JACOB F. HONSBERGER (DEFENDANT) ..... APPELLANT;

AND

THE WEYBURN TOWNSITE COMPANY (PLAINTIFF) ..... RESPONDENT.

1919
*May 27, 28.
*Oct. 14.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Constitutional law—Provincial Company—Status ab Extra—Comity—Right of Action—License—"Extra-Provincial Corporations Act," R.S.O. [1914] c. 179.

Item 11 of sec. 92 "B.N.A. Act," 1867, empowering the legislature of any province to make laws in relation to "the incorporation of companies with provincial objects" does not preclude a legislature from creating a company with capacity to accept extra-provincial powers and rights. *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, followed.

Such capacity need not be expressly conferred. It is sufficient if the intention of the legislature to confer it can be gathered from the instruments creating the company.

A Saskatchewan Company may, on obtaining a license under the "Extra-provincial Corporations Act," (R.S.O. [1914] ch. 179), carry on business in Ontario. It may enforce in the Ontario Courts the performance of a contract entered into with a resident of that province and the action may be maintained though the license was not granted until after it was instituted.

Judgment of the Appellate Division (45 Ont. L.R. 176), reversing that on the trial (43 Ont. L.R. 451), affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment on the trial(2), in favour of the defendant.

The questions raised on the appeal were whether or not the respondent company, incorporated under the "Companies Act" of Saskatchewan for the purpose of buying and selling land, could enforce in the

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

(1) 45 Ont. L.R. 176. (2) 43 Ont. L.R. 451.

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Ontario Courts, an agreement for sale of its land in Saskatchewan to a purchaser in Ontario; and whether or not license to resort to the courts of the latter Province had been validly granted by the authorities there.

The trial judge held that the company could not carry on its business outside of Saskatchewan and dismissed the action. His judgment was reversed by the Appellate Division.

Hellmuth K.C. and *Kingstone* for the appellant. The reasoning of Lord Haldane in the *Bonanza Creek Gold Mining Co.* v. *The King* (1), is that a provincial company must have express authority before it can operate beyond the limits of its Province. And see *Florence Mining Co.* v. *Cobalt Lake Mining Co*(2).

Tilley K.C. and *Payne* for the respondent.

THE CHIEF JUSTICE.—This appeal must, in my opinion, be decided in accordance with the law as laid down by the Judicial Committee of the Privy Council in the *Bonanza Case*(1), as to the powers and capacities of companies incorporated by provincial legislatures.

I think the head-note of the case correctly defines what their Lordships in that case determined. It is as follows:—

> Section 92 of the "British North America Act," 1867, confines the actual powers and rights which a provincial government can bestow upon a company, either by legislation or through the Executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the

(1) [1916] 1 A.C. 566; 26 D.L.R. 273. (2) 18 Ont. L.R. 275.

Lieutenant Governor of the Province of Ontario by section 65 of the above mentioned Act has not been abrogated or interfered with by the "Ontario Companies Act" R.S. O. 1897, ch. 191.

The doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), does not apply to a company which derives its existence from the act of the Sovereign and not merely from the regulating statute.

Lord Haldane in delivering the reasoned and considered judgment of their Lordships overrules the judgment of the majority of this court, of which I was one, when the *Bonanza Case*(2), was before us, as to the meaning of sub-section 11 of section 92 of our Constitutional Act empowering legislatures exclusively to make laws in relation to the

incorporation of companies with provincial objects.

Our judgment placed a territorial limitation upon the powers which the provincial legislatures were authorized to confer upon the companies created or incorporated by them, and this limitation was, Lord Haldane says, at page 577, so complete

that by or under provincial legislation no company could be incorporated with an existence in law that extended beyond the boundarise of the province.

Whether His Lordship stated with accuracy the real meaning and effect of the decision of this court I do not stop to discuss. We are concerned alone with the proper construction of the judgment of the Judicial Committee for whom His Lordship was speaking, as to the meaning of this 11th sub-section.

I think, as I have said, the head-note of the Bonanza judgment correctly epitomizes the gist of that judgment, namely, that while the "powers and rights" which a provincial legislature can bestow are confined to those exercisable within the province, that does not preclude such legislature from legislating so as to create by statute a corporation with the

(1) L.R. 7 H.L. 653. (2) 50 Can. S.C.R. 534; 21 D.L.R. 123.

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general capacity to acquire in another province of the Dominion power to operate in that province with respect to the carrying out of its corporate powers granted by the province incorporating the company.

The question in this case, in my opinion, under the construction I put upon the Privy Council judgment in the *Bonanza Case*(1) was confined to two points, first, whether the company had the capacity given to it by the legislature to obtain power *ab extra* to carry on in another province its authorized business of buying and selling real estate in Saskatchewan, and secondly, whether it had obtained such power from the Province of Ontario, assuming that its contract in question was made there.

I am, as I have said, of the opinion that its corporate powers "to carry on real estate loan and general brokerage business" in the Province of Saskatchewan, under the *Bonanza Case*(1), decision of the Judicial Committee, conferred on it the *capacity* to obtain such power from Ontario under what is known as the law of comity.

Of course, such a statutory corporation as the respondent could not obtain *ab extra* power to carry on any business not strictly within its corporate powers, but within these powers it had such capacity. My construction of the powers conferred upon the company "of real estate loan and general brokerage business" is that they referred to real estate in the Province of Saskatchewan alone, and not to real estate elsewhere. The lands in question in this case were, of course, situate in the Province of Saskatchewan

The question is then raised whether it did obtain such powers *ab extra* or not.

