legislate as to property and civil rights; neither corporations nor

traders can set themselves above that law and contract as they please independent of it. Suppose no statute of frauds was in force in a province, and the legislature enacted that no agreement for the sale of goods over $20 should be valid unless the contract of sale was evidenced by a writing signed by the parties, or in fact enacted a statute of frauds similar to the statute of *Charles*; or with reference to the statute of limitations, passed an Act limiting the validity of the contract as well as the remedy, or altered the existing limitations, and reduced or extended the time limited for bringing an action, could a corporation, merchants or traders, successfully claim to be exempt from the operation of such law on the ground that they interfered with trade and commerce, or that they were foreign corporations or foreigners engaged in trade, and therefore bound by no local laws?

If an insurance company is a trader, and the business it carries on is commercial, why should the local legislature, having legislative power over property and civil rights, and matters of a private and local character, not be enabled to say to such a company: "If you do business in the province of *Ontario*, and insure property situate here, we have legislative control over property and over the civil rights in the province, and will, under such power, for the protection of that property and the rights of the insured, define the conditions on which you shall deal with such property," it being possibly wholly unconnected with trade and commerce, as a private dwelling or farming establishment, and the person insured having possibly no connection with trade or commerce?

How can it be said that such property and such civil rights or contract shall be outside of all local legislation, and so outside of all local legislative protection? If the business of insurance is connected with trade and

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commerce, the legislation we are now considering does not attempt to prohibit the carrying on of the business of insurance, but having the property and the civil rights of the people of the province confided to them this legislation, in relation thereto, is simply the protection of such property and of such rights. In *Patteson* v. *Mills* (1), Lord *Lyndhurst* says:—

> And here another question arises—supposing the Act does not extend to *Scotland*, still it is said to be a bar to this action, because it is founded on a policy by an English company. The company is certainly an English one, but it is to be considered where the original contract was made. The policy was executed in *London*, but the action is not on the policy, but on the agreement; the original contract is made in *Scotland*, and if I, residing in *England*, send down my agent to *Scotland*, and he makes contracts for me there, it is the same as if I myself went there and made them.

In *Copin* v. *Adamson* (2), *Kelly*, C. B., cites the marginal note in *Bank of Australasia* v. *Harding* (3), which he adopts as a correct proposition of law:

> The members resident in *England*, of a company formed for the purpose of carrying on business in a place out of *England*, are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on.

I am, therefore, of opinion that this Act applies to all insurance companies that insure property in the Province of *Ontario*, whether local, dominion or foreign.

STRONG, J., who was present at the argument in the cases of *The Queen Insurance Company* v. *Parsons*, and *Citizens' Insurance Company* v. *Parsons*, did not deliver a formal judgment, but authorized the Chief Justice to state that he entirely agreed with the majority of the court in their conclusions, both as to the constitutionality of the *Ontario* statute, ch. 162 R. S., *Ont.*, and the construction to be put upon the provisions of that statute.

(1) 1 Dow & C. 362. (2) L. R. 9 Ex. 350.
(3) 9 C. B. 661.

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La principale question à décider est celle de la constitutionalité de l'acte d'*Ontario*, 39 *Vict.*, ch. 24, maintenant le ch. 162 des statuts revisés, pour assurer l'uniformité des conditions de police d'assurance. La constitutionalité est mise en question sur le principe que le pouvoir de législater au sujet des assurances appartient au parlement fédéral, comme conséquence de son pouvoir exclusif de réglementer le traffic et le commerce.

Afin de s'assurer s'il y a conflit de pouvoirs, la première chose à faire est sans doute d'examiner la nature de la loi dont il s'agit. Comme l'indique son titre, elle a pour but d'assurer des conditions uniformes dans les polices d'assurance contre le feu.

La 2me section déclare que l'exécution imparfaite des conditions de l'assurance, quant à la preuve de l'incendie ne sera pas une raison suffisante pour annuler le contrat : 1o. lorsque par raison de nécessité, erreur ou accident, ces conditions n'ont pu être remplies ; 2o. lorsque après que cette preuve a été fournie conformément aux conditions du contrat, la compagnie fait objection pour d'autres motifs que le défaut d'accomplissement de ces conditions ; 3o. lorsqu'après avoir reçu cette preuve elle ne donne pas, dans un temps raisonnable, avis par écrit à l'assuré, des raisons pour lesquelles elle considère cette preuve défectueuse ; 4o. lorsque la cour ou le juge, pour aucune autre raison, considère qu'il serait injuste de déclarer l'assurance nulle pour cause d'exécution imparfaite de ces conditions.

La 3me déclare que les conditions mentionnées dans la cédule feront, contre l'assureur (*as against the insurer*), partie de toute police d'assurance contre le feu sur des propriétés situées dans la province d'*Ontario*. Ces con-

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ditions doivent de plus être imprimées sur la police d'assurance avec le titre "Statutory conditions."

La 4me section indique la manière de modifier les conditions et le mode à suivre pour leur impression.

La 5me section déclare qu'aucune variation de ces conditions ne sera obligatoire pour l'assuré, à moins qu'elle n'ait été faite conformément à la sec. 4; dans le cas contraire la police demeure, quant aux assureurs (*as against insurers*) soumise aux conditions imposées par le statut.

Par la sec. 6, il est déclaré que si d'autres conditions que celles voulues par le statut sont insérées dans une police—et que le juge ou la cour décide qu'elles ne sont ni justes ni raisonnables—elles sont dans ce cas déclarées nulles et sans effet.

La 7me donne un appel des causes jugées en vertu de cet acte.

Ce précis de la loi fait voir qu'elle se borne à établir des règles au sujet de la preuve à faire dans certains cas, ainsi qu'à déclarer quelles seront, dans la province d'*Ontario*, les conditions obligatoires de tout contrat d'assurance. Ces dispositions, entièrement de droit civil, ne comportent aucune prohibition du commerce de l'assureur, ni la nullité des polices qu'il émet. Les conditions imposées sont justes et raisonnables, et en réalité fort peu différentes de celles adoptées par la plupart des compagnies.

En quoi cette législation trouve-t-elle au pouvoir de réglementer le commerce et le trafic? Le sujet auquel elle s'applique, le contrat d'assurance, n'appartient-il pas au droit civil et ne fait-il pas partie de la juridiction attribuée aux provinces par le paragraphe 13 de la section 92 de l'Acte de l'Amérique Britannique du Nord au sujet de la propriété et des droits civils?

Sans doute que le contrat d'assurance est d'un usage immense dans le commerce, aussi bien que

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par les non commerçants. Mais l'objet auquel s'applique un contrat n'en change pas la nature; quel que soit son objet le contrat d'assurance n'est toujours qu'un contrat d'indemnité, qui tient de la nature du cautionnement, et comme tel il appartient au droit civil. Le commerce ne fait-il pas aussi constamment usage des contrats de vente, d'échange, de louage, etc. ? S'en suit-il pour cela que la législation à leur sujet doit être considérée comme faisant partie de la réglementation du commerce ? S'il en était ainsi, si tout ce que peut atteindre le commerce devait, pour cette raison, faire partie du pouvoir exclusif du parlement fédéral, la plupart des pouvoirs des provinces se trouveraient ainsi anéantis, car le commerce dans son acception la plus étendue touche à tout,—c'est, dit une définition de ce mot par un auteur français, " cet " échange de produits et de services. C'est en dernière " analyse le fonds même de la société."

Il est clair que dans notre acte constitutionnel—le mot ne peut avoir une signification aussi étendue.

Pour déterminer la portée du paragraphe 2 de la sec. 91, on ne doit pas le considérer isolément; il faut au contraire le comparer avec l'ensemble des dispositions de l'acte constitutionnel, afin d'arriver à une conclusion qui soit conforme à son esprit, et de manière à donner effet à toutes ses dispositions. Le but du législateur en divisant les pouvoirs législatifs par les sec. 91 et 92 entre le gouvernement fédéral et les provinces était, autant que compatible avec le nouvel ordre de choses, de conserver à ces derniers, leur autonomie, sous le rapport des droits civils particuliers à chacune d'elles. On arriverait cependant à un résultat tout différent, si l'on donnait au paragraphe 2 la signification étendue que peut comporter son sens littéral. Mais il est évident que ce ne serait pas l'interpréter correctement, puisque les paragraphes suivants de la même section lui donnent un sens limité. En effet si c'eût été l'in-

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tention de donner à ces expressions "réglementaires du trafic et du commerce" une signification absolue ; pourquoi la loi aurait-elle énuméré certains sujets de législation qui sont certainement compris dans le pouvoir de réglementer le commerce, comme *e.g.* la navigation et les bâtiments ou navires, les banques, les lettres de change et les billets promissoires, la faillite et la banqueroute—tous sujets qui sans cette énumération spéciale se trouveraient compris dans le pouvoir de réglementer le commerce. Il me semble que l'on doit conclure de là que si les expressions générales de ces paragraphes ne comprennent pas d'après l'acte lui-même tout ce qui fait certainement partie du commerce, elles doivent encore moins comprendre ce qui ne s'y rapporte qu'indirectement.

Dans la cause de *Severn* vs. *La Reine* (1) je me suis appuyé sur la définition donnée par le célèbre juge en chef *Marshall* des mots *regulations of commerce* dans la constitution des *Etats-Unis*. Elle est ainsi : "It is the „ power to regulate, that is the power to prescribe the rule „ by which commerce is to be governed. This power, like „ all others vested in congress, is complete in itself, may " be exercised to its utmost extent, and acknowledges no " limitations other than are prescribed by the constitu- " tion." Je crois encore à l'exactitude de cette définition. Pourvu qu'on la prenne en entier, elle peut s'appliquer à la question sous considération et nous aider à en trouver la solution. Il faut surtout ne pas perdre de vue les derniers mots "*and acknowledges no limitations other than are prescribed by the constitution.*" Cette restriction nous indique que c'est dans la constitution seulement que doit se trouver la limite du pouvoir de réglementer le commerce. Après avoir donné ce pouvoir au parlement fédéral, paragraphe 2, section 91, elle donne aux provinces la juridiction sur la propriété,

(1) 2 Can. Sup. Ct. R., at p. 121.

les droits civils et les affaires purement locales, etc., etc. Ces pouvoirs particuliers, exclusivement attribués aux provinces ne peuvent pas, d'après les termes mêmes de l'acte constitutionnel, être considérés comme pouvant tomber sous le pouvoir de réglementer le commerce. Réglementation du commerce et du trafic doit nécessairement signifier autre chose que législation sur la propriété et les droits civils, puisqu'ils sont des attributs exclusifs de chaque gouvernement. Dans l'exercice de sa juridiction, le parlement fédéral a sans doute le pouvoir de toucher incidemment à des matières qui sont de la juridiction des provinces,—mais ce pouvoir ne s'étend pas au-delà de ce qui est raisonnable et nécessaire à une législation pour les fins du commerce seulement. Le parlement fédéral ne pourrait donc sous ce prétexte de commerce contrôler entièrement un sujet qui est de la juridiction des provinces. Sa législation comme réglementation du commerce doit être complète, sans cependant anéantir la juridiction des provinces sur cette partie du sujet qui n'a pas été affectée par cette législation. S'il n'en était ainsi, chaque fois que le parlement fédéral, en exerçant son pouvoir au sujet de commerce, toucherait à la propriété et aux droits civils, il en résulterait que toute législation sur ce sujet lui serait attribuée et que le pouvoir législatif des provinces sur ces mêmes sujets cesserait d'exister. La décision du Conseil Privé dans la cause de l'*Union St. Jacques et Bellisle* (1), a adopté un principe dont l'application à cette cause nous permet de concilier l'exercice des pouvoirs respectifs du gouvernement fédéral et provincial. S'il n'était pas ainsi, qu'arriverait-il, par exemple, au sujet de la législation sur le mariage? Le gouvernement fédéral a juridiction sur le mariage et le divorce; la juridiction provinciale est limitée à la solennisation du mariage; ce dernier pouvoir est limité aux formalités extérieures du

(1) L. R. 6 P. C. 34.

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contrat de mariage. Mais les expressions générales " le mariage et le divorce " interprétées littéralement sont susceptibles d'une signification très étendue. Le gouvernement fédéral pourrait-il dans ce cas, sur le motif que la législation sur le mariage lui appartient, étendre sa juridiction jusqu'à en régler les conditions civiles, comme le douaire, la communauté de biens—et par là exclure la juridiction des provinces sur cette partie du droit civil ? N'est-il pas évident qu'il devait, au contraire, borner strictement sa législation aux conditions de capacité et d'incapacité de contracter mariage, ainsi qu'aux causes d'empêchements et autres conditions qui sont de la nature de ce contrat, sans intervenir avec les droits civils qui en résultent. Ces expressions générales du parag. 26, sec. 91 " Le mariage et le divorce " nous offre un autre exemple de l'emploi dans l'acte constitutionnel d'expressions qui doivent cependant avoir un sens limité par d'autres dispositions du même acte. N'en devrait-il pas être de même de l'exercice du pouvoir de réglementer le commerce ?

Afin de concilier l'exercice de ses pouvoirs je conclus que dans un cas comme celui dont il s'agit, la juridiction provinciale ne se trouve limitée par l'exercice de celle du pouvoir fédéral, qu'en ce qui est de la compétence de ce dernier,—et que la province peut encore exercer son pouvoir sur cette partie du sujet de sa juridiction dans tout ce qui ne se trouverait pas en conflit direct avec la législation fédérale sur un sujet de sa compétence,—cette interprétation me semble conforme à l'autorité suivante :—

A grant of power to regulate, necessarily excludes the action of all others who would perform the same operation on the same thing (1).

Existe-il une législation fédérale sur le même sujet; *same operation on the same thing* ? Il est bien vrai que

(1) Story on Stat. and Const. law, vol. 1, sec. 106.

le parlement du *Canada* a passé plusieurs lois concernant les compagnies d'assurances avant et depuis celle dont il s'agit.

Sans vouloir entrer dans l'examen particulier de cette législation, sur laquelle je ne suis pas maintenant appelé à me prononcer, je crois cependant devoir faire allusion à quelques-unes de ses principales dispositions, afin de faire voir qu'il n'y a pas de conflit entre les lois fédérales et la loi d'*Ontario*.

La 40e *Vict.*, chap. 42, qui a amendé, consolidé et révoqué les lois antérieures dont la première est la 31e *Vict.*, ch. 48, adoptées par le parlement fédéral au sujet des assurances a établi des dispositions dont le but évident est de protéger le public contre des pertes qui pourraient être infligées par des compagnies irresponsables. Les compagnies auxquelles cet acte s'applique sont d'abord obligées de prendre une licence sans laquelle elles ne peuvent transiger aucune affaire, il leur faut ensuite faire un dépôt entre les mains du ministre des finances de $100,000 pour la sûreté des porteurs de polices d'assurances. Elles doivent aussi produire dans le département des finances, ainsi qu'aux greffes des Cours Supérieures, dans la juridiction desquelles elles transigent des affaires, une copie de leur acte d'incorporation, aussi, une procuration de la compagnie, en la forme prescrite, a son principal gérant ou agent en *Canada*, avec déclaration que la signification de tous brefs ou procédures contre elle pourra être faite au bureau de cet agent. Elles doivent fournir des statistiques complètes et détaillées sur leurs affaires, indiquer tout changement survenu dans l'agence principale, donner avis de l'obtention de la licence et aussi de la cessation des affaires. Des dispositions spéciales sont adoptées pour la liquidation des affaires dans le cas d'insolvabilité. Enfin, elles sont soumises à l'inspection et surveillance d'un inspecteur qui est revêtu

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de pouvoirs étendus pour faire exécuter toutes les dispositions de cet acte.

Ces dispositions, comme on le voit, ont pour but, non pas de régler le contrat d'assurance, mais uniquement de soumettre l'assureur dans l'exercice de son commerce comme tel à l'observation de règlements établis pour la protection du public. Ces lois n'imposent aucunes conditions comme devant faire partie obligatoirement du contrat.

Ainsi la loi fédérale ne touche nullement à la nature du contrat d'assurance, ni aux conditions qui devront en faire partie dont s'occupe exclusivement la loi d'*Ontario;* les deux législations découlant de deux sources différentes de pouvoir, la première du pouvoir de règlementer le commerce, et la seconde de celui de législater sur les droits civils et la propriété, ne peuvent-elles pas subsister toutes deux, si leurs dispositions ne sont ni contradictoires ni incompatibles ? Je dois avouer que je ne trouve aucun conflit entre ces lois et que je ne vois aucun obstacle à leur exécution. Cette manière de voir est supportée par l'autorité suivante :

.....So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from others which remain with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers ; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality. (1)

Bien qu'il soit possible de concilier ainsi l'existence de ces deux législations, n'est-il pas évident cependant que la loi d'*Ontario*, portant exclusivement sur la preuve et la nature des conditions des contrats d'assurance

(1) Pomeroy Constitutional Law, p. 218.

faits dans cette province, cette loi est *intra vires ?* En effet l'émission d'une police d'assurance n'est pas *nécessairement* une transaction commerciale. Elle ne l'est certainement pas de la part de l'assuré, bien que d'après le code civil, elle le soit de la part de l'assureur. *Pardessus* s'exprime ainsi à ce sujet :

> Elles (les conventions d'assurances) ne sont par leur nature des actes de commerce au moins de la part de ceux qui se font assurer. Mais comme presque toujours de la part de ceux qui assurent, elles sont de véritables spéculations, c'est sous ce point de vue que nous les considérons comme actes de commerce, et que nous avons cru devoir en faire connaître les principes.

Dans le droit anglais, il en est de même ; l'assurance est une transaction commerciale, bien que le contrat d'assurance dont il fait un usage constant soit du droit civil.

L'acte constitutionnel ne dit nulle part que le droit commercial est de la juridiction de la Puissance. Il semble au contraire en lui en attribuant spécialement une certaine partie, comme la navigation, les banques, les lettres de change et les billets promissoires, la faillite, avoir laissé le surplus à la juridiction des provinces comme faisant partie des droits civils.

