*1923
Oct. 18, 19.
Dec. 21.

MYRYLO LUKEY (DEFENDANT) AND THE ATTORNEY GENERAL FOR SASKATCHEWAN AND THE ATTORNEY GENERAL FOR ONTARIO (INTERVENANTS) ..... } APPELLANTS;

AND

THE RUTHENIAN FARMERS' ELEVATOR COMPANY, LTD., (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Dominion company—Right to sell its shares—Provincial legislation—Prohibiting same without licence—Ultra vires—B.N.A. Act, sections 91, 92—Interpretation Act, R.S.C. (1906), c. 1, s. 30—Companies Act, R.S.C. [1906] c. 79, s. 5—The Sale of Shares Act, R.S.S. [1920], c. 199, ss. 4, 21, 22.

The respondent is a company incorporated by authority of the Parliament of Canada with its head office in Winnipeg. Its agent obtained in the province of Saskatchewan from the appellant Lukey an application for shares in the respondent company for which he gave the promissory notes sued on. This application was forwarded to Winnipeg where it was accepted and the shares allotted to him. Section 4 of "The Sale of Shares Act" of Saskatchewan (R.S.S. [1920] c. 199) provides that "no person shall sell or offer or attempt to sell in Saskatchewan any shares * * * of a company * * * without first obtaining from the Local Government Board a certificate; and in the case of an agent a licence." No such certificate or licence had been obtained by the respondent company or by its agent.

Held, Idington J. dissenting and Anglin J. expressing no opinion, that the provisions of section 4 of "The Sale of Shares Act," in so far as they purport to apply to the sale of its own shares by a Dominion company, are *ultra vires* of the provincial legislature.

Held also, Duff and Anglin JJ. *contra,* that there had been an attempt by the respondent to sell its shares in Saskatchewan within the meaning of section 4 of "The Sale of Shares Act."

Judgment of the Court of Appeal ([1923] 3 W.W.R. 138) affirmed, Idington J. dissenting.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2) and maintaining the respondent's action.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1923] 3 W.W.R. 138.

(2) [1922] 3 W.W.R. 396.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

A. Blackwood for the appellant Lukey. The shares have been offered for sale or attempted to be sold in Saskatchewan within the meaning of section 4 of "The Sale of Shares Act."

Cross K.C. for the Attorney General for Saskatchewan. This provincial legislation falls primarily within the jurisdiction of the legislature under s.s. 13 of s. 92 of the B.N.A. Act over "property and civil rights in the province," and also under s.s. 16 of s. 92 "matters of a merely local or private nature." *Citizens Insurance Co.* v. *Parsons* (1); *Attorney General of Ontario* v. *Attorney General of Canada* (2); *Attorney General of Manitoba v. Manitoba Licence-Holders' Association* (3).

This legislation does not interfere with the status and powers of a Dominion company within the meaning of the decisions in the *John Deere Plow Co.* v. *Wharton* (4) and *Great West Saddlery Co.* v. *The King* (5). See *Colonial Building and Investment Association* v. *Attorney General for Quebec* (6); *Bank of Toronto* v. *Lambe* (7).

Bayley K.C. for the Attorney General for Ontario. The legislation in question is validly enacted under section 92 of the B.N.A. Act.

The Sale of Shares Act does not touch upon any subject matter reserved exclusively for the Dominion Parliament by section 91 of the B.N.A. Act.

F. Heap and *Geo. F. Macdonnell* for the respondent. The prohibition of the statute as to selling, etc., without a licence is expressly limited by section 4 of "The Sale of Shares Act" to selling, etc., in Saskatchewan; and it is submitted that no act of the prohibited kind took place in that province.

The Sale of Shares Act is *ultra vires* of the provincial legislature. *Great West Saddlery Co.* v. *The King* (5).

(1) [1881] 7 App. Cas. 96.
(2) [1896] A.C. 348.
(3) [1902] A.C. 73.
(4) [1915] A.C. 330.
(5) [1921] 2 A.C. 91.
(6) [1883] 9 App. Cas. 157.
(7) [1887] 12 App. Cas. 575.

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The Chief Justice.

THE CHIEF JUSTICE.—This appeal raises two questions: first, whether as a fact there was an "attempt" by the respondent company to sell its shares in the province of Saskatchewan contrary to section 4 of the Saskatchewan Sale of Shares Act (R.S.S., c. 19) and, if so, does the statute apply to Dominion corporations and compel them, before selling or attempting to sell their own shares, to obtain a certificate or licence as provided in the statute?

On the questions as to their having been an "attempt to sell" its own shares without having obtained such certificate as the statute provides for, I have no doubt that, under the facts, there was such an attempt, although it did not become effective until ratified in Manitoba where the respondent company had its head office.

As to the other question which is one of grave and great importance, namely whether the statute applies to Dominion companies selling or attempting to sell their own shares in the province of Saskatchewan without first having obtained a provincial licence, I am of the opinion that the statute while broad enough in its terms to include Dominion companies selling or attempting to sell their own shares, should not in such cases be construed as including Dominion companies; because it was not within the powers of the provincial legislature to prohibit the sale within the province by a Dominion company of its own shares, or to compel the company to take out such a licence to do so as the statute in question provided for. In other words, I hold it not to be within the power of the legislature either to prohibit the sale by a Dominion company of its own shares within the province, or to require such a company to take out from the Local Government Board a certificate or, in the case of an agent, a licence before making or attempting to make any such sale.

