46, 1938

No. 38.

IN THE SUPREME COURT OF CANADA.

IN THE MATTER of two Bills passed by the Legislative Assembly of the Province of Alberta at the 1937 (Third Session) thereof, entitled respectively:

"An Act Respecting the Taxation of Banks";

"An Act to Amend and Consolidate the Credit of Alberta Regulation Act";

and reserved by the Lieutenant-Governor for the signification of the Governor General's pleasure.

FACTUM OF THE CHARTERED BANKS OF CANADA.

1. The Order of Reference dated the 2nd November, 1937, (P.C. 2749) mentions a number of statutes enacted by the Alberta Legislature in the years 1936 and 1937. (*Case pp. 5–7.)

2. The Social Credit Measures Act, 1936, (First Session) Chapter 5, (Case p. 29), effective upon assent, contained in its preamble the following second recital (Case p. 29, l. 10):

> "Whereas the existence of indigence and unemployment throughout a large portion of the population demonstrates the fact that the present monetary system is obsolete and a hindrance to the efficient production and distribution of goods."

Section 3 (Case p. 30) enabled the Lieutenant-Governor-in-Council to appoint persons to investigate and formulate "proposals having for their object the increase of the purchasing power of the consumer by means of social dividends, compensating discounts or by any other means . . . . . ."

3. The Alberta Credit House Act, 1936 (Second Session) Chapter 1, (Case p. 35) described as "An Act to provide the People of Alberta with additional Credit," brought into force upon Proclamation 15th October, 1936 (Alberta Gazette Vol. 32, No. 19, p. 1095), designated the persons entitled to "Alberta credit" which phrase was defined by section 2 (a) (Case p. 35, l. 30) as meaning

> "the credit provided by the Credit House for facilitating the exchange of goods and services within the Province."

The Act provided for the registration of persons entitled to Alberta credit (section 5, Case p. 37, l. 1) and of persons who were producers, manufacturers or dealers in commodities. (Section 4, Case p. 36, l. 32.)

Part II (Case p. 38, l. 31) established The Alberta Credit House as a body corporate the principal function of which, under Part III (Case p. 40, l. 8) was to furnish to persons entitled to Alberta credit "facilities for the exchange of goods and services in the Province." To that end the Credit House was empowered

* For "Case" read "Record" throughout.

(*a*) to provide Alberta credit;

(*b*) to receive deposits of Alberta credit vouchers and of transfers of Alberta credit, keeping account thereof

(*c*) to convert into Alberta credit any currency and negotiable instruments received.

Section 23 (Case p. 41) authorized the Credit House to make advances of Alberta credit against securities but without interest.

In essence the legislation sought to set up the equivalent of a bank to deal in Alberta credit.

4. The Alberta Social Credit Act, 1937 (First Session) Chapter 10, (Case p. 85), effective on assent, described as "An Act respecting the Issuance and Use of Alberta Social Credit," effective upon assent, by section 49 (Case p. 103) repealed the statutes mentioned above. The preamble (Case p. 86, l. 1) contains the following as the final recital :

> "Whereas the existing means or system of distribution and exchange of wealth is considered to be inadequate, unjust and not suited to the welfare, prosperity and happiness of the people of Alberta."

Alberta credit and persons entitled thereto are again defined (Section 2 (*a*) (*j*), Case p. 86).

Part I (Case p. 88) establishes a Board, (Section 3) a body corporate which is authorized to appoint The Provincial Credit Commission (Section 4, Case p. 89, l. 6) which is clothed with broad powers (Section 5, Case p. 89, sections 14 to 18, Case pp. 93 to 96, section 36 and 37, Case pp. 101, 102). The Commission is to constitute the Alberta Credit House as a body corporate and Department of Provincial Administration (Part III, Case p. 96, l. 28). The Credit House is to attend to all transactions in and transfers of Alberta credit. There is provision for Branch Credit Houses (Section 22, Case p. 97) and Clearing House Associations (Section 30, Case p. 99).