A ce point de vue la loi d'*Ontario* aurait sa source dans le pouvoir des provinces de législater sur les droits civils. C'est d'après ce principe que la cause de *Paul vs. Virginia* a été décidée (1). Une loi de l'Etat de *Virginie* avait déclaré que les compagnies d'assurance non incorporées en vertu des lois de cet état n'auraient pas le pouvoir de faire des affaires dans les limites de l'Etat, à moins d'avoir obtenu une licence à cet effet, et déposé une certaine somme pour la garantie des droits des assurés. Le demandeur prétendait que cette loi était inconstitutionnelle parce qu'elle était contraire au pouvoir du Congrès de réglementer le

(1) 8 Wallace 168.

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commerce. Le juge *Field* en prononçant le jugement de la cour s'exprime ainsi :

Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the Corporation and the assured, for a consideration paid by the latter.

D'après cette autorité, c'est donc comme appartenant au droit civil que la législature d'*Ontario* avait droit d'adopter la loi en question. Mais il y a un autre argument que je considère comme très important dans le cas actuel, c'est comme on le verra ci-après la reconnaissance par le parlement fédéral du droit des provinces de législater à cet égard.

Bien que le paragraphe 11 de la section 92 donne aux provinces les pouvoirs d'incorporer des compagnies pour des objets *provinciaux*, on a cependant douté que les termes soient suffisants pour comprendre le pouvoir d'incorporer des compagnies d'assurances. Il me semble clair toutefois que les termes de ce paragraphe sont assez étendus pour comprendre les compagnies d'assurances. Si l'on objecte que l'objet d'une compagnie d'assurance n'est pas *provincial*, en ce sens qu'il n'a pas pour objet un intérêt concernant toute la province, c-à-d. un intérêt public, je répondrai que l'objet de la compagnie étant de faire des affaires dans toute la province c'est ce que les termes 'objets provinciaux' signifient, s'ils ont une signification quelconque. Ils n'en auraient certainement aucune, si on les interprétaient comme ne donnant que les pouvoirs d'incorporer des compagnies ayant un intérêt public provincial, une telle interprétation équivaudrait à dire que le gouvernement peut déléguer et faire remplir ses fonctions par des corporations, mais qu'il n'a pas le droit d'incorporer aucune compagnie pour des fins de commerce, d'industrie, etc. Il a sans doute ce pouvoir, pourvu que les compagnies ainsi créées bornent leurs opérations aux limites de la province.

Si elles veulent aller au-delà, elles tombent alors sous la loi fédérale à laquelle elles doivent se conformer et qui contient des dispositions spéciales pour ce cas.

Ce pouvoir d'incorporer des compagnies d'assurances exercé par la législature d'*Ontario* a été reconnu par la loi fédérale comme appartenant aux législatures provinciales.

La sec. 28 de 40 *Vict.*, ch. 42, s'exprime ainsi à cet égard :

This Act shall not apply to any company within the exclusive legislative control of anyone of the provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout *Canada*.

La première section de cet acte applique les lois de faillite aux compagnies d'assurances incorporées par le parlement du *Canada*, ainsi qu'à celles incorporées avant ou après la Confédération, par la législature d'aucune province constituant actuellement le *Canada*.

On trouve encore dans la sec. 30 du même acte une autre reconnaissance du pouvoir législatif des provinces au sujet des assurances. Des doutes s'étant élevés au sujet de certaines dispositions de l'acte d'*Ontario* concernant les assurances mutuelles, cette section de l'acte fédéral déclare que telles dispositions seulement qui peuvent être dans les limites de la juridiction du parlement fédéral sont révoquées. Il y a dans cette section, non-seulement la reconnaissance formelle des pouvoirs de la province, mais il y a de plus la déclaration si importante que l'acte n'est révoqué que dans sa partie seulement où il y a conflit de pouvoirs. C'est une admission formelle que le sujet, en ce qui concerne son côté commercial, est de la compétence du parlement fédéral, tandis que pour ce qui concerne le droit civil, comme la nature et les conditions du contrat d'assurance,

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il reste sous le contrôle de la législation provinciale. C'est aussi en même temps une confirmation de l'opinion exprimée plus haut sur les restrictions que le gouvernement fédéral et le gouvernement provincial doivent s'imposer dans l'exercice de leurs pouvoirs respectifs, afin de ne pas en dépasser les limites.

Il est vrai que l'exercice d'un pouvoir ne saurait être dans la plupart des cas une raison suffisante pour établir son existence légale. Mais dans un cas comme celui dont il s'agit, où il y a de fortes raisons pour qu'il soit exercé d'une manière limitée comme il l'a été par la 40e *Vict.*, ch. 42, en reconnaissant le droit des provinces qui paraît également bien fondé, on doit en conclure que l'accord des deux législations pour se tenir dans leurs limites respectives, est une grande présomption qu'elles n'ont exercé que les pouvoirs leur appartenant. Les plus importants départements publics, comme la justice, les finances, ont adopté depuis plusieurs années cette manière de voir en faisant exécuter les dispositions des diverses lois fédérales au sujet des assurances. Cette interprétation ne saurait sans doute prévaloir contre une interprétation judiciaire, mais en l'absence de celle-ci, l'interprétation administrative ne peut manquer d'avoir une grande importance. *Story* la met au second rang et en parle en ces termes :—

> And, after all, the most unexceptional source of collateral interpretation is from the practical exposition of the Government itself in its various departments upon particular questions discussed, and settled upon their own single merits. Those approach the nearest in their own nature to judicial expositions; and have the same general recommendation, that belongs to the latter (1).

Cette interprétation administrative a eu lieu depuis plusieurs années—les droits de licences ont été perçus, les statistiques exigées ont été fournies, sans qu'il se soit élevé aucune prétention au contraire, de la part des

(1) Story Const. of the U. S. 1st Vol., p. 290, No. 408.

provinces ; de même que le pouvoir exercé par la loi d'*Ontario* n'a pas été mis en contestation par le gouvernement fédéral qui aurait pu désavouer cette loi s'il l'eût considéré comme *ultra vires*. Lorsque les deux gouvernements sont d'accord sur ce sujet, et qu'ils font disparaître par des lois les doutes qui pouvaient exister, n'y aurait-il pas témérité à substituer une autre interprétation que la leur. S'il y a doute sur la question il me semble réglé par l'interprétation législative et les tribunaux n'ont qu'à s'y conformer.

Ainsi, à part des raisons que j'ai données plus haut au soutien de la loi d'*Ontario*, il y a donc encore à son appui l'interprétation administrative et l'interprétation législative. Si je ne parle pas de l'interprétation judiciaire des cours d'*Ontario*, c'est parce qu'elle est mise en question par le présent appel, mais elle n'en a pas moins la plus haute valeur par l'unanimité d'opinions des honorables juges qui ont été appelés à se prononcer sur cette question, supportée comme elle l'est par la décision de la Cour Suprême des *Etats-Unis* dans la cause ci-dessus citée de *Paul* vs. *Virginia*.

Indépendemment de la question de constitutionalité, l'appelante prétend aussi qu'étant une compagnie incorporée par le parlement d'*Angleterre* elle se trouve par cela même soustraite à l'opération de la loi en question.

Quelle que soit l'origine des corporations, soit qu'elles doivent leur existence au parlement de la Puissance, aux législatures provinciales, ou à un pouvoir étranger, elles n'en sont pas moins, dans un cas comme dans l'autre, soumises pour l'exercice de leurs franchises aux conditions que peut leur imposer la loi du pays dans lequel elles les exercent. Ces corporations ne sont en réalité que des associations commerciales ne différant principalement des sociétés commerciales ordinaires que par la limite apportée à la responsabilité de ceux qui les composent. La loi fédérale citée plus haute, sec.

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1re, les met au même rang que les sociétés de particuliers faisant des affaires d'assurances. Elles ne peuvent pas plus que les autres sociétés se prétendre exemptes de se conformer aux lois. Nos grandes maisons de commerce, qui ont des comptoirs dans presque toutes les provinces de la Puissance et dans un grand nombre de pays étrangers, ont-elles jamais prétendu faire fléchir les lois des divers pays où elles font leur commerce, devant les conditions qu'elles ont pu faire au siège principal de leurs affaires. Quelque inconvénient qui puisse en résulter, ne sont-elles pas obligées dans tous leurs contrats, de se conformer aux lois de chaque pays où elles font des affaires. Il serait sans doute plus simple et plus commode pour les compagnies d'assurance d'avoir le pouvoir souverain de fixer elles-mêmes leurs conditions et de les imposer dans tous les pays où elles pourraient établir des bureaux. Mais ne serait-ce pas les mettre au-dessus de la loi ? Loin de leur reconnaître un pareil privilége, les autorités et de nombreuses décisions judiciaires sont d'accord sur le principe contraire. Cette question a été aussi décidée dans la cause déjà citée de *Paul* vs. *Virginia*, où le juge *Field* s'exprime ainsi à ce sujet :

> The recognition of its existence (Corporation) even by the other States, and the enforcement of its contracts made therein, depend greatly upon the comity of those States, a comity which is never extended when the existence of the Corporation or the exercise of its powers is prejudicial to their interests, or repugnant to their policy. They may exclude the foreign corporations entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests.

Il est à peine nécessaire de citer des autorités à ce sujet, car il s'agit de l'application d'une règle réglementaire, *locus regit actum*. Je citerai cependant la suivante parce qu'elle contient l'opinion de l'auteur du "Traité du droit de la nature et des gens :

"Lorsque la police est applicable à des navires armés et équipés en *France* quoique étrangers, les dispositions de la loi française doivent être suivies. La Cour de Cassation a eu l'occasion d'examiner cette question et l'a résolue dans ce sens. *Merlin* qui rapporte cet arrêt l'approuve (1)."

"Sur cette question," disait M. *Daniels*, organe du ministère public, "rien n'est plus constant que le principe invoqué par les demandeurs et développé par *Puffendorf*, dans son traité du *Droit de la nature et des gens*: Quiconque passe un contrat dans les terres d'un souverain, se soumet aux lois du pays et devient en quelque manière sujet passager de cet état."

La compagnie appelante prétend en outre que ses conditions étant en substance les mêmes que celles du statut, elle doit en avoir le bénéfice, bien qu'elle ne se soit pas conformée aux conditions qu'il impose à cet égard—ce qui se réduit à dire que pour avoir éludé la loi, elle doit en avoir le même bénéfice que si elle l'avait respectée. Il me paraît clair que lorsqu'une compagnie ne fait pas imprimer les conditions du statut en la manière prescrite par la sec. 4, la sec. 3 veut qu'alors les conditions soient censées faire partie de la police contre l'assureur (*as against the insurer*) laissant l'assuré libre d'en prendre ou non avantage, l'assurance n'étant alors sujette à aucune autre condition que celles qui résultent suivant la loi de la nature du contrat d'assurance. Je n'entends pas discuter ici cette question qui l'a déjà été si souvent dans les tribunaux d'*Ontario*, et sur laquelle une grande majorité des juges se sont prononcés pour cette interprétation. Je me bornerai à exprimer mon entière et complète adhésion à l'opinion exprimée à ce sujet par l'honorable juge en chef *Moss*.

Pour ces raisons, je suis d'opinion que ces appels doivent être renvoyés avec dépens.

(1) Alauzet, vol. 1, No. 194, p. 361.

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[TRANSLATED.]

FOURNIER, J.:—

The principal question to be decided in this case is whether the *Ontario* Act, 39 *Vic.*, ch. 24, now ch. 162 of the Revised Statutes of *Ontario*, "An Act to secure uniform conditions in policies of fire insurance," is *ultra vires* of the *Ontario* legislature. Its constitutionality is questioned on the ground that the power of legislating in reference to the subject matter of insurance belongs to the federal parliament, as the necessary sequence of its exclusive power to regulate trade and commerce.

In order to ascertain whether there is a conflict of powers, the first step, no doubt, is to examine the character of the law in question. As may be seen from its title, the object of the Act is to secure uniform conditions in policies of fire insurance. The second section enacts that if the conditions of the contract of insurance have not been strictly complied with, it shall not be a sufficient reason to annul the contract, first, where by reason of necessity, accident or mistake, the conditions have not been complied with; secondly, where, after proof of loss has been given in accordance with the conditions of the contract, the company objects to the loss upon other grounds than for imperfect compliance with such conditions; thirdly, where, after having received this proof, the company does not notify, in writing to the assured, within a reasonable time, the reason for which the company considers the proof defective; fourthly, when the court or judge for any other reason considers it inequitable that the insurance should be deemed void by reason of imperfect compliance with such conditions. The third section declares that the conditions set forth in the schedule to the Act shall, *as against the insurers*, be deemed to be

part of every policy of fire insurance, with respect to any property situate in the province of *Ontario*. These conditions must also be printed on the policy of insurance, with the heading "Statutory Conditions." The fourth section indicates the manner in which the conditions may be varied or omitted, or new conditions added, by being printed in a particular way. The fifth section declares that the variations shall not be binding on the assured unless they have been made in conformity with the fourth section. If the contrary is done, the policy shall, as against the assurers, be subject to the statutory conditions only. By the sixth section, it is declared that if any other conditions than the statutory conditions are inserted in the policy, and that the judge of the court declares that they are not just and reasonable, that such conditions shall be null and void. The seventh section allows an appeal from any decision given under the Act.

This synopsis of the law shows that it was not intended to do more than to establish the proof to be given in certain cases, and to declare what shall be in the province of *Ontario* the conditions upon which all contracts of insurance should be subjected to in accordance with the law. These provisions, entirely relating to civil law, do not, in any way, prohibit the commerce of the assurers, neither do they declare that the policies which they insure are null and void. They are just and reasonable conditions, and, in fact, are almost similar to the conditions adopted by the majority of insurance companies. How then can it be said that this legislation in any wise refers to the power of regulating trade and commerce? The subject matter to which it is applicable is the contract of insurance, and does not that belong to the civil law, and does it not come under the jurisdiction assigned to the provin-

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ces by paragraph nineteen of section 92 of the *British North America Act*, "Property and Civil Rights"?

No doubt the contract of insurance is extensively availed of in commerce as well as by non-traders, but the object of a contract does not change its character; whatever may be its object, the contract of insurance is nevertheless a contract of indemnity, which is similar to a contract of guarantee, and, as such, belongs to the civil law. In commerce, contracts of sale, of exchange and bail are constantly employed and executed. Does it follow that any legislation in reference thereto must be considered as being a regulation of commerce? If this be so, if everything which has reference to commerce could for this reason come under the exclusive control of the Federal power, the greater portion of the powers of the provinces would thus become of no avail, for commerce in its most comprehensive meaning extends to everything. It is, as defined by a French author, "Cet échange de produits et de service. C'est en dernière analyse le fonds même de la société."

It is evident that this word cannot have in our constitutional Act such an extensive meaning.

In order to determine the meaning of these words in the second paragraph of section 91, they should not be read alone, but, on the contrary, they should be taken in connection with the whole of the provisions of the Constitutional Act, in order to arrive at a conclusion conformable to the spirit of the Act and to give effect to all its provisions. The object of the law-giver, in dividing the legislative powers between the Federal power and the provincial legislatures, was, as far as it was possible in the new order of things, to conserve to the latter their autonomy in so far as the civil law peculiar to each province was concerned. We would, however, arrive at a very different conclusion if we held that the words in paragraph two had the comprehensive meaning

that they have literally. But it is evident that it would not be interpreting them correctly, as in the following paragraph of the same section their meaning is limited. If it had been the intention to give to this expression, "Regulation of trade and commerce," such an absolute meaning, why should certain subjects of legislation which certainly come under the power of regulating trade and commerce have been enumerated in the statute, such as navigation, ships and steamers, banks, bills of exchange, promissory notes, insolvency and bankruptcy; all subjects which, without this special enumeration, would be comprised within the power of regulating trade and commerce. The proper conclusion to draw, it seems to me, is that if the general expression in this paragraph did not comprise, according to the Act itself, all that certainly forms part of commerce, it certainly should not comprise a subject-matter which is only indirectly connected with commerce.

In the case of *Severn* v. *The Queen*, (1) I relied on the definition given by *Marshall*, C. J., of the words, "Regulation of Commerce," (which are in the Constitution of the *United States*,) as follows: "That is the power to regulate, that is to prescribe, the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and acknowledges no limitations other than those which are prescribed by the constitution." I still adhere to the correctness of this definition. If we take it in its entirety, it is applicable to the question now under consideration, and will help us to solve it. We must, above all, not lose sight of the last words, "and acknowledges no limitations other than those which are prescribed by the constitution." This restriction indicates that it is in the constitution alone that the limitations of the power to regulate com-

(1) 2 Can. Sup. C. R. at p. 121.

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merce will be found. After giving this power to the Federal parliament by paragraph 2, section 91, the statute gives to the provinces legislative control over property, civil rights, and matters of a merely local and private nature. This special power, exclusively assigned to the provinces, cannot by the terms of the constitution itself be considered as coming under the power of regulating commerce. The regulation of trade and commerce must necessarily mean something else than legislation on property and civil rights, subjects which belong exclusively to the local legislature. In exercising its power, the Federal parliament, no doubt, has the right to incidentally entertain these matters which are under the jurisdiction of the provinces, but this power cannot extend any further than to what is just and reasonable and necessary in order to legislate for commercial purposes only. The Federal parliament could not, therefore, under the pretence of legislating on commerce, entirely control a subject matter which comes under the jurisdiction of the provinces. Any legislation having reference to the regulation of commerce must be complete, but it need not necessarily destroy the jurisdiction of the provinces over that part of the subject matter which is not affected by such legislation.

