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the provisions of the statute in that behalf, was to defeat and delay his creditors.

Appeal dismissed with costs.

Solicitors for appellant: *Gibbons, McNab & Mulkern.*

Solicitors for respondent: *Foster, Clarke & Bowes.*

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*March 16.

THE MERCHANTS' BANK OF HALIFAX..................................APPELLANTS;

AND

GILLESPIE, MOFFAT & Co.............RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding up Company.—45 *Vic., ch.* 23 (*D*).—*Foreign Company.*

The *Steel Company of Canada* (*Limited*), incorporated in *England* under the Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in *Nova Scotia*, and having its principal place of business at *Londonderry*, *Nova Scotia*, was, by order of a judge, on the application of the respondents and with the consent of the company, ordered to be wound up under 45 *Vic.*, ch. 23 (D). The appellants, creditors of the *Steel Company*, intervened, and objected to the granting of the winding-up order on the ground, that 45 *Vic.*, ch 23 was not applicable to the company.

Held—reversing the judgment of the Supreme Court of *Nova Scotia*, *Fournier*, J., dissenting—that 45 *Vic.*, ch. 23, was not applicable to such Company.

APPEAL from the judgment of the Supreme Court of *Nova Scotia*, rendered on the 31st March, 1884, granting an order for winding-up of the *Steel Company of Canada* (*Limited*).

The *Steel Company of Canada* (*Limited*), is a joint stock company, incorporated in *England* in 1874, under

*PRESENT—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, JJ.

the Imperial Joint Stock Companies' Acts of 1864 and 1867.

The said company was never incorporated in *Nova Scotia*, nor in the Dominion of *Canada*. The chief place of business of the company in *Canada* is at *Londonderry*, in the county of *Colchester*, in the Province of *Nova Scotia* aforesaid, where the company have for some years past owned and operated extensive iron mines and iron and steel works, and the company's property at *Londonderry* constitutes almost entirely its assets. The company owned no real estate or premises elsewhere than in *Canada*, but occupied an office in *Great Britain*.

The objects of the company, according to the memorandum of association, were as follows:—

1. The carrying into effect of the agreements following, or any modifications of the same, respectively, which may be agreed upon by the several parties and the company; that is to say:

(*a*.) An agreement, dated the 13th day of March, 1874, made between *Charles Tennant*, of the one part, and *Edward Faulcknor Tremayne*, of the other part, for the purchase of certain iron works, properties, lands and hereditaments, situate at or near *Londonderry*, in the Province of *Nova Scotia* and Dominion of *Canada*, formerly belonging to the *Intercolonial Iron Company* (*Limited*), and other works and hereditaments held in connection therewith.

(*b*). An agreement dated the 13th day of March, 1874, and made between *Charles William Siemens*, of the one part, and *Edward Faulcknor Tremayne*, of the other part, for the grant of a license or right to use, free of royalty, the patent process of the said *Charles William Siemens*, for the production of iron and steel, and their subsequent working into merchantable forms.

2. The purchasing, leasing, or otherwise acquiring of

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iron works, collieries, coal mines, iron mines, or any other mines, mining ground or minerals, and particularly the purchasing, leasing, or otherwise acquiring of the iron works and collieries, coal and ironstone mines, and other properties, lands and hereditaments mentioned or referred to in the said agreement, and other works and hereditaments held in connection therewith; and the searching for, and getting, and working, raising and making merchantable and selling and disposing of iron, coal, ironstone, and all ores, metals and minerals whatsoever.

3. The carrying on the trades or businesses of iron masters, coal masters, miners, smelters, engineers, steel converters and manufacturers, iron founders and general contractors, in all their branches, and the making, purchasing, hiring and selling railway and other plant, fittings, machinery and rolling stock.

4. The purchasing and selling as merchants, iron, steel, coal, metals and other materials, articles or things on commission, or as agents, or otherwise.

5. The purchasing or taking in exchange or on lease, renting, occupying, or otherwise acquiring of any works, collieries, lands, hereditaments, premises, properties, estates and effects, or any grants, concessions, leases, or other interest therein, and purchasing or working of any patent or patent rights which may be considered desirable for the interests of the company.

6. The purchasing the goodwill or any interest in any trade or business of a nature or character similar to any trade or business which the company may be authorized to carry on.

7. The draining, paving, planting, building on or otherwise improving and realizing of all or any parts of the lands from time to time purchased, taken in exchange, or on lease, or otherwise acquired by the company, and the managing, farming, cultivating,

maintaining, improving, under-letting, setting, leasing, exchanging, selling and otherwise dealing with and disposing of all or any parts of the lands, hereditaments, and real and personal estates and properties and effects of the company, and in such manner, and on such terms, and for such purposes as the company think proper.

