

CANADA / JUDGMENT

## Duplain v. Cameron et al.

[1961] SCR 693

### COURT

Supreme Court of Canada

### DECIDED

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Duplain v. Cameron et al.

Collection

Supreme Court Judgments

Date

1961-10-03

Report

[1961] SCR 693

### Judges

Kerwin, Patrick; Taschereau, Robert; Locke, Charles Holland; Cartwright, John Robert; Fauteux, Joseph Honoré G  rald; Judson, Wilfred; Ritchie, Roland Almon

On appeal from

Saskatchewan

Subjects

Constitutional law

Decision Content

Supreme Court of Canada

Duplain v. Cameron et al., [1961] S.C.R. 693

Date: 1961-10-03

Alfred A. Duplain (Plaintiff) Appellant;

and

Walter W. Cameron, Leo J. Beaudry and John Holgate (Defendants) Respondents;

and

The Attorney General for Saskatchewan (Added Defendant) Intervenant.

1961: May 3, 4; 1961: October 3.

Present: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Judson and Ritchie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Constitutional law—Business of securing loans on security of promissory notes to acquire equities in real property—Order of Securities Commission—Whether sections of securities statute dealing with promissory notes ultra vires the Legislature—The Securities Act, 1954, (Sask.), c. 89, s. 20(2)(f), (3).

The plaintiff brought an action for a declaratory judgment that those sections of the Saskatchewan Securities Act, 1954, c. 89, dealing with promissory notes were ultra vires the Legislature, being legislation in relation to head 18 of s. 91 of the B.N.A. Act. The plaintiff carried on a business whereby he secured loans from various people, giving in return therefor promissory notes in the form of documents entitled "Promissory Note and Collateral Covenants", each of which was payable in less than one year from the date of issue. The funds borrowed were used to acquire equities in real property which were put in the hands of trustees as security for the repayment of the funds so acquired. The plaintiff's action followed an order of the Securities Commission made under the provisions of s. 20(3) of the Act, whereby the plaintiff was deprived of the exemption from registration under s. 20(2) (f). The order further stated that the registration of the plaintiff as a salesman was cancelled. An application by the plaintiff for an interim injunction was by agreement turned into a motion for judgment. The Court of Appeal by a majority dismissed the action and granted leave to appeal to this Court.

Held (Locke J. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux and Judson JJ.: The Securities Act is not one relating to promissory notes; its pith and substance is the regulation of trading in securities. *Lymburn v. Mayland*, [1932] A.C. 318, applied; *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*, [1941] S.C.R. 87; *Attorney General for Alberta v. Attorney General of Canada*, [1943] A.C. 356, distinguished. Per Cartwright J.: The main object of The Securities Act is to secure that persons who carry on, in the province, the business of dealing in securities shall do so honestly and in this way to protect the public from being defrauded. Such legislation is within the power of the provincial legislature. *Lymburn v. Mayland*, supra; *Smith v. The Queen*, [1960] S.C.R. 776, referred to.

The statute restricts the right of a person trading in securities to issue promissory notes, but it does not purport to alter or affect the character of promissory notes issued in contravention of its provisions, nor does it destroy their negotiability. It followed that the impugned sections are not legislation in relation to the matter of promissory notes; they form part of a valid scheme of provincial legislation for regulating the raising of money for business ventures in the province in such manner as to prevent the practice of fraud.

R. E. Jones Limited v. Waring and Gillow Limited, [1926] A.C. 670; Lewis v. Clay (1897), 67 L.J. Q.B. 224, referred to.

Per Ritchie J.: The legal nature and effect of promissory notes has been exhaustively dealt with by Parliament in the Bills of Exchange Act, but this in no way prevents the provincial legislature from regulating the conduct of persons who issue such documents as the plaintiff's "Promissory Note and Collateral Covenants" within the province. The fact that Parliament has enacted the law governing promissory notes does not preclude the provincial legislature from imposing registration requirements on individuals seeking to issue them. The sections of The Securities Act under attack neither relate to nor purport to deal with the law of bills and notes; the legislation is a valid exercise of provincial power. Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd., supra, distinguished.

Per Locke J., dissenting: It was implicit in the terms of the Bills of Exchange Act, as first enacted in 1890 and as it now reads, that all persons throughout Canada may freely contract by bills of exchange, promissory notes and cheques and that such instruments, created by promissors; should be freely negotiable in the manner prescribed by the Act, and that when thus placed in circulation they could be transferred in the manner provided and vest in the transferees the rights indicated. The Act did not. exhaustively deal with all of the rights given to persons desiring to contract in this manner or to holders of these instruments under the law merchant. These rights were reserved to the holders of such instruments by s. 10. It was a common law right of the subject prior to the Act of 1890 in this country to freely negotiate bills of exchange and promissory notes and that right was preserved by s. 10.

The portions of The Securities Act complained of constitute a direct infringement of the rights of all persons wishing to contract in this manner in the Province of Saskatchewan and are invalid. Lymburn v. Mayland, supra; Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd., supra, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan<sup>1</sup>, dismissing an appeal from dismissal of an application for an injunction and application to the Court of Appeal for an interim injunction which was turned into a motion for judgment. Appeal dismissed, Locke J. dissenting.

