1923
*May 2.
*June 15.

THE CANADIAN BANK OF COMMERCE (PLAINTIFF) ..... } APPELLANT;

AND

THE CUDWORTH RURAL TELEPHONE COMPANY (DEFENDANT).. } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Company—Bills and notes—Rural telephone company—Power to make promissory notes—"The Rural Telephone Act," Sask. 1912-13, c. 33, s. 43; 1918-19, c. 46, s. 48; R.S.S. 1920, c. 96—"The Companies Act," (Sask.) 1917, c. 34, s. 42 (3); R.S.S. 1920, c. 76, s. 14; R.S.S. 1922, c. 76.

The respondent company was organized under the provisions of the "Rural Telephone Act" and, pursuant to those provisions, was duly registered and incorporated under the Saskatchewan "Companies Act."

Held that the respondent company had no power to make a promissory note under the provisions of the "Rural Telephone Act."

Held, also, Idington J. dissenting, that it has no such power under section 14 of the "Companies Act."

Per Idington, Brodeur and Mignault JJ.—Section 14 applies to the respondent company. Duff J. *contra;* Davies C.J. and Anglin J. expressing no opinion, although Anglin J. *semble* in the affirmative.

Held, Idington J. dissenting, that, on the assumption that section 14 did apply, there is nothing in it to extend the limited and clearly defined powers of the respondent company under "The Rural Telephone Act."

Per Davies C.J. and Mignault J.—The word "capacities" in the second part of section 14 does not mean "powers."

Per Duff J.—The effect of section 14 as regards the extraprovincial capacities of companies to which it applies is to establish as a rule of construction the rule laid down by Blackburn J. in the *Ashbury Company's Case* (L.R. 7 H.L. 653) but held by the House of Lords in that case not to be applicable to companies incorporated under "The Companies Act" of 1862, the rule being that companies affected by it have *prima facie* all the capacities of a natural person but subject to all restrictions created expressly or by necessary implication by any statutory enactment by which such companies are governed. Section 14 does not apply to companies incorporated for the purpose of working a rural telephone system under "The Rural Telephone Act," since the memorandum of association of such a company must be read as incorporating the restrictions upon the capacities of such a company to be found in "The Rural Telephone Act" which by necessary implication exclude the operation of section 14 in relation to such companies.

Per Anglin J.—Under the provisions of "The Rural Telephone Act," the respondent company already possessed for the purposes for which it was incorporated all "actual powers and rights" and the fullest

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

"capacity" which the legislature could bestow (*Honsberger* v. *Weyburn Townsite Co.*, 59 Can. S.C.R. 281); and section 14 did not add anything to such "capacity."

Per Idington J. (dissenting).—The corporate powers and capacity of the respondent company rest upon "The Companies Act" entirely, and section 14 impliedly gives to it the capacity and power to make promissory notes.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 1211) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the judgment of Bigelow J. at the trial (2) and dismissing the appellant's action.

This was an action on a promissory note for $5,407.50 made by the respondent company, payable on demand to one George Foley and indorsed by him to the appellant bank.

On the trial, the principal defence raised on behalf of the respondent company was that making the promissory note was beyond the powers of the company.

F. F. MacDermid for the appellant.

F. A. Sheppard for the respondent.

THE CHIEF JUSTICE.—The single question in this appeal is whether the respondent company did or did not have the power to make the promissory note in question.

The respondent is a non-trading corporation organized under "The Rural Telephone Act" of Saskatchewan (see Statutes of Saskatchewan 1912-13, c. 33, since repealed by 1918-19, c. 46) for a specific purpose. As such it had no power to make a promissory note. *Bateman* v. *Mid-Wales Railway Co.* (3). That act provided explicitly for the manner in which it could raise or borrow the necessary moneys required to carry out its object and purpose, viz., by debentures. Every step the organized company had to take had to be approved of by the Minister and the Lieutenant-Governor in Council.

After being organized under "The Rural Telephone Act" it became incorporated under "The Companies Act" of Saskatchewan and the question at once arises whether such incorporation conferred upon it the power, under section 14 of that Act, to do what it could not do before and make the promissory note in question.

(1) [1922] 2 W.W.R. 1211. (2) [1922] 1 W.W.R. 287.
(3) L.R. 1 C.P. 499.