8. The construction of any waterworks, ponds, reservoirs or watercourses, and the promoting, making, providing, acquiring, leasing, working, using and disposing of railways, tramways, and other roads and ways, for the more convenient access to any parts, or otherwise for the benefit, or supposed benefit, of any property of the company, or for any other purpose.

9. The contributing to the expense of constructing, making, providing, acquiring, working and using the same.

10. The applying for and obtaining on behalf of the company of patents for processes to be used in any of the works or operations of the company, and the purchasing and acquiring of any patents for like processes granted to any other person or corporation, or any license for the using of the same.

11. The making and carrying into effect of arrangements with landowners, railway companies, shipping companies, carriers and other companies and persons, for the purposes of the company.

12. To sell the undertaking, assets and property of the company, or any portion of the same, to any other company or companies, or any person or persons, for such price in money or shares in any purchasing company or other firm, and on such terms as the company shall sanction, and to acquire the whole or any part of the undertaking, assets and property of, or otherwise to amalgamate with any other company or companies established for objects similar in general character to the objects of this company.

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13. The establishing and regulating of agencies for purposes of the company, whether in the *United Kingdom* or abroad; and

14. The doing all such other things as are incidental or conducive to the attainment of the above objects.

In May, 1875, an Act (ch. 3) of the Legislature of *Nova Scotia*, was passed in reference to the said *Steel Company of Canada* (*Limited*), and that Act was to be read as a part of the case on appeal.

The business of the company was managed by directors, whose meetings took place in *Great Britain*. Two at least of the directors always resided in *Canada*. At the commencement of these proceedings, and for some time prior thereto, the managing director resided in *Canada*.

On the 29th day of November, 1883, *Gillespie, Moffat & Co.*, of the city of *Montreal*, creditors of the said company, presented before the Supreme Court of *Nova Scotia*, a petition to wind up the said company.

The company consented to the winding up, as prayed for in the said petition, but the *Merchants Bank of Halifax*, creditors of the said company, and the appellants in this appeal, appeared and opposed the granting of a winding-up order. The court made the winding-up order, from which order an appeal was taken.

The only question argued on this appeal was as to whether the Act (ch. 23) of the statutes of *Canada*, 1882, in reference to insolvent banks, insurance companies, &c., is applicable to the *Steel Company of Canada* (*Limited*).

Mr. *Henry*, Q.C., for appellant:

As appears by the case, the only question to be argued in this appeal is as to whether the statute (ch. 23) of the *Canada* Acts of 1882 is applicable to the *Steel Company of Canada* (*Limited*).

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This is not a mere bankruptcy act but a winding-up act. A company may be wound up when not insolvent at all, and the act is expressly made applicable to companies which are not insolvent. *Lindley* on Partnership (1).

The Act contains many provisions which it would be impossible to carry out against this company. The following are referred to here as examples of these inapplicable and unworkable provisions:

Section 19 is intended to prevent the company from carrying on business except in so far as the liquidator may think beneficial for the winding up. It also restricts, after the making of the winding-up order, transfer of shares by shareholders in *England*, who in no view of the matter can be regarded as subject to Canadian legislation. Contributories are to be consulted in reference to the winding-up, although they live thousands of miles away, and in a different jurisdiction. Under section 38 the powers of the directors end at the beginning of the winding-up proceedings, although the board sits in another country and acts under the authority of an Imperial Legislature. Section 44 purports to work a complete dissolution of the company, although by virtue of an Imperial statute its organization and powers remain intact.

The rights of contributories who are in no wise subject to any jurisdiction in *Canada* are to be adjudicated upon and settled by a Canadian court or judge. Contributories in *England* may be called upon to pay money into our court. The liquidator may compromise all calls and liabilities to calls.

Creditors in *England* are to be restrained from suing the company, and must ask leave of the court here before they can sue even there. Section 34 provides that the liquidator is to take into his hands all the assets of the company.

(1) (Ed. 1878) 2 vol. 1486.

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By various clauses, provisions are made for proceedings against absconding directors, and for the punishment of fraudulent directors. The franchises conferred by the Parliament of *Great Britain* are to be limited and cancelled by certain proceedings under an act of the Colonial Dominion of *Canada*.

Independently of these provisions of the Act and of its general frame and tenor, which so strongly indicate that it was not intended to apply to an English incorporated company, some light upon the question of construction is afforded by the consideration that by the comity of nations the jurisdiction in which this company should be wound up in insolvency would be in *Great Britain*, where it may be said to be domiciled and where there actually exist ample provisions for so winding it up. *Bulkeley* v. *Shultz* (1).