In my judgment the power of a Dominion company to sell its own shares throughout the Dominion goes to the root of its essential powers and capacities and any attempt by a provincial legislature to prohibit altogether the sale by a Dominion company of its own shares in a province, or to make the legality of such sale depend upon the company's first obtaining a licence, or a certificate from a Local

Government Board, must necessarily be beyond the powers of a provincial legislature.

I have read the many cases cited at bar by counsel, notably *John Deere Plow Co.* v. *Wharton* (1), *and Great West Saddlery Co.* v. *The King* (2), decisions of the Judicial Committee of the Privy Council, and the reasoning in those cases of Lord Haldane, who delivered the judgments of their Lordships, has served to confirm me in the conclusions I have reached as to the powers of the provincial legislature on the sole question we have now to determine.

I have carefully read and studied the ably reasoned opinion of the learned judges of the Court of Appeal for Saskatchewan and concurring generally as I do in those reasons I do not feel it necessary to repeat them over again in detail.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—This appeal arises out of an action brought by respondent upon two promissory notes given by the defendant appellant, each for the sum of one hundred dollars, in payment of shares in the respondent company obtained through an agent in Saskatchewan.

The said agent is alleged to have acted in his sale of said shares and taking said promissory notes on behalf of the respondent in violation of the provisions of the "Sale of Shares Act" of Saskatchewan.

The action was tried by Judge Ross, a district judge of the said province of Saskatchewan, and decided upon an admission of facts appearing in the case.

He held that upon said admission of facts the plaintiff, now respondent, could not succeed; and upon the authorities he cites and others cited by counsel for appellants before us, he was right, assuming that the statute of Saskatchewan in question was not *ultra vires*.

It was suggested in the court below by counsel for the company then appellant, now respondent, that the notes having been accepted by the respondent in Manitoba there is no basis for invoking the Act now in question. What actually transpired might have been made clearer but in any event I would infer that all that is really involved in the case, and the real foundation of the claims, took place

(1) [1915] A.C. 330. (2) [1921] 2 A.C. 91.

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in Saskatchewan, and was only ratified by the company, and that its rights are tainted by the illegality charged, if any.

The important feature of this appeal is the question raised as to whether or not the Saskatchewan Act which is involved was *ultra vires* or not.

There would seem to be a very serious evil prevalent in the methods adopted for selling such securities as mentioned in the Act, and need of a remedy therefor.

At least each of the respective legislatures of Manitoba, Alberta, and Ontario has enacted an Act more or less similar to that in question, for the purpose of protecting the public and frustrating the object of those pursuing such undesirable methods.

We are not referred to any similar legislation by the Dominion Parliament, or effective measures taken by it having the like object in view.

What is urged by the respondent is that the Dominion "Companies Act" enacted under and by virtue of the residuary powers which Parliament has under the B.N.A. Act, enabled the respondent to acquire, by its incorporation, powers such as set forth in its charter obtained under said Companies Act, and these can in no way be impaired by any more provincial legislation.

If the Act under which respondent had become incorporated had been enacted under the enumerated powers given Parliament by section 91 of the B.N.A. Act, as, for example, the banking incorporation powers given by item no. 15 of said section 91, or under item no. 27 of said section 91 and excepted, by item no. 10 of section 92, from the expressly enumerated powers, given by that section to local legislatures, then the local legislature of a province perhaps could not interfere in any way.

But these corporations of Parliament are all expressly excepted, or intended to be, from the operation of the Saskatchewan Act now in question, as I read it.

The respondent could not have been incorporated by Parliament under any of these specific powers I have just referred to.

The decision in the case of *The Citizens Ins. Co.* v. *Parsons* (1), seems to me expressly in point or so nearly so as we can hope to find on such a question as raised herein.

(1) 7 App. Cas. 96.

To make that clearer I may recall the history of the provincial legislation there in question. A serious public evil became prevalent in Ontario by reason of trivial objections taken in insurance cases by which such companies often escaped unjustly payment of losses suffered by the insured and against which the insurer was supposed to have agreed to indemnify.

The misleading nature of the conditions and the kind of printing used to express them was the basis of the evil.

The local government of Ontario appointed a commission to inquire into the evil and recommend a remedy. That commission of very able men, of whom at least two were judges, reported that what are now known as "statutory conditions" should be indorsed on every insurance policy, and recommended that if the insurance company desired to be protected by further conditions, such must be printed in red ink.

Surely if ever there was a case of interference by a local legislature with the supposed powers conferred by the Dominion Parliament in the charter it had issued or adopted and affirmed, that was.

The insurance companies challenged its being *intra vires* the powers of the Ontario legislature. Hence *The Citizens Ins. Co.* v. *Parsons Case* (1).