M. C. Shumiatcher, Q.C., and B. Goldstein, for the plaintiff, appellant.

E. C. Leslie, Q.C., and B. L. Strayer, for the defendants, respondents, and for the Attorney General of Saskatchewan.

N. A. Chalmers, for the Attorney General of Canada.

E. R. Pepper, Q.C., for the Attorney-General of Ontario.

E. H. Coleman, Q.C., for the Attorney-General of Manitoba.

J. J. Frawley, Q.C., for the Attorney General of Alberta.

**The judgment of Kerwin C.J. and of Taschereau, Fauteux and Judson JJ. was delivered by**

The Chief Justice:—By leave of the Court of Appeal for Saskatchewan Alfred A. Duplain appeals from a judgment of that Court<sup>2</sup>. We are not concerned with all the steps taken by the appellant in the Courts of Saskatchewan in connection with his claims that he and the business carried on by him were not covered by the provisions of The Securities Act of that Province, 1954 (Sask.), c. 89 and amendments thereto, or that certain sections thereof were ultra vires the Legislature. It suffices to commence with the action brought by him in the Court of Queen's Bench against the Chairman, Vice-Chairman and the third member of the Saskatchewan Securities Commission in which the statement of claim asks:

- (a) A declaration that those sections of The Securities Act 1954 and amendments thereto, which relate to and purport to deal with promissory notes, are ultra vires the Legislature of the Province of Saskatchewan being legislation in relation to Head 18 of Section 91 of The British North America Act, 1867.
- (b) A declaration that the Order of the Chairman of the Saskatchewan Securities Commission dated the 24th day of May 1960 and purportedly made pursuant to Section 20(3) of The Securities Act, 1954 is a nullity and ultra vires the power of the Saskatchewan Securities Commission insofar as it relates to promissory notes, for the reasons stated in paragraph (a) hereof; (c) An injunction restraining the Defendants and each of them and any and all of their officers, agents, employees, investigators and persons acting under their authority or instructions:
  - (i) from taking any proceedings, making any orders, issuing any notices or doing any other act under the purported authority of The Securities Act, 1954, and amendments thereto in respect of the business operations of the Applicant, Alfred A. Duplain and that of his sole proprietorship, Western Diversified Mortgage Company, and
  - (ii) from investigating or inquiring into the affairs of the Plaintiff, Alfred A. Duplain, and of persons to whom the Plaintiff has given promissory notes or with whom the Plaintiff has entered into negotiations for the borrowing of money.

The appellant secured an ex parte injunction in that action but his motion to continue it until the trial was dismissed. A notice of appeal to the Court of Appeal from that dismissal was filed and served and an application to that Court having been made for an interim injunction in terms similar to the injunction dissolved, the parties, at the suggestion of the Court, entered into an

agreement as to the facts and as to the substantive questions which the Court would be required to adjudicate upon in the action, and in accordance therewith the Attorney General of the Province was added as an intervenant and was deemed to have received all necessary notices in the action as required under the provisions of The Constitutional Questions Act, R.S.S. 1953, c. 78. This agreement was filed with the Registrar and was thereupon deemed to be enforceable as an order of the Court of Appeal. The application by the plaintiff for an interim injunction having thus been turned into a motion for judgment, the Court of Appeal after considering the arguments rendered judgment dismissing the action with costs, Chief Justice Martin and McNiven J.A. dissenting. It is from that judgment that the present appeal is taken. Pursuant to Rule 18 of this Court, a copy of the notice of appeal and of a statement of the issues arising for determination was served upon the Attorney General of Canada and the Attorney General of each Province. The Attorney General of Canada filed a factum and was represented by counsel at the hearing. So far as the Provinces are concerned, only the Attorney-General for Ontario, the Attorney-General of Manitoba and the Attorney-General of Alberta filed factums and appeared by counsel and they adopted the submissions of counsel for the Attorney General for Saskatchewan who also represented the original defendants in the action.

It is not without significance that The Securities Act is intituled "An Act for the Prevention of Fraud in Connection with the Sale of Securities". Provision is made by s. 3 for the appointment of a Securities Commission consisting of a chairman, vice-chairman and a third member, and by s. 4 the chairman may execute the powers and duties vested in or imposed upon the Commission by the Act or the regulations, and by s. 5 a Registrar may be appointed. By subs. (1) of s. 6

No person or company shall:

- (a) trade in any security unless such person or company is registered as a broker, investment dealer, broker-dealer, security issuer or as a salesman of a registered broker, investment dealer, broker-dealer or security issuer;

.....

and such registration has been made in accordance with the provisions of this Act and the regulations. . . .

By subs. (2) of s. 20

Subject to the regulations, registration shall not be required to trade in the following securities

.....

- (f) negotiable promissory notes or commercial paper maturing not more than a year from the date of issue;

but by subs. (3) of s. 20

Where a person or company has been guilty of acts or conduct which, in the opinion of the commission would warrant the commission refusing to grant registration to him or it under this Act, the commission may rule that subsections (1) and (2) shall not apply to him or it.

Section 8 enacts:

The commission shall suspend or cancel any registration where in its opinion such action is in the public interest.

By s. 2,

In this Act.....

.....

19. "security" includes:

(a) any document, instrument or writing commonly known as a security; (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;

.....

(e) any bond, debenture, share, stock, note, unit, unit certificate, participation certificate, certificate of share or interest, pre-organization certificate or subscription;

.....