The English cases which have been relied upon by the respondents to establish that under this Act the court should entertain jurisdiction to wind up foreign companies, were based upon the 199th section of the English Act, which provides that any partnership association or company, except railway campanies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term "unregistered company," may be wound up under this Act. And all the provisions of this Act, with respect to winding up, shall apply to such company.

There is no such provision in the Canadian Act, and it is obvious, from the English cases in question, that the jurisdiction would not have been entertained in the absence of this 199th section.

See specially *in re Commercial Bank of India* (2).

If the act in question is to be construed as applicable

(1) L. R. 3 P. C. 769. (2) L. R. 6 Eq. 517.

to such a company as the *Steel Company of Canada*, it is so far *ultra vires* of the Parliament of *Canada*.

If this act is to be read as extending to this company, its provisions are so far essentially inconsistent with those of the Companies Acts, 1862 and 1867, under which the company is constituted, that they must be considered repugnant, and therefore to that extent, at all events, void.

The Companies Acts, 1862 and 1867, were passed by the same Imperial Legislature which enacted the *British North America Act*, and if the Canadian Act of 1882 purports to deal with this company in a manner inconsistent with the operation of the Imperial legislation, under which the company was constituted, and to which it is clearly subject, then the Canadian Act is *ultra vires* to the extent of the inconsistency involved.

Then, finally, I submit that the act of 1884, expressly stating that it is applicable to foreign companies, shows that the Dominion Parliament did not intend that the Act of 1882 should apply to English companies.

Mr. *Laflamme*, Q.C., and Mr. *Sedgwick*, Q.C., for respondents:

The first section of the *Canadian Winding-up Act* is wide enough to include and does include foreign corporations. "This act applies to incorporated trading companies." Sections 13, 106, 109 and 116 show that parliament intended the act to apply to foreign as well as to home companies. Sections 107 and 108 refer to the statutes relating to life insurance, and provide for the payment of claims against life insurance companies that are being wound up. *The Consolidated Insurance Act*, 1877, one of these statutes, is expressly referred to, and upon reference to that act it will be seen it unquestionably includes within its purview foreign corporations.

The English "Companies Act, 1862," provides for the

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winding up of corporations. It applies to "any partnership association or company" (sec. 199). This section is the only authority which gives the Imperial Courts jurisdiction to wind up foreign corporations under that act, and that power is unquestioned and has been repeatedly exercised.

See *re Madrid & Valencia R. Co.* (1); *re Union Bank of Calcutta* (2); *Reuss* v. *Bos* (3); *re Commercial Bank of India* (4).

The words in the Canadian statute "any incorporated company" are as comprehensive as those of the Imperial, "any partnership association or company," and, if so, then the authority of the English cases is wholly in favor of the respondents. See also *Parsons* v. *The Queen Insurance Co.* decided by this court (5).

The Canadian Act is not, strictly speaking, a winding-up act, but a bankrupt act. In contradistinction to the English statute it relates only to insolvent companies—a company can be wound up only when insolvent. It cannot of its own motion be wound up. Its contributories cannot invoke the aid of the act; creditors are the only persons entitled to do so. No such provision is made for its total extinguishment as that contained in section 143 of the Companies Act, 1862; and it is submitted that should all its debts be paid under liquidation proceedings it might then proceed with its business under its original charter. The only object the act has in view is equal distribution of the company's assets among its creditors, an object peculiarly within the powers of the Parliament of *Canada*. That parliament had shortly before repealed the Insolvent Act, and this act was simply in effect a re-enactment of that act, so far as it related to corporations, but without any provisions for discharge.

(1) 3 De Gex & S. 127.
(2) 3 De Gex & S. 253.
(3) L. R. 5 H. of L. 176.
(4) L. R. 6 Eq. 517.
(5) 4 Can. S. C. R. 115.

Then viewing the act in question simply as an Insolvent Act, there can be no question as to its application to a foreign insolvent company doing its principal business in *Canada*. In *France* companies having foreign legal personality are continually declared bankrupt. See *Westlake's* Private International Law (1).

The legal principles applicable to a foreigner, or person not domiciled in *Canada*, but doing business in *Canada*, cannot be different from those applicable to a foreign company doing business in *Canada*. By comity of nations English courts extend to foreign corporations, in matters of trading, the same protection and privileges as they shew to foreign individuals.

The *Steel Company of Canada* was formed for the purpose of operating iron mines in *Canada* and carrying on business there. It became insolvent there. It committed an act of bankruptcy there. Can it be said it is not to be subject to the bankrupt laws existing there?

The argument that Parliament could not have intended the Act in question to apply to foreign companies, inasmuch as the collection of its assets abroad is difficult, if not impossible, is not, it is submitted, tenable, for the following among other reasons: –

Because, assuming the act is an Insolvent Act, foreign courts will recognize the rights of the statutory assignee to property abroad. *Westlake* on Private International Law (2).