It was also tested at the same time by an action of *Parsons* v. *The Queen Ins. Co.* (1). Both cases were argued together, at all events in the last court of resort.

The history of *The Citizens Ins. Co. Case* (1) is briefly outlined in the judgment of the Judicial Committee of the Privy Council delivered by the late Sir Montague Smith and reported at page 104 of said report, as follows:—

> It will only be necessary to premise that "The Citizens Insurance Company of Canada," the defendant in the first action, was originally incorporated by an Act of the late province of Canada, 19-20 Vict., c. 124, by the name of "The Canada Marine Insurance Company." By another Act of the late province, 27-28 Vict., c. 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name was changed to "The Citizens Insurance and Investment Company;" and, finally, by an Act of the Dominion Parliament, its name was again changed to the present title, and it

(1) 7 App. Cas. 96.

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was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name.

That there should be no question of what the lastly referred to Act enacted I may say that I find it was assented to 12th April, 1876, and is c. 55, in vol. 11, of the Acts of the Dominion Parliament passed in the 39th year of the reign of Her late Majesty Queen Victoria, and is as follows:—

> 1. The name of the said company is hereby changed to The Citizens Insurance Company of Canada, by which name in future the said company shall enjoy all the franchises and privileges, and shall hold all the rights and assets, and shall be subject to all the liabilities heretofore held, enjoyed and possessed, or which have heretofore attached to The Citizens Insurance and Investment Company; and no suit now pending shall be abated by reason of the said change of name, but may be continued to final judgment in the name under which it shall have been commenced.

I submit that this enactment is quite as specific an enactment by Parliament, when read in light of the previous enactments, recited in the foregoing extract from the judgment as quoted above, and confers by all the relevant powers Parliament had, quite as substantial a status and extensive grant of incidental powers, resting upon the power of Parliament, as anything the respondent ever received therefrom by its incorporation under the Dominion Companies Act.

Yet the judgment in said case to test the validity of such provincial legislation as I have referred to, varying its most essential power of framing its own contract, and imposing thereon a limitation until then undreamed of, stands good law to-day and better expresses what all those concerned in the B.N.A. Act meant, than we hear urged by those born in later days when forced to argue otherwise.

I am quite unable to reconcile the interpretation given by the learned judges in the Saskatchewan Court of Appeal to the opinion judgment of the Judicial Committee of the Privy Council in the *Great West Saddlery Co.* v. *The King* (1), with the decision in the said cases of *The Citizens Ins. Co.* v. *Parsons* (2), and *The Queen Ins. Co.* v. *Parsons* (2), heard together, and treat that in the latter as if overruled thereby.

(1) [1921] 2 A.C. 91.

(2) 7 App. Cas. 96.

For my part any opinion judgment must be read in light of the question at issue and therein decided and all else *obiter dicta* be simply given the weight due to opinion.

The *John Deere Plow Case* (1), so much referred to by said learned judges, involved simply this: Could a provincial legislature by its enactments insist that the corporate creation of Parliament, or its enactments, must go out of existence? Such an attempt as the authorities in British Columbia then and thus tried to enforce was quite unjustifiable.

I eliminate from my consideration of that case all else but that single point, save due respect to the *obiter dicta* in the reasons given.

When we come to the *Great West Saddlery Case* (2) and what was raised therein and the results reached, what are they?

In the final paragraph of the judgment of the court above therein, the net result seems to be covered by the following quotation:—

> Here again their Lordships think that the provincial legislature has failed to confine its legislation to the objects prescribed in s. 92, and has trenched on what is exclusively given by the British North America Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the provincial register and to pay fees not exceeding those payable by provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Saskatchewan Companies Act or shall become liable to dissolution under s. 28, the Act would be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney general of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Section 25 of the Saskatchewan Act, which requires a Dominion company to obtain a licence, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as *ultra vires;* and in this case

(1) [1915] A.C. 330.

(2) [1921] 2 A.C. 91.

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also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

The pith and substance of that judgment as I read it is that if a reasonable time had been given to furnish the material required for purposes of taxation or otherwise, perhaps much could not be complained of as matter of law especially as to the Saskatchewan statute therein in question.

The temporary suspension of the exercise of its corporate rights was more than the court above felt it could justify and hence held *ultra vires,* though the individual citizen exercising as such all the business rights that any corporate body could exercise, was left liable to pay the taxing licence fee before actually beginning to carry on business.

In other words, if instead of insisting upon prepayment of the taxing licence fee, as usually done in many other instances in common use in Canada, a reasonable time had been allowed, the company could not be held to have been held up, or the Act *ultra vires.*

Such at least is my view of what may be reasonably taken of the net result of basis of complaint in that case, so far as Saskatchewan was concerned.

The reasoning for that purpose, or far beyond it, does not lead me to infer that either *Citizens Ins. Co.* v. *Parsons; Queen Ins. Co.* v. *Parsons* (1), or *The Colonial Building & Investment Association.* v. *Attorney General of Quebec* (2), have all, or any of those three just named decisions, been overruled. And until they are, I cannot see why the legislature of Saskatchewan cannot (to protect its citizens against evil practice of even a creation of the Dominion Parliament, unless possibly one brought into existence by virtue of the exclusive powers assigned Parliament by subsections of section 91 of the British North America Act) enact such provisions as are directly in question herein and so far as relevant to the disposition of the issues raised thereby as to render it necessary for the court passing thereon to hold that the enactment on the facts stated invalidates the plaintiff's claim.