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The Chief Justice

That section reads as follows:—

Every company heretofore or hereafter created (*a*) by or under the authority of any general or special ordinance of the North West Territories; or, (*b*) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act, or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extra-provincial powers and rights, and to exercise its powers beyond the boundaries of the province and to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

The question arises under the second part of this section and really is whether the words

such incorporation shall so far as the capacities of such companies are concerned

extend to or embrace "powers" not given to it by its organization under "The Rural Telephone Act." I do not think they do. Lord Haldane in delivering the judgment of the Judicial Committee in *Bonanza Creek Gold Mining Co.* v. *The King* (1) drew a clear and broad distinction between "capacities" and "powers." I frankly say that I do not clearly understand what the word "capacities" in the second part of the above section really means. But I am satisfied it does not embrace "powers." The language used is very precise in expressing the intention of the legislature as it says "so far as capacities" of such companies are concerned, which to my mind impliedly excludes "powers." Unless, therefore, the word "capacities" is construed in this section as embracing "powers" I cannot see how it can apply to extend the limited and clearly defined powers of the company under "The Rural Telephone Act."

In the view I take of the meaning and extent of "The Companies Act" above quoted it is not necessary for me to express any opinion with respect to the ground on which the Court of Appeal for Saskatchewan based its judgment, viz. that section 14 of "The Companies Act" does not apply to companies created under "The Rural Telephone Act."

I would dismiss the appeal with costs.

(1) [1916] 1 A.C. 566.

IDINGTON J. (dissenting).—The respondent was duly incorporated on the 8th of May, 1918, under and by virtue of the Saskatchewan Act known as "The Companies Act." The memorandum of association presented as the basis of such incorporation in compliance with sections 5 and 6 of said Act, stated that

the object for which the company is established is the construction, maintenance and operation of a telephone system.

In the course of carrying on its business within the limits of the said object it had become indebted to one Foley and as the result of a settlement between him and respondent of their said dealings it was agreed that the said indebtedness amounted to the sum of $5,407.50, and therefore the respondent gave on the 12th of June, 1920, to said Foley its promissory note payable on demand to the order of said Foley for the said amount.

He discounted same with the appellant shortly after and thus it became in due course the holder thereof.

The respondent's authorities, upon payment being demanded by appellant, professed to have discovered that a mistake had been made in the amount due said Foley and that the amount of said promissory note exceeded by a considerable sum what was actually due said Foley, and refused payment.

This action was brought by appellant to recover the amount of said promissory note.

The respondent in answer thereto pleaded amongst other things its incorporation and, what it contends in law, that the making of said note was beyond the powers of the said company.

It was conceded at the trial that the appellant was the holder of said promissory note in due course and entitled, under the "Bills of Exchange Act," to recover if the respondent could be held to have given it within its power and capacity to make same.

The learned trial judge overruled this defence and entered judgment for the amount claimed.

He relied upon an amendment originally enacted in 1917, in the following words:—

13 (*a*). Every company heretofore or hereafter created:

(*a*) by or under the authority of any general or special ordinance of the North West Territories; or

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(b) by or under the authority of The Companies Act, being chapter 72 of the Revised Statutes of Saskatchewan, 1909, or under this Act or any Act that may hereafter be substituted therefor; or

(c) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

This in substance is now section 14 of chapter 76 of the Revised Statutes of Saskatchewan, 1920.

The learned trial judge quoted the last sentence as the essential part thereof, in which I agree, but owing to the Court of Appeal having dealt with same from another angle of vision, to which I am about to refer, I quote the entire amendment. He seemed to rely upon the decision of the Ontario Appellate Division in the case of *Edwards* v. *Blackmore* (1), in which it had to consider a similar enactment.

The Court of Appeal reversed said judgment, holding that the said amendment could not be made applicable to the case of the respondent.

The learned Chief Justice referred to "The Rural Telephone Act" of Saskatchewan as being that under which respondent was organized.

I, with great respect, cannot adopt his reasoning.

The corporate powers and capacity of the respondent rest upon "The Companies Act" entirely, and the amendments thereto made by the legislature of Saskatchewan so expressly, as above, were such as no one can properly discard. It impliedly gave the capacity and power to make a promissory note.

That legislature had given, by "The Rural Telephone Act," certain jurisdiction over the respondent and its like creatures to the Minister named, as it was quite competent for the said legislature to enact, and thereby it limited the borrowing powers of such creations as respondent.

(1) [1918] 42 Ont. L.R. 105.

I have read the said "Rural Telephone Act" to see if it said anything therein as to the power of the respondent to give a promissory note for anything else than borrowed money, and I fail to find anything therein touching the power to make a promissory note for anything else than borrowed money and even that only impliedly in section 31.

This note now in question was not given for borrowed money. Therefore I fail to see how its powers in regard to what is here in question can be held to be in any way touched by the provisions of "The Rural Telephone Act."