Because the difficulty of realizing property or of the company's liquidator obtaining a status in foreign courts, is not conclusive as to Parliament's intention. In *England*, *Ontario* and *Nova Scotia* statutes have been passed providing for service of process on foreigners abroad and for obtaining judgments against them. If the defendants do not submit to the jurisdiction of the courts out of which the process issues these judgments

(1) P. 133 and ss. 123 & 124. (2) 1 Sec. 125.

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have no validity in the defendant's domicile, and yet the constitutionality of these statutes cannot be questioned. They are binding at home, and the moment the defendant comes within the reach of the arm of the court they are effective.

In like manner a liquidator can settle in this country the list of contributories, and thus can obtain what is in effect a judgment against each of them—such judgment is as efficient as any judgment obtained in this country against a foreigner. The difficulty of realizing the fruits of it does not affect its validity, as far as our courts are concerned.

The case of *In re Matheson Bros. & Co. (Limited)* (1) was referred to and commented on as being conclusive in favor of appellant's contention.

Mr. *Henry*, Q.C., in reply.

RITCHIE, C. J., :—

The Steel Company of Canada (Limited) is a joint stock company incorporated in *England* in 1874 under the Imperial Joint Stock Companies Acts 1862 and 1867.

The said company was never incorporated in *Nova Scotia*, nor in the Dominion of *Canada*.

The only question argued on this appeal was whether the Act, ch. 23 of the statutes of *Canada*, 1882, in reference to insolvent banks, insurance companies, &c., is applicable to the *Steel Company of Canada (Limited)*.

This is a case of winding up pure and simple. I do not think that the Dominion Parliament intended that the 45 *Vic.*, ch. 23, should apply to winding up companies incorporated under the Imperial Joint Stock Companies Acts, 1862, and 1867. The provisions of the Dominion Act and the Imperial Acts as to winding up are in so many most important particulars inconsistent the one with the others, that if the Dominion Parliament

(1) 32 Week. Rep. p. 846.

had intended the 45 *Vic.* to apply to companies incorporated under the Imperial Acts, there would have been in the Dominion Act some distinct intimation indicated to that effect, or some reconciliation of the conflicting or inconsistent provisions, so that the act with respect to such companies might be effectively carried out in its integrity, which cannot now be done.

I am confirmed in this opinion by the action of the Dominion Parliament in passing the first section of the 47 *Vic.*, ch. 39, which repeals the 1st sect. of 45 *Vic*, ch. 23, and substitutes the 1st sec. of 47 *Vic.* in lieu thereof, the only alteration being the addition to the enumeration of the companies to which the 45 *Vic.* is to apply of the words: "which are doing business in *Canada* no matter where incorporated," conveying, it appears to me, a very clear intimation that the 45 *Vic.* did not so apply.

The 47 *Vic.* was passed after the proceedings in this case were taken, and there is no indication that the added words should have a retrospective operation.

Therefore I think the Act, ch. 23 of the statutes of *Canada*, 1882, in reference to Insolvent Banks and Insurance Companies, &c., is not applicable to the *Steel Company of Canada* (*Limited.*)

This renders it quite unnecessary to discuss the question as to the extent of the power of the Dominion Parliament to pass laws for winding up, or otherwise dealing with foreign insolvent trading companies doing business in the Dominion, or in reference to the disposition of their property and assets in this country or elsewhere if insolvent.

STRONG, J.:—(ORAL.)

The first point to be decided in this case is, whether the statute of the Dominion known as the Winding up Act of 1882 applies to a company incorporated in *Eng-*

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land under the companies Act of 1862, as the *Steel Company of Canada* was.

The effect of the winding up under this statute is to settle the rights and equities of the shareholders,or *quasi* partners, as between themselves, and to dissolve the company.

By the Imperial Act of 1862, under which this company was organized, winding up is provided for, and the effect of such a winding up is thus described by Lord *Romilly*, M. R., in *re Philips* (1):—

> The object of the winding up acts was only to settle the equities between the partners in order that when the partnership was wound up they might obtain contribution from each other.

This then being a company having its domicile in *England*, and being subject to an express statutory provision for its winding up in the appropriate forum for such a purpose, viz., the forum of its domicile, a colonial statute providing for the winding up of the same company would be *ultra vires* and void, not merely upon the interpretation of the clauses as to the general powers of the Dominion Parliament in the *British North America* Act, but by the express provisions of a paramount law, the Imperial statute 28 and 29 *Vic.*, ch. 63, which enacts:—

> That any Colonial law repugnant to any Act of Parliament extending to the Colony to which such law may relate shall be void to the extent of such repugnancy.