Whether the power to do so be rested upon the power over property and civil rights, or upon local conditions

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

or as against local evil arising from dishonest methods to be combatted it seems to me so far as necessary for the disposition of, and maintenance of the defence in this case, to fall within one or other of such powers, and hence *intra vires*.

Why should a corporate entity have greater rights than the individual citizen? And how far?

The Colonial Building & Investment Association v. *The Attorney General of Quebec* (1), shews how the right to enforce provincial mortmain Acts has been recognized as valid even against Dominion corporations.

I most respectfully submit that a prevalent gross dishonesty such as the Act in question aims at checking, and thereby preventing the ruin of possibly thousands of helpless people, ignorant of financial schemes of our so-called enlightened days, is quite as well within the powers of our local legislatures, as the several provincial Acts forbidding the sale to any one of a glass of beer, even by a legal entity, clothed, indeed created, by the residuary Dominion powers of incorporation.

See the cases of *The Attorney General for Ontario* v. *The Attorney General for the Dominion* (2); *The Attorney General of Manitoba* v. *The Manitoba Licence Holders Association* (3).

Turning from that aspect of the relevant facts to another presented by the case of *Attorney General for the Dominion and the Attorney General for the Province of Alberta and others, and the Attorney General for the Province of British Columbia* (4), not that it is directly in point herein, but is illustrative of what limitations exist as to the power of Parliament, conversely as it were, and worth considering.

If the very simple method of getting incorporation from the Dominion had ever been thought of as fraught with the consequential freedom from all interference on the part of provincial legislatures such as now set up herein and otherwise, why was it not resorted to?

(1) 9 App. Cas. 157, at pp. 168 and 169.
(2) [1896] A.C. 348, at pp. 365 and 370.
(3) [1902] A.C. 73.
(4) [1916] 1 A.C. 588.

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Why was the item of "Trade and Commerce" in section 91 of the British North America Act so frequently resorted to as a means of giving the Dominion power to exercise exclusive power sought?

And when our old acquaintance "trade and commerce" seemed at last exhausted as means to such an end, why are we troubled anew with Dominion incorporating means of giving the Dominion Parliament a power hitherto, at least since the decision of *Citizens Ins. Co.* v. *Parsons* (1), unknown?

It seems rather late in the day to argue that a mere corporate body has any greater power or rights than any ordinary citizen in the way of overriding and escaping the operation of the exclusive powers assigned to the provincial legislatures over all property and civil rights, over direct taxation, or means of enforcing same, or over all matters of a merely local or private nature in the province. The ordinary citizen if possessed of the necessary means is entitled to embark in anything save those subject matters specifically assigned by the British North America Act to the exclusive jurisdiction of the Dominion Parliament.

The evil aimed at by the legislation now claimed to be *ultra vires* existed long ago, as exemplified by the case of *Scott* v. *Brown, Doering, McNab & Co.* (2), and certainly needed a remedy within the powers of each local legislature where the evil existed.

The legislation now attacked is simply an attempt to protect the innocent confiding mass from such like schemes as by the court dealing with said case demonstrated to be illegal, in short an illegal means of rendering fraud possibly successful, unless when the wealthy man was the victim and chose to fight it out.

If this case fell within its true meaning then the entire scheme was fraudulent (as in the case just cited) and no room exists for setting up the pretence of a delivery of a note in Winnipeg which in fact was delivered into the mail in Saskatchewan by respondent's agent after breach of the Act in question at every angle thereof and tainted with illegality.

(1) 7 App. Cas. 96.

(2) [1892] 2 Q.B. 724.

I should have said above that the illustrations of counsel for the Attorney General for Ontario given in his factum, of the necessity for Dominion corporations created under the residual powers of Parliament complying with local statutes as the Statute of Frauds, Bills of Sale, and Chattel Mortgages, and Conditional Sales Acts, and similar legislation yet never questioned but observed, are well worth considering herein.

These requirements vary in different provinces and possibly in some they do not all exist.

The legislation here in question simply goes a step further and is somewhat more complicated but in principle, I submit, the same.

Nearly all are to prevent fraud or wrongdoing; and as the business of the commercial world becomes more complicated the necessary legislation becomes, of necessity, more so also.

I desire to say that in referring to "The Sale of Shares Act" as if to the whole, I by no means am to be taken as holding that there is nothing in it *ultra vires* for I have only carefully considered the provisions actually necessary for the disposition of the issues necessarily raised for the determination of the defence herein.

The appeal should be allowed with costs here and below and the judgment of the trial judge restored.