On that point I cannot think there can be any

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

doubt. The law of Ontario has, as is pointed out by the trial judge, Masten J., always recognized, subject to certain specified restrictions which do not enter into this case, the right of foreign corporations to carry on their authorized business and make contracts within their authorized powers outside of the country in which they are incorporated, so that the contract sued on in this case even if made in Ontario, being admittedly within the express corporate powers of the company to buy and sell real estate in Saskatchewan, was not *ultra vires* and was capable of being enforced in the Ontario courts.

The appellant relied upon the "Extra-Provincial Corporations Act," R.S.O. ch. 179. The plaintiff admitted it did not have the license required by section 7 of that Act until after it had commenced this action, but it did then obtain the license and the statute expressly provides that the granting of the license put the company's right of resort to the Ontario Courts in the same position as if it had been granted before the action was instituted.

In the result I am of the opinion that whether the contract sued on was made in Saskatchewan as found by the Appellate Division, or in Ontario as contended by the appellant, the right of the plaintiff to maintain an action upon it in Ontario was clear.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant is and has been throughout the period of time involved in the negotiations and bargaining in question herein, and this litigation founded thereon, a resident of Ontario.

The respondent is a company incorporated (23rd March, 1912) under and by virtue of the "Saskatchewan Companies Act" "to carry on real estate, loan and general brokerage business."

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In the course of carrying on said business the respondent had its head office in Weyburn in Saskatchewan and acquired some lands in the said province. The appellant by an agreement of sale dated the 15th October, 1912, made between the respondent and himself, agreed to purchase from the former certain blocks of said land and to pay the price named, for balance of which this action is brought.

The defences set up at the trial failed, except as to one which raised the question that the said contract was *ultra vires* the respondent company and hence null and void.

The learned trial judge maintained this contention and dismissed, for that reason alone, respondent's action.

The first Appellate Division of Ontario reversed this and directed judgment to be entered for respondent for the sum claimed.

The agreement in question was drawn up in duplicate at Weyburn in Saskatchewan and forwarded to the appellant in Ontario, who executed both copies and returned them to the respondent, who, then in Weyburn, executed same there. That does not seem to me to constitute anything *ultra vires* the corporate powers or capacity of the respondent.

The said "Companies Act" of Saskatchewan appears in the Consolidation of 1909, which is enacted by a statute of the legislature, assented to January 26th, 1911, and professes to be an enactment of His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan.

The first chapter of said Revised Statutes is called "The Interpretation Act" and by the second clause thereof provides that the following words may be inserted in the preamble of Acts and shall indicate

the authority by virtue of which they are passed, that is to say:—

His Majesty by and with the consent of the Legislative Assembly of Saskatchewan enacts as follows:—

From this Act I infer as well as from the words in the preamble to the Act respecting the Revised Statutes of Saskatchewan, 1909, which adopts these enacting words

His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan,

that the enactments in the consolidation are to be treated as if they were made in that form.

The fifth clause of the "Companies Act" declares as follows:—

Any three or more persons associated for any lawful purpose to which the authority of the Legislature extends * * * may by subscribing their names to the memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company with or without limited liability.

I am unable to understand how a company incorporated, without any limitations upon the powers or capacity of the legal entity thereby created, under and by virtue of an enactment professing to be enacted by His Majesty by and with the advice of the legislature, and expressly intending that the full power of incorporation which a provincial legislature has to incorporate for certain specific objects is being exercised, can be said to have been acting *ultra vires* of the power thereby conferred, when confining its action within the obvious purposes of its creation; and that no matter where acting unless in violation of the law of the country or province where so acting or other local limitations upon the usual observance of the comity of a foreign state in relation to the recognition of corporations created beyond its jurisdiction.

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I most respectfully submit that what was said in the *Bonanza Creek Case*(1), having been intended to be applicable only to an enactment using entirely different language and mode of thought for expressing the purpose of the legislature, and also to a different state of facts from those presented herein, cannot be helpful herein or further than in an expressly identical sort of case.

I am quite sure that whenever it is in such an enactment the obvious intention of the legislature when indicated as above to exercise to the fullest extent the powers given it by the "British North America Act," the incorporating power it thereby confers upon those obtaining incorporation thereunder all the power and capacity that can be given by virtue of such powers as conferred by section 92, Item No. 11 of said Act.

"The Legislature," which must be taken to mean all that section 92 of the "British North America Act" implied by the use of that very term which Parliament used when it expressly endowed each province with the incorporating power in question, has in the plainest and most comprehensive language quoted above, expressed such a purpose, and I am not prepared to minimize in the slightest degree the full effect thereof.

What Parliament in that regard conferred upon each province in question in the "British North America Act" has been conferred, by a process needless to trace here in detail, upon the Province of Saskatchewan.

What, in my opinion, that implied in Item II of the "British North American Act," I have heretofore expressed in several cases. I am the more inclined to adhere thereto when I recall that I had reached the

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

same result in the *Bonanza Case* (1) as did the court above, and I now hear it argued as it was, relying upon the reasons assigned by the said court in that case, by counsel for appellant herein, that the corporate body created in Saskatchewan as this was has no power to sue in another province.

Though that proposition was ably and logically presented as a corollary of some of the reasons I cannot assent thereto.