If this was not the case, whenever the federal power, in exercise of its authority over commerce, should legislate in such a manner as to indirectly affect property and civil rights, it would follow that all legislation over the subject matter would belong exclusively to the Federal parliament, and the legislative power of the provinces over the same matter would cease to exist. The decision of the Privy Council, in the case of *L'Union St. Jacques* v. *Belisle* (1), has enunciated a principle which, applied to this case,

(1) L. R. 6 P. C. 36.

enables us to reconcile the exercise of their respective powers by the Federal parliament and provincial legislatures. If this construction is not the proper one, what would be the consequence of legislation on the subject of marriage? The Federal Government has jurisdiction over marriage and divorce; the jurisdiction of the provinces is limited to the solemnization of marriage, which means the formalities required previous to marriage. Now the general expression, "marriage and divorce," literally interpreted, is susceptible of a very extensive meaning. Could the Federal parliament, in such a case, on the ground that the legislation over marriage is assigned to it, extend its jurisdiction so as to regulate the civil conditions of the contract, such as dower, community of goods, and thus exclude the jurisdiction of the provinces over that portion of the civil law? On the contrary, is it not evident that the Federal parliament should confine its legislation strictly to the conditions which have reference to the capacity or incapacity of contracting marriage, and to reasons for prohibition, and to other conditions relating to the character of that contract, without interfering with the civil rights appertaining thereto. This general expression, in paragraph 26, section 91, "Marriage and Divorce," gives us another example of the use made in the Constitutional Act of expressions, which must have a limited meaning by the other provisions of the same Act. Cannot the same process of reasoning apply in construing the power of regulating trade and commerce?

In order to reconcile the exercise of these powers, I have arrived at the conclusion, in a case such as the one now under consideration, that the provincial jurisdiction is only limited by the exercise by the Federal parliament of its power, in so far as the latter is competent to exercise it, and that the province can still exercise

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its power over that portion of the subject-matter over which it has jurisdiction, provided the provincial legislation does not directly conflict with the federal legislation. This interpretation seems to be supported by the following authority: "A grant of power to regulate necessarily excludes the action of all others who would perform the same operation on the same thing" (1). The question, therefore, is, is there any federal legislation on the same subject, *same operation on the same thing*? It is quite true that the parliament of *Canada* has passed several statutes relating to insurance companies, prior and subsequent to the law now under consideration. Without wishing to enter into a minute examination of this legislation, upon which I am not at present called upon to decide, I will, however, refer to some of its principal provisions, in order to show that there is no conflict between the federal laws and the statute passed by the legislature of *Ontario*. The statute 40 *Vic.*, ch. 42, which amends, consolidates and repeals the previous legislation (the first Act being 31 *Vic.*, ch. 48) passed by the Federal parliament, in reference to the subject-matter of insurance, enacts several provisions, the object of which is clearly to protect the public against any loss which might result from companies being irresponsible. The companies to which this legislation applies are first obliged to take out a license, without which they cannot transact any business; they must afterwards deposit in the hands of the Minister of Finance the sum of $100,000 as security for the holders of their policies of insurance. They must also file in the Department of Finance, and also in the offices of the Superior Courts having jurisdiction where they transact business, a copy of their charter of incorporation, as well as a power of attorney, in the form prescribed on the part

(1) Story Stat. & Const Law, 1st Vol. s. 1,037.

of the company, to its principal manager, with a declaration that the service of any writ or proceeding against the company can be made at the office of such agent or manager. They must as well furnish complete and detailed statistics of their business, and notify any change with respect to their head office, give notice that they have obtained a license, and also notify when they cease to do business. Special provisions are enacted, with a view of winding up such companies in case of their insolvency. Lastly, they are subject to the inspection and supervision of an inspector, who is given sufficient authority for the carrying out of the provisions of the Act.

These provisions it is clear, have nothing whatever to do with respect to the contract of insurance, but are only for the purpose of subjecting the insurer in the exercise of his trade as such, to certain regulations established for the protection of the public. This legislation does not impose any conditions which necessarily form part of the contract.

We find, therefore, that the federal legislation does not in anywise affect the nature of the contract of insurance, nor the conditions forming part of such contract, and that the legislation of *Ontario*, now under consideration, deals exclusively with that subject,—both legislations deriving their respective powers from different sources, the first from the power of regulating trade and commerce, and the other from their power of legislating over civil rights and property. Why, if the provisions of these laws are neither conflicting nor antagonistic to one another, can we not hold that both are constitutional? I must confess that I see between them no conflict, and I see no obstacle to their being carried into operation. This view of the case is supported by the following authority (1):

(1) Pomeroy on Constitutional Law, 218

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So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character, with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from the other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

Although it is possible to thus reconcile these legislations, is it not evident, however, that the Act passed by the legislature of *Ontario*, relating exclusively to the proof to be made in case of loss, and to the nature of the conditions of contracts of insurance effected in the province of *Ontario*, is *intra vires?* for the issuing of a policy of insurance is not necessarily a commercial transaction; it is certainly not one on the part of the assured, although, by the Civil Code of the province of *Quebec*, it is a commercial transaction on the part of the assurer. *Pardessus*, Droit Commercial, says:

> Elles (les conventions d'assurance) ne sont pas par leur nature des actes de commerce de la part de ceux qui se font assurer. Mais comme presque toujours de la part de ceux qui assurent, elles sont de véritables spéculations, c'est sous ce point de vue que nous les considérons comme actes de commerce et que nous avons cru devoir en faire connaitre les principes.

It is the same in *England*; insurance is a commercial transaction, although the contract of insurance itself forms part of the civil law. In our constitutional Act I cannot find anywhere that commercial law is under the jurisdiction of the Dominion; it seems to me, on the contrary, that the Act, by assigning specifically to the Dominion legislative control over a part of the commercial law, such as any law on navigation, banking, bills

of exchange, promissory notes and insolvency, has left the residue to the jurisdiction of the several provinces as coming under the head "civil law." In this view of the case, the Act now under consideration would derive its authority from the power of the provinces to legislate on civil rights. It is on this principle that the case of *Paul* v. *Virginia* (1) was decided. A law passed by the State of *Virginia* enacted that insurance companies, not having been incorporated under the laws of the state, could not transact any business within the limits of the state without previously taking out a license and depositing a certain sum as security for the rights of the assured. The plaintiff contended that the law was unconstitutional, because it was contrary to the power of Congress to regulate trade and commerce. Mr. Justice *Field*, who delivered the judgment of the court, makes use of the following language:—

> Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporation and the assured for a consideration paid by the latter.

According to this decision, the legislature of *Ontario* had power to pass the law in question as being a part of civil law.

But there is also another argument which I consider conclusive; it is, as will be seen hereafter, the recognition by the Federal parliament of the right of the local legislatures to legislate on this subject. Although, by paragraph 11 of section 92, power is given to the provinces to incorporate companies for *provincial objects*, it has, however, been contended that these words are not sufficient to comprise the power to incorporate insurance companies. It seems to me, however, that the terms are sufficiently comprehensive to include insurance companies. If it is objected that the object of an

(1) 8 Wallace 168.

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insurance company is not *provincial* in the sense that its object has not an interest for the whole province, that is to say, a public interest, I answer by saying that the object is to transact business throughout the province. This must be the interpretation to be given to these words, if they are to have any signification whatever. They certainly would have no meaning whatever, if they were interpreted as giving the power only of incorporating companies having a public provincial interest. Such an interpretation would be equivalent to saying that the Government could delegate its functions to corporations, and have them exercised by them, and that they have no power to incorporate companies for the purpose of commerce, industry, trade, &c., &c. They certainly have, in my opinion, that power, provided the companies thus incorporated limit their operations within the limits of such province. If they desire to go outside of the province, they come under the provisions of the federal law, to which they must conform, and which contains special provisions for such event.

This power of incorporating companies, exercised by the legislature of *Ontario*, has been recognized by federal legislation, as belonging to provincial legislatures. Sec. 28 of 40 *Vic.*, c. 42, enacts:—

> This Act shall not apply to any company within the exclusive control of any one of the provinces of *Canada*, unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall have the power of transacting its business of insurance throughout *Canada*.

The first section of this Act makes the laws respecting insolvency applicable to insurance companies incorporated by the parliament of *Canada*, as well as to those incorporated prior to and after Confederation, by the legislature of any province now constituting *Canada*. We also find in the 30th section of the same Act another

recognition of the power of the provinces to legislate on the subject of insurance. Doubts having been raised as to the validity of a certain *Ontario* statute relating to mutual insurance companies, this section of the Federal Act declares that only such provisions as are within the jurisdiction of the Federal parliament are repealed. In this section there is not only the formal recognition of this power in the province, but there is also this important declaration, that the Act repeals only that part of its provisions involving a conflict of power. It is a formal admission that this subject-matter, when treated in its commercial aspect, is within the control of the Federal parliament, whilst, when regarded as relating to civil rights, such as involve the form and nature of the conditions of insurance, it remains under the control of the provincial legislature. This also confirms the opinion above stated, as to the restrictions which the Federal and provincial governments must impose upon themselves in the exercise of their respective powers, in order to keep within the limits of their jurisdiction. It is true that the exercise of a power would not be a sufficient reason, in many cases, for declaring that it legally exists, but in a case such as the one now under consideration, where there are cogent reasons for exercising this power in a limited manner, as it has been by 40 *Vic.*, ch. 42, recognizing the power of the provinces, which seems equally well founded, we may fairly presume that the accord of both legislatures to keep themselves within the limit of their respective powers, was for the purpose of exercising such powers as properly belonged to them respectively. The most important public departments, such as the Department of Justice, and the Department of Finance, have for some years past adopted this view of the law, by seeing that the requirements of the several federal laws relating to

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insurance were strictly complied with. Such an interpretation could not prevail, no doubt, against a judicial decision, but, in the absence of the latter, the interpretation given by the departments must have great weight. *Story* thus speaks of the value of the same (1):

> And, after all, the most unexceptional source of collateral interpretation is from the practical exposition of the Government itself, and its various departments, upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial exposition, and have the same general recommendation that belongs to the latter.

This departmental interpretation has been acted upon for several years; the license fees have been collected, statistics have been furnished without any contention on the part of the provinces, and the power exercised in virtue of the law of *Ontario* was not contested by the Federal Government, who had the authority to disallow the Act had they considered it *ultra vires*. When both Governments are in accord, and in order to dispel any doubts specially legislate, would it not be unwise to substitute another interpretation than theirs? If there is any doubt on the matter, it seems to me to have been settled by legislative interpretation, and all the tribunals have to do is to conform themselves thereto. Thus, besides the reasons I have given above in favor of the law of *Ontario*, there is also in its favor administrative interpretation and legislative interpretation. If I do not add judicial exposition of the *Ontario* Courts, it is because their decisions are being appealed from; but it is, nevertheless, of the greatest weight, as it has been the unanimous opinion of all the judges who have been called upon to pronounce upon this question. In addition to this we have this decision supported by the Supreme Court of the *United States* in the case of *Paul* v. *Virginia*. Besides the

(1) *Story*—Constitution of the United States, Vol. I., No. 408.

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question raised as to the constitutionality of the Act, the company (appellant) contends that, because it has been incorporated by the parliament of *Great Britain*, it is not subject to the provisions of the Act now under consideration. Whatever may be the origin of the corporation, whether they owe their existence to the parliament of the Dominion or to the provincial legislatures, or to a foreign power, they are nevertheless in the one case as the other, subject, in order to exercise their franchise, to the conditions which may be imposed upon them by the laws of the country where they desire to exercise such franchise. These corporations are in reality only commercial associations, which only differ from ordinary commercial partnerships as to the limited liability of the members thereof. The federal statute which I have cited, by the first section, treats them as ordinary associations of individuals transacting insurance business. These corporations cannot, any more than other associations, set themselves above the law, to which they are obliged to conform. Our large commercial houses, which have branch houses in the different provinces of the Dominion as well as in foreign countries, have never for a moment pretended that they could set themselves above the laws of the provinces or countries in which they carry on business, and claim that they should be subject only to the laws in force at their principal place of business. Whatever may be the inconvenience, are they not obliged in all their contracts to conform themselves to the laws of the country where they carry on business? It would, no doubt, be much simpler and more advantageous for insurance companies, to have the power of determining themselves their conditions and to impose them in all countries where they would open offices. Would this not be putting them above the law? Far from recognizing that they have such privileges, numerous

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authorities and judicial decisions agree to the contrary. This point has already been decided in the case of *Paul* v. *Virginia*, already cited, in which Mr. Justice *Field* says:

> A recognition of its existence (corporation) even by the other States, and the enforcement of its contracts made therein, depend greatly on the comity of those States, a comity which is never extended when the existence of the corporation or the exercise of its power is prejudicial to their intent or repugnant to their interest. They may exclude this foreign corporation, they may restrict its business to particular localities, or they may exact security for the performance of its contracts with their citizens, as in their judgment will best promote the public interest.

It is hardly necessary to cite authorities on this point, as it is only the application of the elementary rule "*locus regit actum.*" I will cite, however, the following, as it contains the opinion of the author of the "Traité du dróit de la nature et des gens":

> Lorsque la police est applicable à des navires armés et equipés en France quoique étrangers les disposition de la loi française doivent être suivies. La cour de Cassation a eu occasion d'examiner cette question et l'a résolue dans ce sens. Merlin qui rapporte cet arrêt l'approuve.
>
> "Sur cette question," disait Mr. *Daniels*, organe du ministère public, "rien n'est plus constant que le principe invoqué par les demandeurs et developpé par *Puffendorf:* Quiconque passe un contrat dans les terres d'un souverain, se soumet au loi du pays et devient en quelque manière, sujet passager de cet état (1)."

The company (appellant) also contends that their conditions being in substance similar to the statutory conditions, they may avail themselves of the statutory conditions, and yet not comply with the requirements imposed by the statute; that is to say, in my opinion, because they have evaded the law, they should have the same right as though they had complied with it. It seems to me clear that when a company does not have the statutory conditions printed, as prescribed by sec. 4, the third section provides that they may form part

(1) Alauzet, Vol. 1, No. 194, p. 361.

of the policy "as against the insurers," leaving it optional to the insured to take advantage of them or not, the insurance then being subject to such conditions as result from the law bearing on the subject of contract of insurance. I do not presume here to discuss this point, as it has been so often before the Courts of *Ontario*, and as the large majority of the judges have given their opinion in favor of this construction of the Act. It is sufficient for me to say that I entirely concur with the opinion expressed by the learned C. J. *Moss* on this point, in the cases now before us.

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

HENRY, J. :—

Several important questions were raised and argued in this case, not the least of which was that as to the constitutionality of the Act of *Ontario*, which provides for conditions in policies for fire insurance such as that which is now contested by the appellants. I have considered that subject, and have arrived at the conclusion that the Act is *intra vires*. It is contended that, inasmuch "as the regulation of trade and commerce," by the 91st section of the *British North America Act*, is specifically given to the parliament of *Canada*, there is no power in a local legislature to regulate by enactment the rights of insurers and those they insure against loss or damage by fire. It is also contended that, if it be not so, the local legislature might, by the imposition of conditions and restrictions, frustrate the object of a company chartered, or incorporated by, or under, an Imperial Act, as is the case with the appellant's company, or by or under an Act of the parliament of *Canada*. The contention may or may not be well founded, but local legislation has not yet reached that point, and besides, the settlement either

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way cannot, I think, affect the main question. If it ever does, it will be time enough to deal with that position when it arises. If the power to regulate the matters in question be with the local legislature, it is not easy to find the authority to question, control, or limit the exercise of it.

We must construe the words of sec. 91, which I have quoted, *by the whole Act*, and the several important objects in view, and be governed by what is intended by it. The *regulation* of trade and commerce is a very comprehensive, but, at the same time, a very indefinite and vague term, and, if construed in its comprehensive meaning, would include a great variety of subjects which we find specifically added in the list of subjects given to the parliament of *Canada*, such, for example, as "beacons, buoys, lighthouses," "navigation and shipping," "Quarantine and establishment of marine hospitals," "Currency and coinage," "Banking, incorporation of banks, and the issue of paper money," "Bills of exchange and promissory notes," "Interest," "Legal tender," "Bankruptcy and insolvency," and others. From this it may be fairly assumed the term was used in some generic, but, at the same time, qualified sense, and not intended to apply to the regulation of trade and commerce in regard to all subjects that may be found to contribute to the one or the other. The operations of manufacturers, the hiring of their operatives, the providing and erection of machinery, procuring the raw materials used by them, with the necessary contracts and agreements and expenditure of labor employed, and the interests of all parties engaged, from the owner of the soil through all the train of persons engaged in producing and supplying lumber, iron or other materials for manufacturing purposes, may all be said to be intimately connected with trade and commerce, and be included in the gen-

eral term used, and if they were not shown by the whole Act and its objects to be excepted, we might possibly conclude them to have been intentionally included. The matters just referred to all tend to contribute to and create trade and commerce; but a Fire Insurance Company may operate, as they do in some cases, only in respect of agricultural buildings, which but very remotely have any effect on the trade and commerce of the country. If organized for local operation, we find, by number eleven of the list of subjects given to the local legislatures, the charters are to be granted by them. "The incorporation of companies with provincial objects" are the words used. But apart from these considerations, "Property and civil rights in the province" being within the power of the local legislatures, we must determine the extent to which, if any, the power to deal with them is necessarily restrained, and what limitation of them the British parliament intended to provide in reference to the exercise of it, by giving to parliament "The regulation of trade and commerce."

As I have before said, we must construe the whole Act together, and so as to give effect, if possible, to every part of it, and reconcile and ascertain what seeming contradictions the British Act contains.

From the pecular distribution of the legislative powers, and the mode adopted, it was a difficult undertaking to legislate so as to prevent difficulties arising, but they are to be properly resolved only by keeping prominently in view the leading objects intended to be provided for. Looking only at number 26 in the list contained in section 91, and finding the words "Marriage and Divorce," we would at once conclude that those words included everything with respect to those subjects; but in number 12 of section 92 we find "The solemnization of Marriage in the province" is expressly given to the

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local legislatures. No doubt can be entertained that, considering *both* provisions, notwithstanding any other provision of the Act, the intention was to give the power to regulate the solemnization of marriage to the local legislatures. I admit that the two cases are not exactly alike, but still it shows no one part of the Act should be alone looked at.

