A. S. MATTHEW (DEFENDANT).....APPELLANT;

AND

GUARDIAN ASSURANCE COMPANY (PLAINTIFF).....RESPONDENT.

1918
*Oct. 29, 30
Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Constitutional law—Statute—Retrospective legislation—Insurance—Fire—Dominion and provincial licenses—Action against agent—"Dominion Insurance Act," 7 & 8 Geo. V. c. 29, ss. 4, 6, 11—"British Columbia Fire Insurance Act," R.S.B.C. c. 113, ss. 4, 6, 7, 10, 11.

The appellant, being appointed to act as attorney of the Guardian Fire Insurance Company of Utah in the event of its obtaining a licence under the "British Columbia Fire Insurance Act," made application to the provincial authorities for such licence. The respondent took proceedings, by way of injunction, to restrain him from doing so, and his action was dismissed. Between the date of the trial and the hearing in appeal, the "Dominion Insurance Act" was amended by 7 & 8 Geo. V. c. 29, and sections 4 and 11 provided that a foreign insurance company could not carry on its business in Canada unless and until it has obtained a licence from the Minister of Finance for the Dominion of Canada.

Held, that the Court of Appeal should have taken judicial notice of the amendments to the "Dominion Insurance Act;" and, if so, the Guardian Fire Insurance Company of Utah not being able through the issuing of a provincial licence to transact any business in British Columbia before having obtained a Dominion licence, the proceedings by way of injunction taken by the respondent were premature. *Boulevard Heights* v. *Veilleux* (52 Can. S.C.R. 185; 26 D.L.R. 333), distinguished.

Per Idington, Anglin and Cassels JJ.—An application for injunction should not be entertained against the agent of an insurance company to restrain him from applying for the issuance of a license to the company, without the latter being made a party to the proceedings.

Per Davies C.J. and Brodeur J.—The absence of the principal as a party to this action, though not absolutely fatal, must necessarily lessen and narrow the measure of relief to which the respondent claims to be entitled.

Judgment of the Court of Appeal (40 D.L.R. 455; [1918] 2 W.W.R. 405), reversed.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial, and maintaining the plaintiff's action.

The circumstances of the case are stated in the head-note and the questions in issue on the appeal are referred to in the judgments now reported.

Geo. F. Henderson K.C. and *Cameron* for the appellant.

Lafleur K.C. and *Atwater K.C.* for the respondent.

THE CHIEF JUSTICE—As to the point taken by my brother, Sir Walter Cassels, on the argument that the Guardian Fire Insurance Company of Salt Lake City, Utah, the real defendant in this case, was a necessary party to the action brought to restrain its agent Matthew, the appellant, from applying to the Superintendent of Insurance in British Columbia for a provincial licence to that company to do business in that province, I am not at present ready to pronounce the objection a fatal one. I agree that the company is a proper party to be joined as defendant, and I think the court of the province would have been well advised not to proceed in the hearing of the cause unless and until it had been added as a defendant.

But, as a matter of fact, Matthew, its general agent in British Columbia, made the application to the Superintendent of Insurance as the authorized agent of the company in that behalf and while the absence of the company may not be absolutely fatal, it must necessarily lessen and narrow the measure of relief to which the plaintiff company claims to be entitled.

The main and substantial question before us is the meaning and effect of the "Dominion Insurance Act,"

(1) 40 D.L.R. 455; [1918] 2 W.W.R. 405, *sub. nom. Guardian Assur. Co.* v. *Garrett.*

1917, which came into force 20th September, 1917. The appeal from the trial judge to the Court of Appeal of British Columbia was argued November, 1917, and the Act was therefore in force at that time.

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It should, in my judgment, have been taken judicial notice of by the Court of Appeal and, if it had been, it would have appeared, which was common ground on the argument at bar, that no foreign insurance company can carry on its activities in the business it is authorised to deal in anywhere in Canada unless and until it first obtains the licence from the Dominion Minister provided for in section 4 of the statute.

The obtaining of a provincial licence such as that applied for in British Columbia by the appellant, Matthew, to the Superintendent of Insurance in British Columbia would not operate to permit of the company carrying on any of its activities in that province. It would not affect the prohibitions prescribed in section 11 of the Dominion Act against the company doing any kind of insurance business unless and until it has first obtained a Dominion licence. The provincial licence was, therefore, useless, innocuous and impotent in itself in any way to injure, hurt or damage the plaintiff company.

The result would be that this application was in any event premature. I agree that the official charged with the issuing of provincial licences would be well advised to do so only to companies which had first obtained a Dominion licence. But I do not see anything in either the Dominion or provincial statutes which prevents him granting a provincial licence, useless as it may be, to enable the licencee to carry on any business until after the Dominion licence has been obtained.