Nor do I think the negotiations which took place in Ontario leading up to the execution of the above mentioned instrument under seal in which they would, so far as in any way affecting the relations between the parties, be merged therein, can affect the answer to be given the question raised in one way or another.

As to the right to sue in Ontario I assume that a corporation created by the like authority which created respondent may, as any one else may, be debarred from using the courts of a province in violation of a valid statutory prohibition; but anything of that kind which may have existed was removed by the licence issued respondent.

There is nothing in the Ontario legislation which affects, or pretends to affect, in any way the legality of the contract.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

DUFF J.—I shall assume for the purposes of this judgment that the respondent company was carrying on business within the meaning of the Ontario statute, in Ontario, when the contract was made and that the contract, which is the subject of the action, was effected in the course of carrying on that business.

(1) 50 Can. S.C.R. 534, 21 D.L.R. 123.

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On that assumption, the principal question is whether the respondent company possesses capacity recognized by the laws of Ontario to become a party to that contract. The question whether it enjoys such capacity is primarily, of course, a question to be determined by the Ontario law Ontario law on this subject, in so far as it has not been altered by statute, is the common law of England. The common law of England recognizes the legal personality of juristic persons, speaking generally, for the purposes for which they have been endowed with capacity to be the subjects of rights and duties by the authority to which they owe their existence. The concrete point for decision is therefore, under the assumption above mentioned, did the respondent company under the law of Saskatchewan receive capacity to procure recognition in Ontario as a corporation and to acquire the right to enter into the contract it seeks to enforce?

It is argued that from the fact that the legislative authority of a Canadian province in relation to the incorporation of companies is an authority limited in respect of territory and subject matter, one of these two results follows: either (it is said) 1st., A corporation (to which the doctrine of *ultra vires* applies) owing its existence to legislation passed under the authority of No. 11 of section 92 is inherently wanting in capacity in consequence of the limitations laid down in the "British North America Act" to acquire recognition abroad for the purpose of pursuing the objects for which it is incorporated, or 2nd., it receives such capacity only when that is given in express words by the instruments defining its constitution.

To deal with these propositions in the order in which I have stated them, the legislative authority of a province is, of course, territorially limited—the

power conferred by section 92 in relation to the subjects enumerated being a power to make laws for the province; but when a question arises in another jurisdiction touching the recognition of a right acquired under the law of a Canadian province or alleged to have been so acquired, the rules applicable for deciding the question do not in any presently relevant respect differ from those applicable where rights are alleged to arise under a system of law owing its sanctions to a sovereign authority unlimited as regards subject matter and unlimited by any constitutional instrument as regards territory. The very point was discussed by Mr. Justice Willes in his most illuminating judgment at pages 18, 19 and 20(1), delivered on behalf of the Exchequer Chamber in *Phillips* v. *Eyre*, and he there says:—

> We are satisfied * * * * that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, as to matters within its competence and the limits of its jurisdiction has the operation and force of sovereign legislation, though subject to be controlled by the Imperial parliament.

Almost identical language is used (with reference to the particular case of the Canadian Provinces) by Lord Watson in delivering the judgment of the Judicial Committee in *The Maritime Bank* v. *Receiver General of New Brunswick*(2), and by Lord Haldane in giving judgment on behalf of their Lordships in *In re The Initiative and Referendum Act*(3), at page 5. Lord Haldane's exact words are:—

> Subject to this (the qualification has no bearing on the present discussion) each province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in

(1) L.R. 6 Q.B. 1. (2) [1892] A.C. 437.
(3) [1919] A.C. 935; 48 D.L.R. 18 at 22; [1919] 3 W.W.R. 1.

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the plenitude of its own freedom before it handed them over to the Dominion and the provinces, in accordance with the scheme of distribution which it enacted in 1867.

There seems to be no reason for suggesting that the recognition of corporateness or juristic personality, which is only the capacity to be the subject of rights, should stand on a lower plane than, e.g. rights arising from a judgment (see Dicey, page 469 note and page 23); and speaking generally the law of England recognizes such capacity subject to the restrictions (if any) imposed by the authority from which the capacity is derived. Where corporate capacity is derived from a legislature, having limited authority as regards the creation of corporations, the limits set to the legislative authority must, of course, be considered in determining the scope of such capacity and as I have already said the contention now advanced is that No. 11 of section 92 does confine the authority of a provincial legislature in relation to that subject to the creation of companies having capacity only to carry on business within the limits of the province.

The judgment of the Judicial Committee in the *Bonanza Company's Case*(1), seems to be decisive of the point in the opposite sense.

Their Lordships there enunciate at page 578, an interpretation of No. 11 of section 92 in these words:—

> For the words of section 92 are, in their Lordships' opinion, wide enough to enable the Legislature of the province to keep the power alive, if there existed in the Executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province.

And at page 583:—

> The whole matter may be put thus: The limitations of the legislative powers of a province expressed in section 92, and in particular

(1) [1916] 1 A.C. 566, 26 D.L.R. 273.

the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another.

And again at page 584:—

Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to a province under section 92. If the words of this section are to receive the interpretation placed on them by the majority of the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.

The language of No. 11 of section 92 —

incorporation of companies for provincial objects.

had of course never been supposed by anybody to import any limitation by which companies created under it would be disabled from acquiring status and recognition abroad for the purpose of pursuing the objects for which they were legitimately incorporated. It was never supposed, for example, that a mutual fire insurance company authorized by provincial legislation to carry on business in a single county would, because of this restriction of its business operations, be disabled from enforcing the payment of a

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premium note in the courts of another jurisdiction against a defaulting member who had left the province.