Part II (Case p. 91) provides for the issuance of Treasury Credit Certificates (Section 2 (p), Case p. 87) against the Provincial Credit Account (Section 2 (*k*), Case p. 87) to the extent necessary to increase the purchasing power of the consumers of Alberta until it conforms to the productive capacity of the Alberta people (Section 7, Case p. 91).

Section 31 (Case p. 99, l. 23) contains the following statement :

> ". . . . It is the intent of this Act to control the volume of the means of payment for goods and services in harmony with the ability of the whole Province to produce and consume them on a rising standard of living, so that excess expansion of credit and a consequent undue advance in the price level shall not occur, and that the present system of issuing credit through private initiative for profit, resulting in recurrent deflations and inflations shall cease."

This Act is still in force.

5. The Credit of Alberta Regulation Act, 1937 (Second Session) Chapter 1, (Case p. 111), described as " An Act to provide for the Regulation of the Credit of the Province of Alberta," and effective on assent, contained the following preamble :

> " Whereas Bank Deposits and Banks Loans in Alberta are made possible mainly or wholly as a result of the monetization of the credit of the People of Alberta, which credit is the basis of the credit of the Province of Alberta; and
>
> " Whereas the extent to which property and civil rights in the Province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the Province and to the People collectively and individually of the Province; and
>
> " Whereas it is expedient that the business of banking in Alberta shall be controlled with the object of attaining for the People of Alberta the full enjoyment of property and civil rights in the the Province."

Under this Act a banker, defined as a corporation whose business or any part of it was banking (Section 2 (*a*), Case p. 111, l. 23), and its employees were required to be licensed within 21 days from the 6th August, 1937, when the Act came into force, (Section 3 (1), Case p. 112). Failure to become licensed would subject the bank and its employees to heavy penalties (Sections 5, 6, Case p. 114) the bank being deprived of the power of commencing or maintaining any court proceedings in Alberta. (Section 7, Case p. 114). Similar restrictions upon commencing, maintaining and also defending civil actions, to be effective on proclamation only, was made with respect to unlicensed employees of bankers in " The Bank Employees Civil Rights Act," 1937, (Second Session) (Chapter 2, which contained a preamble practically identical to the above). (Case p. 115).

Provision was also made for the appointment of Local Directorates of five persons, three to be appointed by the Social Credit Board and two by the bank. (Section 4, Case p. 113, l. 17).

6. These two statutes, with a third, amending the Judicature Act, 1937 (Second Session) Chapter 5, (Case p. 119) were disallowed by the Governor General in Council on the 17th August, 1937, (P. C. 1985), Case pp. 18–24) the Lieutenant-Governor's Proclamation thereof on the 27th August, 1937, appeared in the *Canada Gazette* on the 11th September, 1937. (Case pp. 24–5).

7. The Alberta Legislative Assembly met again late in September for the third time in 1937 and, among a few others, passed two Bills 1 and 8, entitled respectively

> " The Bank Taxation Act " described as " An Act respecting the Taxation of Banks." (Case p. 9)
>
> and
>
> " The Credit of Alberta Regulation Act, 1937," described as " An Act to Amend and Consolidate The Credit of Alberta Regulation Act." (Case p. 11).

The description of the latter indicates an intention to amend and consolidate " The Credit of Alberta Regulation Act," and section 9 of Bill 8 (Case p. 15) purports to repeal such Act, both notwithstanding the disallowance.

The Lieutenant-Governor of Alberta, on the 5th October, 1937, reserved both of these Bills for the signification of the Governor General's pleasure.

8. The preamble of " The Credit of Alberta Regulation Act, 1937 " is the same as the second recital in The Credit of Alberta Regulation Act which was disallowed, (Case p. 11, l. 22 and p. 111, l. 11).

9. The foregoing statutes and Bills, which are undoubtedly *in pari materia*, must be read together in order to ascertain the intention of the Legislative Assembly in passing the two Bills presently under consideration.

R. v. *Loxdale* (1758) 1 Burr. 445, Lord Mansfield laid down the rule at p. 448 :

> " Where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other."

