DOMINION COMPANIES AND THE SASKATCHEWAN ACT.

The right of the provinces to require companies incorporated under authority of the Dominion Parliament to become registered has for a long time been the subject of dispute.

The question is one of more than academic interest, involving as it does in Saskatchewan, the right of the legislature to compel a Dominion company to pay for registration what is really an incorporation fee.

In considering this question, it is necessary to ascertain first what rights are given to a company incorporated by the Dominion Parliament, review the history of the legislation and decisions thereunder and then study carefully the present Companies Act of Saskatchewan.

By section 33 of the Companies Act,[1] a company incorporated by Letters Patent under the Act is vested "with all the powers, privileges and immunities, requisite or incidental to the carrying on of its undertaking, as if it was incorporated by a special Act of Parliament." By the Letters Patent issued under the Act, the company is made a body corporate, and is empowered to carry on its operations throughout the Dominion of Canada.

The Interpretation Act,[2] provides that words making a number of persons a corporation shall vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, etc.

Therefore, when a company is incorporated by the Dominion Parliament either by a special Act or by Letters Patent under the Companies Act, it has power to carry on its business in Saskatchewan, including the right to make contracts in this province that will be legal in effectuating their objects and that can be sued on in the name of the corporation. The decisions of the Judicial Committee of the Privy Council lay down clearly that any provincial legislation interfering with or destroying these powers and consequent capacity of a Dominion company is *ultra vires*.

The history of the provincial legislation shows a persistent attempt on the part of the legislature to require Dominion companies to register and to circumvent or, perhaps I should say, get away from

[1] R.S.C. 1927, cap. 27.
[2] R.S.C. 1927, cap. 1, sec. 30.

the judgments of the Privy Council holding provincial legislation invalid. In the case of *John Deere Plow Company* v. *Wharton*[3] the Privy Council held that Part 6 of the Companies Act of British Columbia, requiring extra-provincial companies to register, was *ultra vires* of the province so far as Dominion companies were concerned. That statute imposed a penalty of $50.00 for every day upon which an extra-provincial company remained unregistered and provided that a company, while unregistered, could not maintain any suit or other proceeding in any court in the province. In holding the legislation *ultra vires,* the Privy Council said in part:

> It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. . . . It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the Province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the provincial Legislature. . . . They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

When this decision was given there was in force in Saskatchewan the Foreign Companies Act,[4] which contained provisions similar to those in Part 6 of the British Columbia Companies Act, including a provision that a company, while unregistered, was incapable of maintaining any action in any court in the province in respect of any contract made in whole or in part in Saskatchewan in the course of or in connection with business carried on without registration.

On June 24th, 1915, obviously as the result of the *John Deere Plow Company* v. *Wharton* decision (*supra*), the Saskatchewan Legislature repealed both the former Companies Act and Foreign Companies Act and enacted a new Companies Act, being cap. 14

[3] [1915] A.C. 330 at p. 341.
[4] R.S.S. 1909, cap 73.

of the Statutes of 1915. Section 23, dealing with registration, reads as follows:

23. Any company whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object and carrying on business in Saskatchewan, shall be registered under this Act.

(2) Any unregistered company carrying on business, and any company, firm, broker or other person carrying on business as a representative, or on behalf of such unregistered company, shall be liable on summary conviction, to a penalty not exceeding $50 for every day on which such business is carried on in contravention of this section, and proof of compliance with the provisions of this section shall be at all times upon the accused.

(3) The taking of orders by travellers for goods, wares or merchandise to be subsequently imported into Saskatchewan to fill such orders, or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in Saskatchewan, shall not be deemed to be carrying on business within the meaning of this Act.

You will note that the requirements for registration are by the 1915 statute made a part of the Companies Act and do not deal expressly with extra-provincial corporations but require every company to be registered whether incorporated under the provisions of the Saskatchewan Act or otherwise, that is to say, every company "having gain for its object," etc. There is in the 1915 Act no express provision preventing a company, while unregistered, from bringing action in the courts.