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Upon this ground alone I would allow the appeal, but under the circumstances without costs in this court and in the courts below. For fear that in thus allowing the appeal I might mistakenly be supposed to have done so on the merits, I desire to add that nothing could be further from my intention.

The power to determine whether under circumstances and facts as disclosed in this case, or whether in any case such a licence should be granted to any company, is now vested in the Minister of Finance, and neither this court nor any other court, I take it, can interfere with the exercise of his statutory discretion. At the same time I desire not to leave it open to be said that I had in any way, directly or obliquely, reversed or thrown doubt upon the judgment of the Court of Appeal in this case so far as the merits were concerned.

IDINGTON J.—It seems to me there has existed from the outset a fundamental misconception of the actual legal situation in which the respective parties concerned were placed, otherwise I imagine we should have been presented with some other evidence than submitted and argument thereupon helpful to solve, what I venture to look upon as an entirely novel claim.

The appellant happened to be named as attorney, to act for the Guardian Fire Insurance Company, in the event of its obtaining a licence under the "British Columbia Fire Insurance Act" and amending Acts. And I assume he consented in such event to so act and may have taken a part in filing with the provincial authorities part of the necessary material for obtaining such a licence.

Both the respondent and the Guardian Fire Insurance Company in question were foreign corporations.

The respondent was created such in Great Britain, and the other in Utah, one of the United States of America. Neither had any right to do any business in Canada against the will of the Parliament of Canada.

That Parliament, as early as 1868, passed an Insurance Act which prohibited the carrying on of such business in Canada by any foreign companies or persons unless and until duly licensed under said Act, and then subject to the conditions laid down therein.

That Act was amended from time to time and, by an early amendment, required the licence to be renewed from year to year. The respondent had been, under another name, it is said, duly licensed under said Act. That name was changed more than once, and in 1902 took the form now appearing herein. It also had obtained a licence under, and pursuant to, the provisions of the "British Columbia Insurance Act" to do business in British Columbia.

That Act, passed for purposes of revenue and other good reasons, rendered registration there necessary and provided for the issuing of a licence as evidence thereof.

Each insurance company of those concerned saw fit and was possibly required thereby to describe itself as of its place of origin or creation.

So far as appears in this case the Guardian Fire Insurance Company had never applied to the Dominion authorities. Until it had done so and obtained a licence or at least had made an application therefor, I think this action was premature. There was nothing to be feared from the merely preparatory and formal application made in British Columbia.

Whatever might be said for an action such as this had it been taken against the company, I think it cannot properly be maintained as against a mere agent

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doing no more than appellant had done, apparently in good faith and depending, no doubt, upon his principal duly proceeding to obtain, and duly obtaining, a Dominion licence before doing anything in the way of carrying on business.

The respondent had, until that done, presumably nothing to fear. Unfortunately, from the misconception I have adverted to, this objection never seems to have been considered by those concerned until my brother Sir Walter Cassels, on argument, called attention to the failure to make said company a party, and hence we are without argument on the question.

So far as I have been enabled to discover, the nearest approach to an agent in an analogous case being held thus liable to be attacked and enjoined, without his principal being made a party, is the case of those handling goods of a principal who was infringing some trade mark as, for example, in the case of *Upmann* v. *Elkan* (1), and other analogous cases cited in Kerr on Injunctions, 4th ed., pp. 342 *et seq.*

In such like cases the agent was clearly doing that which was in itself illegal and hence responsible in an action for an injunction. Here, presumably, there was nothing of that kind. The purpose certainly was neither, nor pretended to have been, that of proceeding to carry on the business without obtaining a Dominion licence. If another purpose was had in view it ought to have been established by evidence, which is not attempted.

It is true that as early as 1910, before the Utah company was created, sections 4 and 70 of the "Dominion Insurance Act" of 1910 had been called in question as being *ultra vires* the Dominion Parliament

(1) 7 Ch. App. 130.

by reason of the infringement thereby of provincial rights.

In consequence of such question being raised, a case was submitted to this court. That submission, although directed by order-in-council in 1910, was, for some reason or other, not proceeded with to argument until 1912, and not decided here till the following year.

An appeal was taken from the judgment of this court (1), to the Judicial Committee of the Privy Council, which was argued in December, 1915, and judgment given there in the following February (2).

I hardly think any one ever supposed that if the said section had been framed to deal only with foreign corporations, that there could be a question of the power of the Dominion Parliament in that regard.

For my part I felt bound to so limit the effect of my answer to the second question submitted, as to avoid all appearance of questioning that power so far as regards the foreign insurance companies.

The Judicial Committee, in giving an affirmative answer, seemed to feel bound to express clearly its opinion that as regards foreign corporations the Dominion Parliament had the power if expressed in "properly framed legislation."