I submit that even if there had been any such provisions in said Act it was quite competent for the legislature to have modified all that.

It has not done more than declare, as set forth in the above quoted section, that unless a contrary intention is expressed in a special Act or ordinance incorporating it, or in a memorandum of association thereof certain new capacities are to be given to the corporate creations of "The Companies Act."

There was no special Act incorporating it. Its incorporation was solely within the powers given therefor by "The Companies Act," and there was nothing in the memorandum of association by which that expressed a contrary intention.

The fact that such men as the promoters of such an association required the sanction or approval of a certain minister as preliminary to such an application does not constitute that as part of the memorandum of association.

I submit it is the plain meaning of the language used that must govern us and not something imaginary as result of a metaphysical train of reasoning that we have to deal with.

The later enactments when expressed plainly always should overrule the prior enactments of the same legislature. If the latter has erred that is the court to go to.

I respectfully submit that to uphold and give effect to the judgment appealed from instead of leaving the matter to the legislature we would run grave danger of doing more harm than any good to be gained by defeating what as regards Foley may be an unfounded claim.

Moreover, I am unable to understand how the respondent can get away from the effect of sections 113 and 114

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of "The Companies Act" as it now stands, and has stood in otherwise numbered sections.

There may be some explanation that I have failed to discover, for the point was not made clear in argument, though appellant's factum refers to a section 98 which, unless one of these sections is what it meant, I cannot understand.

The references of respondent to section 117 dealing with borrowed money is beside the question and should have been left aside for we are not concerned with borrowed money.

As to the *Edwards Case* (1) relied upon by the learned trial judge I do not see how it helps us herein or if the converse view had been taken how it could hinder us. It turned upon an Ontario amendment to its "Companies Act" each respectively framed quite differently from the Saskatchewan "Companies Act" and the amendment thereto now in question herein.

I think this appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the learned trial judge be restored.

DUFF J.—The crucial question concerns the effect of section 14 of "The Companies Act." I have reached two conclusions as to the effect of that section: first, it does not, as I think, apply to the respondent company; secondly, on the assumption that it did apply, there is nothing in it to exclude the express and implied prohibition touching the exercise of the company's capacities and powers to be found in "The Rural Telephone Act." As to the first point. Section 14 is in the following words:

> Every company heretofore or hereafter created:
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> (*a*) by or under the authority of any general or special ordinance of the Northwest Territories; or,
>
> (*b*) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act, or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province and to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have

(1) 42 Ont. L.R. 105.

and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal. 1917, c. 34, s. 42 (3).

A rural telephone company, by which phrase I shall designate a company incorporated for the purpose of working a rural telephone system under "The Rural Telephones Act," is a company incorporated and organized under the joint authority of "The Rural Telephones Act" and "The Companies Act." The first step in the proceedings is a petition to the Minister charged with the administration of the Act, in which are set forth a description of the proposed system, in accordance with the regulations of the department, a statement of the amount of capital proposed, evidence that a majority of the resident occupants who may be charged or taxed under the Act are to be shareholders of the company, and that a minimum sum in cash amounting to five dollars per pole mile of the system as described in the specifications has been actually raised. The Minister may in his discretion grant the prayer of the petition and permit the petitioners to organize a company for the purpose of working the system, and then, and then only, is it competent to these persons to proceed to incorporation for that purpose under "The Companies Act."

The design of the statute is to produce a scheme by which the inhabitants of rural districts may combine in a company to provide a telephone system for the benefit of the district and to raise the necessary funds by debentures charged upon lands adjoining the system. The general plan is that every person having a telephone connection with the system is a shareholder in the company, that everybody is entitled to have such connection who is a resident occupant along the line of the system, and that all property actually or presumptively accommodated by the presence of the system is chargeable with the payment of moneys raised in the first instance for construction and is taxable for the purpose of meeting the interest on such moneys.

The authority given by the Minister is an authority to incorporate a company for the purpose of constructing and working such a system under the provisions of the Act. It is a strictly limited authority, to establish a co-operative telephone system under the conditions prescribed by the

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Act and to use therefor the machinery of incorporation provided by "The Companies Act." It is most important to note also that the permission of the Minister is an essential part of the proceedings for incorporation under "The Companies Act." By section 44 of "The Rural Telephone Act," 1912, no company can be incorporated under "The Companies Act" for the purpose of working a telephone system without the sanction of the Lieutenant-Governor in Council unless the proceedings prescribed by "The Rural Telephone Act" have been taken. Every memorandum of association, therefore, of a company to be incorporated under the authority of "The Rural Telephone Act" strictly ought to shew on its face that it is a company to be incorporated under the permission of the Minister for the establishment of the system sanctioned by the Minister; and every such memorandum of association must, in my judgment, be read, however general its language may be, as incorporating by reference the objects of the company as shewn by the petition and the permission of the Minister. The certificate of incorporation of the respondent company correctly refers to the company as a company "organized under the provisions" of "The Rural Telephone Act."