DUFF J.—The defendant's contract with the respondent company originated in an offer to purchase shares addressed to the directors of the respondent company, whose head office was in Winnipeg. That offer was accepted by allotment at Winnipeg and notice of allotment given there. The contract of sale was a contract concluded in Manitoba, and therefore was not a sale in Saskatchewan within the meaning of section 4 of the Act; nor do I think there was any offer or attempt "to sell in Saskatchewan" within the meaning of section 4. The offer, in point of fact, was an offer made by the defendant, and was an offer to purchase, and it was also an offer which contemplated completion at the head office in Manitoba. The acts of the company's agent may have amounted to an attempt in Saskatchewan to bring about a sale of the shares by a contract to be com-

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pleted in Manitoba, but there was no attempt to sell in Saskatchewan; that is to say, there was no attempt to bring about the making of a contract of sale in Saskatchewan, which, I am disposed to think, is necessary in order to constitute an attempt within the section. Again, such attempt as there was did not enter into the contract sought to be enforced as one of the constitutive elements of it; and the contract would appear to have been a good contract, even assuming it to have been in fact brought about by a solicitation on part of the agent of the company which was an unlawful solicitation and under the ban of the statute.

There has been, however, some difference of judicial opinion upon this point, which is, perhaps, not quite free from doubt, and in view of the fact that the court below have based their decision upon the conclusion at which they arrived, that it was not competent to the Saskatchewan Legislature to enact the statute upon which the defendant relies, I think it is advisable to express my opinion upon the question raised by the appellants' attack upon this view.

The question is: Does the statute apply to sales of shares, stocks, bonds or securities of a Dominion company? And the answer to that question admittedly depends upon the answer to the question whether the Saskatchewan Legislature has power to control by such legislation the sale of such objects by a Dominion company. The plan of the Act is to require every company desiring to sell any stocks, bonds, debentures or other securities to apply to the Local Government Board for a certificate to the effect that the company is complying with the Act as a condition of a lawful sale. On the application the company is required to furnish certain information specified in the Act, and it is the duty of the Board to examine the statements and documents filed, and further if deemed desirable, to make a detailed examination of the company's affairs. The Board is then under the duty to issue a statutory certificate if it finds that the company is solvent, that its constitution and by-laws and its proposed plan of business and its proposed contracts

provide a fair, just and equitable plan for the transaction of business and appear to indicate a probability of a fair return on the shares, stocks, bonds or other securities * * * proposed to be offered for sale.

If it finds otherwise its duty is to refuse the certificate. The Board has authority to revoke the certificate on discovering that the assets of the company have ceased to be equal to its liabilities or that it is conducting its business in an unsafe, inequitable or unauthorized manner or is jeopardizing the interests of its stockholders or investors in shares, stocks, bonds or other securities offered for sale by it.

The prohibitions of the Act are comprehensive. Sales, offers to sell, attempts to sell in Saskatchewan are forbidden by section 4 in the absence of a certificate subject to the qualification that this does not apply when (section 21) the

sale or attempted sale is not made in course of continued or successive acts.

The issue, putting forth and distribution of any advertisement in any newspaper or other periodical of any circular letter or other paper containing

an offer to sell, solicitation or purchase or intimation of the facts of shares, stock, bonds or debentures being open to subscription or purchase, shall be evidence of an attempt to sell in the course of continued and successive acts in violation of the Act.

By section 5,

no person shall print, publish, issue or distribute any advertisement, prospectus, circular, letter or other document containing an offer to sell or request to purchase any of such shares, stocks, bonds or other securities unless the company whose shares, stocks, bonds or other securities are offered for sale shall first have obtained from all the board the required certificate.

It is perhaps not easy to attach a precise meaning to the qualification of section 21; but although section 4 might not affect a company carrying out a distribution of shares arranged prior to incorporation among the promoters of the company or among existing shareholders according to mutual arrangement, it seems clear enough, having regard to sections 5 and 22, that in the absence of a certificate a company to which the Act applies is debarred from issuing any document bringing the opportunity of subscribing for its shares or purchasing its debentures to the attention of possible subscribers or purchasers.

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It is convenient to consider the operation of the Act by reference to a company having its head office in the province, so that the allotment of stock to shareholders—in other words, sales of its shares by the company—would in the ordinary course take place in the province. Such a company, being minded to obtain capital by the sale of its shares through a general subscription, becomes, if governed by the Act, subject to the necessity of submitting its constitution, its by-laws, its plan of business, as well as its assets, to the Local Government Board and (if required) of modifying these to meet the views of the Board as to what is fair and equitable and likely to be commercially successful, as a condition of lawfully proceeding with its plans for obtaining capital by the sale of its shares. As regards the borrowing of money within the province through sale of its bonds and debentures, it is in the like case.

The general principles governing the respective authorities of the Dominion and the provinces in relation to the subject of Dominion companies, in so far as presently relevant, are stated by Lord Haldane on behalf of the Judicial Committee in *John Deere Plow Co.* v. *Wharton* (1). The view there expressed may be summarized for our present purposes thus: The power of legislating with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Dominion Parliament as being a matter not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the initial meaning of the words of section 91, and as being a matter affecting the Dominion generally and covered by the expression, " the peace, order and good government of Canada." Moreover, the power to regulate trade and commerce covered by the second head of section 91 upon the Dominion enables the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion, should be exercisable and what limitations should be placed on such powers. This is not to say that the power to regulate trade and commerce is lawfully capable of execution in such a way as to trench on the exclusive jurisdiction of the provincial legislatures over civil rights in general within the provinces but a province in exercise of its jurisdiction cannot legislate so as

(1) [1915] A.C. 330, at pp. 339-341.

to deprive a Dominion company of its status and powers. It was also laid down that the Parliament of Canada had power to enact certain sections of the Dominion Companies Act and the Interpretation Act.