If it, in fact, was ever supposed by respondent to have been part of the purpose of the Guardian Fire Insurance Company, created in Utah, pending this litigation, to deny the power of the Dominion Parliament and insist upon a right to operate in British Columbia by virtue only of a licence under the "British Columbia Insurance Act," I think it should have so alleged and proved such an allegation.

(1) 48 Can. S.C.R. 260; 15 D.L.R. 251.

(2) [1916] 1 A.C. 588; 26 D.L.R. 288.

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The surmise comes too late after it has obtained an injunction by the court below recognising the unquestioned validity of the Act of 1917, which contained in other respects identical provisions I am about to deal with.

In other words, when the appeal seeking for an injunction was argued, and the injunction now in question was granted by the court below, there was no longer, if ever, the slightest reason to seek for such relief.

That brings me to a consideration of the situation presented by the application of section 6 of the "Dominion Insurance Act," 1910, and its repetition in the Act of 1917, which enacts as follows:—

> 6. Before issuing a licence to a company the Minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable,

which had been brought into and remained part of the Act since 1894.

It may be arguable, as I suggested on the argument herein, that the whole situation of the legal relation of the parties concerned is not and cannot be affected by anything contained therein. And hence it may be further arguable that an agent or clerk of any kind can be attacked alone and restrained upon the basis of what we might hold to be the right interpretation and construction of this section.

Even assuming that such a claim might be arguable as against appellant's principal, I cannot see how such a case can be maintainable against the agent alone.

The appellant, it is true, has, by his pleading and his conduct of the defence, gone beyond that, but his foolishly doing so cannot determine the actual legal rights and liabilities existent between such parties and

bind us to hold that the granting or withholding of an injunction must be governed thereby.

The offence to be considered, and for repetition or continuation of which he is sought to be enjoined, is not that of pleading such a defence but an alleged offence anterior thereto.

I might rest my opinion here, but the claim, even if to be considered in light of the possible presence of the principal, is one of such a remarkable character that I feel it desirable to point out briefly the actual situation and need of pausing before, in such a case as is presented, laying down as law, in the absence of the Minister and without having his ruling, that he must not entertain for a moment the consideration of such an application.

And when we find that in Canada there actually are carrying on business no less than three or four different sets (and possibly many more) of foreign insurance companies possessing such similar names as "The Phœnix of London, England;" "The Phœnix of Hartford, Connecticut;" "The Phœnix of Paris," and, it is said, "The Phœnix of Brooklyn," we should I submit, infer that such a condition of things is the result of a considered and settled policy in the administration of the Act.

Indeed there is the case amongst others of the Guardians (one of which is a branch of that at Utah) competing with respondent in the accident line of insurance, from which it is fairly inferable that the respondent company or its parent company had for many years assented to such an interpretation and construction of the section as being correct.

Confronted with such a situation it seems to require some boldness on the part of respondent, well knowing all, to ask us to declare it all done illegally and in

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violation of the section I have just quoted. For my part I cannot assent to the creation of such inevitable confusion as would result from our so declaring in a case launched, as this has been, and steered, as far as possible, clear of an investigation of the actual facts.

We are asked to do that on the strength of a decision in which, as I read the case, there was ample ground for suspecting unfair dealing and a conscious purpose of doing wrong.

True, the court put it on another ground—as many of its kind were politely put when in fact reading between the lines there existed grave ground for suspecting intentional wrong-doing or a determination to attempt it.

Case law, however helpful, is often a blind guide to follow. I do not think that line of cases applicable herein or that they should govern the decision of this.

I think we should become possessed of a full realisation, or as full a realisation as we can, of the actual legal and commercial situations respectively, and observe an understanding of what men, even when incorporated, are about, and then ask ourselves if there is in truth that exact resemblance between the respective situations which each of the lines of cases presented, and that which confronted the Minister (or succession of Ministers) asked to administer the law as enacted in the "Dominion Insurance Act."

Let us never forget that the foreign corporation has no rights save in a recognised comity liable to be set aside absolutely or conditionally.

Let us further bear in mind that each of the foreign corporations now in question herein was created in a different country, conformably to the respective laws thereof, without, so far as we can see, any thought of coming into Canada.

And again let us bear in mind that respondent has never attempted to do business in the United States. The incorporation of the Utah company no doubt used what had become an apt word to catch the ear of him desiring to be insured, and could hardly have dreamed of rivalling or invading any property of respondent. Moreover, the literature used by it in business does not suggest such a purpose, but the contrary purpose of avoiding the possible evil complained of.

It seems to me that the presentation of each of such foreign companies so created and named respectively, of a claim to be licensed in Canada, ought rather to be allowed to stand on the like footing and be considered from the like point of view on which the court (and if I might be permitted to say so a very capable court) proceeded in the case of *Burgess* v. *Burgess* (1), and which was followed by another strong court thirty-six years later in *Turton* v. *Turton* (2).