I find little difficulty in concluding, when the matter is looked upon in this way, that the memorandum of association does contain or must be deemed in law to contain within the meaning of section 14, an expression of the "contrary intention" which excludes the operation of that section. The learned Chief Justice of Saskatchewan has called attention to the fact that the objects of the company under "The Rural Telephone Act" are territorially limited in the strictest way. The area within which the system is to operate is fixed by the Minister; no extension of the system is permitted without the authority of the Minister; and it is only such a company which, through the machinery of "The Companies Act," the memorandum of association, and so on, can be given corporate capacity to work a rural telephone system. It obviously follows that that part of section 14 which gives to certain companies capacity to acquire extra-provincial powers and rights to an unlimited extent can have no application to

such companies. Nor can the other limb of the section be applied. The objects as stated in the memorandum of association, if correctly stated (or perhaps one ought to say, in the memorandum of association as one must interpret it in light of the special provisions of "The Rural Telephone Act" already referred to), are objects limited in such a way as necessarily to exclude the idea of a general capacity such as that acquired by a company incorporated by letters patent.

Assuming, however, that companies incorporated under "The Rural Telephone Act" are not excluded by the express language of section 14 from the operation of that section, I should still be disposed to think that the effect of "The Rural Telephone Act" was to restrict the powers of companies organized under it in such a way as to exclude the capacity to create negotiable instruments generally.

In order to get a just conception of the purview of this section, it is necessary to bear in mind that it was passed in consequence of the decision of the Privy Council in the *Bonanza Creek Company's Case* (1), and it is important, I think, to note one or two points in the judgment of the Judicial Committee delivered by Lord Haldane in that case. The company whose powers were there under consideration was an Ontario company incorporated by letters patent and governed by the Ontario Companies Act.

His Lordship, in the course of his judgment, pointed out that the effect of the decision of the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2) was that a company deriving its existence solely from statute must be deemed to have only such capacities as those conferred upon it either expressly or by implication by the language of the statute creating it. In such a case it is not admissible to treat the words creating the corporation as conferring upon it all the capacities of a corporation at common law, subject only to such restrictions as may be found in the statute, as the legislature has not in view in such a case a common law corporation, but only its own creature.

(1) [1916] 1 A.C. 566.
(2) [1875] L.R. 7 H. L. 653.

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It is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation.

And this, His Lordship says, is the error into which the House of Lords held that Blackburn J., as he then was, had fallen in his judgment in the Exchequer Chamber. But His Lordship points out, at page 578, that although the assumption that the legislature had a common law corporation in view may be wrong, because the language of the statute may not

warrant the inference that it has done more than concern itself with its own creature,

nevertheless

the language may be such as to shew an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn J. will be the true one.

The effect of section 14 is, as I think, to bring the companies to which it applies within the principle thus enunciated by Lord Haldane. It is difficult indeed to escape the conclusion that it was precisely this passage in Lord Haldane's exposition which the legislature had in view in enacting section 14.

And what is the result? If we turn to the judgment of Blackburn J., in the Exchequer Chamber (1), there is this passage:

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

And at p. 264 he formulates thus the question that must be answered:

Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the legislature to prohibit, and so avoid the making of, a contract of this particular kind?

The effect, then, of section 14 upon the companies to which it applies is not to abrogate entirely the doctrine of *ultra vires* but to establish a rule of construction which in

(1) [1874] L.R. 9 Ex. 224, at p. 262.

effect is that such companies are to be deemed to have the capacities of a common law corporation, subject to such restrictions as the legislature has evidenced an intention of imposing upon it. In declaring in section 14 that the companies referred to are to have the capacities of a common law corporation, the legislature cannot be supposed to have intended to abrogate the restrictions and prohibitions which the legislature itself has shewn an intention to impose upon such companies. A company created by charter, as Lord Haldane points out at pp. 582-3, is necessarily subject to the restrictions imposed upon it by the legislature, and where the enactment imposing such restrictions evinces an intention that a given transaction shall not be entered into, then any attempt on the part of the company to enter into such a transaction must be inoperative in law. Lord Haldane's judgment, as I read it, gives the sanction of his approval to the principle expressed in the first of the passages quoted above from Blackburn J., in those cases in which Blackburn J's principle of construction is properly applicable.