Palmer's Case (1784) 1 Leach, C.C. (4th ed.) 335.
City of Ottawa v. *Hunter* (1900) 31 S.C.R. 7 at 10.
This rule also extends to statutes which have been repealed.
Ex parte Copeland (1852) 2 De. G.M. & G. 914 at 920.
Bradlaugh v. *Clarke* (1883) 8 App. Cas. 354.
See Lord Blackburn, at p. 373.

10. The above statutes and others set out in the case were part of a legislative programme based on the assumed obsolescence of the existing monetary system and meant to carry out the following policies :

(*a*) The supply of increased purchasing power to the people of Alberta in the form of Alberta credit through the agency of an Alberta Credit House, with branches throughout the Province;

(*b*) The subjection of banks to licensing requirements, with severe sanctions, under the supervision of local directorates controlled by Alberta Government appointees, who would thereby control the business policies of the banks in Alberta so that enjoyment of property and civil rights by Albertans would not be interfered with or restricted;

(*c*) The control of the banks by the Alberta Government notwithstanding disallowance of the first efforts in that direction, such control to be exercised, as before, through local directorates under the sanctions of licenses and heavy penalties, but over that part of the banks' business which relates to dealing in credit in order to prevent any restriction or interference with the full enjoyment of property and civil rights by any person in Alberta.

(*d*) The imposition of heavy and coercive taxation upon the banks in order to strengthen the control of the provincial government over the banks' credit providing facilities, or, if desired, of suppressing them.

11. The first question will now be considered :

QUESTION 1—

IS BILL NO. 1, ENTITLED "AN ACT RESPECTING THE TAXATION OF BANKS," OR ANY OF THE PROVISIONS THEREOF, AND IN WHAT PARTICULAR OR PARTICULARS OR TO WHAT EXTENT INTRA VIRES OF THE LEGISLATURE OF THE PROVINCE OF ALBERTA ?

12. It must first be determined whether the provisions of this Bill fall within the powers conferred upon Provincial Legislatures under section 92 (2) of The British North America Act, to make laws in relation to

> " Direct taxation within the Province in order to the raising of a revenue for provincial purposes."

Even if the legislation appears to fall within section 92, it must then be ascertained whether it also comes under a heading reserved exclusively for Parliament by section 91.

13. It is submitted that the Bill under consideration would, if assented to, be *ultra vires* of the Alberta Legislature for the following among other reasons :

(*a*) *It is not* " *Direct.*"

The plain tendency of a tax on the paid-up capital, reserve fund and undivided profits is that it shall be passed on, particularly where the tax is of such magnitude.

Brewers' and Maltsters' Case (1897) A.C. 237.

Lower Mainland Committee Case (1933) A.C. 168.

The tax is levied anew each year and is in reality an attempt to impose a tax on the whole of the bank's paid-up capital and reserves and on profits made throughout Canada and abroad.

Bank of Toronto v. *Lambe* (1887) 12 App. Cas. 575 has no application.

A levy of $\frac{1}{2}$ of 1 per cent. on the paid-up capital and 1 per cent. on the reserve fund and undivided profits would amount to about $2,082,000, an amount so large that the general tendency of the tax must be to force the banks to pass it on to their customers.

The magnitude of the tax, and the relative increases as between the banks and some other corporations are shown below :

TABLE 1.

AMOUNT OF TAX.

Bank	Paid-up Capital.	Reserve Fund.	Undivided Profits.
	$	$	$
Bank of Montreal - - -	36,000,000	38,000,000	1,935,033
The Bank of Nova Scotia - -	12,000,000	24,000,000	711,629
The Bank of Toronto - - -	6,000,000	9,000,000	843,565
The Canadian Bank of Commerce	30,000,000	20,000,000	665,394
The Royal Bank of Canada - -	35,000,000	20,000,000	1,609,554
The Dominion Bank - - -	7,000,000	7,000,000	592,699
Banque Canadienne Nationale -	7,000,000	5,000,000	227,860
Imperial Bank of Canada - -	7,000,000	8,000,000	607,242
	$140,000,000	$131,000,000	$7,192,976

The total paid-up capital of all banks represented in Alberta was $140,000,000.