The measure of prosperity that tempts a corporate creature to wander from its place of birth to do business in foreign lands surely has the like attendant inconveniences facing it when asked to change its name, as the son of his father might have to face in taking over the latter's business, if forced to abandon his name, and the like consideration, I submit, ought to be extended to it.

Indeed, it may be competent for the Minister to deal with such a difficulty in a practical manner as the court did in the case of *The Guardian Fire and Life Assur. Co.* v. *The Guardian & General Ins. Co.* (3).

Moreover, the names here in question are not identical, but if they had been the section in question might be held to constitute an imperative prohibition.

(1) 3 De Gex, M. & G. 896. (2) 42 Ch. D. 128.
(3) 43 L.T. 791.

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In regard to the alternative of either bearing names liable to be confused with others, can either claim a licence?

There is no priority given by reason of seniority or otherwise in the section.

Nor is there anything else in the statute very helpful. These licences only last for a year and are renewable, but

> subject, however, to any qualification or limitation which is considered expedient.

Who is to determine the matter of expediency? Is it not the Minister? Can he not provide in such a case for a mark of distinction that will suffice unless in the case of customers exceptionally stupid or unintelligent?

And the mistake liable to occur from such causes would be reciprocal and the only inconvenience worth a moment's consideration would be from the competition created by adding another insurer, or two others, as one reads the section, to those already on the roll.

That is, of course, the real grievance, but it enures to the benefit of the public.

The monopolistic tendencies of commercial life increase with prosperity and courts as well as legislators should, I submit, be astute to see that when it is the administration of a great Department of State that is in question, as in truth it is herein, the specious and plausible resemblance, of its problems to be solved, to a decided case is not carried too far.

I forbear expressing any decided opinion upon what the section of the statute may mean in several of these features I point out, beyond the decided opinion that no injunction should be granted in entire disregard of its consideration which has been avoided heretofore in the progress of the case.

I have not overlooked the fact that the "Companies Act" in England contains a somewhat analogous section enabling the registrar to refuse in cases of conflict of names, and that courts have passed upon the result. One grave question, however, is that the relative positions of the Minister of Finance here and and Registrar of Companies there, are hardly the same, and in any event the section here in question clearly imposes a duty to discharge, possibly decisively, and the other merely enables, knowing that the court can rectify.

Can the court here rectify? We know the court can advise if asked.

There may be another arguable side of the question of the Minister's power.

It was attempted, unsuccessfully, it is true, in *Steele* v. *North Metropolitan Railway Co.* (1), to enjoin the defendant from petitioning Parliament for relief. In dismissing the application Lord Chelmsford L.C. remarked that judges of great eminence had said the court had power to enjoin an application to Parliament but they had all declined to define the occasion which would justify such interference.

On the other hand, in *The Queen* v. *The Registrar of Friendly Societies* (2), the court, while declining to interfere with the ruling of a registrar, did not seem to doubt such a jurisdiction existed in a proper case. *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (3), was another of similar character not denying power, but only to be exercised in an extreme case. Another shade of opinion, as it were, arising out of a different set of circumstances, it is true, but in relation to the proper exercise of the power of injunction

(1) 2 Ch. 237. (2) L.R. 7 Q.B. 741.
(3) [1898] 2 Ch. 331.

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is there presented, when a specific remedy had been furnished by statute. The judgment of Stirling J. is well worth reading. It seems to furnish food for thought before resorting to an injunction in such a case as this where the Minister seems, impliedly at least, to have been given more power.

Many of the cases cited by Stirling J. in his judgment should be well considered before interference in such a case as this.

Norton v. *Nichols* (1), is one of the cases in which the question of letting plaintiff resort to an action at law instead of granting injunction is dealt with and is valuable as containing, though on an interlocutory motion, the expressions of opinion of eminent equity judges.

I need not continue on the lines of thought I indicate. I am clear the judgment of the learned trial judge should not have been reversed and an injunction granted in light of the clear enactment existing when the judgment appealed from was pronounced.

I think the appeal should be allowed and the judgment of the learned trial judge be restored with costs, but without prejudice to the rights of respondent, if any, as events develop, and if the purpose is continued on the part of the Utah company of applying for a Dominion licence.

At most the result should be no higher than in the cases when application for injunction failed and the plaintiff was relegated to a court of law to claim damages.