I therefore consider that, as we are not to give any statute a construction which would make it repugnant to a higher law, and so void upon principles of constitutional law, neither this statute of 1882, nor the subsequent Act, which declares that foreign corporations are to be included in its provisions, applies to this company—for no one can doubt but that the Imperial statute of 1882 is binding throughout the empire;

(1) 18 Beav. 169.

therefore upon this principle, even if this statute had expressly in words included this company incorporated under the *English* Act of 1862, I should have equally held it to have been void,

But supposing the statute of 1862 to have made no specific provision for winding up, I should still hold that this act of 1882 did not apply to a joint stock company domiciled in *England*. All statutes are to be construed so as not to conflict with well established rules of international law.

Then it is a universally recognized principle that a company or partnership is only to be wound up, *i. e.* the rights of partners *inter se* and the dissolution are only to be judicially brought about, in the forum of its domicile.

We must, therefore, construe this statute so as to be consistent with and to give effect to this rule, as to which there is a general consensus of authority, English, American and Continental. This last position does not, of course, affect the validity of the statute of 1882 but merely its construction, for the rules and canons which govern the comity of nations and make up what is called Private International Law do not in any way control the legislature, and, therefore, so far as the mere question of construction is concerned, the difficulty would have been obviated if the statute, as originally expressed, had been declared to be applicable to foreign corporations, as it is by the subsequent act of 1883, but in that case, as I have already said, I should have considered it *ultra vires* as in conflict with the Imperial Act of 28 and 29 *Vic.*, ch. 63. Lastly, the very fact of the 47 *Vic.*, ch. 39 (1883), having made the statute of 1882 applicable to foreign corporations, is conclusive to show that it was not the intention of the Legislature to include them in the first instance in the Act of 1882, upon which the winding up order in this case is alone dependent.

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Nothing in the foregoing statement of the reasons for this decision is intended to impugn the power of the legislature to enact bankruptcy and insolvency statutes applying to foreign corporations, or even to provide for the winding up of such corporations, provided in the case of the latter the statutory provision is express, and does not conflict with any Imperial legislation.

FOURNIER, J.:

La seule question soulevée en cette cause est de savoir si "l'acte relatif aux banques et corporations de commerce en état d'insolvabilité" peut être appliqué à la compagnie "*The Steel Company of Canada* (*Limited*)."

Cette compagnie a été incorporée en *Angleterre* en 1874, conformément aux dispositions des actes impériaux de 1862 et 1867, concernant l'incorporation des compagnies à fonds social. Mais le chef-lieu de ses affaires est à *Londonderry*, dans le comté de *Colchester*, *Nouvelle-Ecosse*, où elle fait une exploitation considérable de mines de fer, ainsi que la manufacture sur une grande échelle d'ouvrages en fer et en acier.

Il est admis que toutes les propriétés de la compagnie sont situées en *Canada* et qu'elle n'a qu'un bureau d'affaires en *Angleterre*.

Les opérations de la compagnie devaient comprendre non seulement l'exploitation des mines de fer et de charbon, mais presque tous les travaux qui se rattachent à ces industries, aussi l'exploitation de mines en général, ainsi que la construction d'une grande variété d'ouvrages, tel que le tout est énuméré dans un mémoire adopté par la dite compagnie pour indiquer et pour définir les objets qu'elle avait en vue d'atteindre par son incorporation.

Les affaires étaient conduites par des directeurs qui tenaient leurs réunions en *Angleterre*, deux de ces direc-

teurs ont toujours demeuré en *Canada*. Le principal gérant n'a cessé d'y demeurer que depuis le commencement des procédés en liquidation.

Le 29 Novembre 1883, les intimés, créanciers de la dite Compagnie, ont présenté à la Cour Suprême de la *Nouvelle-Ecosse*, une requête demandant la liquidation de la Compagnie suivant les dispositions de l'acte ci-dessus cité.

La Compagnie a donné son consentement à cette procédure, mais l'appelante s'y est opposée. La cour ayant accordé la demande des intimés, c'est de l'ordre rendu à cet effet qu'il y a présentement appel.

La seule question débattue devant la cour de première instance, comme devant celle-ci, a été de savoir si l'acte 45 *Vict.*, (1882,) ch. 23, concernant les banques insolvables, etc., etc., est applicable à la Compagnie dont il s'agit. Ayant été incorporée en *Angleterre*, cette Compagnie se trouve ici une corporation étrangère. L'acte ne faisant pas une mention spéciale des corporations étrangères, on en conclut qu'elles ne pouvaient être soumises à son opération. C'est le principal argument invoqué contre son application à la présente Compagnie; le second est fondé sur l'insuffisance de ses dispositions pour atteindre les débiteurs et contributaires de la Compagnie résidant en pays étrangers.