	$
½ of 1 per cent. of $140,000,000 would yield -	700,000
Their total reserve funds were $131,000,000.	
1 per cent. of $131,000,000 would yield - -	1,310,000
Their undivided profits were $7,192,976.	
1 per cent. of $7,192,976 would yield - -	71,929
The total tax would be - - - - -	$2,081,929

Note: The total paid-up capital and reserve funds of all banks represented in Alberta are taken from *The Canada Gazette*, 2nd May, 1936, Supplement, showing the Monthly Return of the chartered banks to the Minister of Finance for the 31st March, 1936, pursuant to section 112 of The Bank Act, *see also* section 4 of The Bank Taxation Act (Case p. 10).

The undivided profits of such banks are taken from the certified profit and loss statements attached to the annual statement returns of such chartered banks to the Minister of Finance for the fiscal years ending in 1935, pursuant to section 53 (9) of The Bank Act.

TABLE 2

ALBERTA TAXATION PER BRANCH.
TAXES ON BRANCHES ONLY
ON 1936 BASIS.

Bank.	Branches in Alberta.	Tax on Branches	Tax per Branch
		$	$
Bank of Montreal	48	15,500	321
The Bank of Nova Scotia	9	4,800	533
The Bank of Toronto	10	4,100	410
The Canadian Bank of Commerce	49	16,300	332
The Royal Bank of Canada	52	16,900	325
The Dominion Bank	3	3,000	1,000
Banque Canadienne Nationale	5	2,800	560
Imperial Bank of Canada	21	8,800	419
	197	$72,200	

TAXES ON PAID-UP CAPITAL, RESERVE FUND AND UNDIVIDED PROFITS.

Bank.	New Tax $\frac{1}{10}$ of 1% on Paid-up Capital Imposed 1937 (1st session) Chapter 57	New Tax per Branch	Proposed Tax $\frac{1}{2}$ of 1% on paid-up capital and 1% on reserve fund and undivided profits	Proposed Tax Per Branch
	$	$	$	$
Bank of Montreal	36,000	750	579,350	12,069
The Bank of Nova Scotia	12,000	1,333	307,116	34,124
The Bank of Toronto	6,000	600	128,435	12,843
The Canadian Bank of Commerce	30,000	612	356,653	7,278
The Royal Bank of Canada	35,000	673	391,095	7,521
The Dominion Bank	7,000	2,333	110,926	36,975
Banque Canadienne Nationale	7,000	1,400	87,278	17,455
Imperial Bank of Canada	7,000	333	121,072	5,765
	$140,000		$2,081,925	

Note: The numbers of Alberta branches are taken from the Canada Year Book, 1937, p. 908.

The paid-up capital, reserve funds and undivided profits used in preparing Table 2 were taken from the sources mentioned in the note to Table 1.

TABLE 3.

COMPARISON OF ALBERTA TAX INCREASES, 1937.

Class of Taxpayer.	Nature of increased tax.	Percentage of increase of 1937 taxation basis over 1936 taxation basis.
Banks	1/10 of 1 per cent. on paid-up capital (1937 (1st Sess.)) Imposed payable 1937	194 per cent.
Banks	½ of 1 per cent. on paid-up capital 1 per cent. on reserve fund and undivided profits (1937 (3rd Sess.)) Proposed	2,883 per cent.
Life Insurance Companies	Increased from 2 per cent. to 3 per cent. on gross premiums from Alberta business. (1937 (1st Sess.))	50 per cent.
Loan Companies	Increased from 1 per cent. to 2 per cent. on gross income from investments in Alberta. (1937 (1st Sess.))	100 per cent.
Finance Companies	Increased from 1 per cent. to 2 per cent. on gross income from business in Alberta (1937 (1st Sess.))	100 per cent.
Power Companies	Increased from $1,000 to $10,000. (1937 (1st Sess.))	900 per cent.
Companies not otherwise taxed.	Increased from 40 cents to 50 cents for each $1,000 of authorized capital. (1937 (1st Sess.))	25 per cent.

It is to be noted that the taxes on banks with other corporations had already been revised and the levies increased in the year 1937 by Chapter 57 of the statutes of 1937 (First Session).

The tendency of the tax must in all cases be carefully considered.