There is also a section (25) requiring every company to take out an annual license and imposing a penalty of $25.00 a day for every day in which business is carried on without a license.

The validity of these sections was attacked in *Harmer* v. *A. Macdonald Company Limited*;[5] *The King* v. *Great West Saddlery Co.*,[6] and *The King* v. *John Deere Plow Co.*,[7] and the sections held *intra vires* by the Saskatchewan Court *en banc*. I had the privilege of arguing the cases for the companies in that Court, and contended that the effect of imposing a penalty for carrying on business while unregistered was to prohibit the company from carrying on business while unregistered and to make any contract invalid made by a company while unregistered. The decision of the Court *en banc* was delivered by Newlands, J.[8] After reviewing the history of the legislation and referring to and quoting from *John Deere Plow Company Ltd.* v. *Wharton* (*supra*), laying down that the "status and

[5] 10 S.L.R. 231.
[6] Not reported.
[7] Not reported.
[8] 10 S.L.R. 238.

powers of a Dominion company as such can not be destroyed by provincial legislation," the judgment says, at p. 240:

> Therefore, I take it that the Legislature intended to refrain from anything that would "destroy the status and powers of a Dominion company" and to make their legislation applicable to companies, of general application to all companies wherever incorporated.

The judgment goes on to deal with the intention of the Legislature as shown by the language used in the 1915 Act and disagrees with the argument that contracts entered into by a company while unregistered would be void, concluding, at p. 242, with:

> The provisions of the Act requiring all companies to register and to take out an annual license being general law of the province, applicable to all companies and not in any way affecting the status or powers of the company, because as I have said it does not prevent the company from exercising its functions and doing business within the province, was therefore *intra vires* of the Legislature and must be obeyed by the defendant company.

The companies appealed to the Supreme Court of Canada[9] and that Court dismissed the appeal and upheld the validity of the legislation, the Chief Justice expressing the view that the Saskatchewan Act had been so framed as to get over the difficulties indicated in the *John Deere Plow Co.* v. *Wharton* decision (*supra*).

An appeal was taken by the companies, along with companies from Ontario and Manitoba, in a consolidated case entitled *Great West Saddlery* v. *The King* (*supra*) and other cases, in which counsel appeared not only for the parties involved in the actions but also for the Dominion of Canada and for the provinces of Ontario, Manitoba and Saskatchewan. The judgment of the Judicial Committee which was delivered on February 25th, 1921,[10] held that sections 23 and 25 of the Companies Act of 1915 were both *ultra vires* of the Provincial Legislature and that, therefore, the companies were not precluded, by reason of not having been registered or licensed under the Act, from carrying on business and exercising powers in the province and were not liable to the penalties prescribed for having so carried on business. The judgment of the Privy Council on the main question says, at p. 123:

> 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.

[9] 59 S.C.R. 19.
[10] [1921] 2 A.C. 91.

This decision, however, did not settle the question, for in the following year the Saskatchewan Legislature passed amendments to the Companies Act (cap. 33 of the Statutes of 1921-22) which, with subsequent amendments, are now carried into the present Saskatchewan Companies Act, being cap. 28 of the Statutes of 1928-29, Sections 31 to 44. By these provisions, while all companies are required to register, a Dominion Company is not required to take out a license but instead a certificate of renewal of registration, for which it pays an annual fee of $5.00. The provisions for striking a company off the register for ceasing to do business or failing to comply with the requirements of the Companies Act are made not to apply to Dominion companies, although the Registrar, if satisfied that a Dominion company is not carrying on business in Saskatchewan, may, for the purpose of correcting his register, after a month's notice in the Saskatchewan Gazette, strike the name off the register, and provision is made for restoring the name if the company resumes business.

While, therefore, some of the objectionable features of the 1915 Act are removed, the present Act still requires a Dominion company to become registered and to take out annually a certificate of renewal of registration. As, however, the latter only requires an annual fee of $5.00, the main dispute at the present time arises from the registration requirement laid down in Section 31. This reads as follows:

31 (1) Every company, whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object and carrying on business in Saskatchewan, shall be registered under this Act, provincial companies forthwith upon incorporation and extra-provincial companies within thirty days after commencing business in the province.