Quoique l'acte 45 *Vict.*, ch. 23, ne fasse pas une mention particulière des corporations étrangères, les termes qui le déclarent applicable aux corporations de commerce (*Trading Corporations*) en état d'insolvabilité, ne sont-ils pas assez étendus pour les comprendre? Les expressions employées par notre statut sont au moins aussi étendues et compréhensives que celles de l'acte impérial (*Winding Up Acts of* 1862 *and* 1867), qui se sert des termes: "*any partnership, association or company,*" pour désigner les sociétés ou compagnies soumises à son opération. Si sous cette désignation, qui me paraît plus

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vague encore que celles de notre statut, les tribunaux en *Angleterre* ont cru devoir faire application des dispositions de l'acte impérial aux corporations étrangères, je ne vois pas de raison qui puisse nous empêcher de déclarer que ces corporations seront également soumises aux dispositions de notre statut.

D'ailleurs,indépendamment de la généralité des termes qui devrait suffire pour les comprendre, on voit par la sec. 13, que le statut les avait en vue en adoptant une disposition spéciale à l'égard des compagnies qui n'ont pas le siège de leurs affaires en *Canada.*

Dans ce cas, le statut donne la faculté aux créanciers d'intenter leurs procédés contre telles compagnies dans la province où elles ont leur principal ou un de leur principaux établissements. La section 109 qui concerne, il est vrai, plus spécialement les compagnies d'assurance, fait mention de l'avis à donner à un créancier étranger. La section 116 prescrit le mode de donner avis au créancier étranger du dépôt de la liste des créanciers. Il est bien évident par ces dispositions que l'intention du législateur était d'atteindre les corporations étrangères aussi bien que celles du pays.

Ceci n'est pas douteux du moins par rapport aux compagnies d'assurance qui, par la section 108, sont obligées d'adopter le mode d'estimation de la valeur des polices, indiqué dans "l'Acte d'assurance refondu de 1877," dont les dispositions sont déclarées s'appliquer aux corporations étrangères.

Dans la cause de "*The Queen Insurance Company* v. *Parsons*," (1) cette cour a décidé que les corporations étrangères étaient soumises à l'opération du ch. 162 des statuts revisés d'*Ontario*. "*An act to secure uniform conditions in policies of fire insurance.*"

Cependant cet acte ne faisait, pas plus que la 45me *Vict.*, ch. 23, mention des compagnies étrangères. Le

(1) 4 Can. S. C. R. 215.

sommaire de la décision de la cour sur ce point est ainsi qu'il suit :—

That "the Fire Insurance Policy Act" R. S. O., ch. 162., was not *ultra vires* and is applicable to insurance companies (whether foreign or incorporated by the Dominion) licensed to carry on insurance business throughout *Canada*, and taking risks on property situate within the province of *Ontario*.

Dans les conclusions de son jugement Sir *William Ritchie*, C. J., s'exprime de manière à ne laisser aucun doute sur cette question.

I am, therefore, of opinion that this Act applies to all insurance companies that insure property in the province of *Ontario*, whether local, dominion or foreign.

Les raisons qui ont amené cette cour à comprendre les compagnies étrangères dans les dispositions du "*Fire Insurance Policy Act*" d'*Ontario*, me paraissent aussi concluantes dans cette cause que dans celle de *Parsons*.

Un mot d'un argument qu'on a fait valoir contre cette interprétation, c'est que le parlement, par un acte subséquent en amendement, ayant fait mention spécialement des corporations étrangères, semble avoir reconnu qu'il y avait eu omission.

Je ne crois pas que l'on puisse en tirer cette conclusion, car tout en tranchant la question pour l'avenir, il est spécialement déclaré en ces termes :

Nothing in this act contained shall affect any pending suit or action or any right of action now existing.

La décision de la question doit donc dépendre uniquement de l'interprétation à donner au ch. 23, 45 *Vict.*, et les raisons invoquées plus haut ne perdent aucunement de leur force par la passation de l'acte d'amendement mentionné plus haut.

Il n'est pas contesté que la compagnie dont il s'agit est une corporation commerciale. Elle devait donc en cette qualité être soumise à l'opération du ch. 23, malgré qu'elle soit une corporation étrangère.