ANGLIN J.—For the reasons stated by Mr. Justice Cassels I doubt whether this action is properly con-

(1) 4 K. & J. 475.

stituted in the absence of the Guardian Fire Insurance Company (of Utah). The purpose of the plaintiff is to restrain projected activities of this Utah company in British Columbia. It is, I think, quite clear that the defendant Matthew does not represent it for the purpose of this action. His capacity to sue and be sued on its behalf under the power of attorney in evidence would arise only upon the licence sought being granted. It is for the conduct in matters therein specified, of the affairs of the company when so licensed that the power of attorney is furnished as required by the statute. R.S.B.C. 1911, ch. 113, sec. 10 (*g*). If not a necessary party—as I incline to think it was—the Guardian Fire Insurance Company (of Utah) would certainly have been a proper party; and I think judicial discretion would have been soundly exercised by declining to entertain this action until it had been added as a defendant. Where the injunction sought will injuriously affect the rights of a person or body not before the court it will not ordinarily, and without special circumstances, be granted. *Hartlepool Gas & Water Co.* v. *West Hartlepool Railway Co.* (1). I prefer, however, not to rest a judgment of dismissal of the action on this ground, but rather on another which a little more closely touches the merits of the issue, having regard to the nature of the relief sought —an injunction *quia timet.*

In *Attorney-General* v. *Corporation of Manchester* (2), Chitty J. says:—

> The principle which I think may be properly and safely extracted from the *quia timet* authorities is that the plaintiff must shew a strong case of probability that the apprehended mischief will in fact arise.

Whatever ground the decision of the Judicial Committee (3) (see, however, *Farmer's Mutual Hail*

(1) 12 L.T. 366. (2) [1893] 2 Ch. 87, at p. 92.
(3) [1916] 1 A.C. 588, at p. 597.

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Insurance Association v. *Whittaker* (1),) in regard to the validity of sec. 4 (*et seq.*) of the "Dominion Insurance Act," 1910, ch. 32, may have given the present plaintiff to apprehend injury from the granting of a British Columbia licence to the Utah company, since the enactment of the new "Dominion Insurance Act" of 1917 (ch. 29, ss. 4-11) it seems abundantly clear that the granting of a provincial licence (assuming the legislation providing for it to be within the ambit of provincial legislative jurisdiction as defined in *John Deere Plow Co.* v. *Wharton* (2), would not enable the Utah company to solicit or transact any business in British Columbia until it should obtain a licence from the Dominion authorities. So essential is the Dominion licence that without it the transaction of any business by the company is prohibited (7 & 8 Geo. V. (D.), ch. 29, sec. 11), and upon its being granted the right to a provincial licence or payment of the prescribed fee is indisputable (R.S.B.C. 1911, ch. 113, sec. 7). The granting of the British Columbia licence will, therefore, not entail the mischief to avoid which the desired injunction is sought.

Under these circumstances the British Columbia registrar might be well advised to refrain from granting the provincial licence until the applicant company has obtained its federal licence. Should the latter licence be refused, or should it be granted to the company under a different or modified name, as is not improbable, a British Columbia licence obtained under the present name might be entirely useless. But I know of no ground for holding that applications for both licences may not be made concurrently or that that for the provincial licence may not precede that for the Dominion licence. For aught that appears it was the Utah

(1) 37 D.L.R. 705; [1917] 3 W.W.R. 750.

(2) [1915] A.C. 330; 18 D.L.R. 353.

company's intention to apply for the necessary Domin- Dominion licence before undertaking to carry on business in British Columbia. It may already have done so. The defendant Matthew, in making the application complained of, has not done anything illegal.

The Dominion Act of 1917 was in force when this case was heard by the British Columbia Court of Appeal and should have been taken account of by that court. Since, therefore, in view of that legislation a British Columbia licence, if granted to the Utah company, would be impotent to enable it to transact any business to the prejudice of the plaintiff, I am, with respect, of the opinion that when this action came before the Court of Appeal a case for the granting of the injunction asked did not exist and that it should have been refused. Our statutory duty is to pronounce the judgment which that court should have rendered. *Boulevard Heights* v. *Veilleux* (1). This ground suffices for the disposition of the appeal without considering the other questions dealt with at bar.

I agree with my brother Cassels that the injunction should also be dissolved as to the defendant Garrett, although he did not appeal against it.

BRODEUR J.—I concur in the opinion of the Chief Justice.

CASSELS J.—An appeal from the Court of Appeal of British Columbia. The plaintiff, the Guardian Assurance Company, Limited, commenced this action by writ issued on the 27th March, 1917, and the case came on for trial before Mr. Justice Clement. Judgment was rendered on the 26th June, 1917, dismissing

(1) 52 Can. S.C.R. 185; 26 D.L.R. 333.

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the action with costs to be paid by the plaintiff to the defendant Matthew.

The plaintiff's statement of claim alleges that the plaintiff is a company duly authorised to carry on business in the Dominion of Canada. It alleges that a company called the Guardian Fire Insurance Company, incorporated in Utah, and with power (on obtaining a proper licence) to carry on business in British Columbia, had made application to the defendant Garrett for the issue of a licence under the "British Columbia Fire Insurance Act."

The statement of claim further alleges that the Guardian Fire Insurance Company proposes and intends to carry on the business of fire insurance in the Province of British Columbia under the name of the Guardian Fire Insurance Company.