City of Halifax v. *Fairbanks' Estate* (1928) A.C. 117.

The King v. *Caledonian Collieries* (1928) A.C. 358.

Lower Mainland Committee v. *Crystal Dairy Limited* (1933) A.C. 168.

Section 3 (Case p. 10) is not merely a tax on the bank, it is in reality a tax on the paid-up capital, reserve fund and undivided profits.

Prov. Treasurer of Alberta v. *Kerr* (1933) A.C. 710 at 720.

The section must, of course, be construed strictly.

Cox v. *Rabbits* (1878) 3 App. Cas. 473 at 478.

Foss Lumber Co. v. *The King* (1912) 47 S.C.R. 130 at 154.

Ex parte Lewin (1886) 11 S.C.R. 484 at 489.

(*b*) *It is not Taxation " Within the Province."*

(i) because paid-up capital, reserve fund and undivided profits are taxed.

In *Bank of Toronto* v. *Lambe* there was " no attempt to tax the capital of the bank any more than its profits." The Legislature did not " carry the taxation out of the province." Here the opposite is the case.

The paid-up capital subscribed by the shareholders of the bank, the reserve funds made up partly of the premiums paid by them on their stock and partly of profits derived from banking operations, as well as the undivided profits, are not in Alberta, but have a *situs* outside the Province.

Royal Bank of Canada v. *The King* (1913) A.C. 283.
R. v. *National Trust Company* (1933) S.C.R. 670.
Provincial Treasurer of Alberta v. *Kerr* (1933) A.C. 710.

The Winding-Up Act, R.S.C., chapter 213, section 12, confers jurisdiction only on the courts of the province in which the head office of the bank is situated, and it is there that a shareholder would have to take proceedings to enforce payment of his share of the surplus assets, if any.

The taxation is not " within the Province."

(ii) because, even if the banks, rather than their assets, are taxed they are not domiciled in the province but have their head offices elsewhere.

In *Provincial Treasurer of Alberta* v. *Kerr* (1933) A.C. 710, Lord Thankerton at p. 718 says :

> " . . . . their Lordships agree with the statement of Anglin, C.J., in *R.* v. *Cotton* (1912) 45 S.C.R. 469 at 536, where he said : " in order that a Provincial tax should be valid under the British North America Act, in my opinion the subject of taxation must be within the Province."

The bank is not " ordinarily resident " in Alberta but at its principal or chief place of business in cases where it has several places of business.

Jones v. *Scottish Accident Insurance Co.* (1886) 17 Q.B.D. 421.
Baelz v. *Public Trustee* (1926) Ch. 863.
De Beers Consolidated Mines Limited v. *Howe* (1906) A.C. 455. Lord Loreburn, L.C., at p. 458.

> " . . . the real business is carried on where the control management and control actually abides."

Canadian Bank of Commerce v. *Brouillette* (1925) 39 K.B. 526 (Que.).

(iii) The taxation is not " within the Province " because it is really confiscation of assets and revenues outside the Province.

It is obviously so heavy that the banks could not recoup themselves from their assets or revenues within the Province.

Table 2, *supra*, shows the effect on individual banks :

(c) *The proposed impost is not " In Order to the Raising of a Revenue for Provincial Purposes."*

The taxing power cannot be invoked except for the *bona fide* purpose of raising revenue; any exercise of that power to effectuate a totally different Governmental policy must be invalid.

The legislation must be scrutinized in its entirety in order that its " true nature and character," its " pith and substance " may be ascertained.

Great West Saddlery Co. v. *The King* (1921) 2 A.C. 91 at 117.

Attorney General for Ontario v. *Reciprocal Insurers* (1924) A.C. 328 at 337.

The course of legislation already reviewed shows that the real intention of the Legislative Assembly in imposing this heavy taxation was to coerce the banks into submitting to provincial control by means of licenses and local directors, the majority of whom would be Government appointees.

The Bill confers on the Minister powers, in form unlimited, of demanding information from the banks under heavy penalties, all of which is coercive and intended to force the banks to assist the Government in establishing its policy of social credit. Sections 7, 8 and 11, (Case pp. 10, 11).