In this view I am disposed to think that there is ample evidence to be found in the provisions of "The Rural Telephone Act" of an intention to prohibit the giving of promissory notes and negotiable instruments generally by rural telephone companies; and consequently that on the assumption upon which we have been proceeding, the promissory notes in question must be held not to have been the promissory notes of the company.

It is desirable, I think, to refer before taking the leave of the case to the point which was made on the argument that the whole of section 14 is limited to the capacity to acquire extra-provincial powers and rights. I may say at once that such a reading appears to me to involve the deletion of the second limb of the section. Evidence could be accumulated indefinitely of the use of the words "corporate capacity" to describe the powers of companies and other corporations to enter into contracts, make promissory notes and do other acts in the law. In his judgment in the *Bonanza Company's Case* (1), Lord Haldane draws a

(1) [1916] 1 A.C. 566.

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distinction between "capacities" and "actual powers and rights" which for his purpose is, of course, a most useful and illuminating one; because he is there dealing with the validity of acts which depend for their validity upon two coefficients—the capacity of a corporation derived from the law from which it takes its being, and the power and right of the corporation to exercise its capacities in a territory where that law is without authority; and the words of section 14 "capacity * * * to accept extraprovincial powers and rights" are natural and appropriate to that part of this section which deals exclusively with such "powers and rights." The distinction may come into play in cases where the respective jurisdictions are not marked off by territorial delimitation; such, for example, as the case of a Dominion corporation seeking to acquire land in a province deriving its "capacity" in the sense in which Lord Haldane uses the word, from the Dominion, and its right to exercise that capacity from the province which requires a license in mortmain, or in the case of a provincial corporation executing a bill of exchange or promissory note. The law which recognizes a bill of exchange or promissory note made by an artificial person as a good bill or note is a Dominion law while the capacity to make such instruments is a capacity which the corporation could derive from the province alone.

But there is, of course, nothing in Lord Haldane's judgment throwing a doubt upon the propriety and aptitude of the phrase "corporate capacity" sanctioned by the widest and most inveterate usage as applied to the power now in question.

It has been suggested, indeed, that the words, "as far as the capacities of such companies are concerned" are on this view superfluous. What I have already said will sufficiently indicate that in my opinion they are far from superfluous; on the contrary they indicate a deliberate intention to adopt for the purpose of determining the capacities of such companies the principle of construction laid down by Blackburn J., as explained by Lord Haldane. And indeed a moment's reflection shews that the use of some such phraseology was necessary in order to confine the

effect of the enactment by reference to the purpose the legislature had in view. One rule of law, for example, touching common law corporations which it might very well have been thought desirable to avoid is the rule that subjects a corporation created by letters patent which has infringed some provision of its charter to proceedings in *scire facias* for the recall of the charter. The jurisdiction of the courts in such cases at common law is strictly confined to corporations created by matter of record. *The Queen* v. *Hughes* (1). The effect of the omission of the words in question might very well have raised a serious point as to whether or not in addition to the statutable machinery for the winding-up of companies created by special Act or under the " Companies Act " the common law procedure by *scire facias* would have been available. I do not pursue the point. I mention this as one example of the things which it may have been desired to avoid by the use of these words.

Although not suggested on the argument, a point has arisen as to the effect of sections 112 to 114 of " The Companies Act."

I shall state with brevity and directness my view upon this point. I infer from Form A, which gives the general form of memorandum of association, that the statute contemplates, in cases in which the power to make negotiable instruments is not by implication involved in the statement of the principal object or objects of the company and this power is intended to be taken, that it shall be taken by express words in the memorandum of association.

The sections mentioned are not to be read as enacting that every company—an athletic association, for example, —formed under " The Companies Act," is to have the capacity to create negotiable instruments, even though the memorandum of association be silent upon the subject.

Where the memorandum of association is silent upon the subject, then the question of the existence or non-existence of the capacity is to be solved by answering the question whether a grant of the power is implied in the statement of the objects of the company and the other provisions of the memorandum.

(1) [1865] L.R. 1 P.C. 81

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I have already said sufficient to shew that in my opinion a memorandum of association containing, as the memorandum now before us contains, no statement as to the company's objects except the statement that the company is formed to construct and to work a rural telephone system, does not give such a power by implication.

The appeal should be dismissed with costs.

ANGLIN J.—Whether the giving of a promissory note for an indebtedness admittedly incurred in carrying out the purpose for which it was incorporated was *ultra vires* of the respondent company is the question before us on this appeal.