In *Great West Saddlery Co.* v. *The King* (1), their Lordships in applying these general principles observed that even in the case of provincial laws competently enacted and applicable to Dominion companies they had carefully refrained from saying, in the judgment just referred to, that the sanctions by which such provincial laws might be enforced

> could validly be so directed as indirectly to sterilize * * * if the local laws were not obeyed * * * the capacities and powers which the Dominion had validly conferred.

And their Lordships added that

> where one had legislative power, the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise.

I think that, for our present purpose, the implications of these two judgments receive valuable illustration by reference to the provisions of the Dominion Companies Act and the Dominion Interpretation Act, which were held to be within the legislative authority of the Dominion. Section 5 of the Dominion Companies Act, which was held to be *intra vires,* gives authority to constitute certain subscribing shareholders a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends; and by force of section 30 of the Interpretation Act, this imports authority to vest in such a corporation the power to sue and be sued, to contract and be contracted with in its corporate name, to have a common seal, to have perpetual succession, to acquire and hold personal property or movables and to alienate the same at pleasure, to vest in the majority the power to bind other members by their acts and to exempt individual members of the corporation from personal liability for its debts or obligations.

This is an express decision that the authority of the Dominion under the residuary clause fortified by that under section 91 (2) embraces authority to provide for the constitution of companies falling within the class of joint

(1) [1921] 2 A.C. 91, at p. 100.

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stock companies as that phrase is commonly understood, companies, that is to say, having capital divided into shares owned by shareholders who are the members of the company, whose liability in respect of the debts and obligations of the company is limited, possessing independently of provincial legislation in each of the provinces the status of a juridical person, having the right to contract, and having the right to invoke the jurisdiction of the courts, subject always, of course, to the measures passed by provincial legislatures of general application in relation to such civil rights. And I think upon principle no distinction can be drawn between the provisions of the Act dealing with these subjects and those which imply power to acquire capital by selling the company's shares; nor do I think any sound distinction can be drawn between such provisions and those which expressly authorize the company to borrow money on its own credit and to give as security for the money so borrowed its bonds and debentures charged upon its property.

It is indisputable I think that if the restrictions established by the statute be validly enacted it is equally within the power of the province to prohibit entirely, in the absence of a certificate, the sale of shares. There cannot I think be any distinction in principle from the constitutional point of view between sale by isolated acts and sale in course of continuous and successive acts. And the learned judges of the court below have rightly considered I think that the true question is whether to create such a prohibition is competent to a provincial legislature.

The authority to incorporate companies and endow them with status and powers, maintainable and exercisable independently of provincial sanction, would appear at least to involve the authority to dictate the constitution of the company including the procedure by which membership in the corporation is acquired, as well as to prescribe the character of relations which shall obtain between the corporation and its members. And legislation defining this procedure and creating powers expressly or impliedly to enable it to be carried out, is strictly not within the scope of legislation on the subject of " civil rights " as contemplated by 92 (13) but belongs to the class of legislation on the

subject of "incorporation of companies" and therefore is not within the scope of section 92 when governing companies with objects other than "provincial rights" within the meaning of 92 (1).

The enactments of the impugned statute necessarily have as already mentioned the immediate effect of preventing Dominion companies with head offices in Saskatchewan exercising in the normal way the power to obtain capital through subscription for their shares. Not only is that the effect of the legislation, it is of the essence of its design. For by its provisions the exercise of the powers of such a company is made conditional upon submission by the company to a provincial control which would deprive it of the free right of exercising its capacities according to the constitution validly imposed upon it by the Dominion; the constitution, the arrangements between the company and its members, between different classes of members, between the members and the management as touching the control of its affairs, and the distribution of profits are all subjected to the supervision of the provincial Local Board.

The legislation in question no doubt has for its purpose, its principal purpose at all events, the protection of those who are properly the objects of the care of the legislature of Saskatchewan, the inhabitants of that province, from the allurement of attractive offers of investment by bubble companies or companies engaged in improvident enterprises, or companies operating according to plans designed for the enrichment of promoters and managers, at the expense of investing shareholders.

It is quite true that the provinces have a large authority in relation to the suppression of local evils and the prevention of them and although legislation devoted to such purposes almost invariably affects civil rights, such legislation as a rule falls under section 92 (16) or under one of the more specifically defined categories of section 92 and not under 92 (13) as legislation in relation to civil rights. *Russell* v. *The Queen* (1); *Attorney General of Manitoba* v. *Manitoba Licence Holders Association* (2); *Quong-Wing* v. *The King* (3). But provinces exercising such author-

(1) 7 App. Cas. 829. (2) [1902] A.C. 73.
(3) [1914] 49 S.C.R. 440.