21. "trade" or "trading" includes:

(a) any solicitation for or obtaining of a subscription to, disposition of or trade in or option upon a security for valuable consideration whether the terms of payment be upon margin, instalment or otherwise;

The agreement between the parties shows that the plaintiff, who resides in Saskatoon, registered on February 9, 1960, under The Partnership Act, certifying his intention to carry on business as a sole proprietorship under the name Western Diversified Mortgage Company. He had stationery and other appropriate forms printed and established an office in Saskatoon. He intended to acquire equities in real property with the proceeds of money which he might acquire by way of loan and to place such equities in the hands of trustees who would then hold them to secure the repayment of the funds so acquired, and for this purpose a firm of solicitors agreed to act as such trustees under the terms of a deed of trust made between Western Diversified Mortgage Company of the first part and the solicitors of the second part.

After the execution of the trust agreement the plaintiff and his representatives secured loans from various people giving temporary receipts therefor. Ultimately a document called "Promissory Note and Collateral Covenants" was issued to each lender in the following form:

W

D WESTERN DIVERSIFIED MORTGAGE COMPANY

M Saskatoon, Sask.

\$ 196

Face Value Series & Number Date of Maturity

## PROMISSORY NOTE AND COLLATERAL COVENANTS

Twelve calendar months after the.....day of.....A.D. 196 for value received, WESTERN DIVERSIFIED MORTGAGE COMPANY PROMISES TO PAY TO.....or Order at THE CANADIAN BANK OF COMMERCE, MAIN BRANCH, SASKATOON, SASKATCHEWAN, the sum of.....(\$.....) Dollars in lawful money of Canada, together with interest therein at the rate of.....( %) percentum per annum. WESTERN DIVERSIFIED MORTGAGE COMPANY further covenants that it has deposited on assignment with the TRUSTEES, Messrs. NEWSHAM & DUNBAR, Barristers and Solicitors, Saskatoon, Saskatchewan, certain mortgages and agreements for sale, the balance of monies receivable thereon being in excess of the face value of this and all other notes issued in the series above set out and of the accrued interest thereon, AND that the said TRUSTEES are authorized under a TRUST DEED dated the 17th day of February, 1960, to hold the aforesaid instruments as collateral security for the performance of the obligations set out in the note herein and all other notes of the said Series heretofore issued by the said Company AND are authorized upon the non-performance at maturity of the covenants set out in the said note or notes, to sell a part or the whole of the aforesaid instruments, either at public or at private sale, and to apply the proceeds or as much as may be necessary thereof to the satisfaction of the covenants thereunder not theretofore satisfied, and all necessary charges and expenses, the said Company holding itself responsible for the deficiencies if any in the satisfaction thereof.

WESTERN DIVERSIFIED MORTGAGE COMPANY further covenants that under the provisions of the said TRUST DEED, the aforesaid instruments and other papers relating thereto may be examined by any person or persons on demand of the PAYEE or a HOLDER in due course of the note herein, at the offices of the TRUSTEES, 203 Glengarry Building, Saskatoon, Saskatchewan, during the normal open office hours of the said TRUSTEES.

WESTERN DIVERSIFIED MORTGAGE COMPANY further covenants at the option of the PAYEE or a HOLDER in due course of the note herein, and on deferment of the maturity date herein for a further period of twelve calendar months, to extend the covenants herein for the said further period.

SIGNED, SEALED AND DELIVERED at the City of

Saskatoon, in the Province of Saskatchewan, this..... day of.....A.D. 196...

(SPACE)

FOR WESTERN DIVERSIFIED MORTGAGE COMPANY

(SEAL)

.....

### General Manager

Following interviews between the plaintiff and his advisers and representatives of the Commission an order was made by the Commission reading as follows:

IN THE MATTER OF THE SECURITIES ACT, 1954

AND

IN THE MATTER OF ALFRED A. DUPLAIN and

### WESTERN DIVERSIFIED MORTGAGE COMPANY

1. PURSUANT TO subsection 3 of section 20 of The Securities Act, 1954 the Commission rules that, whereas Alfred A. Duplain has been guilty of acts or conduct which, in the opinion of the Commission, would warrant the Commission refusing to grant registration to him under The Securities Act, 1954, clause (f) of subsection 2 of section 20 of The Securities Act, 1954, shall not apply to the said Alfred A. Duplain.
2. PURSUANT TO section 8 of The Securities Act, 1954 registration of Alfred A. Duplain as a salesman is hereby cancelled.

DATED at Regina this 24th day of May A.D. 1960.

SASKATCHEWAN SECURITIES COMMISSION

"W. W. Cameron"

### Chairman

The effect of this order was to bring the notes obtained by the plaintiff, which were for twelve months, into the category of promissory notes maturing after one year.

The parties agreed that the word "note" in the definition section of the Act, 2(19) (e), includes "promissory note" and that the negotiation of promissory notes is "trading" in them within the meaning of that term as defined in the Act. However, the Act is not one relating to promissory notes. Its pith and substance is the regulation of trading in securities. Although the appellant took steps in an endeavour to protect those who loaned him money on the strength of the promissory notes and covenants, a second charge of land in Saskatchewan, as Gordon J.A. points out, is not a first class security and there would not be a return within a year sufficient to pay the notes as they fell due. The case falls clearly within the decision of the Privy Council in *Lymburn v. Mayland*<sup>3</sup> and as in *Smith v. The Queen*<sup>4</sup>, the words of Lord Atkin in the *Lymburn* case are particularly apt:

There was no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

The appellant relied upon the decision of this Court in *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*<sup>5</sup> However, there it was held that the fact that no permit had been issued to the plaintiff by the Debt Adjustment Board of Alberta was no defence because a certain section of the Act there in question took away a right given to a holder of a promissory note by the Bills of Exchange Act, namely, the right to sue and recover judgment upon it against the maker. In the present case there is nothing to prevent the holder of a Promissory Note and Collateral Covenants from suing upon the document. In *Attorney General for Alberta v. Attorney General of Canada*<sup>6</sup>, it was held that The Debt Adjustment Act of Alberta was ultra vires in toto as being legislation in relation to bankruptcy and insolvency but no such question arises here.