(d) *The proposed taxation would destroy or nullify the status, capacities and powers in Alberta of the banks, which are Dominion corporations.*

A series of cases establishes this principle in respect of Dominion companies incorporated under the general power of Parliament to make laws for the peace, order and good government of Canada.

John Deere Plow Co. v. *Wharton* (1915) A.C. 330.

Great West Saddlery Co. v. *The King* (1921) 2 A.C. 91.

In the case of banks, incorporated under the exclusive powers conferred on Parliament by section 91 (15) to make laws in relation to

> " Banking, incorporation of banks, and the issue of paper money " the principle must be even more stringently applied.

(i) As has been shown the real reason for these taxes is to force the banks to submit to provincial control of their operations, a control manifestly incompatible with their Dominion status, capacities and powers.

No provincial Legislature can, in the guise of taxation legislation or otherwise, validly legislate itself into control over a subject-matter beyond its jurisdiction. Parliament, by a series of enactments in form criminal and otherwise ostensibly based upon its authority under section 91 of the Federation Act essayed to gain control over the business of insurance. The principle established in the long series of cases denying to Parliament the powers it sought but did not have is equally applicable against Provincial Legislatures seeking to attain an authority which they lack.

(ii) If the object is not to control banking operations, the only alternative is that it is designed to drive the banks out of the Province in order that provincial banking system may be made effectual.

Taxation of this character, particularly if adopted by other provinces, would render the banks impotent throughout Canada, and would completely vitiate the Dominion control over banking conferred by section 91 (15) of the British North America Act.

(e) *Taxation of the character in question if within provincial competence and adopted by all provinces would strike at the very solvency of the banks and their ability to return moneys deposited with them.*

It could only be put forward seriously by those holding the mistaken view now advanced by the exponents of social credit, that paying taxes costs the banks nothing.

(f) *It is submitted that this bill is invalid in its entirety and that no portion of its provisions is severable in such a way that it can become even partially operative.*

Attorney-General for Manitoba v. *Attorney-General for Canada* (1925) A.C. 561 at 567-98.

Attorney-General for British Columbia v. *C.P.R.* (1927) A.C. 934 at 938.

Attorney-General for British Columbia v. *Attorney-General for Canada* (1937) A.C. 377.

14. The second question will now be considered:

QUESTION 2—

IS BILL NO. 8, ENTITLED "AN ACT TO AMEND AND CONSOLIDATE THE CREDIT OF ALBERTA REGULATION ACT" OR ANY OF THE PROVISIONS THEREOF AND IN WHAT PARTICULAR OR PARTICULARS OR TO WHAT EXTENT INTRA VIRES OF THE LEGISLATURE OF THE PROVINCE OF ALBERTA?

15. It should first be ascertained whether the impugned legislation falls under any classes of subjects in section 92 of The British North America Act, such as

> "9. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local or municipal purposes."
>
> "13. Property and civil rights in the Province."
>
> "16. Generally all matters of a merely local or private nature in the Province."

16. It is submitted that Bill No. 8 is *ultra vires* of the Alberta Legislature for the following among other reasons:

(a) *The provision for licensing is not "In Order to the Raising of a Revenue for Provincial . . . . . Purposes."*

The licensing requirement is merely another manifestation of the real purpose behind the series of Alberta enactments under consideration, i.e., to gain control of the credit-providing facilities of the banks.

The licence fee is not to exceed an amount equal to $100 per branch (section 3 (6), Case p. 13) but the penalty for dealing in credit without a licence is to be $10,000 a day (section 5, Case p. 14).

Before the licence is issued the bank must submit to a Local Directorate of five, three being appointees of the Social Credit Board "to supervise, direct and control the policy of the business of dealing in credit . . . . for the purpose of preventing any act by such credit institution constituting a

restriction or interference either direct or indirect, with the full enjoyment of property and civil rights by any person within the Province." (Section 4 (1), Case p. 13.)

The foregoing clearly indicates the same purpose so clearly expressed in the preamble of disallowed Act which this purports to repeal, amend and consolidate :

> " Whereas it is expedient that the business of banking in Alberta shall be controlled with the object of attaining for the People of Alberta the full enjoyment of property and civil rights in the Province." (Case p. 111.)