(2) Any company carrying on business in Saskatchewan which fails to become registered in accordance with the provisions of this Act shall be guilty of an offence and liable, on summary conviction, to a penalty not exceeding $20 for every day during which the default continues, and proof of compliance with this section shall be at all times upon the accused.

(3) Every resident agent or representative of a company carrying on business in Saskatchewan which has failed to become registered in accordance with the provisions of this Act shall also be liable on summary conviction, to a penalty of $20 for every day during which the default of the company continues, and proof of compliance by the company with this section shall be at all times upon the accused.

(4) (Same as subsection 3 of former section 23).

Comparison of this new Section 31 with Section 23 of the 1915 Act (which was held *ultra vires*) shows that the present section, like the old one, requires every company, having gain for its object,

to be registered whether incorporated under the Saskatchewan Companies Act or otherwise and carrying on business in Saskatchewan. The new section, however, requires provincial companies to register forthwith upon incorporation while extra-provincial companies are required to register within thirty days after commencing business in the province. Subsection 2 of Section 31 is the crucial part of the section as it creates the offence and imposes the penalty. Note, however, that the company must still be carrying on business in Saskatchewan in order to be guilty of the offence, and that the new subsection 2 is still clearly within the decision of the Judicial Committee quoted above if it imposes a penalty for carrying on business while unregistered. Then any ordinary business contracts entered into by the company in Saskatchewan while unregistered would be unenforceable if the Act is valid as against Dominion companies. It may be contended on behalf of those supporting the validity of the legislation that the penalty is not for carrying on business but for failing to become registered. Since, however, it is no offence for a company to fail to become registered unless it is carrying on business in Saskatchewan, it is submitted that there is no distinction between Subsection 2 of Section 31 and Subsection 2 of Section 23 of the 1915 Act. It should also be noticed that under the new subsection there is a penalty "not exceeding $20.00 for every day during which the default continues." It could not be successfully contended that this penalty could be imposed for any day after the company had ceased to carry on business in Saskatchewan, showing clearly that the penalty is not simply for failing to register but for carrying on business while unregistered. Surely there is no difference between imposing a penalty upon an *unregistered company carrying on business,* as was done in the 1915 Act, and imposing a penalty for *failing to become registered while carrying on business.* It seems to be a case of "Tweedledum and Tweedledee."

The fact that the penalty is now only $20.00 per day instead of $50.00 per day does not affect the legal question and the penalty is still so great that, in a year, excluding Sundays and holidays, the total penalties would amount to $6,000.00, which sum is in effect prohibitive for most companies.

In considering whether the carrying on of business while unregistered is prohibited by the new section and the contracts of the company therefore illegal, the case of *Victorian Daylesford Syndicate* v. *Dott,*[11] is instructive. In that case it was held that a contract

[11] [1905] 2 Ch. 624.

made by a money-lender was illegal where he was not registered under the Money Lenders' Act, which made him liable to a fine if he failed to register himself as required by the Act or carried on business otherwise than in his registered name. Buckley, J., says, at p. 630:

> It provides that a money lender's contract must be in that money lender's registered name; otherwise a penalty is imposed upon him, the result being that the act done is an act forbidden by Statute and is illegal. . . . Not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then it shews that the act is a prohibited act, because every time the act is done the penalty is imposed. Now here the penalty is imposed every time the act is done. . . . For these reasons I come to the conclusion that the contract under which the defendant was to receive (certain) sums was an illegal contract on which he cannot sue.