The appeal is dismissed with costs to be paid by the appellant to the respondents and intervenants. There will be no costs to or against the Attorney General of Canada or the Attorney General of any of the other Provinces.

Locke J. (dissenting) :—The terms of the instruments negotiated by the appellant are stated in other reasons to be delivered in this matter. It is conceded that they are notes, within the meaning of that word in s. 2(19) (e) of The Securities Act, 1954, and that they are promissory notes, within the meaning of s. 176 of the Bills of Exchange Act, R.S.C. 1952, c. 15.

The question to be determined is whether the sections of The Securities Act, which purport to render it necessary for a person wishing to negotiate such notes in the ordinary course of his business to register as a "security issuer" or a salesman, as required by s. 6 of the Act and the regulations, and receive written notice of such registration from the registrar are ultra vires the Provincial Legislature. It is upon this ground alone that the dissenting judgment of Martin C.J.S. proceeded, a judgment concurred in by the late Mr. Justice McNiven. The constitutional validity of the Act as a whole is not attacked and need not be considered.

This question is not dealt with in the judgment of the Judicial Committee in *Lymburn v. Mayland*<sup>7</sup>. In the sense that The Securities Act does not in terms deny access to the courts to the promisee or subsequent holder of such a note, the case differs from the issues dealt with in the judgments delivered in this Court in *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*<sup>8</sup> The cases, however, have this similarity that the question arose in each as to whether a person may be deprived of rights given to him by the Bills of Exchange Act by provincial legislation. It is only upon this aspect of the matter that the case was treated as relevant in the judgment of the Chief Justice.

The facts, in so far as it is necessary to refer to them are as follows:—Duplain, desiring to negotiate these promissory notes to obtain loans and to invest the moneys borrowed in securities (using that term in its commonly accepted sense) of the nature referred to in the instrument, registered under the provisions of the Saskatchewan Partnership Act and obtained a certificate declaring his intention to carry on business as a sole proprietorship under the name of Western

Diversified Mortgage Company. Thereafter he borrowed considerable sums of money from various Saskatchewan residents, giving to each a promissory note in the form mentioned, each of which was payable in less than one year from the date of issue. Promissory notes so maturing might be negotiated by persons other than those registered under the provisions of s. 6 by reason of the terms of s. 20(2) (f) of the Act. After notes in a total amount in excess of \$115,000 had been negotiated, the Saskatchewan Securities Commission after conducting an investigation made an order which recited that Duplain had been guilty of conduct which, in the opinion of the Commission, would warrant it in refusing him registration under The Securities Act and, invoking the provisions of subs. (3) of s. 20 of the Act, declared that clause (f) of subs. (2) of s. 20 above mentioned should not apply to Duplain. The order further stated that the registration of Duplain as a salesman was cancelled. The record contains no particulars of the conduct complained of.

In the result, the further negotiation of these notes by the appellant could be done only at the risk of prosecution under the provisions of the Act and the action followed.

Section 91 of the British North America Act declares, inter alia, that notwithstanding anything in that Act the exclusive legislative authority of the Parliament of Canada extends to bills of exchange and promissory notes and that any matter coming within any of the classes of subjects enumerated in the section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the legislatures of the provinces. The Bills of Exchange Act of 1890 was, with some modifications, in the same terms as the Bills of Exchange Act of 1882 passed by the British Parliament. That statute was the first statute codifying any branch of the English common law. With certain changes it codified in part the rules of the common law, including the law merchant, under which bills of exchange and promissory notes payable to bearer passed freely by delivery only and, when payable to order, by endorsement and delivery. These instruments in this respect differed materially from agreements containing covenants which passed by assignment and had further distinct characteristics, such as that which enabled persons to become holders in due course freed from any equities attaching to them in the hands of the holder in described circumstances. These were then, as they now are, the conditions defined in s. 56 of the Bills of Exchange Act.

The Bills of Exchange Act does not merely define the form in which such instruments may be negotiated. Section 47 provides that capacity to incur liability as a party to a bill is co-extensive with the capacity to contract. Section 56 defines a holder in due course and the rights of a holder, whether for value or not who derives his title through a holder in due course, are declared by s. 57. Sections 60 to 73 provide the manner in which a bill may be negotiated and some of the consequences of such negotiation, and s. 74 (which was considered by Duff C.J. in *Winstanley's* case) the rights of the holder of a bill, a section which applies equally to the holder of a promissory note.

It has been for centuries the right of all persons in England, and for a lengthy, though lesser, time in Canada, to negotiate such bills of exchange or promissory notes freely in the conduct of their business and to vest in the promisee or endorsee of such instrument the rights given to them at common law, and since 1890 by the Canadian statute.