Manifestly this is not a real licensing Act, being merely an effort to control banking which cannot be supported under the licensing power.

Attorney-General for Quebec v. *Queen Insurance Co.* (1878) 3 App. Cas. 1090 at 1098–9.

See also *Attorney-General for British Columbia* v. *Kingcome Navigation Co. Ltd.* (1934) A.C. 45 at p. 60, where reference is made to *Lawson* v. *International Fruit and Vegetable Committee* (1931) S.C.R. 357, as an interesting case where a provincial Legislature sought to regulate the import of commodities.

(*b*) *Parliament has exclusive jurisdiction over " Banking " and allied subjects, which are therefore beyond provincial control.*

While the Bill purports to deal with " property and civil rights in the Province," it actually applies to phases of banking which have been removed from provincial to exclusively Dominion jurisdiction by the express words of section 91.

The preamble of this Bill is identical with the second recital of the preamble of its disallowed predecessor, the first and third recitals having been omitted, obviously because they expressly referred to banking. (Case pp. 111 and 11.) The intention is plainly the same—to control the banks.

Parliament is given exclusive legislative power over the following related classes of subjects :

2. The regulation of trade and commerce.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.

It may be noted that Lord Watson, in *Tennant* v. *Union Bank of Canada* (1894) A.C. 31, at p. 46, said that " banking " as used in section 91 (15) is " an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker."

See also remarks by Davies, J., as to the scheme of the British North America Act with regard to banking, in *C.P.R.* v. *Ottawa Fire Insurance Co.* (1907) 39 S.C.R. 405 at 424.

Likewise with these other heads of jurisdiction, which, while undoubtedly affecting property and civil rights, must be deemed to have given to Parliament the exclusive control over these subjects in their widest possible sense.

See Lord Watson at p. 47 of *Tennant* v. *Union Bank of Canada, supra.*

(c) *The control of dealing in credit is "Necessarily Incidental" to "Banking," "Bills of Exchange and Promissory Notes."*

Even if the subjects of "banking," "bills of exchange," etc., do not directly include dealing in credit, the power to lend by means of negotiable credit instruments is such an integral part of banking that it must be regarded as "necessarily incidental" thereto, making the relevant provisions of The Bank Act paramount over any conflicting provincial legislation.

Tennant v. *Union Bank of Canada* (1894) A.C. 31.

See The Bank Act, 1934, chapter 24.

By section 75 (1) (c), a bank is expressly authorized by Parliament to

> "deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities . . . . . ."

A definition of the term "Banking Business" was made in 1918 by the British Board of Trade after consultation with the Treasury, which reads:

> "'Banking business' means receiving money on current account or on deposit; accepting bills of exchange; making, discounting, buying, selling, collecting or dealing in bills of exchange, promissory notes and drafts whether negotiable or not, buying, selling or collecting coupons; buying or selling foreign exchange by cable transfer or otherwise; issuing for subscription or purchase or underwriting the issue of, loans, shares or securities; making or negotiating loans for commercial or industrial objects; or granting and issuing letters of credit and circular notes; except in so far as such operations form part of and are for the purpose of and incidental to the conduct of a business carried on for other purposes by the company, firm or individual by whom such operations are transacted."

Rule 1 of the Enemy Banking Business Rules, 1918 (S.R.O. 1918, No. 1649) made under The Trading with the Enemy (Amendment) Act, 1918.

"Banking" must at least include all of these.

(*d*) *The provision for the appointment of local directors by the Social Credit Board and the bank are void as conflicting with the requirement of the Bank Act that directors be elected by the shareholders.*

Section 21 (1) of The Bank Act states " The directors shall be elected by the shareholders at the annual general meeting . . . "

This is valid legislation respecting the incorporation of banks or banking, or is necessarily ancillary thereto, superseding this provincial legislation which conflicts with it.

(*e*) *The exception of " Banking " at the foot of section 2 (b) ignores Parliament's control over matters incidental to banking.*

The exclusion from " business of dealing in credit " of transactions which are banking within the meaning of " banking " in section 91 (15) is an attempt to disclaim jurisdiction over " banking " in the narrow sense, and to attain control over matters " necessarily ancillary " thereto.