Incorporated in 1918 under the Saskatchewan "Companies Act" (R.S.S. 1909, c. 72), the respondent is a purely statutory corporation to which the doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), applies. It possesses, however, all the powers conferred on companies by that Act, except as varied by "The Rural Telephone Act" (1912-13, c. 33, s. 43). Those powers were expressly continued and confirmed by section 48 of "The Rural Telephone Act," 1918-19, c. 46 (R.S.S. 1920, c. 96). See also section 46 of the same statute. By an amendment to the Companies Act, made in 1917 (c. 34, s. 42 (3) (R.S.S. 1920, c. 76, s. 14) it was provided that

> Every company heretofore or hereafter created:
>
> (*a*) by or under the authority of any general or special ordinance of the North West Territories; or
>
> (*b*) under any general or special Act of this legislature shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

The contrary intention was not so expressed.

As at present advised, I am not prepared to accede to the view which prevailed in the Court of Appeal that s. 14 of c. 76 R.S.S. 1920, is inapplicable to the respondent.

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

That section expressly provides for its application to every company created under any general or special act of the legislature. The respondent is such a company. But it is probably not necessary to determine that question.

I agree with the opinions expressed below that the respondent is a statutory non-trading corporation, whose authority to make promissory notes must be found in the statutes which confer its powers. *Bateman* v. *Mid-Wales Ry. Co.* (1). The note was not given for borrowed money. Therefore, while section 117 of "The Companies Act" (1915, c. 14) cannot be invoked to authorise it, neither would section 31 of "The Rural Telephone Act," 1918-19, c. 46, by implication exclude the power of the company to make it. Having regard to the language of section 48 of "The Rural Telephone Act," 1918-19, c. 46 (R.S.S. 1920, c. 96), nothing in that Act can be invoked to cut down whatever powers the respondent acquired by virtue of its incorporation in 1918 under "The Companies Act" subject to the provisions of "The Rural Telephone Act," 1912-13 (c. 33); vide s. 43.

But, assuming the applicability of section 14 of "The Companies Act" (R.S.S. 1920, c. 76), above quoted, to the respondent, it does not in my opinion help the appellant. The word "capacity," as first used in that section, is explicitly restricted to its passive or subjective sense—the capacity "to accept extra-provincial powers and rights"—as Viscount Haldane used it in the *Bonanza Creek Case* (2), at page 576—"capacity to acquire and exercise rights and powers." As his Lordship said, at page 583:

> Actual powers and rights are one thing and capacity to accept extra-provincial powers and rights quite another.

The word "capacities" occurs again in the latter part of the section in this context—

> such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

Apart altogether from the familiar rule of construction that where a word occurs twice in the same statutory provision, it will ordinarily be given the same meaning in

(1) L.R. 1 C.P. 499. (2) [1916] 1 A.C. 566.

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each case, the obviously limitative purpose of the phrase, "so far as the capacities of the companies are concerned," and the known fact that this legislation, like somewhat similar legislation in other provinces, was enacted in consequence of the decision in the *Bonanza Case* (1) make it reasonably certain that the word "capacities" is here again used in the purely passive or subjective sense. It confines the operation of section 14 to enabling companies to which it applies to accept and exercise powers and rights otherwise conferred upon them and does not import or imply any grant of "actual powers or rights" additional to those conferred elsewhere in the statute.

For reasons stated in *Honsberger* v. *Weyburn Townsite Co.* (2), I strongly incline to the view that the respondent company already possessed for the purposes for which it was incorporated all "actual powers and rights" and the fullest "capacity" which the legislature of Saskatchewan could bestow. I doubt therefore whether section 14 was at all necessary and rather think it added nothing to the "capacity" which the defendant company already had. Its purpose was to put it beyond doubt that companies incorporated under the Saskatchewan Companies Act or special Acts, which could not invoke the benefits held in the *Bonanza Case* (1) to result from the instrument of incorporation having taken the form, prescribed by the Ontario "Companies Act," of Letters Patent issued under the Great Seal, should, nevertheless, "so far as their *capacities* are concerned," be in the same position as if that form of incorporation had been authorized and adopted—that and nothing more.

I find nothing in section 14 which would confer on a non-trading statutory corporation, such as the defendant, the actual power to bind itself by making a promissory note.

I am therefore of the opinion that the giving of the note in question was *ultra vires* of the defendant company and that the judgment in appeal should be affirmed.

BRODEUR J.—The question to be decided is whether the respondent company had the power to sign a promissory note.

(1) [1916] 1 A.C. 566.

(2) [1919] 59 Can. S.C.R. 281, at p. 306.