The question is, assuming that the negotiation of a promissory note by the maker is a trade in a security within the meaning of s. 6 of The Securities Act, whether the exercise of the right of negotiation may by provincial legislation be made contingent upon obtaining the permission of the Saskatchewan Securities Commission. The subject matter of the present Securities Act was first dealt with by the Saskatchewan Legislature by the Security Frauds Prevention Act, 1930 (c. 74). In that Act the definition of the word "security" (s. 2(8)) did not in terms include promissory notes. Section 3(j), however, excepted notes or commercial paper maturing in less than one year, as does the present Act, which may have indicated an intention to control the negotiation of notes maturing after a longer period.

The title of this Act was changed by c. 90 of the statutes of 1950 to The Securities Act and, by that name, it appeared as c. 361 of R.S.S. 1953. The definition of the word "security" was in the terms of the original Act. The present Act repealed c. 361 and by subs. (19) of s. 2 the definition of "security" was extended to include, inter alia, a note. The definition of the term "trade" or "trading" was materially extended, but the portion relevant in the present matter, contained in para. (a) of subs. (21) of s. 2, was not materially altered and reads:

"Trade" or "trading" includes:

- (a) any solicitation for or obtaining of a subscription to, disposition of or trade in or option upon a security for valuable consideration whether the terms of payment be upon margin, instalment or otherwise.

The Act as drawn in 1930 appears to have been directed primarily to the prevention of frauds in connection with the sale of shares of stock, debentures and bonds of corporations and certain other miscellaneous interests such as units in a syndicate, commonly designated in the business world as securities. In the present statute s. 37 provides the means whereby members of a prospecting syndicate may file an agreement with the Commission containing certain defined provisions and limit the liability of the members to the extent provided. Such interests are treated as securities and may not be traded in by any person registered in trading in securities under the Act.

Subsection (5) of s. 37 deals with an unrelated matter and reads:

No person or company registered for trading in securities under this Act shall trade in a security issued by a person, other than a prospecting syndicate, either as agent for such person or as principal unless:

- (a) written permission, upon such terms as the commission may require, has been obtained from the commission; and (b) information satisfactory to the commission relating to such person and such security has been accepted for filing by the commission.

This would apply to the negotiation of a promissory note when it was not an isolated "trade" within the meaning of s. 20(1) (b), as amended by c. 31 of the statutes of 1959.

Sections 38, 39 and 40 require the filing of a prospectus by mining, industrial and investment companies respectively and prohibit the trading in the securities of such companies until the required information has been received and accepted by the commission as sufficient.

Subsection 5 of s. 37 appeared for the first time in the Act of 1954. According to the notice given by the chairman of the Commission to the appellant on May 24, 1960, he had been registered as a salesman under the Act and that registration was thereby cancelled. Clause (f) of subs. (2) declared that registration to trade was not necessary in the case of negotiable promissory notes or commercial paper maturing not more than a year from the date of issue and the effect of the order, if it was validly made, was to require registration by the appellant as a condition precedent to the negotiation of the notes, even though they matured in less than a year from the date of issue.

While, in my opinion, there is grave doubt that the negotiation of a promissory note in the manner permitted and provided for by the Bills of Exchange Act is a trading within the meaning of the definition above mentioned, we were informed by counsel that it had been agreed on the argument before the Court of Appeal that such negotiation fell within the definition and the matter has been dealt with by that court on this footing. In the circumstances, I think we should deal with the matter in the same manner in this Court.

The grounds upon which the Saskatchewan Securities Commission acted in rescinding the registration of the appellant are not part of the record. In the absence of any suggestion of misconduct on the part of the appellant, it is perhaps fair to assume that the real reason for the order was the fact that the Commission did not consider the collateral security for the payment of the note, consisting, as we are informed by the agreed statements of facts, of mortgages and agreements for sale available for purchase at a discount, was satisfactory. As Mr. Justice Procter has pointed out, this is an irrelevant consideration where the question to be determined is as to the constitutional powers of the province.

In the result, since The Securities Act requires registration by a person proposing to negotiate his own promissory notes in other than isolated transactions of the nature referred to in s. 20(1)(b), the effect of the order of the Commission is to prohibit the appellant from negotiating notes in this manner.

For the respondent it is said that The Securities Act is in pith and substance an Act to regulate trading in securities in the province and that its validity is established by the decision of the Judicial Committee in *Lymburn v. Mayland*, above referred to. This, however, does not answer the appellant's case which is that those portions of the statute which assumed to vest in the

Securities Commission the power at its discretion to prohibit the negotiation of promissory notes in the province is beyond the powers of the legislature. A provincial legislature may not extend its own jurisdiction, so as to trench upon the exclusive jurisdiction vested in Parliament by one of the heads of s. 91, by annexing to legislation within its power provisions which trespass upon such a field.

In *Union Colliery v. Bryden*<sup>9</sup>, it was not suggested that the Coal Mines Regulation Act, 1890, of British Columbia was in its entirety ultra vires, but merely that s. 4 which prohibited Chinese of full age from employment in underground coal workings was beyond the powers of the legislature, and it was that section alone which, it was held, exceeded such powers. In *Lymburn's* case the requirement of registration as a condition precedent to the right of a public company to sell its shares was held to be a valid exercise of the powers conferred upon the legislature by head 13 of s. 92. No question arose as to the right of a province to limit or prohibit the negotiation of bills of exchange or promissory notes or other instruments, as to which exclusive jurisdiction was vested in Parliament under head 18 of s. 91.