The incorporation of fire insurance companies with provincial objects being given to the local legislatures, they can, as to them, prescribe conditions and terms for the conduct of the business, and regulate the rights of the companies and those dealing with them. With the power to deal with the whole subject of property, real and personal, and civil rights, and the right to prescribe and regulate as just stated, in respect of the incorporation of companies with provincial objects, it would be unreasonable to conclude they were intended to have no power to apply the same, or similar conditions, to the dealings of other companies chartered outside. It would be, I think, improper to conclude that the Imperial Parliament, in the use of the words "the regulation of trade and commerce," in the peculiar connection in which we find them, could have intended them to apply, not only to the *regulation* of trade and commerce, as generally understood, but to all trading and commercial contracts, so as to limit the operation of the provision giving specifically the subject of property and civil rights to the local legislatures.

If once decided that contracts for fire insurance are necessarily beyond the powers of the local legislatures, where can a line be drawn to save to them the power to legislate touching the wages and contracts connected with manufactories, mercantile transactions, or others, or in respect to liens on personal estate, in the shape of stocks of goods, or to mercantile shops or warehouses.

The words of a statute, unless the context shows

otherwise, or they have a technical meaning, are to be construed according to their well understood and accustomed meaning. "Trade" means the act or business of exchanging commodities by barter, or the business of buying and selling for money—commerce—traffic—barter; it means the giving of one article for another for money or money's worth. "Commerce" is only another term for the same thing. Neither of the terms includes the rules of law by which parties engaged in trade or commerce are bound to each other, but when their *regulation* is given to a legislative body, it must be assumed the intention was that control in some respects was to be exercised, but to what extent, we must judge in this case by taking the whole Act into consideration. I have no doubt that the Dominion parliament has power to enact general regulations in regard to trade and commerce, but not to interfere with the powers of the local legislatures in the matter of local contracts, amongst which is properly included policies of insurance against loss by fire on property in the same province.

"To regulate" trade may remotely affect some of the conditions and terms under which articles are produced, but not necessarily so; and the regulation of it may consist only in rules governing the disposition or sale of goods, or may include conditions under which goods are manufactured, by which they become liable to duty. The term or expression "Regulation of trade and commerce" cannot, under the Imperial Act, be construed to extend to and include contracts for the erection, purchase, or renting of warehouses, manufactories, or shops used for trading or commercial purposes.

In some of the cases I have put, trade and commerce would be regulated. In the others they might be affected, but only incidentally, by the laws regulating

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contracts; nor is it, I think, at all necessary under the Act, that they should be construed to regulate contracts. This view is in accordance with the decision of the Supreme Court of the *United States*, in *Paul* v. *Virginia* (1), cited in this case by the learned Chief Justice of *Ontario*, and which, in the absence of English authorities, I feel at liberty to adopt.

I was of the majority of this Court who decided against the constitutionality of the Act of *Ontario* under which the case of *Severn* and *The Queen* came before us; but that case was essentially different from this, as will appear by a comparison of my reasons in the two cases.

Having disposed of the first, and, in several respects, the most important point, I will briefly consider what conditions attached to the insurance by the terms of the interim receipt, upon which the action in this case was brought.

The legislature having enacted that all policies should be subject to certain prescribed conditions, which were required to be printed on them (except where variations were appended in the manner prescribed), a question is raised how such legislation affects insurances created by the usual interim receipts, which provide that the conditions of the particular company, which differ from the statutory ones, shall be applicable. The legislature has virtually said that unless the prescribed conditions are printed as directed on the policy, there shall be, in fact, none in the interest or for the benefit of the company; but, although not so printed, they may be invoked by and for the insured, and "*shall, as against the insurers*, be deemed to be part of every policy of fire insurance."

The statute thus plainly negatives the right of the insurers to invoke the conditions unless printed on the

(1) 8 Wallace 168.

policy as it requires. Whether in the case of an insurance by an interim receipt referring to conditions different from the statutory ones, by which the insurers are shown to ignore the enactment altogether, they can set up any condition at variance with the statutory ones, or invoke the latter, is a question that, in my view of the meaning of the statutes, should be resolved against them.

They are not justified in inserting in a policy any condition at variance with the statutory ones, and any such, for that reason, could not be a defence, and, being in that position, they cannot invoke the latter, for they are only to be deemed to be part of the policy, as *against* them, and not in their favor. If, therefore, that is the result, it has arisen because they have ignored the statutory provisions which they were bound by, and in departing from which they must be held to have, by their own act, become amenable to the consequences.

I entirely concur in the observations made by the learned Chief Justice of *Ontario*, in the second paragraph of his judgment in this case, and think it is the duty of courts to enforce obedience to the laws, and not to give the benefit of a provision to parties who, by their overt and deliberate acts, have violated it. After the enactment, companies should have changed their interim receipts, and made the reference in them to the statutory conditions, or to them with the variations and additions, as they might desire; but to make reference to conditions in opposition to the statute, is what they were clearly not justified in doing.

The amendment in the declaration as to the allegation of the time for making the claim was virtually made by the Court of Queen's Bench and sanctioned by the Court of Appeal, so that the declaration may be considered in that respect as in conformity with the statut-

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ory condition; and the proof was given as therein provided.

On a careful examination of the evidence I have arrived at this conclusion:—

Although the statutory conditions could not be invoked by the appellants, the first of them—providing for the avoiding of the policy in case of misrepresentation or omissions to communicate circumstances material to be known to the company—is supplied by the law otherwise, and is applicable to the question of other existing insurances not notified. The pleas alleging the other insurances in the "*Canada* Farmer's Insurance Company" and the "*Canada* Fire and Marine Insurance Company" are not proved, for it is clearly shown that the policies of those two companies were on goods different from those covered by the interim receipt herein.

Although in the view I take of the law, it is not necessary for me to refer to the matter of the gunpowder, I may say that I agree with the ruling that the verdict of the jury should settle the point as to the quantity of it. It was the only one in regard to which there was conflicting evidence and which became necessary to be found by the jury. I think the evidence abundantly warranted that finding, and that under it the appellant is shown not to have a greater quantity than he was justified in having by the statutory condition relating thereto, if it were applicable. I am of the opinion there is nothing in any of the other pleas which requires special notice. I think the respondent is entitled to recover the amount claimed, and that the judgments appealed from should be confirmed and the appeal dismissed with costs.

Since this judgment was prepared in December last, I heard very attentively the argument of other cases on the constitutionality of two Acts—one of the

Dominion parliament, the other of the Act under consideration in this case; but have heard nothing to induce me to change my views, but, on the contrary, much to sustain them.

Since judgments were delivered in the *Queen* v. *the City of Fredericton*, I lighted upon a judgment of the Privy Council, which sustains the views I therein enunciated as well as those in my present judgment.

In *Ingram* v. *Drinkwater* (1), it was held, as by the head note, that although the words of the statute—

Were large enough to include a rent charge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the Act that it was not intended to apply to incorporeal rights.

The doctrine, as laid down by the Court, is thus stated:—

It is clear that, under the 6th section of the Act of 1860, the rate can only be laid on property legally liable to be included in the valuation under the 2nd section, and the only words in that section, or throughout the Act, which the respondent relies upon to make the amount paid to the vicar rateable, are the words "real estate," which, doubtless, are large enough to comprehend it, if intended to do so, but which have not necessarily that effect unless so intended; and looking to the collocation of those words in the different sections, as well as to the whole frame and general wording of the Act, their Lordships are of opinion that the rating powers were not intended to include or apply to the amounts payable to the appellant, and others similarly circumstanced.

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This is an action on a policy of insurance made after the passing of the Act of the legislature of *Ontario*, 39 *Vic.*, ch. 24, and the policy did not contain the conditions as required by that Act.

The same questions are raised here as in the case of the *Queen Insurance Company* v. *Parsons*, decided this term: first, as to the constitutionality of the Act, and, secondly, as to the consequence of a company ignoring the Act, and inserting conditions different from those

(1) 32 L. T. N. S. 746.

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prescribed by it. I have given, in my judgment in that case, my views on both subjects, and, in accordance with those views, I have now only to say that, in my opinion, the Act in question was not *ultra vires*, and that, as the appellants inserted conditions in the policy contrary to its provisions, they cannot set them up as any answer to the respondent's action.

The insertion of the conditions in the manner and substance adopted being virtually prohibited by the statute, no effect can be given to them in favor of the insurers. They cannot invoke the aid or benefit of the statutory conditions, because they did not obey the statute by inserting them. They undertook to make a contract in terms forbidden by the statute, and must take the consequences of a refusal of the Courts to ratify their attempt to evade the statutory provisions. Such conditions being prohibited, neither party is bound by them. Had it not been so, the respondent could have bound himself by any conditions agreed upon. But the legislature having, for, I have no doubt, wise objects, interposed and provided the only means of escape from the statutory conditions, which is by the insertion of them in full, and appending, in a prescribed manner, variations or additions, the conditions otherwise made are void in every respect. The legal course not having been pursued, we can substitute nothing in its stead. Such is the result, so far as I am able to determine and declare it. In so declaring it, I must not be understood as declaring that the policy is threfore free of all conditions, for the general principles applicable to all contracts still remain. My decision and remarks are only intended to apply to peculiar conditions, added to the ordinary implied ones, by insurance companies in their policies.

The appellants contend that, as their company was incorporated by the Dominion parliament, they cannot

be reached or affected by a local Act. That contention has been well answered in the judgments appealed from. If, as I have considered, the local legislature had the right to regulate fire insurance contracts, in common with others, it matters little where the mere corporate existence is created. By the comity of nations and countries, companies chartered in one country are acknowledged in others, but, at the same time, foreign companies must carry on their affairs and business, and be guided and governed by the local laws of all countries in which such affairs and business are carried on.

The issues tendered by the only pleas brought to our notice become, for the reasons given, immaterial, and are therefore no answer to the action of the respondent. Those pleas are founded, according to my views, on illegal conditions in the policy, and the breach of them cannot, therefore, be alleged as a ground of defence.

I think the appeal should be dismissed, and the previous judgments affirmed, with costs.

TASCHEREAU, J. :—

I do not concur in the judgment of the Court in these cases, and I proceed to state the grounds upon which I dissent.

The Citizens' Insurance Company of *Canada*, known in the first instance under an Act of the late province of *Canada* (19 and 20 *Vic.*, ch. 124, 1856), as the *Canada* Marine Insurance Company, later under 27 and 28 *Vic.*, ch. 98, 1864, as the Citizens' Insurance and Investment Company, and now, under its present name, by an Act of the Dominion parliament, 39 *Vic.*, ch. 55, (1876) has obtained from the Federal authority, by this last statute, the right to make and effect contracts of insurance upon such conditions, and under such modifications and restrictions, as might be bargained or agreed upon by and between the company and the persons contracting with them for such insurances.

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By chapter 162 of its revised statutes, the *Ontario* legislature has virtually revoked this power which this company held from the federal authority, and repealed the enactment of the Dominion Act under which the said company held this power, for a law repugnant to another, as entirely repeals that other as if express terms of repeal were used. It has said to this company: "The Federal authority has given you the right to make such contracts as you pleased, but we revoke that grant, we repeal *pro tanto* the Dominion statute under which you hold it, and hereafter you shall not contract except under the conditions we impose upon you."

Had the *Ontario* legislature, under the *British North America Act*, the power to do so? or, to put the question in another shape: Had the Dominion parliament the right to pass the 39 *Vic.*, ch. 55, under which the company (appellant) claims the right to issue its policies under such conditions as they please? For it must be admitted that, under the *British North America Act*, there can be no concurrent jurisdiction in the matter between the Federal and the local legislative authorities, and that if the Dominion parliament had the power to so authorize the said company to issue its policies under such conditions as it pleased, and to enact the said 39 *Vic.*, ch. 55, the local legislature had not the power to revoke this authorization or to repeal the said Act. It would be a strange state of things indeed if the local legislatures could repeal an Act passed by the Dominion parliament. They cannot do it either expressly or impliedly. They cannot by their legislation render nugatory the enactments of the Federal legislative power on subjects left under the control of the said Federal legislative power by the *British North America Act*.

Are these statutes, the Federal Act creating the

company (appellant) and the *Ontario* Act imposing conditions on its policies of insurance, regulations of trade and commerce? If they are, it follows that the Federal Act is constitutional and the *Ontario* Act unconstitutional. I am of opinion that both of these statutes are regulations on commercial corporations and commercial operations, and the words "regulation of trade and commerce" in sec. 91 of the *British North America Act*, mean "all regulations on all the branches of trade and commerce." Indeed, a contrary interpretation would be against the very letter of the Act. We cannot, it seems to me, find restrictions and limitations where the words used by the law-giver are so clear and general. That companies doing the business of insurance are commercial companies, and that their operations are of a commercial nature, admits of no doubt in my opinion. In one of the provinces (*Quebec*) a special article of its civil code (2,470) distinctly says so, and in that same province, so far back as 1835, long before the civil code, the Court of Queen's Bench, in *Montreal*, composed of *Vallière*, *Rolland* and *Day*, J. J, in a case of *Smith* v *Irvine* (1), held that the insuring against fire by an insurance company is a commercial transaction.

So it is held to be in *France*:

Cette enterprise, supposant l'existence d'un établissement et de bureaux ouverts a quiconque voudra se faire assurer, et un ensemble d'opérations faites dans l'espoir des bénéfices qui doivent en resulter présente tous les caractères d'une spéculation et constitute une véritable enterprise commerciale.

Les Compagnies d'assurance à prime font évidemment des actes de commerce en souscrivant des polices d'assurance, puisqu'elles font profession de vendre la garantie à laquelle elles s'obligent, et qu'elles ne contractent qu'en vue de profit qu'elles espérent retirer de leurs operations (2).

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(1) 1 Rev. Leg. 47.

(2) Boudousquié, Traité de l'assurance No. 70.

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L'assurance à prime contre l'incendie étant de la même nature que l'assurance maritime est reputée acte de commerce. Dalloz avait d'abord émis un sentiment contraire qu'aprés nouvel examen il a cru devoir abandonner (1).

In *Prussia*, *Belgium*, *Portugal*, *Spain*, *Holland* and *Wurtemburg*, whose codes I have been able to refer to, the contract of insurance against fire is also held to be a commercial contract. Why should it be considered otherwise in *England*, the emporium of trade and commerce, where the amount of business done by these fire companies is so large? Not a single authority has been cited at the Bar tending to show that there they are not considered as commercial companies, or that their operations are not considered as commercial operations, and I have not been able to find any. On the contrary, if I open *Homan's Cyclopœdia of Commerce*, or *MacGregor's Commercial Statistics*, or *McCulloch's Commercial Dictionary*, I find these companies and their contracts treated of as falling under the commercial operations and the commercial law of *England*. In *Stephen's* Commentaries (2), an insurer is spoken of as a party "carrying on" a general *trade* or "business of insurance."

In *Levis' Manual of Mercantile Law* (3), Joint Stock Companies are said to be under the Commercial Law of *England*, and at paragraph 230, of the same book, I find a chapter on these insurance companies as falling within the Mercantile Law. So in *Smith's* Mercantile Law, and in *Chitty's* Commercial and General Lawyer. And Lord *Mansfield*, in *Carter* v. *Bohem* (4), says that "Insurance is a contract upon speculation." I also remark

(1) Ibid. No. 384. See Dalloz, Actes de Commerce, No. 216, where the decisions cited shew that the jurisprudence of the Courts is in the same sense. See also Pardessus, Droit Commercial, No. 588; Dalloz Diction. *vo.* Assurance Terrestre, Nos. 19, 20 and 22.

(2) Vol. 2, page 127.

(3) Paragraph 30.

(4) 3 Burr. 1,905.

that this case was tried before a special jury of *merchants*, yet it was not a case of maritime insurance.

I really cannot see on what grounds, under the English Law, a Fire Insurance Company can be said to be a non-commercial corporation. It is commercial, it seems to me, for the same reasons that make it so in *France* and the rest of *Europe*, that is to say, because it is a company doing the business of speculation on risks and hazards, because it trades on its contracts of indemnity, because it does the business of selling that indemnity. It is as commercial as the contract of maritime insurance, the character of which admits of no doubt (1), and in which, as in the contract of fire insurance, there is nothing but a contract of indemnity (2). And is not maritime insurance a commercial contract, whether it is a pleasure yacht, a man-of-war, a ship engaged in a scientific expedition, or a merchant vessel that is insured? Then if so, how can it be contended that fire insurance is a commercial contract only when it is made on goods and merchandize, and not commercial when made, say, on a building? As in maritime insurance, it is not from the nature of the thing insured that the transaction derives its character, but from the fact that the insurer does the business, speculation or trade of insurance; so, for instance, with the contract of sale, which is not commercial of its essence, but becomes commercial, not from the nature of the article sold, but because the seller does a business of selling that article. What is trade? Trade is an occupation, employment or business carried on for gain or profit. Now, do these Fire Insurance Companies carry on a business for gain or profit? To ask the question is to answer it. They are trading corporations,

(1) Stephen's Com. 2 Vol. p. 128.
(2) *Dalby* v. *India and London Life Insurance Co.*, 15 C. B. 365.

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and trading corporations are commercial corporations (1). In the *United States*, as in *England*, this seems uncontroverted. In *Angell & Ames* on Corporations, insurance companies are classified among commercial corporations. In *Parson's* Mercantile Law and *Bryant & Stratton's* Commercial Law, fire insurance is treated of as forming part of the commercial law. In the Civil Code of *Louisiana*, the contract of insurance was entirely left out, to form part of the Code of Commerce, which it was then intended to promulgate.