The statement of claim asks for an injunction to restrain the defendant Matthew, the agent of the Utah company, from making any application for the licensing of the Utah company and to restrain the defendant Garrett from issuing any licence.

The Utah company, namely, the Guardian Fire Insurance Company, were not made defendants to the action.

It will be noticed that there is no allegation in the statement of claim that the defendant Garrett intended to issue such a licence as had been applied for. The defendant Garrett filed no defence to the action.

A mass of evidence was adduced at the trial, a considerable portion of which was inadmissible if the decisions of the House of Lords in trade-mark cases are assumed to be binding upon our courts. For reasons which I give hereafter I do not see that the action could have been properly tried in the absence of the parties who were interested. The

action having been dismissed, and, as I think, rightly dismissed by the trial judge, the question does not become one of very great moment were it not for the decision of the Court of Appeal now before this court.

The appeal before the Court of Appeal of British Columbia (1), was heard on the 16th and 19th days of November, 1917, and the order of the Court of Appeal bears date the 2nd April, 1918. The formal judgment of the 2nd April, 1918, is beyond what was evidently contemplated by the learned judges. It provides as follows:—

> And this court doth further order and adjudge that the respondent Matthew be, and he is, hereby perpetually restrained from applying to the Superintendent of Insurance of the Province of British Columbia, and the respondent the Superintendent of Insurance be, and he is, hereby perpetually restrained from granting any application for the licensing under the "British Columbia Fire Insurance Act" of any company under the name of the Guardian Insurance Company or any other name likely to mislead or deceive the public into the belief that the company being licensed as aforesaid is the same as the Guardian Assurance Company, Limited.

This seems to me to be rather a sweeping injunction if the judgment were otherwise correct. It not merely restrains the Superintendent of Insurance from granting a licence to the Utah company, the company whose agent the defendant Matthew is, and a company as I have mentioned not a party to the action unless the action against Matthew, the agent, means an action against them, but it restrains the issuing of a licence to any other company that may apply whether the Utah company or not.

The defendant Garrett did not appear on the appeal and the judgment of the Court of Appeal orders and adjudges that the appellant's costs of the said action and of this appeal be taxed and paid by the respondent Matthew.

(1) 40 D.L.R. 455; [1918] 2 W.W.R. 405.

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The statute of British Columbia, the one in question, is ch. 113, of the Revised Statutes of British Columbia, 1911. It provides by section 4 as follows:—

No company shall undertake or solicit, or agree or offer to undertake, any contract within the intent of section 2 of this Act, whether the contract be original or renewed, or accept or agree or negotiate for any premium or other consideration for the contract, or prosecute or maintain any action or proceeding in resepct of the contract, except such actions or proceedings as arise in winding up the affairs of the company, without in each such case having first obtained from the Superintendent and holding a licence under this Act.

Section 6 provides as follows:—

6. So soon as a company applying for a licence has deposited with the Superintendent the security hereinafter mentioned, and has otherwise conformed to the requirements of this Act, the Superintendent may issue the licence.

By section 10 it is provided that

Before the issue of a licence to a company other than a provincial company, such company shall file in the office of the Superintendent.

certain documents which are set out.

Sub-section (*d*) provides for filing:—

Notice of the place where the head office without the province is situate.

Sub-section (*g*) provides:—

A duly executed power of attorney under its common seal, empowering some person therein named and residing in the city or place where the head office of the company in the province is situate, verified in manner satisfactory to the Superintendent, to act as its attorney and to sue and be sued, plead or be impleaded, in any court, and generally on behalf of such company, and within the province, to accept service of process and to receive all lawful notices, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney; provided that whenever the company has by power of attorney under the seal of the company appointed a general agent for Canada, and has thereby authorised such general agent to appoint other agents in the various provinces of Canada, then, after filing with the Superintendent a copy of said power duly certified by a notary public to be a true copy thereof, other powers of attorney executed by the said general agent for Canada, under his seal, in the presence of a witness, verified in manner satisfactory to the Superintendent, shall be deemed sufficiently executed by the company for all the purposes of this Act.

Section 11 of the Act is as follows:—

11. Such power of attorney shall declare at what place in the province the chief agency, head office, or office of the attorney of the company is or is to be established, and shall expressly authorise the attorney to receive service of process in all actions, suits and proceedings against the company in the province in respect of any liabilities incurred by the company therein; and shall declare that service of process for or in respect of such liabilities thereat, or on the attorney, or any adult person in the employ of the company at the said office, shall be legal and binding on the company to all intents and purposes whatsoever.

I do not think that, on the proper construction of this statute, it was sufficient to have made the defendant Matthew the sole party. He is constituted the agent of the company for the purposes set out in the Act, but that does not, to my mind, get rid of the necessity in an action of this nature of having the company before the court.