Section 10 of the Bills of Exchange Act reads:

The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques. This section reproduced subs. (2) of s. 97 of the Imperial Act of 1882.

It is, in my opinion, apart altogether from s. 10, implicit in the terms of the Bills of Exchange Act, as first enacted in 1890 and as it now reads, that all persons throughout Canada may freely contract in this manner and that such instruments, created by promissors, should be freely negotiable in the manner prescribed by the Act and that when thus placed in circulation they could be transferred in the manner provided and vest in the transferees the rights indicated. It was, no doubt, for the reason that the free use of such instruments was considered essential in carrying on business throughout the country and that it was a matter of national importance that the law throughout Canada upon the subject should be uniform that the exclusive jurisdiction was vested in Parliament.

The Act, while intended as a code, did not exhaustively deal with all of the rights given to persons desiring to contract in this manner or to the holders of these instruments under that branch of the common law referred to as the law merchant. These rights were reserved by s. 97(2) and are reserved to the holders of such instruments by s. 10. An illustration of this is to be found in *Re Gillespie, Ex parte Robarts*<sup>10</sup>, where Cave J. held that the right to recover the expenses of re-exchange of a dishonoured bill, which existed prior to the Act of 1882, was preserved in the circumstances by subs. (2) of s. 97. On appeal, that judgment was upheld by the judgment of the Court of Appeal delivered by Lindley L.J. It was a common law right of the subject prior to the Act of 1890 in this country to freely negotiate bills of exchange and promissory notes and that right is, in my opinion, preserved by s. 10.

I consider that the portions of this legislation complained of constitute a direct infringement of the rights of all persons wishing to contract in this manner in the Province of Saskatchewan and are invalid.

It is quite correct, as has been pointed out, that in Winstanley's case the judgment of Duff C.J., with whom the present Chief Justice of this Court agreed, and of Rinfret J. (as he then was) proceeded on the ground that the legislation was invalid since it prevented the holder of the promissory note from enforcing in the courts the right of action given by the Bills of Exchange Act. That differs from the present case in this respect that, while there the right to sue upon such an instrument without the consent of the Debt Adjustment Board was prohibited, here the legislation goes farther and prohibits the negotiation of promissory notes, except to the limited extent mentioned, unless a permit to do so is obtained from the Saskatchewan Securities Commission.

I would allow this appeal and declare that the sections of the Saskatchewan Securities Act which prohibit or authorize the prohibition of the negotiation of promissory notes, whatever their date of maturity, by any person in the province, and the requirement that persons desiring to negotiate such notes must be registered under the Act are ultra vires.

I would allow the appellant his costs throughout.

Cartwright J.:—The relevant facts and statutory provisions and the questions in issue in this appeal are stated in the reasons of other members of the Court.

I agree with the reasons and conclusion of my brother Ritchie but in view of the differences of opinion in the Court of Appeal and in this Court I propose to state my reasons in my own words as briefly as possible.

It is clear that the main object of The Securities Act, 1954 of Saskatchewan is to secure that persons who carry on, in the province, the business of dealing in securities shall do so honestly and in this way to protect the public from being defrauded. For authority that legislation of this sort is within the powers of the Provincial Legislature it is sufficient to refer to the judgment of the Judicial Committee in *Lymburn v. Mayland*<sup>11</sup> and that of this Court in *Smith v. The Queen*<sup>12</sup>.

The appellant does not contend that the Act as a whole is ultra vires but argues that certain sections constitute legislation in relation to the subject of Bills of Exchange and Promissory Notes to which the exclusive legislative authority of Parliament extends. In dealing with this argument it is first necessary to determine what effect, if any, the impugned sections have upon the law in relation to bills and notes or, in the words used by my brother Ritchie, the "law of bills and notes in the strict sense". This is a matter of construction and the rule is well settled that, if the words used permit, the statute must be construed in accordance with the presumption which imputes to the legislature the intention of limiting the operation of its enactments to matters within its allotted sphere.

So construed the statute does, in my opinion, restrict the right of a person trading in securities to issue promissory notes; he is prohibited from so doing unless he has complied with the provisions of the Act as to registration and the Securities Commission may refuse registration or may revoke a registration which it has allowed. A person who disregards this prohibition is liable to prosecution but the statute does not purport to alter or affect the character of a promissory note which is in fact issued in breach of the statute. The rights of the holder of such a note are not impaired; he is free to enforce payment of the note, to negotiate it or to deal with it in any manner in accordance with the law of bills and notes.

If this view as to the construction of the statute is correct it follows, in my opinion, that the impugned sections are not legislation in relation to the matter of promissory notes; they form part of a valid scheme of provincial legislation for regulating the raising of money for business ventures in the province in such a manner as to prevent the practice of fraud. Persons who obtain money from members of the public in violation of the regulations imposed by the statute are rendered liable to prosecution regardless of the form of instrument issued to the persons from whom the money is obtained; if, as in the case at bar, that instrument is in the form of a promissory note the person violating the regulations does not thereby escape liability to prosecution but the rights of the holders of the notes are in no way affected.

If, contrary to the view that I have expressed, the statute had the effect of altering the character of promissory notes issued in contravention of its provisions, and particularly if it destroyed their negotiability, I would share the view of my brother Locke that its provisions are pro tanto invalid. I am in complete agreement with his statement that a provincial legislature may not extend its own jurisdiction, so as to trench upon the exclusive jurisdiction vested in Parliament by one of the heads of s. 91, by annexing to legislation within its power provisions which trespass upon such a field.