But great stress is laid by the respondent on the decision of the Supreme Court of the *United States* in *Paul* v. *Virginia* (2), where *Field*, J., said that issuing a policy of insurance is not a transaction of commerce. Well, I may first remark that this case is not binding on this Court; then, a reference to the report shows that this is simply an *obiter dictum* of Mr. Justice *Field*, and that the gist of the decision in that case is merely, that insurance business done by a *New York* Company, in the State of *Virginia*, does not fall within the meaning of the clause of the constitution, which declares that Congress shall have power to regulate commerce with foreign nations, and among the several States. Mr. Justice *Field* himself, in *Pensacola Telegraph Co.* v. *Western Telegraph Co.* (3), explained what he said in *Paul* v. *Virginia* as follows:—

> In other words, the Court held that the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance made by a corporation of one State upon property in another State was not a transaction of inter-state commerce. It would have been outside of the case for the Court to have expressed an opinion as to the power of Congress to authorize a foreign corporation to do business in a State upon the assumption that issuing a policy of insurance was a commercial transaction.

(1) 1 Holmes 30.

(2) 8 Wallace 168.

(3) 96 U. S. 2.

So that this case of *Paul* v. *Virginia*, it seems to me, has no application whatever here. The relative positions of the parliament of the Dominion of *Canada*, and the legislatures of the various provinces, are so entirely different from those of Congress and the legislatures of the several States, that all decisions from the *United States* Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution. There the right to regulate commerce *in* the State is given to the State, not to the Federal power. Here, as said by Mr. Justice *Strong*, in *Severn* v. *The Queen* (3) : "That the regulation of trade and commerce *in the provinces*, domestic and internal, as well as foreign and external, is by the *British North America Act* conferred upon the parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit." I might also remark that, whilst in the *United States* constitution, the word "commerce" only is used ; ours has the words "*trade and commerce*." Some law dictionaries give the word "trade" as meaning "internal commerce," whilst the word commerce would refer to foreign intercourse. But this appears to be a fanciful distinction, not recognized either in common parlance or in legal language. In either one or the other, the expressions : "the trade with the *West Indies*, with the *United States* * * * the foreign trade," &c., are of every day use, and therefore, in the interpretation of the Imperial Act, we cannot hold, it seems to me, that the word "trade" has been added to the word "commerce" simply to mean "internal commerce." Leaving it out of the Act, the internal commerce of the Dominion would remain as it is—under the control of the federal power. Every word of the Act must have its due force and appropriate meaning, and the Imperial parliament, which, no doubt, whilst creat-

(3) 2 Can. Sup. Ct. R. 104.

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ing a federal union among its North American possessions, had before its eyes the constitution of the *United States*, must have intended by adding this word "trade" to the word "commerce" to give to our federal authority supreme power, not only over the commerce, internal as well as external, but also over the trade of the whole Dominion, internal as well as external. Of course we are not called upon to give a general definition of this word "trade" as used in the Act. In the interpretation of the constitution, general definitions are to be avoided. In this case, all that is necessary to determine is, whether the word embraces insurance companies and their contracts, and, in my opinion, it does.

To revert to the case of *Paul* v. *Virginia*, the *obiter dictum* of Mr. Justice *Field*, "that issuing a policy of insurance is not a transaction of commerce," seems to me nothing but a truism. In the same sense, as I have remarked before, it may be said that making a contract of sale is not a transaction of commerce. It is the fact of a person or corporation making a business of selling and buying, or of issuing policies of insurance, which gives to the contract of sale, or the contract of insurance, and the seller or insurer, a commercial character. It is in accordance with this principle that the Civil Code of *Lower Canada*, art. 2,470, to which I have already referred, says that *fire insurances are not by their nature commercial, but that they are so when made for a premium by persons carrying on the business of insurers.*

So it is with the telegraphing business; for example, sending a message by telegraph is not a transaction of commerce, yet, telegraph companies inter-States, and the right to regulate them, are held in the *United States* to be under the federal power as a part of commerce, and this, though a very large proportion of the telegraphic mes-

sages have nothing to do with commerce at all (1). With us, on the same principle, telegraph business would also be exclusively under federal control, if the *British North America Act* did not expressly vest in the local legislatures, the control over local and provincial lines as long as the Federal parliament does not declare them to be for the general advantage of *Canada*.

Against the decision of *Paul* v. *Virginia*, in the *United States*, a decision in our own Courts can be cited. I refer to *Attorney General* v. *The Queen Insurance Co.* (2), in which Mr. Justice *Torrance* in the Superior Court at *Montreal*, and the five judges of the Court of Appeal, unanimously held, that a license tax on *policies* of insurance was a regulation of trade and commerce, and, as such, under the *British North America Act*, *ultra vires* of the provincial legislatures. This decision seems to me in point. The case was carried to the Privy Council, and the judgment of the *Quebec* Courts was confirmed without hearing the respondents. However, the Privy Council disposed of it without deciding whether the provincial License Act on insurance policies was a matter falling within the words "regulation of trade and commerce" of the *British North America Act*. It may, nevertheless, be remarked, that their Lordships in their judgment, after saying that the price of a license to a trader is usually ascertained by the amount of his trade, add, referring to the license imposed by the *Quebec* legislature on insurance policies, "this is not a payment depending in that sense on the amount of trade previously done by the trader," calling insurance business a "trade" and insurance companies "traders." The report of this case in the *Jurist* is very

(1) *Western Union Telegraph Co.* v. *Atlantic and Pacific States Telegraph Co.* 5 Nev. 102; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* 96 U. S. 1.

(2) 21 L. C. J. 77; 22 L. C. J. 307.

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incomplete. I have referred to the *case* containing the note of all the Judges in the *Quebec* Courts at length, as filed before the Privy Council. The judgment of the Privy Council is to be found in L. R. 3 App. Cases 1090.

I will now refer to the statutes in which the legislative authority of the Dominion has exercised its jurisdiction over Insurance companies, or expressed, in its legislation, an opinion on the questions here raised, remarking, at first, that where the commencement of a practice was almost coeval with the constitution, there is great reason to suppose that it was in conformity to the sentiments of those by whom the true intent of the constitution was best known: *Houston* vs. *Moore* (1); *Ogden* vs. *Saunders* (2); *Martin* vs. *Hunter* (3).

Since Confederation, in many instances our statutes have expressly or impliedly recognized insurance companies as trading companies. In the Insolvency Act of 1875 (38 *Vic.*, ch. 16, sec. 1,) it is enacted that the Act applies to traders and to trading companies, *except Insurance Companies*. Now, it is an admitted rule of interpretation that the exception of a particular thing from general words, proves, that in the opinion of the law-giver, the thing excepted would be within the general words, had the exception not been made. So that the opinion of the Federal parliament must have been, when making the said exception in the said statute, that insurance companies are trading corporations. I see, moreover, that in 32 and 33 *Vic.*, ch. 12, sec. 3; 32 and 33 *Vic.*, ch. 13, sec. 3: and 40 *Vic.*, ch. 43, sec. 3, the Dominion parliament has enacted that these statutes should apply to any purposes or objects to which the legislative authority of the parliament of *Canada* extends, *except insurance*. That is

(1) 5 Wheaton 1. (2) 12 Wheaton 213.
(3) 1 Wheaton 304.

saying clearly that the legislative authority of the said parliament extends to insurance. Indeed, the Dominion parliament has given no uncertain sound on the question. Within the very first year of the Confederation (31 *Vic.*, ch. 93,) it exercised the power of legislation on the subject, and it has done so ever since, in no less than twenty-five statutes passed thereon at various periods, as follows :—

1868, 31 *Vic.*, ch. 93.
1869, 32 & 33 *Vic.*, ch. 67, 70.
1870, 33 *Vic.*, ch. 58.
1871, 34 " " 53, 55, 56.
1872, 35 " " 98, 99, 102, 104, 105.
1873, 36 " " 99.
1874, 37 " " 49, 86, 89, 94, 95.
1875, 38 " " 81, 83, 84.
1876, 39 " " 53, 54 & 55.
1879, 42 " " 66.

To these may be added the six license acts on Insurance Companies :—31 *Vic.*, ch. 48 ; 34 *Vic.*, ch. 9 ; 37 *Vic.*, ch. 48 ; 38 *Vic.*, ch. 20 ; 38 *Vic.*, ch. 21 ; 40 *Vic.*, ch. 42, in which the Dominion parliament has also exercised the right to legislate on insurance and insurance companies, and to enact regulations on their trade and business, making at least (not including those of the last session) thirty-one statutes of the Federal parliament (and I have no doubt I have not counted them all), which, if the respondent's contention should prevail, would fall to the ground as unconstitutional.

The consequence of the nullity of these statutes must be, amongst a great many others, that all the amendments made by the Dominion parliament to the charters of the insurance companies existing before confederation, all the charters granted to insurance companies by the said parliament, are null and void ; that all

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their policies of insurance are so many pieces of blank paper; that their shareholders are relieved from all liability whatsoever for the unpaid portions of their shares; that all actions pending, in which any of these companies are parties, must fall to the ground. And, as to the license acts, if they are illegal, of course these companies are not obliged to submit to them; they are, moreover, not only free from the operation of these acts for the future, but the Dominion Government is obliged to refund to them all that they have paid into the treasury under the said acts, and to remit the many hundred thousands of dollars which they have deposited with the Government. Indeed, it is impossible to foresee the grave and stupendous consequence of the nullity of the Dominion legislation on these companies, and the complications which would necessarily arise therefrom.

In fact, the Citizens' Insurance Company itself, the appellant in this case, does not exist if the Federal parliament has not the power of legislating on insurance companies and creating them.

And if the Federal parliament had not the power to create the company (appellant) to give it existence, the judgment itself, that the respondent has obtained, is against a non-existing body, and, as such, must fall to the ground. He, in fact, then, has never been insured; he is the bearer of a mere shadow of a policy.

The respondent is thus driven to admit that the Federal parliament has the right to create and incorporate insurance companies. But then, if parliament has this right, it can only be because these companies fall under the federal control in virtue of the words "regulation of trade and commerce," in s. 91 of the *British North America Act.* "The power to incorporate or create a corporation is not a distinct sovereign power or end of government, but only the means of

carrying its other powers into effect," per *Marshall*, C. J., in *McCulloch* v. *Maryland* (1); and upon this principle, it is to be presumed the framers of the *British North America Act* have not deemed it necessary to grant in express terms to the Federal parliament the power to incorporate railroad, shipping, telegraph or any other companies for the Dominion. Yet it cannot be questioned that it has such power. In the enumeration of the powers of the provincial legislatures, it has been deemed necessary, it is true, to include in express terms the incorporation of companies for provincial objects, but that was undoubtedly because the power of creating a corporation appertains to sovereignty, and as such would not impliedly vest in the provincial legislatures, which clearly, by the Act, have none but the powers expressly given to them, whilst the Federal parliament has all the other powers. And if the Federal parliament has the power to create insurance companies, it has the power to regulate them, that is to say to prescribe the rules under which they can carry on their trade, by which their trade is to be governed. The respondent contends, that, assuming these companies can be created by the Federal parliament, their contracts, their policies fall under provincial control, and that the provincial legislatures alone have the power to regulate these contracts and these policies. But are not these contracts, these policies, the trade and commerce of these companies? and is it not the regulation of trade and commerce itself that the *British North America Act* vests, in express terms, in the federal authority? Is this not contending against the very words of the Act, that the federal authority can create or incorporate traders, but that it cannot regulate their trade? If such was the case, the provincial legislatures would have a power

(1) 4 Wheaton, 316, 411.

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totally incompatible with the supremacy which the 91st section of the *British North America Act* gives in such clear terms, to the Federal parliament, over all the matters left under its control. Either the Federal parliament has no control at all over insurance companies, or it has it supreme, entire and exclusive. If it has it, it has necessarily the power to regulate them and to impose upon their contracts all the conditions or restrictions it may think advisable; it has the power, for instance, to enact a statute imposing upon the companies it has created the very conditions contained in the *Ontario* Fire Insurance Policy Act. And, if it has that power, the *Ontario* legislature has not got it. A contrary interpretation would be giving to one Government the power to create, and to the other the power to destroy; and to use the words of *Marshall*, C. J. (*loc cit.*), "A power to create implies a power to preserve; a power to destroy, if wielded by a different hand, is hostile to and incompatible with this power, to create and preserve, and where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

I really fail to apprehend upon what ground the respondent, and the *Ontario* courts with him, whilst admitting the power of the Federal parliament to incorporate insurance companies, can sustain the contention that the contract of insurance itself falls under provincial control, simply because it is a *contract* or a *personal contract* governed by the local laws, and falling within the words "civil rights," of the 92nd section of the *British North America Act*. Certainly a personal contract is governed by the local laws; no one denies this; but the question to be determined here is, which is the local law, the law in *Ontario* on the subject? Is it the Dominion or the provincial law? The respondent would seem to treat the Dominion laws as foreign laws. He

forgets that before the laws enacted by the federal authority within the scope of its powers, the provincial lines disappear; that for these laws we have a *quasi* legislative union; that these laws are the local laws of the whole Dominion, of each and every province thereof; that the Dominion, as to such laws, is but one country, having but one legislative power, so that a contract made under these laws in *Ontario*, or any one of the provinces, is to be considered, territorially or with respect to locality, as a contract in the Dominion, and, as such, governed by the Dominion laws, and not as a contract locally in the province, governed by the provincial laws. This is why the contracts to convey passengers and goods on the railways under Dominion control, for instance, the contract made by the sender of a message with a telegraph company, the contracts of a sale of bank stocks, are all and every one of them when made anywhere in the Dominion, regulated by the federal authority. And the power of the federal authority to so regulate them has never been doubted; yet are they not all local transactions and personal contracts? Undoubtedly so; but these railway companies, these telegraph companies, these banking companies, being under the federal control, their contracts are necessarily under the same control, absolutely and exclusively. It would be impossible for them to carry on their business, if each province could impose upon them and their contracts different conditions and restrictions. A Dominion charter would be absolutely useless to them if the constitution granted to each province the right to regulate their business. For the same reasons, the Federal parliament, for instance, in the general railway Act of 1879, section 9, has enacted, as it had done in 1868, by the repealed railway Act, that tenants in tail or for life, *grevés de substitutions*, guardians, curators, executors, and all trustees whatsoever,

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may contract and sell their lands to the company. This is certainly an enactment on property and civil rights, yet I have never heard it doubted, during the twelve years that it has been on the statute book, that it is perfectly constitutional. Indeed, without it, the enactments of the Federal parliament might be in some instances entirely defeated and set at nought. In the *United States* the federal power has in the same manner exercised its jurisdiction over civil rights and contracts. It having been settled, for instance, by judicial construction, that navigation was under federal control, Congress has enacted laws regulating the form and nature of the contract of hiring the ships' crews (1). It has altered the obligations imposed by the common law on the contracts made by ship-owners as common carriers, and though the validity of this enactment has never been directly decided upon by the Supreme Court, it has been brought before that tribunal in such a way that their silence was equivalent to a positive and formal judgment in favor of its validity, as demonstrated in *Pomeroy's* Constitutional Law (2).

This court has, in various cases, held that the Federal parliament, on the matters left under its control by section 91 of the *British North America Act*, must have a free and unfettered exercise of its powers, notwithstanding that, by doing so, some of the powers left under provincial control by section 92 of the Act, might be interfered with. And this doctrine has been approved of by the Privy Council as directly as possible in the case of *Cushing* v. *Dupuy*, decided a few weeks ago, April 15th, 1880 (3). In that case it was contended by the appellant that the provisions of the Dominion Insolvency Act were *ultra vires*, because they interfered with property and civil rights, as well as

(1) Pomeroy's Constitutional Law, par. 381.

(2) Par 384.

(3) 3. Leg. News 171.

with the procedure in civil matters, all of which are assigned exclusively to the provincial legislatures by the *British North America Act*. But that contention was disapproved of by their lordships in the following terms:—"The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed; indeed, it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, so far as a general law relating to those subjects might affect them." (That is to say, I take it, so far as a general law relating to bankruptcy and insolvency might affect property and civil rights or procedure.) And their lordships held that consequently the Dominion parliament had, in bankruptcy and insolvency, rightly exercised the power to revoke, alter or amend a certain article of the *Quebec* Code of Civil Procedure.

In the course of his very able argument before us, in one of these cases in favor of the constitutionality of this Fire Insurance Policy Act, the learned Attorney-General for *Ontario* enunciated the proposition that the federal authority may have the power to incorporate insurance companies, but that, if it has it, it is only in virtue of its general power under section 91 of the *British North America Act*, to make laws for the peace,

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order and good government of *Canada*, and that this power must be limited to the creation of these companies, and does not extend to the regulation of their business and contracts over which the provincial authority alone, as he contends, has jurisdiction as matters falling within the words "property and civil rights" of the 92nd section. I have already said why, in my opinion, the powers to create and regulate cannot be in such a manner divided. I will only here add, that this proposition of the learned Attorney-General seems to me entirely opposed to the very words of the section 91, in which it is enacted in very clear terms that this general power of the federal authority to make laws for the peace, order and good government of the Dominion, cannot be exercised *in relation to any of the matters coming within the class of subjects exclusively assigned by the Act to the provincial authority*. Now, the statutes creating and incorporating insurance companies, and enabling them, as bodies corporate, to make contracts of insurance, are clearly in relation to the subject of insurance, so that, if the Federal parliament has the right to incorporate these companies, as it seems to me clear it has, and as the respondent and the *Ontario* Courts are forced to admit, insurance cannot be deemed to come within the classes of subjects put under provincial control by the words "property and civil rights," of the 92nd section of the *British North America Act*. The Federal parliament cannot extend its own jurisdiction by a territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole Dominion, as a provincial legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws, and legislate on matters left to the federal power, by enacting them for the province only, as for instance, incorporate a bank for the province. The

British North America Act is not susceptible of a different construction without eliminating from section 91 thereof the controlling enactment that the general power of the central parliament to make laws for the peace, order and good government of the whole Dominion, *does not extend to the subjects left to the provincial legislative power*, and *that, notwithstanding anything in the Act*, the authority of the central parliament over the matters enumerated, as left under its control, *is exclusive*, as also without eliminating from section 92 of the Act, the enactment that the provincial legislatures have *exclusive* power over the matters therein enumerated. And this cannot be done. It would be declaring that neither one or the other has exclusive powers, whilst it is clearly intended by the Act that the powers of both should be exclusive. And upon this principle, I presume, for the reasons are not given at length, and it was before I came to this Court, a bill to incorporate the Christian Brothers as a Dominion body, which was referred to the judges of this Court by the Senate in 1876, was reported by them to be unconstitutional, and *ultra vires* of the Federal parliament (1). This bill purported to incorporate a company of teachers for the Dominion, and consequently as such, infringed on the powers of the provincial legislatures, in which is vested by section 93 of the *British North America Act*, the exclusive control over education; and the learned judges, by declaring it unconstitutional, recognized the principle that for a matter constitutionally provincial, the Federal parliament has not the power to incorporate a company for the Dominion. And that this is so, seems to me clear; but then it is as clear upon the same principle that the Federal parliament could not incorporate insurance companies, nor legislate in any manner whatsoever on their trade and business, if in-

(1) Journal of Senate, 1876, pp. 155, 206.