It is submitted that on the authority of this case and such well known decisions as *Bensley* v. *Bignold*,[12] *Little* v. *Poole*,[13] *Stephens* v. *Robinson*,[14] *Cope* v. *Rowlands*,[15] and *Brown* v. *Moore*,[16] the new subsection 31, if valid as against Dominion companies, would make it illegal for a Dominion company to carry on business in Saskatchewan, and would render contracts made while unregistered, unenforceable. If that is the result of the legislation, then it comes clearly within the Privy Council decision of *Great West Saddlery* v. *The King* (*supra*) and is *ultra vires* as to Dominion companies.

It may, however, be contended by the provincial authorities that the new Section 31 comes within some remarks made by the Privy Council in the case of *Great West Saddlery* v. *The King* (*supra*) at p. 123, as follows:

> 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.

In the first place, it should be observed that these remarks are merely *obiter dicta* and immediately precede the sentence quoted above in which the Privy Council lays down clearly that the power of imposing a penalty for carrying on business while unregistered is

[12] 5 B. & Ald. 335.
[13] 9 B. & C. 192.
[14] 2 C. & J. 209.
[15] 2 M. & W. 149.
[16] 32 S.C.R. 93.

to make it impossible for the company to enforce its contracts, etc., and so to destroy, for the time being, the status and powers conferred upon the company by the Dominion. Furthermore, I submit that, when the Privy Council suggested that a legislature might require a Dominion company to register and to pay fees not exceeding those payable by provincial companies, it had in mind registration for certain limited purposes, such as furnishing of information, as the Privy Council stated in the *John Deere Plow Co.* v. *Wharton* case (*supra*). The registration, however, required by the present Act is not merely for the purpose of furnishing information or for any limited purpose but is a condition precedent to the company carrying on business in the province, at least for more than thirty days. When the Privy Council in the above quoted *obiter dicta* spoke of Dominion companies being required to register and pay fees not exceeding those payable by provincial companies, it had in mind, I submit, some small fee that would be reasonably necessary to cover the expense of keeping information as to the charter, by-laws, etc., of the different companies registered, but it did not contemplate that the province would require a Dominion company to pay for registration the same fee as it would have to pay for a fresh incorporation. It may be literally true that the fee payable by a Dominion company for registration does not exceed that payable by a Saskatchewan company, but you will observe that, under regulations prescribed by the Lieutenant-Governor-in-Council, there is now no fee payable for the incorporation of a Saskatchewan company but merely a registration fee which is payable forthwith upon incorporation. As a matter of practice, it is paid before incorporation and is really the incorporation fee. It has been suggested that it is a mere subterfuge on the part of the Province to charge the incorporation fee as a registration fee in order to give the Act the appearance, at least, of coming within the *obiter dicta* of the Privy Council above referred to. The Dominion company, as well as all other extra-provincial companies, must, upon registration, pay precisely the same fee as it would have had to pay if it were incorporating in Saskatchewan (with one exception, that, where any extra-provincial company, having a nominal capital exceeding two million dollars proves to the satisfaction of the Registrar that it is actually carrying on an established business beyond Saskatchewan, in which at least fifty per cent. of its subscribed capital is invested, the maximum fee on registration is $540.00).

It may be contended by the provincial authorities that the legis-

lation may be justified as direct taxation against a Dominion company. In answer to this, we must bear in mind that the company is already taxable, if carrying on business in Saskatchewan, under the Corporations Taxation Act. Furthermore, it is submitted that the legislation under consideration cannot be identified or classified as legislation imposing direct taxation within the province or sanctioned by Section 92, Subsection 2 of the British North America Act. It has been laid down by the Judicial Committee of the Privy Council, in considering the constitutionality of legislation under the British North America Act, that, in order to ascertain the class of subject to which the legislation really belongs, its "true nature and character in the particular instance under discussion must always be determined"—*Russell* v. *The Queen*,[17] or, as was stated in *Union Colliery* v. *Bryden*,[18] "the whole pith and substance of the legislation must be determined."

Again, in the case of *Great West Saddlery Co.* v. *The King (supra)*, the Privy Council says:

> The only principle that can be laid down for such cases is that legislation, the validity of which has to be tested, must be scrutinized in its entirety in order to determine its true character.