To conditionally prohibit the issue of promissory notes (in common with the other securities set out in the Act) for the purpose of raising money for business ventures in the province, the condition being that the issuer must first comply with regulations designed to protect the public from being defrauded, is not, in my opinion, to forbid the negotiation of promissory notes. If A makes a promissory note payable to B, he does not negotiate the note by delivering it to B. Negotiation, in the law of bills and notes, involves the transfer of the instrument from one holder to another. The meaning given to the word "negotiate" in the Dictionary of English Law by Earl Jowitt accords with that in all the legal dictionaries that I have consulted:

To negotiate a bill of exchange, promissory note, cheque or other negotiable instrument for the payment of money is to transfer it for value by delivery or endorsement.

This appears to be in accordance with the views expressed in the House of Lords in *Jones (R. E.) Limited v. Waring and Gillow Limited*<sup>13</sup>, particularly at pages 680, 687 and 695. While in that case the instrument in question was a cheque, the judgment of Lord Russell in *Lewis v. Clay*<sup>14</sup> was expressly approved. The last mentioned case was that of a promissory note; at p. 226 Lord Russell said:

Further an examination of sections 20, 21, 29, 30 and 38 relating expressly to bills, and sections 83, 84, 88 and 89, relating to promissory notes, will make it quite clear that "a holder in due course" is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning of the Act.

I would dispose of the appeal as proposed by the Chief Justice. Ritchie J.:—The somewhat unusual procedural background of this case is fully described in the reasons for judgment of the Chief Justice with whose disposition of this appeal I am in full agreement.

The agreement as to facts upon which the appeal is founded discloses that in January 1960, while the appellant was in the process of organizing a business designed to acquire mortgages and other interests in land with money which he proposed to borrow from the public, he formed the opinion that "the proposed business venture would have to be organized in such manner as to be outside the scope of The Securities Act, 1954" of Saskatchewan.

In order to achieve this end, the appellant. evolved a scheme whereby he registered under the Saskatchewan Partnership Act as the sole proprietor of a firm which he called the "Western Diversified Mortgage Company" and caused documents to be printed bearing the name of this firm and entitled "Promissory Note and Collateral. Covenants". These documents, the wording of which is reproduced in the reasons of the Chief Justice, were printed on coloured paper and so designed in format and general appearance as to bear a superficial resemblance to share certificates.

It is to be noted that the promissory note embodied in these documents is made payable 12 months after date and that the last covenant provides for deferment of the maturity date for a further period of 12 months and for an extension of the covenants for that further period.

Promissory notes are "securities" within the meaning of The Securities Act, and the combined effect of ss. 6(1), 65(e) and 66(1) of that Act is to make it an offence punishable at the discretion of the provincial secretary for any person to trade in securities without being registered as therein provided, but by virtue of s. 20(2) (f) registration is not required to trade in "negotiable promissory notes ... maturing not more than a year from the date of issue".

It seems to me to be obvious that in preparing his "Promissory Note and Collateral Covenants" the appellant phrased his firm's main undertaking to pay in the form of a promissory note "maturing not more than one year after the date of issue" for the express purpose of bringing the documents within the exception described in s. 20(2) (f) and thus being enabled to trade without registration in a security for trading in which registration would otherwise have been required.

This design was, however, thwarted by the Saskatchewan Securities Commission which exercised the powers conferred on it by s. 20(3) of the Act and ruled that the provisions of s. 20(2) (f) were not to apply to the appellant whose registration as a salesman was accordingly cancelled.

It is against this background that the appellant now seeks to have s. 20(3) and certain other sections of The Securities Act declared ultra vires as being legislation relating to "Bills of Exchange and Promissory Notes", a matter allocated to the exclusive legislative authority of the Parliament of Canada by s. 91(18) of the British North America Act.

It is not contended on behalf of the appellant that The Securities Act as a whole is invalid, the attack being limited to those sections which, in the appellant's submission, "relate to and purport to deal with promissory notes".

As the Chief Justice has said, the language used by Lord Atkin, speaking of The Security Frauds Prevention Act of Alberta in *Lymburn v. Mayland*<sup>15</sup>, applies to the statute here in question as it was found to apply to The Securities Act of Ontario in *Smith v. The Queen*<sup>16</sup>.

There can, in my view, be no doubt that the main object of The Securities Act of Saskatchewan is the regulation of trading in securities within that province but, as I understand the matter, this does not entirely dispose of the appellant's contention which involves the proposition that certain specific sections of The Securities Act are in conflict with and repugnant to the provisions of the Bills of Exchange Act, R.S.C. 1952, c. 15.