The view which had been taken was that "provincial objects" had no immediate reference to legal powers and capacities but that the word "objects" denoted the undertaking of the company in the commercial or economic sense; and that these words "for provincial objects" expressed a condition requiring that the business or the undertaking of a provincial company must be so restricted as to fall within the description "provincial" and that in applying this condition, the word "provincial" must be interpreted in a territorial sense It followed—on the assumption that No. 11 was to be construed and applied in the spirit of the doctrine of *ultra vires*—that, such a company being a corporation only for such restricted objects, *Ashbury Carriage Co.* v. *Riche*(1), at page 669, per Lord Cairns, and at pages 693 and 694, per Lord Selborne, its capacity to enjoy status and rights outside the province must exist only in respect of such status and such rights as might be necessary to enable it to pursue these objects; although it was by no means involved in this that particular transactions outside the province could not be within the capacity of such a company, as incidental to or consequential upon the pursuit of objects, in substance provincial in a territorial sense.

This view of No. 11 of section 92, which was the view adopted by the majority of this court, was rejected by the Judicial Committee in the *Bonanza Company's Case*(2), as the extracts already quoted sufficiently shew, and it must be accepted as settled law that the words "for provincial objects" in No. 11

(1) L.R. 7 H.L. 653. (2) [1916] 1 A.C. 566; 26 D.L.R. 273.

do not import any restriction upon the "objects" of a provincial company in the sense above mentioned; and moreover—and on this point the effect of the passages cited seems to be unmistakable—that the words "with provincial objects" are merely declaratory of the necessary limits upon the operation of provincial legislation on the subject mentioned which in the absence of them would have been the consequence of the legal principle that corporate status and capacity, in like manner as rights, arising under provincial law, cannot, in jurisdictions beyond the boundaries of the province be legally operative *ex proprio vigore* but only by virtue of recognition, express or implied, accorded by some other political authority or system of law.

It is true that in the *Bonanza Company's Case*(1), it was held that the company whose capacity was there in question was not a company to which the doctrine of *ultra vires* applied. But the language of the passages cited is perfectly general and the principle laid down thereby is broad enough to embrace the case of a company to which the doctrine is applicable. Indeed once the point is reached that the scope of the undertaking (in the sense already mentioned) of a company incorporated under the authority of No. 11 of section 92, is not necessarily limited territorially by virtue of any limitation of legislative authority supposed to reside in the phrase "with provincial objects," it manifestly results that, as regards statutory corporations affected by the doctrine of *ultra vires*, the scope of corporate capacity must be determined by reference to the language 1st, of the statute, and then, if the statute be a general one, of the instrument defining the powers of the particular company under consideration.

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

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Nor does there appear to be any good reason why in interpreting a provincial statute providing machinery for the incorporation of companies generally, or a special statute incorporating a company and defining its constitution, or a memorandum of association taking effect under the authority of a general statute, general words defining the constitution of a particular company and prescribing the scope of its activities, or general words defining corporate capacity, should be read as subject to some stringent canon of construction supposed to have its logical and legal foundation in the fact that the statute is a provincial statute, or that the instrument derives its legal effect from the authority of a provincial statute.

With great respect for the learned trial judge, who seems to have taken the opposite view, I know of no legal principle—and here we come to the second branch of the argument I am considering—and no consideration of convenience, derived from business practice, requiring the court to read the language of such a statute or instrument defining the scope of the company's activities as *primâ facie* confining those activities within the province, or to read the language defining the capacity and powers of the company as *primâ facie* denuding the company of capacity to acquire rights and status abroad; or as *primâ facie* limiting the application of the rule that whatever may fairly be regarded as incidental to or consequential upon things authorized, ought not, unless a contrary intention appear, to be held by judicial construction to be *ultra vires*. *Attorney General* v. *Great Eastern Ry. Co.*(1).

Coming to the concrete case before us I cannot agree with the view that there is anything in the

(1) 5 App. Cas. 473.

Saskatchewan Statute to support the inference that companies incorporated under it are to be limited in their business activities to the territory of the province; and I cannot agree that the unqualified language of the memorandum of the respondent company can be read as subject to some qualification arising from the fact that the company is incorporated in Saskatchewan and has its head office there. Further, had the memorandum, in otherwise unqualified words, authorized dealings in Saskatchewan lands only, I should not have deduced from the two circumstances mentioned alone, a presumption confining within the province the operations of the company either in making contracts of purchase or in making contracts of sale, or indeed in establishing agencies for sale. I do not think there is any solid basis for such a presumption

In this view the Ontario statute (R.S.O. 1914, ch. 179, secs. 7 and 16) admittedly presents no difficulty.

The provisions of section 16 shew plainly enough that the policy of this licensing enactment is primarily in its object and effect a revenue enactment; and sub-section 2 of the last mentioned section explicitly provides that a license granted during the progress of an action is sufficient to support the right of action.

As regards the "Saskatchewan Act" of 1917 (ch. 34, sec. 42) I should only like to say that I pass no opinion upon the question whether the law of Ontario in recognizing a foreign corporation as a juristic person, takes account (for the purpose of determining the capacity of such a corporation) of the enactments of a retroactive statute conclusively binding upon the courts of the jurisdiction where the corporation had its origin and has its principal place of residence.

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The point is an important one and can more conveniently be considered when a case arises in which it is necessary to pass upon it.

The appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals from the judgment of a divisional court of the Supreme Court of Ontario(1), reversing the decision of Masten J. who dismissed the action(2), and directing specific performance of a contract for the purchase of land in Saskatchewan, and payment of the purchase price with interest amounting in all to $6030.35. The facts are fully stated by Mr. Justice Masten.

The execution of the agreement for purchase was not contested. The plaintiff company was incorporated under the "Saskatchewan Companies Act," 1909, sec. 72, pt. 1, by a memorandum of association duly subscribed and registered, in which its objects are declared to be

to carry on real estate, loan and general brokerage business.

The following questions were in issue in the action:

(1) Was the contract procured by misrepresentations which made it voidable by the defendant?

(2) Was the contract made in Saskatchewan, or was it made in Ontario, or in the course of carrying on business by the plaintiff company in Ontario?

(3) If made in Ontario, or in the course of carrying on business there, was it invalid?

(a) because the Legislature of Saskatchewan lacked power to endow a body corporate created by it or under its authority with the subjective capacity to avail itself outside the province of powers, rights or privileges, similar to those enjoyed by it in Saskatch-

(1) 45 Ont. L.R. 176. (2) 43 Ont. L.R. 451.

ewan, of which any other province or foreign state should by comity permit the exercise within its territory;

(b) because, if the Saskatchewan Legislature possessed that power, it was not exercised in favour of the plaintiff company; or

(c) because at the time of the execution of the contract the plaintiff company did not hold a license under the "Ontario Extra-Provincial Corporations Act" R.S.O. ch. 179?

(4) Did the want of such license at the date of instituting the action render it unmaintainable although a license was procured before the trial?

(1) The learned trial judge was of the opinion that the defence based on misrepresentation wholly failed. His view was affirmed by the Appellate Division and that defence has not been made a ground of appeal to this court.

(2) After stating the facts at some length, the learned trial judge expressed his views on this aspect of the case in these words —

> The agreement sued on is dated October 15th, 1912. The only agreement made between these parties was the agreement which was negotiated on that date at Jordan, Ontario, between Gayman, Bowman and Griffin, agents of the company, of the one part and the defendant of the other part. The company subsequently treated what took place on October 15th, not as an offer but as an existing agreement which the company then ratified as of the 15th of October and confirmed and evidenced by executing under its corporate seal a formal written agreement bearing date October 15th.
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> * * * * * *
>
> In the present case it seems to me that the question is whether the sale in question is essentially bottomed on acts of the plaintiff company done outside the territorial limits of Saskatchewan.
>
> When the plaintiff company appointed Gayman, a resident of Ontario, to be its permanent representative and agent in St. Catharines, and when he, along with the President and Secretary of the company, approached the defendant at his residence in Ontario, sold him the lands in question, made the agreement of which Exhibit 1 afterwards became the written record and at the same time received from

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him, as part of the purchase price, the promissory note payable in Ontario, and when Gayman at St. Catharines afterwards received from the defendants payments on account of the price and renewals of the note, the plaintiff company was, I think, carrying on in Ontario essential parts of the transaction in question and was assuming to exercise powers and acquire rights outside of Saskatchewan.

In so far as the question is one of fact I so find on the evidence.

The view taken in the Appellate Division was that notwithstanding the negotiations conducted and the resultant verbal agreement made in Ontario, accompanied by part payment of the purchase money by the giving of a promissory note, and the execution there at a later date by the defendant of the formal instrument now sued upon, because of its execution by the plaintiff company subsequently in Saskatchewan, whereby it became a concluded agreement, it must be regarded as a contract made in Saskatchewan. Hodgins J.A. expressed this opinion perhaps more pointedly than the learned Chief Justice of Ontario, with whom the other members of the court concurred.

I am with great respect not quite prepared to accept without some qualifications the reasoning on which this conclusion has been based. It is the purchaser who is sued. Whatever answer the Statute of Frauds might have afforded him had he not signed the formal instrument, upon his signature being affixed to it a memorandum sufficient to meet the requirements of that Act existed and the verbal contract made at Jordan, Ontario, if otherwise valid, would have been enforceable against him. But, apart from that view of the matter the execution of the agreement in Saskatchewan by the company was merely the carrying to completion of the oral bargain made and already in part performed in Ontario. Yet, assuming that all that had transpired there was void, because *ultra vires* of the company, and that while matters remained in that position the defendant would

have had an unanswerable defence, what had been so done was not illegal and as such incapable of being made the basis of an agreement binding on the parties. There was nothing to preclude the company by a valid contract made in Saskatchewan from selling its land to a non-resident of the province—nothing to prevent it accepting in Saskatchewan an offer from such a non-resident though obtained in and transmitted from another province, even if the company's power and capacity were as restricted as the defendant contends. If all that had been done up to the time he executed the formal agreement was ineffectual because *ultra vires* of the company, the defendant, if aware that he was dealing with a provincial corporation, might be presumed to have been cognizant of the constitutional limitations upon its powers and of the legal consequences which lack of capacity on its part would entail. But, even without the aid of that presumption I would incline to accede to the view that the document signed by him and forwarded with his knowledge for execution by the company, if everything which preceded it were void, might be regarded as an offer to purchase then made by him to the company which was subsequently accepted by the latter in Saskatchewan and thereby became a valid contract binding upon it. Apart, therefore, from some considerations arising out of the phraseology of the "Extra-Provincial Corporations Act" of Ontario presently to be noticed, I would be disposed to agree in the conclusion of the learned Chief Justice of Ontario that, assuming the restrictions upon the corporate capacity of the plaintiff company asserted by the defendant, the contract eventually executed by it should not be regarded as open to the objection to its validity on which he relies.