Dealing in credit is an integral part of banking, the sole control over which Parliament is entitled to take and has taken. Any interference therewith by this provincial legislation must render the latter invalid.

(*f*) *The definition in section 2 (b) can be applied to both lending and deposit transactions.*

The definition is either descriptive or misdescriptive by intention. The very fact that the Bank of Canada is expressly excluded from both Bills 1 and 8 shows that other banks were intended to be included.

Take a typical lending transaction—the borrower gives the bank his promissory note and whatever security is required, whereupon the bank provides a credit by an entry in his account on the bank's books, book-keeping entries naturally being used, and the volume of such credits is never kept down to the level of the legal tender held by the bank.

While the words used in the definition in section 2 (*b*) do not correctly describe lending operations, they are broad enough to include them.

They would also include a typical deposit transaction of a cheque, for in return for a cheque deposited the bank provides a credit by an entry in the customer's account in its books, without regard to its legal tender holdings.

Ultimately, when either the borrower or depositor issues cheques against his deposit, which are deposited in other banks, the first bank must settle with the other, on balance, by a transfer to the other of funds in the Bank of Canada equivalent to legal tender.

Accepting deposits and making loans are such an integral part of a bank's business and so interdependent that provincial control over either cannot be tolerated with safety, nor can such control be validly exercised.

(g) *The principle that the status, capacities and powers of a dominion corporation cannot be nullified and fettered by provincial laws applies with even greater force in the case of banks.*

See *Great West Saddlery* case, (1921) 2 A.C. 91.

As shown under paragraph (f) *supra* the Act is applicable to both borrowing and lending operations of banks.

(i) The purpose of making the Act so applicable is disclosed in section 4 (1), (Case p. 13), it plainly being the intention to have local directors appointed a majority by the Social Credit Board, to supervise, direct and control the policy of the business of dealing in credit to prevent direct or indirect restriction or interference with the full enjoyment of property and civil rights by Alberta residents.

Just what this means is not clear. It would enable local directorates to prevent banks from requiring borrowers to give binding promises to repay loans, to give collateral security, to give rights to realize on that security, or to prevent the banks from enforcing repayment by legal proceedings. It would naturally be impossible for the banks to conduct a lending business in Alberta at anything but a loss, leading to insolvency.

(ii) This phraseology may also mean that these directors will prevent banks from acquiring any contractual rights whatever. Sections 3 (3), 4 (1) and 8 (e). Certainly indicates an intention to take full control of the credit operations of the banks, possibly even to the extent of forcing them to grant loans freely with no contractual power of enforcing repayment.

This would amount to a denial of civil rights to banks and deprive them of their primary function of obtaining the surplus funds of the country in order to lend them to borrowers. The solvency of the banks must depend upon their ability to obtain and if necessary to enforce repayment of their loans. Such interference with the status, capacities and powers of banks would effectively stultify their operations not only in Alberta but throughout Canada, for losses would be tremendous.

The legislation must therefore be invalid.

(h) *Here again the provisions of the bill are not severable. It cannot be safely left to whatever operation it may have and must be declared Ultra Vires in Toto.*

Attorney-General for Manitoba v. *Attorney-General for Canada* (1925) A.C. 561 at 567-8.

Attorney-General for British Columbia v. *C.P.R.* (1927) A.C. 934 at 938.

Attorney-General for British Columbia v. *Attorney-General for Canada* (1937) A.C. at 387-8.

W. N. TILLEY

R. C. MCMICHAEL

IN THE SUPREME COURT OF CANADA.

IN THE MATTER OF—Two Bills passed by the Legislative Assembly of the Province of Alberta at the 1937 (Third Session) thereof, entitled respectively:

"An Act Respecting the Taxation of Banks";

"An Act to Amend and Consolidate the Credit of Alberta Regulation Act";

and reserved by the Lieutenant-Governor for the signification of the Governor-General's pleasure.

FACTUM OF THE CHARTERED BANKS OF CANADA.