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Mais on oppose encore une autre raison à son application dans le cas actuel, c'est la difficulté d'atteindre les débiteurs et contributaires de la compagnie résidant en pays étranger, et la difficulté de mettre à exécution plusieurs de ses dispositions contre une compagnie étrangère. Ainsi la section 19 ordonnant de cesser, à dater de l'ordre de mise en liquidation, toutes opérations et transferts d'actions ne pourrait être mise à exécution dans le cas d'une compagnie dont le bureau de direction est à l'étranger, non plus que la section 38 mettant fin, dans ce cas, au pouvoir des directeurs. Il serait sans doute difficile d'arriver à une liquidation aussi complète et définitive que celle visée par la section 44. Mais est-ce une raison suffisante pour empêcher les créanciers d'exercer leurs droits sur tous les biens possédés dans le pays par cette compagnie. Celle dont il s'agit, quoiqu'elle ait son bureau en *Angleterre*, ne semble pas posséder d'autres biens mobiliers ou immobiliers que ceux qu'elle a dans la *Nouvelle-Ecosse*. Pourquoi dans ce cas les créanciers ne pourraient-il pas se prévaloir des dispositions de l'acte qui sont suffisantes pour faire ordonner la vente et la distribution de tous ces biens? On pourrait ne pas arriver, il est vrai, à une liquidation aussi complète que celle qu'exige l'acte impérial avant que la dissolution d'une corporation en liquidation puisse être ordonnée. Mais comme notre statut a pour objet la liquidation des corporations insolvables, et non leur dissolution dont il ne parle pas, cette liquidation complète n'est pas aussi nécessaire en vertu de notre acte qu'en vertu de l'acte impérial. Les créanciers n'ont aucun intérêt à l'annulation de la charte; ce qu'ils recherchent avant tout, c'est d'exercer leurs droits sur les propriétés les plus facilement réalisables de la compagnie. Quoiqu'il y ait à cela des difficultés sérieuses, je n'y vois cependant pas d'impossibilité légale. Je partage à cet égard l'opinion

de l'honorable juge *Thompson* qui, après avoir signalé toutes les difficultés, n'a pu s'empêcher d'en venir à la conclusion suivante :

They would present to my mind insuperable obstacles against adopting the view that Parliament intended the Act to apply to foreign companies if it were not for this fact. The same difficulties exist in *England* in applying the winding up provisions of the English Companies Act of 1862, to *a foreign company*, and yet, by a succession of decisions the English Courts have held that these provisions do apply to foreign companies, provided such companies carry on *business in England*, or have *their management* there. The provisions which suggest these difficulties are there worked out as nearly as may be in all such cases, or left not worked out at all, according to the exigencies of the case that may be in hand.

Puisque les difficultés sont les mêmes dans l'application de l'acte impérial, je crois que nous devons les surmonter en adoptant le mode suivi par les tribunaux anglais. D'ailleurs, les difficultés sont de nature à ne pouvoir être surmontées par la législation. On n'en a fait disparaître aucune en déclarant par l'amendement que le ch. 23 comprendrait les compagnies étrangères. Notre parlement, pas plus que celui d'*Angleterre*, ne peut atteindre le débiteur ou contributaire étranger par les dispositions législatives ; et les jugements des tribunaux d'*Angleterre* ne sont pas plus faciles à exécuter à l'étranger que ceux de nos cours. Dans un cas comme dans l'autre ils ne reçoivent d'exécution que conformément aux règles de la courtoisie internationale. Puisque l'acte d'amendement n'a pu, et qu'aucun acte législatif ne peut, faire disparaître ces difficultés, il faut donc se contenter d'exécuter notre acte qu'autant que la nature de ses dispositions le permet. C'est l'opinion que l'hon. juge *Rigby* a exprimée de la manière suivante.

If a foreign corporation carries on business in this country through an agent or otherwise it seems to be not more unreasonable to hold that such corporation was amenable to our insolvent laws than a foreign individual trader under the same circumstances. Even if

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the effect of a winding up order in the case before us would be nothing more than to enable the liquidator to take possession of, realize and distribute the assets of the Company within the jurisdiction of the Canadian Courts; that alone would be sufficient in my opinion to justify us in putting the Act in operation, but I cannot see why the liquidator could not go to England and by the aid of the English Courts collect the calls which by Sec. 38 of "The Companies' Act, 1862," (under which Act this Company was incorporated, (1) form an asset of the company and release the other assets of the corporation within their jurisdiction, just as could be done by the Canadian assignee of an Insolvent Englishman who had traded in *Canada.*

C'est aussi celle que je crois devoir adopter. Comme les deux honorables juges dont j'ai cité l'opinion, je crois que notre statut 45 *Vic.*, ch. 23, est applicable aux corporations étrangères et que pour surmonter les difficultés de son application à ces corporations, on doit adopter les décisions des tribunaux anglais qui ont eu à vaincre les mêmes difficultés dans l'application des *Winding Up Acts of* 1862-67, aux corporations étrangères.