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surance was a matter constitutionally provincial, that is to say, left under provincial control by the *British North America Act.*

I say then to the respondent : "If legislation on insurance is left to the provincial legislatures by the *British North America Act*, the Federal parliament had not the power to create the Citizens' Insurance Company, and then you were never insured. If, on the contrary, the power of legislation over insurance is left to the federal authority, then this power is supreme and exclusive : the federal authority alone can regulate this trade in all its details, and the *Ontario* statute, which purports to do so, is *ultra vires* and unconstitutional. In either case, the judgment rendered in your favor in the Courts below must be reversed and the appeal allowed. (It is admitted that, if the *Ontario* statute is *ultra vires*, the appeal is to be allowed.)

However, I feel it my duty not to avoid deciding the main question raised in this case, and I hold for the reasons hereinbefore given, that the Federal parliament has the right to incorporate insurance companies and to regulate them and their trade and business : that this right is exclusive, and that consequently the *Ontario* Legislature has exceeded its powers in enacting the Fire Insurance Policy Act. It cannot be, according to both the letter and the spirit of the *British North America Act*, that one Government could have the right to incorporate these companies, and another Government the right to regulate them and their trade and business. It cannot be that the provincial legislatures could thus have it in their power to retard and impede, burden and impair, obstruct, and even defeat the enactments of the federal authority.

The laws promulgated for the Dominion by the Federal parliament under the provisions of the Imperial

Act, must have their full sway from the Atlantic to the Pacific, unrestrained by any other legislative body, free from provincial control, without hindrance from provincial legislation. On the application of this rule rest entirely for our country the safe-guards against clashing legislation; against concurrent jurisdiction; against interfering powers; against the repugnancy between the right in one government to pull down what there is an acknowledged right in another to build up; against the incompatibility of the right in one government to destroy what it is the right in another to preserve (1). The Court of Appeal of *Ontario* goes so far as to say that an insurance company, created and authorized by the Dominion of *Canada* to do business throughout the whole Dominion, can be excluded from making contracts in the Province of *Ontario* by the provincial legislature; and there is no doubt that it is so, if the provincial legislatures have, as held by the *Ontario* Courts, the power to regulate the insurance trade. But this, in my opinion, demonstrates conclusively that the provincial legislatures have not, and cannot have such a power of regulation.

If the *Ontario* legislature can exclude an insurance company from the province of *Ontario*, it must be conceded that all the other provincial legislatures have the same right in their respective provinces. So that, according to this theory, if all the provincial legislatures should exercise this right, a company created and authorized by the Federal parliament to do business *all through the Dominion*, could not then do business *anywhere in the Dominion*.

But, may I ask here again, what would then be the use of a Dominion charter? Clearly none whatever. Has the Imperial parliament granted to the federal authority a power so entirely useless and unsusceptible of any prac-

(1) *McCulloch* v. *Maryland*, 4 Wheaton 316.

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tical effect? The Constitutional Act does not, as I read it, bear an interpretation inevitably leading to such anomalous consequences; the powers of the federal authority cannot, to such an extent, be dependent upon the consent and good-will of the provincial authorities.

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments so as to exempt its own operations from their influence, and it cannot be that the framers of our constitution, who determined to give to the central power of this Dominion the supremacy and strength which, in the hour of trial, were found to be so much wanting in the federal power of the *United States*, have thus given to a province, or to all the provinces uniting in a common legislation, the power to annihilate, either directly or indirectly, the corporation which the central power is authorized by the Act to create; that they have thus rendered inevitable in this Dominion, that conflict of powers under which a federation must always, sooner or later, crumble and break down.

In re The Western Insurance Company, appellant, and *Johnston*, respondent, the appeal must also, in my opinion, be allowed, for the reasons I have given in the *Citizens'* v. *Parsons*.

The *Western* exists in virtue of an Act of the late province of *Canada*; but if insurance is a trade, the Acts on the subject passed before Confederation can now be repealed, altered or amended, by the Federal parliament only, under section 129 of the *British North America Act*.

In the *Queen Insurance Company* v. *Parsons* also, the appeal must, in my opinion, be allowed. The Company appellant, in this case, being a foreign Company, is on a slightly different footing than the *Citizens'* and the *Western*. Yet, if upon the grounds I have stated, insurance

companies and their trade and business fall under the regulations and control of the Federal parliament, there are no reasons why foreign insurance companies should be held to be under provincial control.

It is admitted (and my remarks here apply as well to the other two companies, which are also under license of the Federal Government) that this company, the Queen Insurance Company, has obtained from the Federal Government a license, that is to say, a permit to do business all through the Dominion, under 38 *Vic.*, ch. 20, and 40 *Vic.*, ch. 42 Now a license is a regulation, or rather, it is a permit to carry on a trade under certain regulations enacted *by the licenser* (1).

These regulations the federal authority has made. To obtain its license, this company had to deposit $50,000 with the Receiver General of the Dominion (2); it had to file with the Dominion Government certain documents, and perform certain formalities enumerated in sections 10 and following ones of the said Act. Any business done before this deposit was made and these formalities fulfilled, would have brought on the person doing such business a penalty of $1,000 or an imprisonment for six months.

This company, moreover, is taxed by the Federal Government, sec. 23, sub-sec. 5. All these enactments are regulations on its trade and business. Having complied with them all, it could reasonably expect to have acquired some right, some privileges. "But that is not so," say the respondent and the *Ontario* courts to the appellant, "or, at the most, if it is so, it is only as long as the provincial legislatures will suffer the permits and enactments of the Dominion authority. And when they please, instead of doing your business all through the Dominion of *Canada*, as the federal authority has

(1) *Calder* v. *Kirby*, 5 Gray's Rep. 597.

(2) Sec. 6, 38 Vic., ch. 42.

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given you the right to do, you will be excluded from *Canada* altogether, either in express terms or indirectly, by these legislatures imposing upon you, under their power to regulate your contracts, such onerous conditions that you will be forced to withdraw." Such is, according to the respondent, the relative position of the federal power towards the provincial power, under the *British North America Act*. I venture to think that our constitution is not the solemn mockery that this interpretation, if it prevails, would make it to be. Insurance business is a trade, and to the federal authority belongs the "*exclusive*" power of regulation of that trade "*in each and every province*" in the Dominion, and this is so, (enacts section 91 of the Constitutional Act), *notwithstanding* that this power might interfere with the rights conceded to the provincial legislatures by section 92. This power to regulate excludes necessarily the action of all others that would perform the same operation on the same thing, and to the Federal parliament alone must belong the right to impose upon the company appellant and its policies, the conditions and restrictions which this *Ontario* Fire Insurance Policy Act purports to impose, or any conditions or restrictions whatsoever.

These companies cannot be controlled and governed by as many different regulations as there are provinces in the Dominion. It is by the comity of the Dominion that they are admitted here, and under the Dominion laws and power that they remain. One of the great benefits of confederation would be lost if the rules on trade and commerce were not uniform all through the Dominion; if the provincial legislatures had, as contended by the respondent, the power to tamper with the grants and privileges conferred by the federal authority on the trading and commercial bodies authorized to do business in this country.

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I have not lost sight of certain enactments of the Federal parliament, in which it seems to be admitted that the provincial legislatures have the right to incorporate insurance companies. But the Federal parliament cannot amend the *British North America Act*, nor give, either expressly or impliedly, to the local legislatures, a power which the Imperial Act does not give them. This is clear, and has always been held in this court to be the law. I have also not failed, as it was my duty to do, to give due consideration to the fact that the respondent appears to have in his favor the weight and authority of the opinions of the learned judges of the province of *Ontario*, though I may here remark that the judges of the Court of Queen's Bench, in one of these cases, *Western Assurance Co.* v. *Johnston*, distinctly stated that they did not express their individual opinions on this constitutional question, but yielded to the judgments already given.

GWYNNE, J.:—

Upon the point as to the construction of the Act, assuming it to be not *ultra vires* of the provincial legislature, I retain the opinion expressed by me in *Geraldi* v. *The Provincial Insurance Company* (1), that the true construction of the Act is that the statutory conditions set out in the schedule to the Act, whether omitted altogether, with or without others being substituted in their place, or whether some be omitted and others retained and new ones added, shall alone be regarded as being part of the policy, unless the conditions and variations, whether of *omission*, substitution or addition, shall be printed on the policy in the manner prescribed by the Act, the object being, that, to secure uniformity, no departure from the statutory conditions shall be

(1) 29 U. C. C. P. 321.

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recognized, unless the variations shall be endorsed in the manner prescribed in the Act.

The words of the statute are, to my mind, free from ambiguity, namely: "The conditions set forth in the schedule to this Act shall, as against the insurers, be *deemed* to be part of every policy of fire insurance hereafter entered into, or renewed, or otherwise in force in *Ontario*, with respect to any property therein."

The words "shall be deemed," &c., &c., here used, plainly point to the case of the conditions not being stated to be part of the policy, in which case there would be no necessity for saying they "shall be deemed to be," &c., &c. Then, the next branch of the sentence is purely *directory*, and not a condition precedent to the prior branch of the sentence acquiring force; it is coupled to the prior branch by the copulative "and," "and shall be printed on every such policy with the heading 'Statutory Conditions;'" the sentence still continues copulatively, "and if a company or other insurer desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added, in conspicuous type and ink of different color, words to the following effect:" Variations from conditions," &c., &c., &c.

These statutory conditions, it is to be observed, are framed for the express purpose of protecting the insurers. Out of twenty-one conditions in the original Act, there is but one which can be said to be framed for the purpose of protecting the insured against the insurers, namely, the 20th.

These conditions, as the Act recites, were framed by a Judicial Commission appointed by the Government of the province of *Ontario*, for the express purpose of framing such conditions as would be just and reasonable to be inserted in all fire policies on real or personal property in the province, and, being so framed, the Act

further recites that "it is advisable that these conditions should be expressly adopted by the legislature as the *Statutory Conditions* to be contained in policies of insurance against fire entered into and in force in the province." The very term here used, "the statutory conditions, &c., &c., seems to show the intent to be that they shall operate by force of the *statute* to be part of a contract without the necessity of their being embodied in the contract, for, if embodied in the contract, they become conditions acquiring force from the contract and agreement of the parties, *and not from the statute*. The contract of fire insurance being one requiring the utmost good faith upon the part of the insured, and these conditions being adopted as being just and reasonable and for the express purpose of protecting insurers, and securing to them that good faith which ought to exist in every contract of insurance, the above recital seems to amount to a legislative declaration, that the presence of these conditions is necessary in order to make contracts of fire insurance to be just and reasonable.

To effect the purpose, namely, that these conditions, so necessary to making contracts of insurance reasonable, shall be part of every contract of fire insurance and no others, unless, as prescribed in the Act, the Act is passed. It would be singular, indeed, if we should find an Act, which has been passed for the purpose of making all contracts of insurance just and reasonable contracts, to be so framed and expressed in its enacting clauses as to force from a court of justice the construction, that unless these conditions are endorsed on the policy in a particular form and under a particular heading, and although conditions of a like import are agreed upon between the parties, and are endorsed upon the policy as part of the contract, nevertheless the contract, stripped of the element essential to make it just and rea-

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sonable, shall be held to be free from all conditions, and may, as such, be enforced by the party who has violated the conditions to which he agreed, as if the opposite party had subscribed a contract without conditions, so compelling a defendant to pay a sum of money, contrary to the express agreement of both parties to the contract, against all reason and justice.

To hold that an insurer shall not be entitled to avail himself of a condition endorsed upon the policy, and agreed to by the other contracting party as an essential element in the contract, and which, in substance, is identical with one of the statutory conditions, or to call in aid the statutory conditions to the like effect, unless the statutory conditions, in the precise words, form and heading given in the statute, are endorsed upon the policy, seems to me to be a mockery of justice. To enact that a contract, in order to be valid and binding and capable of being enforced in a court of justice, must be in a prescribed form, is an exercise of legislative authority with which we are familiar; but an enactment that a contract (to which the parties themselves have expressly agreed) shall not operate according to the terms of their agreement, but shall operate in violation of those express terms, in the interest of the party who alone has violated them, so as to enable him to recover from the other party a sum of money under circumstances in the event of the occuring of which it was an express term of his contract that he should have no claim whatever, or, in other words, although he could not recover under the terms of the contract, which he produces as the one he made, he may, in defiance of such terms, recover as under a totally different contract, which, as a matter of fact, never was made, is such an unprecedented and wanton assertion of arbitrary power, and is so contrary to all our ideas of justice and of the principles which should govern legislative bodies in

their interference with contracts, that the language used by the legislature, upon which such a construction is sought to be put, should be expressed in such unmistakeable, clear and unequivocal terms as to leave open no possible way of escape to the court of justice, which should be called upon to put such a construction upon it.

The courts below have held that the construction which appears to me to be the true one cannot be so, and that the other construction above suggested is—not because the language of the Act *clearly expresses in terms* such to be the intent of the legislature, but because in the judgment of those courts, no force can otherwise be given to the words "as against the insurers," but, as it seems to me, the courts below, in putting the construction which they do upon these words, have overlooked the fact that, in order to do so, they have altered the whole frame of the sentence in which they occur, so as to express the very opposite of what the sentence does literally express.

The sentence is—"the conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of insurance," &c., &c., &c. The Act does not say that as against the insurers the single condition numbered twenty, which is the only one so framed as to operate to the prejudice of the insurers, shall be deemed to be part of every policy, &c., and that the others, (twenty in number) which are framed for the purpose of operating in their favour, shall not be, but that (at whatever may be the time and place contemplated by the Act when, as is therein directed, the adjudication shall take place, namely, that the conditions shall be deemed to be part of every policy, &c., &c.), *all the conditions alike* shall *be deemed*, that is to say, *adjudicated*, to be part of every policy, &c. Now, when can this time and place be,

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unless upon the occasion of an action being brought in Court by the insured against the insurers? Then alone can adjudication take place, and such adjudication is to be, that the conditions set forth in the schedule, that is to say, *all* the conditions, &c., shall be deemed to be part of every policy, &c.; but the construction put by the Courts below upon this language is that "the conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be *no* part of any policy of insurance hereinafter entered into, or renewed, or otherwise in force in *Ontario* with respect to any property therein, unless the same shall all be printed on such policy, under the heading *Statutory Conditions*, and in default of their being so printed, though the assured accepted the policy upon an express contract that it should be held by him subject to certain conditions to be fulfilled by him, he shall, notwithstanding that he has violated all those conditions, be absolved therefrom, and also from the conditions which, because of their being just and reasonable, the Act recites that it was deemed advisable to make them, by legislative authority, part of every policy, and shall recover as upon a contract known to have been never entered into, namely, a contract free from all conditions, except the occurring of loss by fire."

It was suggested, in argument before us, that the intention of the legislature was to impose this consequence as a punishment upon insurance companies in case they should issue policies with conditions, albeit in substance, identical with the statutory conditions, in any other form or mode of expression than that mentioned in the schedule to the Act, and, by this infliction of punishment, to compel the companies to adopt the prescribed form. We are not warranted, in my opinion, in attributing to a legislative body a purpose so futile and so vindictive. The

construction that the statutory conditions, unless there shall be variations agreed upon, shall be deemed to be part of every policy, &c., secures, in the most effectual manner possible, the recited object of the legislature in passing the Act equally as if the conditions should be endorsed under the heading "Statutory Conditions," and as such construction would render disobedience innocuous and practically immaterial, the offence would be, in effect, removed, and, with it, all occasion for the punishment removed also.

But, it is said, if the conditions are to be deemed to be part of every policy, although, in fact, not endorsed, they, from their nature, cannot operate as against the insurer. Grant that they cannot, in the sense in which the Courts below have construed the Act, and it may be difficult to understand how conditions, whose express object and purpose is to protect the insurers against certain acts and defaults of the insured, and for that purpose are pronounced by the Act to be just and reasonable to be adopted as part of every contract of fire insurance, should be used to the prejudice of the persons for whose protection they are introduced; but, to my mind, all this only shews that the intent of the legislature in using the words was not that which is imputed to it by the Courts, for the Act expressly says that it is *against* the insurers that the conditions shall be *deemed* to be, that is, adjudged, to be part of every policy, &c., and a difficulty, if there be any, in giving effect to those words would never justify the construction put upon them by the Courts below, which, in my judgment, is not only forced, unnecessary and contrary to the spirit of the Act, but contrary to its letter also, and one to support which a total remodelling of the sentence is necessary, while a sufficiently reasonable sense can be put upon the words by the construction which appears to me to

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be the true one, a construction which in the most effectual manner attains the object which the preamble of the Act declares the Legislature had in view in passing the Act, namely, that of securing that these just and reasonable conditions, so necessary to the existence of every just contract of insurance, shall be adjudged to be part of every policy of fire insurance, and to be the sole conditions affecting every policy, unless variations therefrom shall be printed on the policy in the precise manner pointed out in the Act; such a construction relieves the courts from the position of doing a plain injustice which the other construction causes. To prevent the adoption of the construction put upon the Act by the Courts below, it is sufficient, in my opinion, to say that there is not an expression in the Act which indicates, in the remotest degree, the intention of the legislature to have been to commit the injustice of enabling an insured person, while violating the express conditions to which he had agreed to subject himself, to recover against the insurers as upon a contract which was never entered into. I am unable to bring my mind to concur in the adoption of a construction which declares that a man who contracts that he shall have no right to recover in case of loss, if he shall keep upon the insured premises any nitroglycerine or more than 10 lbs. of gunpowder, may nevertheless (unless that contract be put into a particular form) recover for his loss, notwithstanding that he has kept one hundred weight of each upon the insured premises, and that these explosive materials caused the fire which occasioned his loss.