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3 (a) But if that view of the case should be wrong and in order to guard against being taken to hold the opinion expressed by Masten J., in which Hodgins J.A. expressly concurs, that it is beyond the legislative jurisdiction of a provincial legislature to incorporate a company with capacity to carry on in another province or state, by virtue of its sanction express or tacit, business within the objects of its incorporation and not otherwise open to exception, I desire to state that on this aspect of the case I adhere to the opinion which I expressed in the *Companies' Reference*(1), and in the *Bonanza Case*(2), and I find that opinion upheld by the judgment of the Judicial Committee on the appeal in the latter case(3). I venture to quote the following passages from what I said in the Companies' Case:—

> If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred upon it by the law of the incorporating state, it would in my opinion be difficult to sustain them, inasmuch as the law of no country can have effect as law beyond the territory of the Sovereign by whom it was imposed. But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin, but upon the express or tacit sanction of the state or province in which such powers are exercised and the absence of any prohibition on the part of the legislature which created it against its taking advantage of international comity. All that a company, incorporated without territorial restriction upon the exercise of its powers, carries abroad is its entity or corporate existence in the state of its origin coupled with a quasi-negative or passive capacity to accept the authorization of foreign states to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign state only by virtue of the recognition of it by that state. It has no right whatever in a foreign state except such as that state confers.
>
> * * * * * *
>
> The provincial company is a domestic company and exercises its powers as of right only within the territory of the province which creates it. Elsewhere in Canada, as abroad, it is a foreign company and it

(1) 48 Can. S.C.R. 331; 15 D.L.R. 332.
(2) 50 Can. S.C.R. 534; 21 D.L.R. 123.
(3) [1916] 1 A.C. 566; 26 D.L.R. 273.

depends for the exercise of its charter powers upon the sanction accorded by the comity of the province in which it seeks to operate, which, although perhaps not the same thing as international comity, is closely akin to it.

In delivering the judgment of the Judicial Committee in the *Bonanza Case*(1) Lord Haldane said:—

The whole matter may be put thus: The limitations of the legislative powers of a province expressed in section 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the *actual* powers and rights which the provincial government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another.

* * * * * *

Where, under legislation resembling that of the "British Companies Act" by a Province of Canada in the exercise of powers which section 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the "British Companies Act," the principle laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(2), of course, applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore excluded, incorporation for such a purpose.

Note the contrast between the form of the clause dealing with the memorandum and that of the clause dealing with the statute. The antithesis is so significant that it is impossible that it was not intentional.

Assuming, however, that provincial legislation has purported to authorize a memorandum of association *permitting operations outside the province* if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under section 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But *their Lordships are of opinion that this interpretation was too narrow.* The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity

(1) [1916] A.C. 566; 26 D.L.R. 273. (2) L.R. 7 H.L. 653.

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analogous to that of a natural person. *Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity.* What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects *outside the province,* while leaving untouched the ability of the corporation, if otherwise adequately called into existence, *to accept such powers and rights, if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.*

On this branch of the case, therefore, I find myself unable to agree with the views expressed by Masten J. and Hodgins J.A. Meredith C.J.O. expressly reserved his opinion on the scope of provincial legislative jurisdiction in regard to the incorporation of companies.

(b) This question presents more difficulty. It was because he thought that whatever power the province possessed to confer the extra-territorial capacity under consideration had not been exercised in favour of the plaintiff company that Meredith C.J O., with the concurrence of three of his colleagues, was of the opinion that

> the appellant company by its incorporation acquired no capacity to carry on its business beyond the limits of Saskatchewan.

The purview and scope of the power and capacity of the plaintiff company depend entirely upon the combined effect of the statute under which it was incorporated and the terms of its memorandum of association. Not having been incorporated by letters-patent, as was the Bonanza Creek Mining Company, it cannot, in order to supplement the powers and capacity derived from its purely statutory incorporation, invoke the prerogative power (if it be vested in the Lieutenant Governor of Saskatchewan) to the exercise of which their Lordships of the Judicial Committee saw fit to impute the possession by the Bonanza Creek Mining Company of the powers and

capacity, similar to those of a natural person, appertaining to a common law corporation. Since the plaintiff company depends for its existence entirely upon the statute subject to the question of constitutional limitation upon the provincial legislative jurisdiction already dealt with, the problem presented on this branch of the case is to ascertain whether upon the fair intendment of the statute and the memorandum of association it should be deemed to have had conferred upon it the capacity to take advantage of the comity of other provinces and states to enable it to exercise its powers within their jurisdiction It cannot derive that capacity from any other source As pointed out by Lord Haldane in the *Bonanza Case*(1), at page 578 —

> The question is merely one of the interpretation of the words used.

The principle of *Ashbury Carriage Co.* v. *Riche*(2), applies. That principle, as stated by his Lordship,

> amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning whatever that may be.

His Lordship adds:—

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

In the passage already quoted referring to a provincial company incorporated by means of a memorandum of association under legislation resembling that of the "British Companies Act" his Lordship, applying the principle laid down in the *Riche Case*(2), said:—

(1) [1916] A.C. 566; 26 D.L.R. 273. (2) L.R. 7 H.L. 653.