Dans tous les cas la compagnie en question ne peut soustraire ses propriétés à l'opération des lois de la *Nouvelle-Ecosse*, parce que son existence a été reconnue par un acte de la législature de cette province qui l'a autorisée à acquérir et posséder des propriétés dans les limites de sa juridiction. Cette reconnaissance de son existence par la législature a pour effet de soumettre ses propriétés à l'effet des lois de la *Nouvelle-Ecosse* et nullement à celles du lieu de son incorporation qui dans ce cas serait celles d'*Angleterre*. Ce principe qui ne saurait être mis en doute est exprimé par *Thring on Joint Stock Cos.* (2).

It (a company) may possess property in foreign countries, but it has no legal existence in such countries, unless it is recognised by the proper authorities, and when so recognised, it holds its property in subjection to the law of the country where the property lies, and not to the law of the country where the company resides.

(1) See Sec. 1 cap. 111, Acts of 1875 N. S..

(2) P. 74.

Pour ces raisons je suis d'avis que l'appel devrait être renvoyé.

HENRY, J.:—

I am of opinion that the true construction of ch. 23 of 45 *Vic.* is that it was intended to apply only to local companies.

I cannot think the legislature intended to confer any jurisdiction upon any court to do that which the court would have no power to do.

The company in this case is incorporated under the Imperial Joint Stock Companies Acts of 1862 and 1867, and the rights of the creditors of that company depend upon that charter, and the shareholders hold their stock under the terms of the Imperial statute, and they can only be called upon to pay for their shares by the board of directors, or, in case of liquidation, by order of a court; and, if so, how can this court, or any other in the Dominion, have authority to make further calls on these shareholders? These parties enter into a partnership under the articles of the Imperial statute, but our statute would come in and say "you shall not be amenable to these articles, the terms of your contract shall be changed and your liabilities extended, and instead of the winding up taking place under the English Act, according to the contract, such winding up shall take place under a Dominion Act, making other provisions."

I entirely agree with the observations of my brother *Strong* when he questions the power of the Dominion to pass a law affecting the rights of shareholders of a company incorporated under the Imperial statute, for the very moment the registration of the articles of a co-partnership takes place the law in England is applicable to every transaction of a company until it is finally wound up. But we are told this is the law of the land and that parliament is supreme over all the subject

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matter over which it has control, but I take the ground as part of my judgment in this case, that if the provisions of a Dominion statute (as in this case) contravene an English statute regulating an English incorporated company, such provisions would be *ultra vires*—and that appeared to me to be the difficulty when the Dominion Parliament undertook to deal with this subject-matter. To say that a company organized in *England*, such as the Bank of *British North America*, doing business in *England*, in *Canada* and elsewhere, with an immense capital, can be subject to a winding up order from a local judge or court, who shall declare who shall be contributories or not, seems to me extraordinary, and I say it is assuming a strong power which I cannot adjudge to exist. Then is it to be concluded that parliament intended to make provision for an act to be done when the requisite authority cannot be given to perform it, when such intention is not conveyed in express terms. Suppose a company has assets in *England*, what power has a court in the Dominion or a liquidator to order them to be realized, and if I have not the power to wind up all the estate, I have no power at all. If a call should be made upon the shareholders of a company registered in *England* under an order of a court in this country, could such call be enforced? Would not the shareholder very properly invoke the statutes in *England* as the only ones binding on him? That would at once bring the legislative power of the two countries into contact, and it is quite unnecessary to say which must prevail. It is possible that a company chartered in the *United States* or other foreign country doing business here might be wound up under the Dominion Act, if such could be done without interfering with the terms of the constating articles, but I see serious difficulties in the way, even in such a case; but to wind up a company chartered by

registry of articles of association in *England* under the statute, I think to be beyond the legislative power of the Dominion to provide for. I, therefore, am of opinion that the court in this case had no power to take the procedure it did, and that the appeal should be allowed with costs.

TASCHEREAU, J., was also of opinion to allow appeal with costs.

Appeal allowed with costs.

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondents: *Meagher, Chisholm & Drysdale.*

THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY.................. APPELLANTS;

AND

THE QUEEN AND THE WESTERN COUNTIES RAILWAY CO......... RESPONDENTS.

1883
*Nov. 5.
1884
*Nov. 3, 4.
1885
*Feb'y. 16.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of right—Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—*37 *Vic. ch.* 16.

By an agreement entered into between the *Windsor & Annapolis Railway Company* and the Government, approved and ratified by the Governor in Council, 22nd September, 1871, the *Windsor Branch Railway, N. S.,* together with certain running powers over the trunk line of the *Intercolonial,* was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said *Windsor Branch* and

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*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.