By reference to the case as reported (1), it appears, although it does not appear in the very imperfectly printed case in appeal brought before us, that the defendants, in their 5th and 6th pleas, set up, in bar of the plaintiff's recovery, the violation by the plaintiff of

(1) 43 U. C. Q. B. 261.

certain conditions endorsed upon the policy of like import with some of the "Statutory Conditions," but which were not printed in the form mentioned in the schedule to the Act. They also, in their 7th plea, pleaded the violation by the plaintiff of one of the statutory conditions, namely, further insurance without notice. The plaintiff himself proved a clear violation, although, perhaps, a negligent violation of that condition, the effect of which was to cause the property to be over insured. The court rejected all those pleas, holding the policy containing conditions to which the plaintiff had assented, to be not only absolved from those conditions, but also from the statutory conditions, and the contract to be free from all conditions. Under these circumstances, it appears to me to be impossible to sustain a verdict rendered in favour of the plaintiff, and that a new trial must needs be granted, if it were not that it is clear the plaintiff has violated the statutory conditions set out in the 7th plea, and as no verdict in his favour could upon that plea be sustained, but would have to be set aside *ex debito justitiæ*, a new trial would be unnecessary, and a non-suit should be entered.

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Upon the question as to the construction of the contract involved in the interim receipt sued upon, assuming the Fire Insurance Policy Act of 1876 not to be *ultra vires* of the provincial legislature, I am of opinion that the Act does not affect an insurance made through the medium of an interim receipt pending an application for a policy. The difference between an interim receipt and a completed policy is well known, and must be deemed to have been so to the legislature, and when they framed an Act having express reference to a policy, and to that only, we must conclude that they did so designedly, and did not intend to include under that term an interim receipt. We have no right to extend

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the Act beyond what it has clearly expressed; moreover, it is impossible to construe the Act as applying to interim receipts, since by so doing we should utterly destroy the most essential characteristic and property of such a receipt, namely, the property of being liable to immediate cancellation upon the company declining to hold the risk and to issue a policy, which the 18th statutory condition, if those conditions applied, would no longer permit to be done; and the effect would be that a condition which, when applied to a perfected policy, is introduced there for the protection of and in the interest of the insurers, would operate to their injury when applied to an interim receipt.

Although an action may now, under the Administration of Justice Act, be brought at law upon an interim receipt, whereas formerly it only could be brought in equity, still the principle upon which the action was sustained remains the same, namely, that the contract involved in such a receipt was one which a Court of Equity would enforce the specific performance of, by decreeing the issue of a policy in accordance with the terms of the agreement contained in the interim receipt, and it was argued in the court below that since the passing of the Fire Insurance Policy Act, a Court of Equity would not decree a policy to issue in pursuance of this receipt other than one which should be subject to the statutory conditions only, and that, therefore, such a policy must be taken to be the one referred to in the receipt under the expression, "subject to all the usual terms and conditions of this Company;" but, as the Act authorises variations to be made in the statutory conditions, provided only that they shall be just and reasonable, even though it might be that, up to the time of the issuing of the interim receipt, the defendants had not had policies printed with the conditions endorsed in the form pointed out in the schedule to the

Act, no court proceeding upon principles of equity could prevent the defendants from adopting, albeit at the eleventh hour, those conditions, with such variations, as should be reasonable, before they should issue a policy in pursuance of the receipt. To a bill in equity framed upon this receipt, the defendants could, as it seems to me, effectually resist a claim made by the plaintiff to have one subject to the statutory conditions only, without variations; the most favorable decree they could upon any principle of justice be entitled to, would be, as it appears to me, subject to the statutory conditions with such variations, being reasonable, as the defendants should desire to insert of like import with those which their former form of policy contained and put into the shape indicated in the statute; no Court of Equity could deprive them of the right given them by the statute of making reasonable variations in the statutory conditions, and compel them to issue a policy with the statutory conditions alone without such variations. The case would have to be regarded, as it appears to me, precisely as if the receipt had been given the day after the passing of the Act, and before the defendants could have adopted a new form of policy in compliance with the terms of the Act, in which case, it seems to be clear beyond all doubt, that no Court of Equity could compel the defendants to issue a policy subject to the statutory conditions only, unless they happened to be identical with the conditions upon the form of policy theretofore in use by the defendants.

If then the statute does not, as I am of opinion that it does not, import the statutory conditions into interim receipts, then these receipts must be construed as they would have been if the Fire Policy Act had not passed, and the defendants can neither at law nor in equity be held liable upon any other terms than those they agreed to, that is, to insure the plaintiff subject to the con-

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ditions contained in the policies which have been and are in use by them, and the plaintiff is in this position, that he cannot sue upon the receipt unless he is willing to regard the policy agreed to be issued under it as one containing the conditions which have ordinarily been in use with the defendants, or, which seems to me to be much the same thing, a policy with the statutory conditions, with such variations as would be effected by such of the conditions upon the policies which have been in ordinary use with the defendants, as would be good and valid under the statute if endorsed as variations in the form prescribed in the statute. The former is what the plaintiff did, for, to pleas setting up in bar the violation by the plaintiff of some of the conditions endorsed on the form of policy ordinarily in use by the defendants, he joined issue in fact, which issues, when brought down for trial, except such only as could have been raised treating the statutory conditions as the only ones to which the insurance was subject, the Court refused to entertain.

The defendants, by the policies in ordinary use with them, guarded themselves from all liability for loss in case the insured should keep more than 10 lbs. of gunpowder upon the premises insured. I do not think it could be held that this would not be a reasonable variation from the statutory condition which allows 25 lbs., if endorsed upon a policy in the manner prescribed in the Act. The Court allowed an enquiry as to whether the insured kept more than the 25 lbs., but would allow none as to whether he kept more than 10 lbs., and in short the case was tried as if a policy had been in fact executed by the defendants subject to the statutory conditions only, without any variations. In this, as it appears to me, for the reasons above given, the Court erred, and there should therefore be a new trial ordered, and the appeal should be allowed with costs.

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But it is contended that the Act under consideration is *ultra vires* of the provincial legislature of *Ontario*, which passed it, as interfering with the regulation of a branch of trade and commerce—control over which is by the 2nd item of sec. 91 of *B. N. A. Act*, vested exclusively in the Dominion parliament.

The question thus raised is, undoubtedly, one of a very grave character, for, as became developed in the argument of the several cases now before us, wherein the point is raised, one of which, namely, the *Western Assurance Co.* v. *Johnston*, was argued by the Attorney-General, who is also the Premier of the province of *Ontario*, in support of the constitutionality of the Act, the question before us is not one merely affecting the particular Act in question, but our judgment in this case, although the Dominion parliament is not represented, and has not been heard in the matter, will logically affect some thirty acts of the Dominion parliament, whose constitutionality has not heretofore been questioned, and which must be *ultra vires* of the parliament, if the Act now before us be *intra vires* of the provincial legislature, and, on the contrary, if this Act be *ultra vires* of the provincial legislature, a number of Acts passed by the legislature of the province of *Ontario* must be equally so. It is clear that the subject-matter of the Act in question is not one over which jurisdiction is by the *B. N. A. Act* given concurrently to the provincial legislatures and to the parliament. If it were, no doubt the Act would be valid "*as long and so far only as* it is not repugnant to any Act of the parliament of *Canada*." The subject not being one over which concurrent jurisdiction is given to the provincial legislatures and to the parliament, must be placed exclusively either under the one or the other. The question, therefore, is determinable by the rule which I adopted in the *City of Fredericton* v. *The Queen* (1),

(1) 3 Can. Sup. Ct. R., 505.

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as appearing to me to furnish an unerring guide in determining whether any given subject of legislation is within the jurisdiction of the provincial legislatures, or of the parliament, namely: "All subjects of whatever nature, not exclusively assigned to the local legislatures, are placed under the supreme control of the Dominion parliament, and no matter is exclusively assigned to the local legislatures unless it be within one of the subjects expressly enumerated in sec. 92, *and at the same time* does not involve any interference with any of the subjects enumerated in sec. 91."

The contention in support of the claim that the Act is within the jurisdiction of the local legislature, is that the subject matter of the Act comes within item 13 of sec. 92 of the *B. N. A. Act*, namely, "Property and Civil Rights in the province."

I have already in the *City of Fredericton* v. *The Queen* expressed my opinion that the plain meaning of the closing sentence of sec. 91 is that (notwithstanding anything in the Act), any matter coming within any of the subjects enumerated in the 91st section, shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they may appear to do so. Jurisdiction, therefore, over "Property and Civil Rights in the province" is not vested absolutely, but only qualifiedly, in the local legislatures.

In so far as jurisdiction over "Property and Civil Rights," in every province may be deemed necessary for the perfect exercise of the exclusive jurisdiction given to the Dominion parliament over the several subjects enumerated in sec. 91, it is vested in the parliament, and what is vested in the local legislatures by item 13 of sec. 92, is only jurisdiction over so much of property and civil rights as may remain, after deducting so much of jurisdiction over those subjects as may

be deemed necessary for securing to the parliament exclusive control over every one of the subjects enumerated in sec. 91, the residuum, in fact, not so absorbed by the jurisdiction conferred on the parliament.

The only question, therefore, before us substantially is: Are or are not joint stock companies, which are incorporated for the purpose of carrying on the business of Fire Insurance, Traders? and is the business which they carry on a trade?

If this question must be answered in the affirmative, the Act under consideration must be *ultra vires* of the provincial legislature, as much as was the Act which in *Severn* v. *The Queen* (1) was pronounced so to be, and as the Act under the consideration in the *City of Fredericton* v. *The Queen* would have been if passed by a local legislature; indeed, it seems to me to be difficult to conceive what greater assertion of jurisdiction to regulate trade and commerce there could be, than is involved in the assumption and exercise of the right to prescribe by Act of the legislature in what manner only, by what form of contract only, by what persons only, and subject to what conditions only, particular trades, or a particular trade, may be carried on, and to prohibit their being carried on otherwise than is prescribed by the Act. If this may be done in one trade, obviously it may be done in every trade, and so all trades must be subject to the will of the legislature having jurisdiction so to legislate as to whether it shall be carried on at all or not. As to the Act under consideration, if it be open to the construction put upon it by the courts below, it seems to me to be impossible to conceive any stronger instance of the assertion of supreme sovereign legislative power to regulate and control the trade of fire insurance and of fire insurance companies, if the business of those com-

(1) 2 Can. Sup. Ct. R. 70.

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panies be a trade. Now, among all the items enumerated in sec. 92, it is observable that not one of them in terms indicates the slightest intention of conferring upon the local legislatures the power to interfere in any matter relating to trade or commerce, or in any matter which in any manner affects any commercial business of any kind, unless it be item No. 10, whereby the local legislatures are empowered exclusively to make laws in relation to "local works and undertakings" subject to this qualification, namely, "other than such as are of the following classes:"

"1. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the provinces, or extending beyond the limits of the province;

"2. Lines of steamships between the province and any British or foreign country; and

"3. Such works as, although wholly situate within the province, are, before or after their execution, declared by the parliament of *Canada* to be for the general advantage of *Canada*, or for the advantage of two or more of the provinces."

All these excepted subjects are, by item 29 of sec 91, placed under the exclusive legislative authority of the parliament of *Canada*, and so, by the closing paragraph of section 91, are, in effect, pronounced not to be local or provincial works or undertakings,—works and undertakings within each province other than those excepted, are all, therefore, which can come within the description of "local works and undertakings" comprehended in item 10.

It is to be observed also that when power to incorporate companies is given, no mention is made of trading companies. The power is expressly limited by item No. 11, sec. 92, to "the incorporation of companies *with provincial objects*." None of the learned counsel who

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contended for the validity of the statute under consideration, ventured to define the term "provincial objects;" they rather preferred to submit at large, that the item intended to confer power to incorporate companies for all purposes of trade, and, in fact, all purposes whether of trade or otherwise, provided only the corporate powers should be expressly prescribed by the Act to be exercised within the province.

It is, perhaps, easier to say what the term does not comprehend than to define it precisely. I venture to suggest, however, that such local works and undertakings as are by item 10 placed under the local legislatures may properly be termed local or provincial objects. So may the subjects enumerated in item No. 7, viz.: "The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals;" and so likewise the item specified in sec. 93, namely, "Education;" and beyond these I cannot say that I see any other; but when we regard the whole scope and object of the *B. N. A. Act* and bear in mind that the scheme of constitutional government, which it was designed to create, was to vest in the Dominion parliament, consisting of Her Majesty (herself the supreme executive authority) as one member, and a Senate and House of Commons as the other members of the legislative body, the supreme sovereign jurisdiction to legislate upon all subjects whatsoever, excepting only certain specific matters *particularly* enumerated, purely of a local, domestic and private nature, which were assigned to the provinces; and, when we find that for greater certainty (to expel doubt as it were) the exclusive legislative jurisdiction of parliament is declared to extend to all matters coming within the regulation of trade and commerce, words which (in perfect character with the general supreme jurisdiction, intended to be

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conferred upon the parliament, excepting only the *particularly* excepted subjects,) are comprehensive enough to include and must be construed to include every trade and everything relating to every trade, and to all branches of commerce and to the persons by whom, and to the manner in which the same, in every branch thereof, may be carried on: we can, I think, with great confidence, assert that no jurisdiction to *incorporate any Trading Company* or to *restrain or control any Trading Company* in the way it should carry on its trade, is given to the local legislatures, unless it be in respect of companies for the construction, maintenance and management of such works, as by item No. 10 are placed under the control of the local legislatures under the designation "local works and undertakings." From the frame of item No. 11, it is plain that what was intended by annexing the qualification "with provincial objects," was not the power of incorporating companies for all purposes, but a limited power, for inasmuch as, wholly irrespective of these words, the local legislatures could give no powers beyond their province, to companies incorporated by them, these words, "with provincial objects" were superfluous, and have no sense unless they be read as words of limitation, having a restrictive operation; it would have been sufficient to have said simply, "the incorporation of companies;" but "for greater certainty," a principle which pervades the Act, I have no doubt these words "with provincial objects" were introduced to confine the power to those purposes which are specially placed under the control of the local legislatures in express terms—so as to leave nothing to be implied or inferred. My brother *Taschereau* has, however, so forcibly dealt with this subject, that I shall discuss it no further, but shall proceed to the enquiry: "Are or are not joint stock companies which are incorporated for the purpose of carry-

ing on the business of fire insurance, traders? and is the business so carried on by them a trade?"

It was admitted as beyond all question that the business of marine insurance is a trade, and that all companies carrying on that business are traders, and are in all matters subjected to the exclusive jurisdiction of the Dominion parliament; but marine insurance policies invariably contain, and from the time of their first introduction did contain, provision for indemnity against loss by fire; and all text books upon the subject of insurance are careful to impress the doctrine that *Fire* insurance is but the offspring of marine insurance, that nothing was more natural, or more reasonably to have been expected, than the conversion of the security which had long afforded protection against injury to ships, occasioned by fire, to the purpose of yielding protection to property on land; that it was the calamitous fire in *London* in 1667, which hastened the application of this provision in marine policies to the protection of property by land; and that, as *Magens* says, there were few merchants in *London* in 1755 who were not insured, as well for their protection, as for the greater credit, both at home and abroad, which they enjoyed in their commercial transactions, from its being known that the great capitals lying in their houses and warehouses are thus secured from the flames; that the utility, both in a public and a private point of view, as an incentive to industry and enterprise, and the promotion and advancement of trade, is as great in contracts of fire insurance as in those of marine insurance, and indeed greater, by so much as the amount secured by contracts of insurance against fire largely exceeds that secured by those against marine risks; that contracts of fire insurance are governed by the same general principles as marine policies, and that the solution of any question that may arise upon an insurance against

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fire, will be found by a careful application of the doctrine of marine insurance; and that the law most reasonably presumed originally that persons who entered into contracts respecting fire insurance were acquainted with, and *had in their contemplation, the custom of merchants and legal rules affecting marine insurance, and intended that those new contracts should be construed and controlled by the same means.* No reason therefore exists for regarding the business of marine insurance to be a trade and a branch of commerce, and that of fire insurance not to be. The only difference in fact between them is, that policies against fire are almost invariably effected by companies formed for the express purpose of carrying on the business, so forming mercantile partnerships, having within themselves the desirable requisites of security, wealth and numbers, which afford them the means of defraying heavy losses, while marine insurance risks are usually taken by individuals.

That the Imperial Parliament had no doubt as to fire insurance companies being traders, and their business a trade, appears from the Joint Stock Companies Act, 7 and 8 *Vic.*, ch. 110, and the Companies Act of 1862, by the former of which every assurance company or association, whether for the purpose of insurance on lives, or against any contingency involving the duration of life, or against the risk of loss or damage *by fire*, or by storm, or by other casualty, or against the risk of loss or damage to ships at sea, or on voyage, or to their cargoes, or for granting or purchasing annuities on lives, are all alike brought under the Act, and are obliged to be registered under the Board of Trade; and by the latter of which all were alike obliged to furnish half-yearly to the Board of Trade a full statement of the liabilities and assets of the companies, and by which also the *commercial* privilege of limited liability was

extended to them. Neither do the members of the Mercantile Law Commission appointed in 1853, nor the legal and mercantile gentlemen to whom questions were submitted by that commission, appear to have had any doubt upon the point.