Applying these principles, the legislation under consideration appears to belong to what is known as "Company Law," governing the existence, capacity and corporate activity of companies.

The following features are significant:

1. The Act is called the "Companies Act" and does not even purport to be a taxing Act.

2. The Act on its face contains practically all of the general law of the province regarding companies.

3. It is a pre-requisite to obtaining registration that the company file a certified copy of its charter and by-laws and a Statutory Declaration giving a list of members and a summary of shares issued, paid up, etc. (see Section 34), which shows that the registration is rather for the purpose of protecting the public in dealing with the company than for the purpose of taxation.

4. The fee payable for registration (unless the company is within the exception above referred to where the maximum is $540.00), is not based on the assets of the company in the province or on the amount of the capital paid up or employed in the province but on the total capitalization of the company.

[17] 7 A.C. 839 and 840.
[18] [1899] A.C. 587.

5. The fee payable is not collected by suit or even by distress as a tax. The imposition of the penalties provided by Section 31 is not an incident of taxation at all. The Judicial Committee in the *Great West Saddlery Co.* v. *The King* (*supra*), after referring to the argument that the legislation of 1915 could be justified as direct taxation, says, at p. 115:

> Nevertheless, the methods by which the direct taxation is to be enforced may be restricted to the bringing of an action with the usual consequences, which was all that was decided to be legal in *Bank of Toronto* v. *Lambe*.[19] It does not follow that because the Government of the Province can tax it can put an end to the existence or even the powers of the company it taxes for non-compliance with the demands of the tax-gatherer.

Further, on page 120, the Privy Council says:

> If the condition of taking out a license had been introduced, not so as to affect the status of the Dominion company, but simply for the purpose of obtaining payment of a direct tax for Provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the Province, or of causing the doing, by that public generally, of some act of a purely local character only under license, their Lordships would, for reasons already given, have been prepared to regard the condition as one which it was within the power of the Province to impose. Even then it would have been requisite to see, as was pointd out by Lord Herschell, in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case*,[20] that the Provincial Legislature was not, under the guise of imposing such direct taxation in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance attempted, their Lordships hold themselves unfettered. If, for example, such a question were to arise hereafter, involving consideration of whether the real effect of the license required by a Provincial law has been to abrogate capacity which it was within the power of the Parliament of Canada to bestow, or whether for a breach of conditions a Provincial Legislature could impose, not an ordinary penalty but one extending to the destruction of the status of the company and its capacity in the Province, nothing that has been here said is intended to prejudice the decision of such a question, should it occur. It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

It would, therefore, seem very doubtful if the new Section 31 can be supported either as being direct taxation or legislation within the *obiter dicta* of the Privy Council in the *Great West Saddlery Co.* case, (*supra*). If it cannot, then it would appear to be *ultra vires* of the Saskatchewan Legislature so far as Dominion companies

[19] 12 A.C. 575.
[20] [1897] A.C. 231 at p. 237.

are concerned. Since the amendment of 1922, a great many Dominion companies have registered in Saskatchewan, and although several members of the profession have questioned the validity of the legislation, I believe no company has yet had the courage to contest it in the Courts. This is perhaps because it is generally conceded that the matter will have to go to the Privy Council again before any decision of a final character can be obtained.

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THE NATIONAL VIRTUE.—Patriotism is the love of our country because it is our country. It resembles in this respect family affection. As someone has reminded us, we can love our country without hating or despising or injuring any other country, in exactly the same way as we can love our family without hating or despising or injuring any other family. This is why those who seek to destroy patriotism often seek, also, the destruction of family life. We love our mother not because she is better than other mothers but simply because she is our mother. We love our country for exactly the same reason. We love our country because we know it best. It is our home, it is the home of our fathers, it contains the ashes of our dead. It is hallowed to us by a thousand tender and sacred associations. It is the place where we were born, and where we hope to die. Other countries may surpass our own in power and dominion, in art, science, and thought. But this makes no difference to our feelings.—Canon Sturdee in *National Review.*