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ity must in doing so observe the constitutional limitations to which they are subject and not effect their objects by means of enactments which both in necessary result and in purpose constitute regulation of Dominion companies in the exercise of powers which belong to them as essential and characteristic.

This is not to say that such companies are withdrawn from the operation of provincial laws dealing generally with matters that may be embraced in whole or in part within the objects of the company. Dominion companies empowered to deal in intoxicating liquors for example are subject to provincial laws regulating or suppressing the sale of liquor; but such laws are not laws aimed at Dominion companies as such or at joint stock companies as such and do not in effect or in purpose prohibit or impose conditions upon the exercise of powers of Dominion companies which are essential in the sense that they are necessary to enable them in a practical way to function as corporations according to the constitutions imposed upon them by the Dominion.

The appeal should be dismissed with costs.

ANGLIN J.—The appellant, Lukey, is sued upon two promissory notes given by him for the purchase price of shares in the respondent company, which is incorporated under the Dominion Companies Act and has its head office in the city of Winnipeg, Manitoba. Lukey's subscription was solicited and the notes sued on were obtained in Saskatchewan by an agent of the respondent company in the course of a general campaign to dispose of its stock. As was intended, they were forwarded by him to the company's head office and the application was there accepted and the shares subscribed accordingly alloted. The appellants (Lukey, and the Attorney General of Saskatchewan and the Attorney General of Ontario, who both intervened), assert that the transaction above outlined was in contravention of section 4 of the Saskatchewan Sale of Shares Act (R.S.S. ch. 199) which reads as follows:

> 4. No person shall sell or offer or attempt to sell in Saskatchewan any shares, stocks, bonds or other securities of a company other than the securities hereinbefore excepted without first obtaining from the Local Government Board a certificate, and in the case of an agent a licence, as hereinafter provided,

and that this illegality vitiates the notes sued upon. It was admitted that at the time of Lukey's subscription the company was uncertified and its agent unlicensed under the Saskatchewan statute.

The respondent maintains that there was no sale of shares in Saskatchewan or any offer or attempt to sell shares in that province in violation of section 4 and it also contests the validity of that legislation in so far as it affects Dominion corporations. Both grounds were relied upon in answer to this appeal.

The trial judge (Ross J.D.C.) held that the solicitation of the subscription in Saskatchewan was within the prohibition of section 4 above quoted and that that section was *intra vires* of the Saskatchewan legislature. He accordingly dismissed the action.

The Court of Appeal reversed this judgment, holding unanimously that section 4 is *ultra vires* in so far as it affects Dominion corporations. Turgeon J.A. (with whom Haultain C.J.S. concurred) also agreed with the trial judge that the transaction fell within the statutory prohibition. On this latter question Lamont, MacKay and Martin JJ.A. expressed no opinion, the latter observing that the only ground of appeal pressed in the argument was the unconstitutionality of section 4.

With the utmost respect, I am of the opinion that what took place in Saskatchewan was neither a sale in that province of, nor an offer or attempt to sell therein, shares of the respondent company. The sale was undoubtedly made when Lukey's application was accepted in Winnipeg. Up to that time there had been merely an application for shares accompanied by a proposition to make payment, should the application be accepted and the stock allotted, by giving two promissory notes for the purchase price tendered with the application for that purpose. The company's agent did not sell its shares in Saskatchewan; neither did he attempt or offer to do so. He did attempt to secure an application for shares there to be forwarded to Winnipeg for acceptance by the company and he did offer to take and forward such application. But neither of those acts falls within the prohibition of section 4, if its language be read in its ordinary and grammatical sense, the ad-

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verbial phrase, "in Saskatchewan," modifying the verb "sell" and "to sell" in the respective clauses; and I know of no reason why it should be given any other construction. There is no ground for construing the section as if its second member read—shall "offer or attempt in Saskatchewan to sell."

Taking this view of the nature of the transaction and of the scope and effect of the legislation, I am not disposed to canvas academically the question whether the legislature transcended its constitutional powers. Their Lordships of the Judicial Committee have frequently intimated that such questions should be dealt with only when the disposition of the case before the court requires it.

I would for these reasons dismiss this appeal. The respondents' costs should be paid by the appellants.

MIGNAULT J.—The first question is whether on the admitted facts the case comes within the statute, chapter 15 of the statutes of Saskatchewan for the year 1916 and amendments.

Section 4 of the statute is as follows:

4. No person shall sell or offer or attempt to sell in Saskatchewan any shares, stocks, bonds or other securities of a company, other than the securities hereinbefore excepted, without first obtaining from the board a certificate, and in the case of an agent a licence, as hereinafter provided.

It is to be noticed that what is prohibited here is to sell, or offer, or attempt to sell, in Saskatchewan, shares of a company which has not obtained a certificate from the board.

The respondent is a Dominion company incorporated by letters patent under the Dominion Companies Act, with its head office in Winnipeg, province of Manitoba. It had not obtained the certificate referred to in section 4.