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The capacity of such a company may be limited to capacity within the province either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the province or because the statute under which incorporation took place did not authorize and therefore excluded incorporation for such a purpose.

While at first blush this language might seem to import that the subjective capacity now in question must be conferred in explicit terms, his Lordship nowhere says so, and I cannot think he meant that in a statute providing for the incorporation of companies general terms may never be given a broad construction of which they are susceptible in order to carry out what should, having regard to all the circumstances and the context of the Act, be considered as having been the intent of the legislature in passing it, but must always be read in the most restricted sense however unreasonable, inconvenient or even mischievous the result. The doctrine of reasonable intendment; *Boon* v. *Howard*(1); *The Duke of Buccleuch*(2), at page 96; *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners*(3), at page 702; *Llewellyn* v. *Vale of Glamorgan Rly Co.*(4), at page 478; *Reid* v. *Reid*(5), at page 407; in my opinion applies to such a statute just as it does to others.

In the "Saskatchewan Companies Act" I find at least two provisions which afford, I think, sufficient indication that the legislature meant that companies incorporated under it

> for any lawful purpose to which the authority of the Legislature extends (section 5)

without any restrictive provision, express or implied, in the memorandum of association should possess, to use Lord Haldane's terms, all the "actual powers

(1) L.R. 9 C.P. 277.
(2) 15 P.D. 86.
(3) 7 App. Cas. 694.
(4) [1898] 1 Q.B. 473.
(5) 31 Ch. D. 402.

and rights" which it could bestow and also the fullest "capacity" which it could confer

to accept extra-provincial powers and rights.

By section 17 the "Saskatchewan Companies Act" of 1909 provides that every body incorporated under that Act shall be

capable of exercising all the functions of an incorporated company

and by section 4 it is enacted that

No company association or partnership consisting of more than twenty persons shall hereafter be formed for the purpose of carrying on any business to which the authority of the Legislature extends that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof unless it is registered as a company under this Act or is formed in pursuance of some other Act of the Legislature.

The creation in Saskatchewan by charter of a common law corporation having more than twenty shareholders is probably precluded by this latter section. There appears to be no other general Act of the Saskatchewan Legislature providing for the incorporation of companies, and no provision for the registration of domestic companies created otherwise than under statutory authority. It would seem therefore that, unless by a special Act, a corporation with more than twenty shareholders having the capacity to avail itself of international comity cannot be brought into existence in that province if it may not be done under the "Companies Act." Compare secs. 18 and 4 of the "Companies Act," 1862, ch 89 (Imp.) and secs. 16(2) and 1(2) of the "Companies (Con.) Act" of 1908, ch. 69 (Imp.); and compare also secs. 95 and 97 of the "Saskatchewan Companies Act" of 1909 with sec. 37 of the "Companies Act" of 1867, ch. 131 (Imp.) and sec. 76 of the "Companies (Con) Act" of 1908. (Imp.)

I think it is abundantly clear that the legislature of Saskatchewan intended to confer upon companies

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to be incorporated under the "Companies Act" of 1909, whose memoranda of association contain no restrictions thereon, the fullest powers, rights and capacity for the attainment of their objects which its legislative jurisdiction empowered it to bestow and which may be requisite or useful to enable it to exercise "all the functions of an incorporated body" for that purpose. It must not be understood, however, that my reference to the provisions of sections 4 and 17 implies that had they been omitted the general terms in which the "Saskatchewan Companies Act" provides for incorporation would not have sufficed to vest in corporations formed under it the capacity we are considering.

There is nothing in the memorandum of association of the plaintiff company which—to quote Lord Haldane again

> has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries.

Its declared objects do not import activities confined to any limited area.

We are not now dealing with a question which affects only provincial corporations. The same problem is presented in the case of every company which has been incorporated by memorandum of association under the "English Companies Acts" in general terms for objects not of such a nature as to imply an intention that the exercise of its powers should be restricted to the United Kingdom and without any such restriction being expressed, but also without any explicit provision that it may carry on its business abroad or may avail itself of the comity of foreign nations or of the self-governing overseas Dominions of the Empire. I am satisfied that thousands upon thousands of contracts have been made by and on behalf of

such corporations outside the United Kingdom in the course of carrying out the objects of their incorporation and that it would surprise and shock its directors and legal advisers if the power of an English company so constituted to make such contracts were called in question and they were told that under the doctrine of *Ashbury Carriage Co.* v. *Riche*(1), its activities must be strictly confined to the United Kingdom. Yet that would seem to be the effect of the Bonanza judgment as interpreted by the learned trial judge and the learned judges of the Appellate Division.

The "English Companies Acts" of 1862 and 1908 nowhere provide expressly that corporations formed under them shall possess, or may acquire, the capacity to accept powers and rights abroad. Section 55 of the Act of 1862 (section 78 of the "Companies (Consolidated) Act" of 1908) providing for foreign attorneys, and the recital and sections 2, 3 and 6 of the "Companies Seals Act" of 1864, (chapter 19) (section 79 of the "Companies (Con.) Act" of 1908), providing for foreign seals, appear to assume that such a capacity might be acquired under the Act of 1862. It is not without significance that it was thought necessary explicitly to restrict the possession of the powers conferred by the Act of 1864 to companies expressly authorized to exercise them by their articles of association. The English sections referred to have no counterpart in the "Saskatchewan Companies Act," 1909.