The latter argument appears to have found favour with Martin C.J.S. who said in the course of his dissenting opinion in the Court of Appeal with which McNiven J.A. concurred:

Counsel for the plaintiff in his factum called attention to some of the sections of The Securities Act which could affect promissory notes when they were not protected by clause (f) of Section 20(2). Reference was made to section 6(1), which prohibits "trading" in securities (which includes promissory notes), unless the person or company trading is registered with the Commission. Under sections 7, 8, and 15, the Commission has complete discretion to refuse registration and under Section 2(21) (b), "trading" includes dealing in or disposing of promissory notes. By Section 50 of The Securities Act the Commission has authority to declare any contract unreasonable and it is then no longer binding upon a person acquiring a security. Section 37(4) prohibits a person or company registered for "trading" under the Act from trading in a security of a prospecting syndicate; a person or company not registered may not so trade because of the provisions of section 6(1) referred to above. Counsel also referred to Section 32 of the Act which authorizes the Commission to impose a sequestration order as a result of which all trading in securities by the person or company affected is prohibited. The Bills of Exchange Act, Chapter 15, R.S.C. 1952, provides, in Section 47(1), that capacity to incur liability as a party to a bill is co-extensive with capacity to contract; and Section 10 of the Act provides that the rules of the common law of England, including the "law merchant" except insofar as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

It would appear that some of the provisions of The Securities Act affect promissory notes which are not protected by clause (f) of Section 20(2) and also the class which is protected by clause (f) when the protection is removed by order of the Commission under the provisions of Section 20(3). Insofar as the provisions affect promissory notes, they are ultra vires the province.

The Securities Act, therefore, is an Act in relation, inter alia, to promissory notes, and is, therefore, an Act in relation to a subject which, under Section 91 of the British North America Act, has been assigned exclusively to the Parliament of Canada.

Counsel for the appellant in this appeal presented an elaborate argument in support of the contention that certain sections of The Securities Act were in conflict with the common law of England applicable to promissory notes and, therefore, repugnant to s. 10 of the Bills of Exchange Act which reads as follows:

10. The rules of the common law of England, including the "law merchant" except in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

The true effect of this provision is, in my opinion, most succinctly and accurately stated by Dean Falconbridge in his work on "Banking and Bills of Exchange", 6th ed., at p. 46 where he says:

The effect of s. 10 would appear to be that the background of law applicable to transactions in which bills, notes or cheques play a part may be either (1) the common law of England, so far as that background consists of rules of the law of bills and notes, in the strict sense, or (2) the commercial law of a particular province, outside of the limits of the law of bills and notes in the strict sense. It is submitted that the law of bills and notes in the strict sense includes the essential elements of that law as such, and that legislation defining those elements is necessarily legislation in relation to a matter coming within item 18 of s. 91 of the B.N.A. Act, and therefore that, even in the absence of further federal legislation, provincial legislation would be ineffective to change the rules of the common law of England made applicable by s. 10 of the Bills of Exchange Act. On the other hand, outside of the limits of the law of bills and notes in the strict sense, as regards transactions more or less involving the use of bills or notes, the applicable law may be the law of a particular province, and not the common law of England, and in this field provincial legislation may be valid, so far as it is legislation in relation to a matter, or for a purpose, coming within any of the classes of subjects assigned to the provincial legislatures by s. 92 of the B.N.A. Act and so far as it is not inconsistent with valid federal legislation.

In the case of Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.<sup>17</sup>, which was strongly relied on by the appellant, it was found that s. 8 of The Debt Adjustment Act of Alberta had the effect of placing a limitation on the unqualified right of the holder of a promissory note to sue, a right which, as Rinfret J. (as he then was) said in that case at p. 101, "is of the very essence of bills of exchange". In the present case, on the contrary, in my view none of the sections of The Securities Act of Saskatchewan which are now under attack has any effect on the form, content, validity or enforceability of promissory notes or is otherwise concerned with the "law of bills and notes in the strict sense". "Issue" is defined by s. 2(j) of the Bills of Exchange Act as meaning, "The first delivery of a bill or note complete in form to a person who takes it as holder". Issue without registration may expose the issuer to proceedings under the Act if the provincial secretary consents to such proceedings being instituted (see s. 66), but failure to register has no bearing on the law governing the note itself.

The legal nature and effect of promissory notes has been exhaustively dealt with by Parliament in the Bills of Exchange Act, but in my opinion this in no way prevents the provincial legislature from regulating the conduct of persons who issue such documents as the appellant's "Promissory Note and Collateral Covenants" within the province. The fact that Parliament has enacted the law governing promissory notes does not preclude the provincial legislature from imposing registration requirements on individuals seeking to issue them. With the greatest respect to those who may hold a different view, I am of opinion that these sections neither relate to nor purport to deal with the law of bills and notes and that the legislation is a valid exercise of provincial power.

As I indicated at the outset, I would dispose of this matter as proposed by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Schumiatcher, Moss & Lavery, Regina.

Solicitor for the defendants, respondent and the intervenant: Roy S. Meldrum, Regina.

1 (1960-61), 33 W.W.R. 289, (1961), 25 D.L.R. (2d) 624.

2 (1960-61), 33 W.W.R. 289, (1961), 25 D.L.R. (2d) 624.

3 [1932] A.C. 318, 101 L.J.P.C. 89.

4 [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

5 [1941] S.C.R. 87, 1 D.L.R. 625.

6 [1943] A.C. 356 affirming [1942] S.C.R. 31.

7 [1932] A.C. 318, 101 L.J.P.C. 89.

8 [1941] S.C.R. 87, 1 D.L.R. 625.

9 [1899] A.C. 580, 68 L.J.P.C. 118.

10 (1885), 16 Q.B.D. 702, affirmed (1886), 18 Q.B.D. 286.

11 [1932] A.C. 318, 101 L.J.P.C. 89.

12 [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

13 [1926] A.C. 670, 95 L.J.K.B. 913.

14 (1897), 67 L.J.Q.B. 224, 77 L.T. 653.

15 [1932] A.C. 318 at 324, 101 L.J.P.C. 89.

16 [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

17 [1941] S.C.R. 87, 1 D.L.R. 625.

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