It has been argued that an injunction may be applied for against an agent of the company, and for this proposition, Kerr on Injunctions (5th ed., p. 377), and the case of *Upmann* v. *Elkan* (1), are cited. This case was an action based upon a trade mark, and against a fraudulent mark on cigars, viz., the trade mark of the plaintiff, a resident of Cuba. Even in that case it will be noticed that the consignees to whom the cigars were consigned were, on their names being disclosed, added as parties to the action.

In Bowstead's Laws of Agency (5th ed., pages 445 & 446) will be found a number of cases, the nearest of which is the case of *Nireaha Tamaki* v. *Baker* (2), but in that case it is expressly stated that the defendant was not the agent for the Crown.

In cases of tort the plaintiff can, of course, sue an agent who is a joint tort feasor, but that is not the case

(1) 7 Ch. App. 130. (2) [1901] A.C. 561; 70 L.J.P.C. 66.

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in question in this action. There is no suggestion of any fraud on the part of Matthew or in fact on the part of the Utah company.

I fail to see by what process of reasoning an incorporated company with a status to carry on business can be restrained from applying for a licence; and I also fail to see how the registrar can be restrained from entertaining such an application. If he were of opinion that the licence should not be granted he would probably have refused it.

The case which seems to be greatly relied upon, viz., *Hendriks* v. *Montague* (1), is a case of a different character. In that case the company was not incorporated, and the facts were different.

I think the remarks of Mr. Henderson K.C. in his argument before this court, that the facts in the *Sun Life Case*, viz., *Saunders* v. *Sun Life Assur. Co. of Canada* (2), are applicable and should be followed, are well founded. In that case the effect of *Hendricks* v. *Montague* (1), is discussed. The appellants in the *Hendriks Case* (1) were represented by Mr. Chitty Q.C. and Mr. H. W. Horn. Mr. Chitty, it is needless to remark, was an eminent counsel—and on page 643 will be found his remarks as follows:—

> The Master of the Rolls was under a misapprehension in thinking that our motion was founded on the 20th section of the "Companies Act," 1862. That is not the case. We only referred to the section as a statutory embodiment of the law on the subject. If we were applying under the Act, it would not be necessary to come to this court, as the registrar would take care of us.

It seems to me the case should have been left to the registrar to deal with, and I utterly fail to understand how jurisdiction can exist to restrain a company duly incorporated with power to carry on business in British Columbia from applying for a licence.

(1) 17 Ch. D. 638. (2) [1894] 1 Ch. D. 537.

On the question of suing an agent in place of the principal, reference is made to *Archibald* v. *The King* (1), recently decided by this court. This case does not, to my mind, maintain the proposition. That case proceeded upon the ground that the municipal council not having chosen to pass a by-law in regard to the issuance of a licence, the clerk was bound to issue the licence. The Chief Justice, at page 51, so treats it, Mr. Justice Idington, at page 52, and Mr. Justice Anglin, at page 53. It is no authority for the proposition that in a case of the nature of the one in appeal an agent can be sued alone.

On the question of what is necessary to prove in the so-called passing off cases, the case in the Privy Council of the *Standard Ideal Co.* v. *The Standard Sanitary Mfg. Co.* (2), may be looked at.

I am of opinion that the appeal in this case should be allowed and the judgment of the trial judge restored. Having come to this conclusion the case might rest there, but I think there is another reason why the Court of Appeal in British Columbia should not have granted the injunction.

In the case of the *Boulevard Heights, Limited* v. *Veilleux* (3), the question arose as to the effect of a curative statute on the right of the appellant. It is material in the case before us to keep in mind the dates.

As I have pointed out, the case was not argued in the Court of Appeal for British Columbia prior to the 16th November, 1917, and the order in appeal is dated the 2nd April, 1918. Between the date of the trial judgment and the hearing in appeal, the law affecting the rights of the Utah company was changed.

(1) 56 S.C.R. 48; 39 D.L.R. 166. (2) [1911] A.C. 78, at p. 85.
(3) 52 Can. S.C.R. 185; 26 D.L.R. 333.

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This is by the "Insurance Act" (ch. 29 of 7 & 8 Geo. V.), which was assented to on the 20th September, 1917. In considering whether or not the court should not have taken cognizance of this statute, it will be seen that the facts in the *Boulevard Heights Case* (1) are dissimilar. At page 188 of the report, Mr. Justice Idington refers to the fact:—

> The Act was amended after judgment was given herein by the Court of Appeal, and the amendment, it is urged, does away with his right therein. Whatever might be said in the case of such an amendment as appears, enacted before the hearing in appeal, cannot, I think, help the appellant now.
>
> That judgment was right when given. We can only give the judgment which the court below appealed from should have given. To go further would be to exceed our jurisdiction.