While it may be said that the presence of these provisions in the English statute, at all events since 1864, made the intention to enable the companies incorporated under it to acquire the capacity under consideration clearer than it is in the case of the

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

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Saskatchewan statute, the difference is merely one of degree. In neither case is there explicit language conferring the capacity. In both its existence depends on the doctrine of reasonable intendment. Does the language of the statute fairly interpreted sufficiently indicate that the legislature meant to provide for the enjoyment of this capacity by the companies to be formed under its authority?

No doubt the plaintiff company, as a statutory corporation, would not have the powers and capacity of a natural person unless conferred upon it by the statute. That is the doctrine of *Ashbury Co.* v. *Riche* (1). But it has nowhere been determined, so far as I am aware—and certainly not in the *Bonanza Case*(2) that in the absence of express language purporting to confer upon it capacity to avail itself of the comity of nations a corporation, formed under a statute, which by reasonable intendment should be taken as having been designed to vest in the bodies corporate created, without restriction, under its authority all the powers and rights and the fullest capacity which the legislature had jurisdiction to bestow, and having objects which imply no territorial restriction and powers set forth in the most general terms, is by English law unable to avail itself of the comity of other nations or dominions and is therefore obliged to confine its activities within the territorial limits of the jurisdiction of the legislature to which it owes its existence.

I am for these reasons of the opinion that the power which the Legislature of Saskatchewan possessed to endow corporations created by it with capacity to exist and to carry on outside the limits of the Province of Saskatchewan business within the objects of its incorporation sanctioned by the country where

(1) L.R. 7 H.L. 653. (2) [1916] 1 A.C. 566; 26 D.L.R. 273.

it is transacted has been exercised in favour of the plaintiff company.

I entirely agree with the learned judges of the provincial courts that the plaintiff can derive no assistance from the Saskatchewan declaratory statute of 1917. If the contract in question had been *ultra vires* of the plaintiff company when entered into such *ex post facto* legislation could not render it enforceable in courts not subject to the jurisdiction of the legislature of Saskatchewan.

Ontario, as Mr. Justice Masten points out, has always recognized

> the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation and not prohibited by its charter and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burdens imposed by the laws enforced therein.

Canadian Pacific Rly. Co. v. *Western Union Telegraph Co.*(1), at page 155.

Howe Machine Co. v. *Walker*(2), cited by the learned judge is a comparatively early instance of the affirmation of that right, and, as he adds,

> so far as I am aware it has ever since been maintained without question.

It follows that, unless prohibited or rendered void by Ontario legislation, the contract sued upon, even if made in Ontario, being admittedly for the attainment of one of the provincial objects of the plaintiff company, was not *ultra vires* and is enforceable in the Ontario Courts.

(c) The only legislation of Ontario on which the appellant relies is the "Extra-Provincial Corporations Act" (R.S.O. ch. 179). The plaintiff company admittedly did not hold the license required by section 7 of that statute when the contract in question was made,

(1) 17 Can. S.C.R. 151. (2) 35 U.C.Q.B. 37

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nor indeed until after this action was begun. Was the contract therefore void and unenforceable in the Ontario Courts? It was undoubtedly negotiated in Ontario and was executed there by the defendent, whose liability upon it it was sought to enforce, and was not an isolated transaction. It was, in my opinion, clearly a contract, within the purview of section 16 (1) of the "Extra-Provincial Corporations Act,"

> made * * in part within Ontario and in the course of or in connection with business carried on contrary to the provisions of said section 7

of that statute, i.e., by or on behalf of an Extra-provincial corporation not then licensed (see section 7, sub-section 2). The Ontario statute however, does not declare such a contract void. On the contrary, it merely deprives the offending extra-provincial corporation of the right

> of maintaining any action or other proceeding in any court in respect of any such contract so long as it remains unlicensed

and upon the granting of a license puts its right of resort to the Ontario courts in the same position

> as if such license had been granted * * * before the institution

of the action or proceeding.

It is the prosecution of "such action or other proceeding"; i.e.

> an action or other proceeding * * in respect of any contract made wholly or in part within Ontario in the course of or in connection with bsuiness carried on contrary to the provisions of said section 7

that section 16(2) expressly authorizes. That provision is utterly repugnant to the idea that the statute was intended to render such contracts void. The "Extra-Provincial Corporations Act" of Ontario does not affect the validity of the contract.

(4) The statute in explicit terms provides by sub-section 2 of section 16 that upon the granting of

the license a pending action upon a contract made contrary to the provisions of section 7

may be prosecuted as if such license had been granted * * before the institution thereof.

I am, for the foregoing reasons, of the opinion that the contract sued upon was not *ultra vires* of the plaintiff company and is enforceable in the courts of Ontario and that the judgment for its specific performance should be upheld.

I would dismiss the appeal with costs.

BRODEUR J.—A company duly incorporated in a province becomes an artificial person authorized by its charter and with the capacity of carrying on its business in all the parts of the world where by the comity of nations such business is not repugnant or prejudicial to the policy or to the interests of the local authority.

Supposing that in this case the respondent company had been selling in Ontario lands situate in Saskatchewan (a fact which is denied by the respondent) it was certainly within the limits of its authority and there was nothing in the Ontario laws which would prevent a company incorporated by another province from doing business so long as it would pay for the licences imposed upon it.

The facts disclosed in the evidence do not shew that the contract in question was made in violation of the powers conferred by its charter and by the comity of nations on the respondent company.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ingersoll & Kingstone.*
Solicitors for the respondent: *Payne & Bissett.*