That commission was appointed to enquire and report how far the *mercantile law* in the different parts of the United Kingdom might be advantageously assimilated, and also whether any and what alterations and amendments should be made in the law of partnership, as regards the question of limited and unlimited responsibility of partners. The commissioners, in their first report, reported against any alterations being made in the mercantile law, which the majority approved of as it stood. Mr. Baron *Bramwell*, who was a commissioner, and in the minority, expressed his opinion, which accompanied the report, in favor of a change, wherein, among other things, he says:

No doubt we are not called upon to consider the general law of partnership, but it is important to refer to its condition, to ascertain how far the proposed change would be a change—how far a novelty to the public, and what present mischief it might prevent.

Now the law does at this present moment permit partnerships with limited liability; *many insurance companies*, though unchartered, are carried on on that principle, and I conceive *all other trades* or businesses theoretically may be so conducted.

Mr. *Slater*, who was also on the commission and in the minority, in an opinion of his, which also accompanied the report, says:

Under certain restrictions and regulations, *joint stock companies* for banking, not being banks of issues, *insurance companies* and companies of a decided public character, possessing a large subscribed capital, might be permitted to conduct their business upon a principle of limited liability, *because their establishment would be advantageous* to the *trading and commercial interests of the country.*

Among the questions submitted by the commission to leading legal and mercantile gentlemen, throughout the United Kingdom and the United States of *America*, was the following:—

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Would you make the limited responsibility of partners applicable to private or ordinary partnerships, as well as to joint stock companies? Would not this unduly interfere with the free competition of industry on the part of individual traders or small partnerships with unlimited liability? Would you apply it to partnerships for banking or insurance?

To this question Mr. *James Andrew Anderson*, then late manager of the Union Bank of *Scotland*, answered:

Banking and insurance companies are those of all others which, in my opinion, ought to enjoy no exemption from unlimited responsibility, not only on account of the magnitude, but of the multitude, of their dealings; *there are now fewer branches of business, which seems less to require the stimulus of limited liability than banking and insurance.*

Mr. *James Stewart*, barrister-at-law, answered:

I apprehend that a limited liability is already applied to partnerships for insurance, as in the policies of all the companies with which I am acquainted, the claim of the assured is limited to the capital stock of the company.

Mr. *William Valentine*, President of, and selected by, the Chamber of Commerce, *Belfast*, answered:

I would make limited responsibility applicable to private partnerships, as well as to public companies generally; *but, as banking and insurance partnerships have dealings with the general public* in districts remote from the localities in which they are established, and it being difficult to obtain correct information in such remote districts as to the extent of the capital and conditions of their liabilities, I would continue the unlimited responsibilities of such companies.

Mr. *Donald McLaren*, merchant, selected by the Chamber of Commerce, *Leith*, to answer the questions, answered:

As regards *insurance companies*, I believe that many of the companies in this country, by a special clause in their policies, limit their liability to the capital stock of the company, and in the city of *Hamburg* there are a great number of companies who have for a long period carried on extensive business, *both in marine and also in fire insurance*, the liability of each shareholder being limited to the amount of his subscription, and the system has been found most satisfactory to the shareholders as well as the public.

Mr. *John Slagg*, merchant, selected by the Chamber of Commerce, *Manchester*, answered as follows:

I do not think there should be any change in the present law, (that is the mercantile law), unless it be that all existing companies, such as "*railway and insurance companies*," should be brought into the same position *as other* "*mercantile firms.*"

And, finally, the author of the "Wealth of Nations," one hundred years ago, in his world accepted work, in book 5, ch. 1, under the title "of the public works and institutions which are necessary *for facilitating particular branches of commerce*," says:

The only trades which it seems possible for a joint stock company to carry on successfully without any exclusive privilege, are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity or method as admits of little or no variation. Of this kind are:—1st. The banking trade; 2nd. The trade of insurance from fire, and from sea risk, and capture in the time of war; 3rd. The making and maintaining a navigable cut or canal; and 4th. The similar trade of bringing water for the supply of a great city.

The value, of the risk, *either from fire* or from loss by sea or capture, though it cannot perhaps be calculated very exactly, admits, however, of such gross estimation, as renders it in some degree reducable to strict rule and method; *the trade of insurance, therefore*, may be carried on by a joint stock company without any exclusive privilege.

When we regard the magnitude of the business of fire insurance, in which alone, in 1860, a sum exceeding one thousand one hundred and thirteen millions of pounds sterling was at risk in *Great Britain*, the annual premiums in respect of which amounted to nearly six millions sterling, a sum five times as great as that derived from marine insurance risks; and when we observe by the report of the Superintendent of Insurance appointed by the authority of the Dominion parliament, that there were in 1869:—

5 Canadian Fire Insurance Companies, having at risk in the Dominion of *Canada*	$ 59,340,916.00
And 12 British Companies, having at risk	115,222,003.00

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And 2 American Companies, having at risk	$ 13,796,890.00
Amounting in all to	$188,359,809.00
Which, in 1877, had increased to 13 Canadian Companies, having at risk	$217,745,048.00
12 British Companies, having at risk	184,304,318.00
3 American Companies, " "	18,293,315.00
Amounting in all to	$420,342,681.00

And when we consider that, but for the business of fire insurance, the trade and commerce of the world could never have attained the magnitude and success and exalted position which they have attained, we may well say, in my judgment, that the trade of fire insurance is, *par excellence*, the trade of trades, without which all other trades would have dwindled and decayed.

Against the position supported by the above vast concurrence of opinion, with the reason of the thing, we have been referred to some observations reported to have been made by Mr. Justice *Field*, in the Supreme Court of the *United States*, in *Paul* v. *Virginia* (1); but Mr. Justice *Field* himself explains, in the *Pensacola Telegraph Co.* v. *Western Telegraph Co.* (2), that all that was decided or intended to be decided in *Paul* v. *Virginia* was :—

> That the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance, made by a corporation of one state upon property in another state, was not a transaction of *inter-state* commerce.

The parliament of Old *Canada*, which comprised the territory now constituting the Provinces of *Quebec* and *Ontario*, when applying to the Imperial parliament for the passage of the *B. N. A. Act*, was not ignorant that by the Civil Code of *Lower Canada*, which was enacted into law by an Act of the parliament of Old *Canada*,

(1) 8 Wallace 168. (2) 6 Otto, or 96 U. S. Rep. 21.

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the contract of fire insurance, when made for a premium by persons carrying on the business of insurers, is a commercial contract. It was therefore upon the same basis as marine insurance, which, by the same article of the Code, 2,470, is declared to be always a commercial contract, and this is given not as new, but as old law. Now, it is impossible to conceive that the *B. N. A Act* contemplated dealing with the same subject as a branch of trade and commerce in one province of the Dominion, and in another as not—in one as subject to the Dominion parliament, in another to the local legislature. I have shewn that in *England* fire insurance has always been regarded to be a trade equally as *marine* insurance, and to have emanated from the latter, and to be governed by the same principles and the same mercantile law as governed marine insurance. There can, therefore, in my judgment, be no doubt that in the contemplation of the *B. N. A. Act*, all insurance, whether of lives, or of real or personal property, and whether against risk by fire on land or on sea, or by storm on land or sea, or by any other casualty, must be equally regarded as branches of trade and commerce, and must all alike be under the jurisdiction of the Dominion parliament. There can, I think, be no doubt that the object of the *B. N. A. Act*, in placing "*all matters coming within*" the term "*regulation of trade and commerce*," under the exclusive control of the Dominion parliament, was to secure a perfect uniformity in all the provinces of the Dominion, as *to all matters whatsoever* affecting all trades, as an essential condition to the prosperous carrying on of trade, and to prevent all possible interference or intermeddling with any trade, which diverse local views entertained in the different provinces of the Dominion might be disposed to attempt, if the subject was placed under local jurisdiction, whether by prescribing a particular form of contract and prohibiting

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any other being used, or by prescribing a particular mode of execution of the contract, or by assuming to dictate in any other manner as to the manner in which, or the terms subject to which trading companies or other persons engaged in any particular trade, should be permitted to carry on such trade. The inconvenience which would attend the carrying on fire insurance business may well be conceived to be highly injurious to the interests of persons engaged in that trade, if they should be restrained from entering into contracts in the terms in which persons desirous of having their property insured may be willing to contract with them, and should be compelled to give up business, unless they should adopt a particular form of contract, executed in a particular manner, and subject to particular conditions, totally different in each province; and if they should be subjected to different penalties, forfeitures and consequences, in each, if the forms prescribed in each should not be followed; so, likewise, how inconvenient it would be if companies empowered, as many are, to carry on marine as well as fire insurance, should, as to one contract, be subject to the Dominion parliament, and, as to the other, to a local legislature. Now, that the Act under consideration, which assumes to prohibit all fire insurance companies, whether composed of foreigners or of British subjects, and whether incorporated by foreign states, or by the Imperial Parliament, from carrying on their trade in the manner authorized by their respective charters of incorporation, and from entering into such contracts as persons willing to deal with them may agree upon, or from entering into any contract in the way of their trade, subject to any other conditions, or in any other form than prescribed by the statute, and that in default of adopting the prescribed form, the parties contracting with them, although violating all the conditions upon

which alone the companies entered into the contracts, shall recover against the companies, notwithstanding that, in the contracts in fact entered into, they had consented that, in the event which had happened, the companies should incur no liability—that such an Act is one which assumes to regulate and control, and in a very marked manner, to interfere with the trade of fire insurance, does not, in my judgment, admit of a doubt. Such an Act may safely, with greater propriety, be said to regulate the trade of fire insurance, and so to relate to a matter coming within the term " regulation of trade and commerce," than the 4th and 17th sections of the Statute of Frauds. That the 17th section of that statute effects a regulation of trade and commerce, will not, I presume, be doubted ; and the Imperial Parliament has furnished us with proof that, in the estimation of that power, to which the *B. N. A. Act* owes its existence, the 4th section does the same, for by the 19th and 20th *Vic.*, ch. 97, intituled " An Act to amend the laws of *England* and *Ireland affecting trade and commerce* ;" after reciting that—

Whereas inconvenience is felt by persons engaged in trade by reason of the laws of *England* and *Ireland* being, in some particulars, different from those of *Scotland* in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience, it is expedient to amend the laws of *England* and *Ireland* as hereinafter mentioned ;

It was enacted among other things :—

Sec. 3. That no special promise to be made by any person after the passing of this Act to answer to the debt, default or miscarriage of another person, being in writing and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document ;

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and by the 16th section, the title given to the Act in citing it is: "The Mercantile Law Amendment Act of 1856."

Now, if this amendment of the 4th section of the Statute of Frauds so affects trade and commerce as to find its proper place in a "Mercantile Law Amendment Act," can there be a doubt that the *Ontario* Fire Insurance Act of 1876, assuming, as it does, to prescribe the only manner in which, and the terms upon which, the trade of fire insurance may be carried on in *Ontario*, is an Act which assumes to introduce a new regulation of trade and commerce into the mercantile law of *Ontario*, and so usurps the jurisdiction of the Dominion parliament, in which, for the purpose of preserving uniformity in matters of trade throughout all the provinces of the Dominion, the exclusive power to enact all laws in any manner affecting trade and commerce, is vested.

The mischief of this legislation lies deeper than appears upon the surface. The germ of that mischief appears in the judgments of some of the learned judges of the Court of Appeal in *Ontario*, and was more fully developed in the argument of the Attorney-General of *Ontario*, in his argument before us in *Johnston* v. *Western Assurance Co.*; the logical result of which, if well-founded, would be, in my judgment, to undermine the fabric which the *B. N. A. Act* designed to erect.

In the *Citizens' Assurance Company*, appellants, v. *Parsons*, respondent, one of the learned judges of the Court of Appeal in *Ontario* makes use of the following language: "The Parliament of the Dominion has no power to authorize a Company;" that is, a 'Fire Insurance Company,' of its creation, "to make contracts in *Ontario*, except such as the legislature of that province may choose to sanction;" they, that is the legislature of the province, "*may*, if they think proper, *exclude such corporation from entering into contracts of*

Insurance here altogether, or they may exact any security which they may deem reasonable for the performance of its contracts."

"The artificial being created by the charter is authorized to make such contracts as come within its designated purposes; but the legislature granting the charter can give no privileges to be exercised within any of the provinces, except with their assent and recognition, and it follows, as a matter course, *that these may be granted upon such terms and conditions as the provinces think fit to impose.*

"Within these respective limits, each legislature is supreme and free from any control by the other. The Dominion parliament has no more authority to regulate contracts of this nature," that is to say, contracts of Fire Insurance, "within any of the provinces, than has the legislature of the province to attempt to regulate promissory notes or bills of exchange. *The terms upon which insurance business is to be carried on within the province is a matter coming exclusively within the powers of the local legislatures*, and any legislation on the subject by the Dominion would be *ultra vires*. The local legislature has the exclusive discretion as to the conditions under which it," that is, the business of insurance, "shall be carried on within the confines of this province."

If this be law, it must be admitted that the imputation charged against the Dominion parliament—that they have encroached upon the jurisdiction of the local legislatures—is well founded; in fact, it may be admitted that in every session of the parliament's existence it has passed Acts which, if the above be law, would have to be pronounced to be *ultra vires*, to the extent of invalidating from 30 to 40 Acts. If the local legislature had jurisdiction to pass the Act under consideration, it is obvious that it has the like jurisdiction over all

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other trades, so that what is asserted on behalf of the local legislatures is the *exclusive right to legislate in such a manner as to regulate and control all trades*, and to exclude, "*if they think proper*," *all persons and corporations, as well foreign as domestic, from carrying on their respective trades within the province of Ontario.* Now I freely admit that the local legislatures have the right so to legislate, if they have the power to pass the Act under consideration, but I add that they have only the like power in each case; that they have no more power or jurisdiction to pass the one species of Act than the other; that they have no more power or jurisdiction to pass an Act to regulate or control the terms under which a trade may be carried on, than they have to prohibit it altogether from being carried on within the limits of the province. The former power is indeed but the exercise of, and is comprehended in, the latter, for an Act to control and regulate a trade is, in effect, to prohibit the carrying on of the trade *at all, otherwise* than upon and subject to the prescribed regulations; but the right to exclude, for example, foreign traders, be they corporations or individuals, from carrying on their trade in a country, can only be asserted in virtue of, and as incident to, Supreme National Sovereignty. An Act of exclusion, equally with an Act to control and regulate the manner in which a trade shall be carried on, can only be vindicated upon the principles governing what is called the *Comity of Nations*, the administration of which belongs exclusively to *Supreme National Sovereignty*. Now the provinces of the Dominion of *Canada*, by the wise precaution of the founders of our constitution, are not invested with any attribute of National Sovereignty. The framers of our constitution, having before their eyes the experience of the *United States of America*, have taken care that the *B. N. A. Act* should leave no doubt upon the subject.

Within this Dominion the right of exercise of National Sovereignty is vested solely in Her Majesty, the Supreme Sovereign Head of the State, and in the Parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the *Comity of Nations*. To prevent all possibility of the local legislatures creating any difficulties embarrassing to the Dominion Government, by presuming to interfere in any matter affecting trade and commerce, and by so doing violating, it might be, the Comity of Nations, all matters coming within those subjects are placed under the exclusive jurisdiction of the Dominion parliament; that the Act in question does usurp the jurisdiction of the Dominion parliament, I must say I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion. The object of the *B. N. A. Act* was to lay in the Dominion Constitution the foundations of a nation, and not to give to provinces carved out of, and subordinated to, the Dominion, anything of the nature of a national or *quasi* national existence.

True it may be, that the Acts of the local legislatures affecting the particularly enumerated subjects placed by the *B. N. A. Act* under their exclusive control, if not disallowed by the Dominion Government, are supreme in the sense that they cannot be called in question in any court, but this supremacy is attributable solely to the authority of the *B. N. A. Act*, which has placed those subjects under the exclusive control of the local legislatures, and is not, in any respect, enjoyed as an incident to national sovereignty.

To enjoy the supremacy so conferred by the *B. N. A. Act*, these local legislatures must be careful to confine the assumption of exercise of the powers so conferred upon them, to the particular subjects expressly placed

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under their jurisdiction, and not to encroach upon subjects which, being of national importance, are for that reason placed under the exclusive control of the parliament.

How the species of legislation which appears upon the statute books, upon the subject of insurance and insurance companies, came to be recognized (by which it would seem as if the parliament and the legislatures had been attempting to make among themselves a partition of jurisdiction, for which the *B. N. A. Act* gives no warrant whatever), I confess appears to me to be very strange, for it surely cannot admit of a doubt that *no act* of the Dominion parliament can give to the local legislatures jurisdiction over any subject which, by the *B. N. A. Act*, is placed exclusively under the control of parliament, and as the parliament cannot by Act or acquiescence transfer to the local legislatures any subject placed by the *B. N. A. Act* under the exclusive control of parliament, so neither can it take from the local legislatures any subject placed by the same authority under *their* exclusive control. There is nothing in the *B. N. A. Act* to justify the conclusion that the subject of insurance is placed under the concurrent jurisdiction of the local legislatures, and of the parliament; if it were, the latter could itself apply the necessary remedy by an Act controlling the legislature of the former. The subject then, not being one of concurrent jurisdiction, must be under the *exclusive control*, either of the parliament or of local legislatures; there can be no partition of the jurisdiction.

It is impossible to estimate the embarrassments which will be occasioned by the species of legislation which has been adopted, if not promptly checked and corrected. The only way of correcting the evil is to determine by an irreversible judicial decision to which authority the exclusive jurisdiction belongs, namely,

whether to the parliament or to the local legislatures. In my judgment, it belongs, without doubt, to the parliament.

The arrival, by the majority of this court, at a contrary conclusion, will, I fear, justly expose their judgment to the imputation that it will be impossible, as I confess I think it will be impossible, to reconcile that judgment with the principle upon which *Severn* v. the *Queen*, and the *City of Fredericton* v. the *Queen*, have been decided; and that it will have the effect of unsettling, rather than of settling, the law upon a most grave constitutional question.

Appeals dismissed with costs.