Some corporations are given special authority to sign promissory notes by their charters or by the general laws by which they are governed. (Revised statutes of Canada, c. 79, sec. 32; Revised statutes of Saskatchewan, c. 72, s. 96.) In the case of others such authority is implied from the nature of their object (*Royal British Bank* v. *Turquand* (1). Trading companies could not easily carry on their trade without having the implied power of signing notes, which have become an instrument of primary necessity in their business relations.

In England, it is stated that the authority cannot be implied from the mere power to contract debts, since the power to issue negotiable paper involves something more than the contracting of a debt, namely the imposition upon the corporation of the liability to innocent indorsers for debts which the corporation is not authorized to contract (Lindley on Companies, p. 242). It has been held in England that this implied power is not possessed by a water works company. *Neale* v. *Turton* (2). But the tendency of recent decisions is towards a more liberal interpretation of these powers. *Re Peruvian Railways Co.* (3).

The corporation which has signed the note in question in this case is a telephone company incorporated as a public service corporation under the provisions of "The Rural Telephone Act" of Saskatchewan. This Act requires that persons desirous of constructing a telephone system should apply to the Minister for the purpose of obtaining his authorization. Plans and specifications of the proposed system and a statement of the amount to be raised by debenture have to be submitted to the Minister. The area within which the construction and operation can be carried out is determined by the Minister. The capital of the company is limited at $10 per pole mile and is divided into shares of $5 each and not more than four shares may be held by any one person. To raise the money for the construction, the company is authorized to issue debentures, but written notice has to be given of the resolution authorizing the loan to all the shareholders, and the resolution must be approved by the Minister and by the local Government

(1) [1856] 6 E. & B. 327. (2) [1827] 4 Bing. 149.
(3) [1867] 2 Ch. App. 317.

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Board. The debentures must be countersigned by the Minister and form a lien on the lands adjoining the system. The moneys for the payment of these bonds are obtained exclusively from taxes levied on the lands affected.

It seems admitted that these telephone companies were not authorized to sign promissory notes until the law was passed in 1917 by the Saskatchewan Legislature which reads as follows:—

14. Every company heretofore or hereafter created:

(*a*) by or under the authority of any general or special ordinance of Northwest Territories; or

(*b*) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

At first sight, we might say that this section gives every company the same powers as a company incorporated under the great seal which is authorized to make notes. But it would be, according to my mind, to give to this section an effect which the legislature never intended. This legislation of 1917 was passed with the purpose of complying with the suggestion made by the Privy Council in the *Bonanza Creek Case* (1). It had been said by Lord Haldane that

the words "legislation in relation to the incorporation of companies with provincial objects" (B.N.A. Act, sec. 92, s.s. 11) do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create by or by virtue of a statute a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation whether by legislation or by executive act according with the distribution of legislative authority of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*.

It had been contended by the federal authorities in this *Bonanza Creek Case* (1) that a provincial company could

(1) [1916] 1 A.C. 566.

not carry on business outside the territory of the incorporating province. In deciding this question, the Privy Council made in 1916 the suggestions above quoted. The Legislature of Saskatchewan, at the session of 1917, passed a necessary remedial legislation which is embodied in section 14, which I have also quoted above.

The legislature evidently intended to grant to its provincial companies the capacity of accepting extra-provincial powers and of exercising its powers beyond the boundaries of the province as far as the laws of the country or province in which the powers are sought to be exercised permit. Going further than that would be giving these companies a more extended power than the remedial legislation contemplated.

I then come to the conclusion that the Cudworth Rural Telephone Company was never authorized by the statute of 1917 to sign promissory notes.

For these reasons the appeal should be dismissed with costs.

MIGNAULT J.—The appellant's argument chiefly centres around section 14 of chapter 76 of the Revised Statutes of Saskatchewan, 1920, which is "The Companies Act" of that province. This section was added as section 13a to "The Companies Act" by chapter 34, section 42, of the statutes of 1917 after, and I think I may say because of, the decision of the Judicial Committee in *Bonanza Creek Gold Mining Co.* v. *The King* (1). It was there held that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario "Companies Act" with the object of carrying on the business of mining, has a status and capacity which enable it to accept and exercise mining leases and rights conferred by the authorities of the Dominion and the Yukon Territory.

Speaking on behalf of their Lordships, Lord Haldane, referring to the power granted to a province by section 92, par. 11, of the B.N.A. Act for the incorporation of companies "with provincial objects," said (p. 576):—

> Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province.

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Further on, his Lordship said (p. 582):—

The doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) does not apply where, as here, the company purports to derive its existence from the act of the sovereign and not merely from the words of the regulating statute * * * If validly granted it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings.