The respondent's agent obtained in Saskatchewan from the appellant Lukey an application for shares in the respondent company, for which Lukey gave the promissory notes sued on. This application was forwarded to the head office of the company in Winnipeg where it was accepted and the shares were allotted to him.

The sale of the shares no doubt did not take place in Saskatchewan, or at least not wholly in Saskatchewan. I will assume it took place in Manitoba. But was there in Saskatchewan an attempt to sell these shares?

The words of section 4 are "attempt to sell in Saskatchewan." Does that mean attempt to make a sale which sale is to be effected in Saskatchewan, or does it mean an attempt in Saskatchewan to sell these shares, or in other words to get somebody in Saskatchewan to buy them?

The statute was enacted for the protection of the inhabitants of the province of Saskatchewan. The legislature of that province could not control or prohibit anything done out of the province and it must be assumed it did not intend to do so.

But it could, if otherwise this legislation can be sustained, deal with matters happening in Saskatchewan, and I will assume it intended to prohibit not only the sale but also the attempt to sell such shares (treating the words "attempt to sell" as a compound verb), if it occurred in Saskatchewan.

Did the respondent, through its agent "attempt to sell," in this sense, the shares in question, and was this done in Saskatchewan?

I would answer yes, just as much as an order for the purchase of goods, solicited in Saskatchewan by a commercial traveller, the order to be filled in another province, would be an attempt to sell these goods in Saskatchewan. And it was in furtherance of this attempt to sell the stock of the respondent company that its agent obtained the notes sued on in this case.

I think therefore the case before us comes within the statute.

On the second question, the validity of the Saskatchewan statute as applied to the sale of its shares by a Dominion company, my opinion is that the appeal fails.

I have already quoted section 4 which shows what the purpose and effect of this statute really is. I may add that section 4 is followed by provisions which carry out this purpose in minute detail. Thus the company whose shares it is desired to sell shall file with the board (which is the local government board of Saskatchewan) a statement showing the plan on which it proposes to do business, a copy of all contracts which it proposes to make with or sell to its contributors and a statement of its actual financial condition and of its property and liabilities (section 6). The board

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examines the statements and documents filed and if deemed advisable makes a detailed examination of the company's affairs (section 8). If the board finds that the company is solvent, that its articles of incorporation, constitution and by-laws, its proposed plan of business and proposed contracts provide a fair, just and equitable plan for the transaction of business, and appear to indicate the probability of a fair return on the shares, stocks, bonds and other securities, it shall issue a certificate to the company reciting that the company has complied with the Act and is permitted to sell its shares, stocks, bonds and other securities (section 9). If, however, the board finds otherwise than as mentioned above, it shall refuse the certificate (section 10). A company shall not, nor shall any person, either as principal or agent, transact business in form or character similar to that set forth in section 4, until such company or person has obtained a certificate, as provided by section 9 (section 13). If any alteration or amendment is made in the charter, memorandum of association, articles of incorporation, constitution or by-laws of the company after a certificate has been granted under section 9, such alteration or amendment shall in every case operate as an immediate revocation of the certificate (section 14). Should the company transact business on any other plan than that set forth in the statement required to be filed by section 6, or make contracts other than those shown in the copy of the proposed contracts required to be filed by section 6, the certificate granted upon the faith of such statement or proposed contracts so shown shall become *ipso facto* null and void, and no business thereby authorized shall be transacted until a new certificate has been obtained (section 14a). The statute provides for the obtaining of a new certificate and for the appointments of agents who must be licensed by the board. It also requires the filing with the board of an annual statement of the financial condition of the company, failing which the company shall forfeit the right to continue the business of selling its shares, bonds or other securities in Saskatchewan (sections 16 and 17).

No matter how praiseworthy may be the object which the legislature had in view, the question to be decided is whether in attempting to attain this object it has trans-

cended its powers, in so far as these enactments apply to a Dominion company.

The test or crucial question, the answer to which determines whether legislation of this character is within the jurisdiction of the provincial legislature, in so far as it affects Dominion companies, was stated by Lord Haldane in *Great West Saddlery Co.* v. *The King* (1), as follows:

> Do these provisions interfere with such powers are are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status?

I think the answer should be in the affirmative. The selling of its stock or bonds in order to obtain the capital necessary to carry on its business, is an act connected with the very life of a company. Capital is for the company seeking to obtain it what blood is for the human body. Without it the company cannot live and carry on its business and capital can be obtained by the company only by selling its stock or by borrowing money. The Saskatchewan statute prevents the Dominion company from selling its stock and bonds or other securities unless and until a certificate of approval is obtained from the local government board. This is an interference with the powers conferred on the company by the Parliament of Canada to carry on its business in the province of Saskatchewan, and so affects its status. And the legislation cannot be sustained as coming within property and civil rights, or as being a matter of a merely local or private nature in the province. It really conflicts with the right of the Dominion Parliament to incorporate companies, and to grant them power to carry on their business throughout the Dominion.

The statute therefore is not a defence to the respondent's action.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant Lukey: *Alex. Blackwood.*
Solicitors for the respondent: *Wilson, Graham & Stewart.*

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(1) [1921] 2 A.C. 91, at p. 114.