Mr. Justice Duff, at pages 191 and 192, quoting *Quilter* v. *Mapleson* (2) puts it as follows:—

> If we are governed by these amendments in the decision of this appeal, then the respondent must fail in so far as his case rests upon the illegality of the agreement of sale.
>
> There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal.

Mr. Justice Anglin, at page 193, puts it:—

> The amending statute of 1915, although made applicable to pending litigation, is not declaratory of the law as it stood at the time of the contract in question or at any subsequent period anterior to its enactment. It became law only after the judgment of the Appellate Division in this case had been delivered. This court is bound by statute to render the judgment which the court appealed from should have given—of course upon the law as it was when that court delivered judgment, etc.

Mr. Justice Brodeur, at page 196, states:—

> At the time the court below was considering this case, the statute now invoked had not been passed. It could not be then acted upon by that court. Our duty is to render the judgment which the court below should have rendered.

(1) 52 Can. S.C.R. 185; 26 D.L.R. 333. (2) 9 Q.B.D. 672.

In this case, as I have stated, the "Dominion Insurance Act" came into force prior to the hearing of the appeal in British Columbia.

In the case of *Attorney-General for the Dominion of Canada* v. *Attorney General of Alberta* (1), which was decided by the Board of the Privy Council, Lord Haldane, who delivered the judgment of the Board, states:—

> The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens.

The Dominion statute relating to insurance referred to, namely, ch. 29, 7 & 8 Geo. V., was enacted, and by the interpretation "Minister" means the Minister of Finance. "Company" includes any foreign company for the purpose of carrying on the business of insurance. "Foreign company" means a company incorporated under the laws of any foreign country for the purpose of carrying on the business of insurance, and having the faculty or capacity under its Act or other instrument of incorporation to carry on such business throughout Canada.

By the admissions in the present case the Utah company has power to carry on business in British Columbia, and I think that it should be assumed that they also have the faculty or capacity to carry on business throughout Canada.

By the statute, section 4, it is provided that it

> shall be competent to the Minister to grant to any company which shall have complied with the requirements of this Act preliminary to the

(1) [1916] 1 A.C. 588, at p. 597; 26 D.L.R. 288, at p. 292.

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granting of a licence, a licence authorising the company to carry on its business of insurance or any specified part thereof, subject to the provisions of this Act and to the terms of the licence.

Sub-sec. (*b*) provides that

in the case of any other company, throughout Canada or in any part of Canada, comprising more than one province which may be specified in the licence.

Section 6 provides:—

Before issuing a licence to a company, the Minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable.

There is a prohibition preventing a company doing business without this licence. Section 11 legislates as to this.

The effect of the licence is provided for by sub-sec. 2 of sec. 4, which reads as follows:—

2. Any company other than a Canadian company which may obtain from the Minister a licence or a renewal of a licence shall thereupon and thereby become and be deemed to be a company incorporated under the laws of Canada with power to carry on throughout Canada, or in such part or parts of Canada as may be specified in the licence, the various branches or kinds of insurance which the licence may authorise.

This is a wide provision.

At the time the appeal was taken to the Court of Appeal in British Columbia the Utah company had not obtained a licence under the British Columbia Act. The licence has to be obtained from the Dominion. Had the Minister of Finance issued the licence no legislation in British Columbia preventing them from carrying on business would have been valid. See *John Deere Plough Case* (1).

It seems to me that the Court of Appeal should have been guided by the fact that when the appeal was heard the law was changed. The requirement on the part of the Utah company to obtain a licence from the

(1) [1915] A.C. 330; 18 D.L.R. 353.

registrar in British Columbia ceased to exist. The forum to determine the question whether a licence should be granted or not was the Minister of Finance for the Dominion, and I fail to see what jurisdiction the courts would have for interfering with the express statutory power which is given to him to grant or refuse.

I think the appeal should be allowed with costs, payable to the defendant Matthew by the plaintiff and the judgment of the trial judge restored.

The defendant Garrett did not appear on the appeal, and a curious result would happen if the judgment were held to be in force as against him, while the decision of the court is that the action should be dismissed on the grounds stated. The nearest authority I can find is *Smith* v. *Cropper* (1), in which a case of an analogous character came up before the House of Lords. It was a patent action. The patent had been declared valid. One or other of the defendants failed to appeal. The appellants succeeded and the patent was declared void. The Lords decided that it would be an anomaly to have a judgment declaring the patent valid as against one defendant, and invalid against the other defendant, and the rest of the world.

I think, in this case, the judgment of the Appellate Court must be set aside in toto both as regards Matthew and Garrett.

Garrett is not entitled to costs as he did not appear in the Court of Appeal or in this court.

Appeal allowed without costs.

Solicitors for the appellant: *Cameron & Cameron.*
Solicitors for the respondent: *Bodwell & Lawson.*

(1) 10 App. Cas. 249, at p. 253.