And further, at p. 583:—

The limitations of the legislative powers of a province expressed in section 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extraprovincial powers and rights is quite another. In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies.

And at p. 584:—

The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*.

The law having been thus authoritatively stated, the Saskatchewan legislature amended its "Companies Act" by adding thereto the enactment which is now section 14 of chapter 76 of the revision of 1920. It is declared by what I will call the first part of this section that every company then or thereafter created by or under the authority of any general or special ordinance of the Northwest Territories or under any general or special Act of the

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

Legislature, unless a contrary intention is expressed in a special Act or ordinance incorporating it, or in a memorandum of association thereof, shall have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit. And after this general declaration, which exactly covers the point determined in *Bonanza Creek Gold Mining Co.* v. *The King* (1), the second part of section 14 states:

and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

The scheme of the Saskatchewan Companies Act is incorporation by means of a memorandum of association and not by letters patent, so that, without the general declaration of the first part of section 14, a company so incorporated would come within the rule of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2). The intendment of the first part of section 14 is to give the company, notwithstanding its mode of incorporation, the capacity of a natural person to accept extra-provincial powers and rights and to exercise its powers beyond the boundaries of the province in so far as permitted by the law where these powers are sought to be exercised. This confers on a company incorporated in Saskatchewan by means of a memorandum of association a capacity which it would not have under *Bonanza Creek Gold Mining Co.* v. *The King* (1), which refers merely to companies incorporated by royal charter, so that in Saskatchewan the distinction between the two kinds of incorporation, in so far as the capacity to accept extra-provincial rights is concerned, becomes immaterial.

The second part of section 14 gives rise to a serious difficulty. It declares that "such incorporation," to wit, incorporation by statute, unless the contrary intention is expressed in a special Act or ordinance incorporating the

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company, or in a memorandum of association thereof, shall, *in so far as the capacities of such companies are concerned,* have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the great seal.

There is no question here of the acceptance of extra-provincial powers and rights. The statutory company is to have the *capacity* of a company incorporated under royal charter, unless the contrary intention is expressed in the statute incorporating it. This, it is contended, does entirely away with the rule of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1). And the words of Lord Haldane,

> in the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter

are relied on as supporting the contention that the defence of *ultra vires* cannot be sustained.

On the other hand, it is argued that the word "capacity" or "capacities" is used in the passive sense in section 14. This can be granted as to the first part of the section. It may be added that this word is primarily so used, for capacity is defined as "ability or fitness to receive" (Stroud's Judicial Dictionary). And the point considered in the *Bonanza Company Case* (2) was the ability of a provincial company to receive or accept extraprovincial rights, that is to say capacity in the passive sense—so it is contended that the words of section 14, "so far as the capacities of such companies are concerned," should be considered as restricting or cutting down the generality of the declaration of the legislature.

It must be admitted that, in so far as the abolition of the doctrine of *ultra vires* is concerned, the legislature has weakened what otherwise would have been an unequivocal declaration by the introduction of qualifying words in the second part of section 14. Of course also the memorandum of association must be looked at, and here the purpose mentioned is

> the construction, maintenance and operation of a telephone system,

which seems to negative the existence of unlimited powers.

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

(3) [1916] 1 A.C. 566.

The word " capacity " in the first part of the section is used in the passive sense and it is not an unfair inference that if this word was intended to have in the second part the meaning of powers and rights the latter expressions would have been employed, if for no other reason, in order to avoid the use in this section of the same expression with two different meanings. So I think that section 14 does not in the present instance conclude the matter as contended by the appellant. This suffices to distinguish this case from *Edwards* v. *Blackmore* (1), the Ontario statute being differently worded, and no doubt the company was of a different nature, and I desire to be understood as expressing no opinion as to the decision of the Ontario court.

On the other branch of the case, I have no difficulty in coming to the conclusion that the respondent company had no power to issue the note here in question. Granting that under section 48 of " The Rural Telephone Act " it had all the powers conferred on companies by " The Companies Act," except as varied by " The Rural Telephone Act," my opinion is that, reading these two Acts together with the memorandum of association and considering the nature of this company which is a local public service organization and the restrictions placed on its borrowing powers, the issuing of negotiable instruments clearly transcended its corporate powers.

I would therefore not interfere with the unanimous judgment of the Saskatchewan Court of Appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Ferguson, MacDermid & MacDermid.*

Solicitors for the respondent: *McCraney, Hutchinson, Carroll & Sheppard.*

(1) 42 Ont. L.R. 105.