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THE BONANZA CREEK GOLD MINING COMPANY (SUPPLIANT)..... APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Provincial mining company—Power to do mining outside of province—Incorporation "with provincial objects"—Territorial limitation—Comity.

A mining company incorporated under the law of the Province of Ontario has no power or capacity to carry on its business in the Yukon Territory and an assignment to it of mining leases and agreements for leases is void. Idington and Anglin JJ. contra.

Held, per Fitzpatrick C.J. and Davies J., that "the incorporation of companies with provincial objects" as to which the provinces are given exclusive jurisdiction ("B.N.A. Act," 1867, sec. 92, sub-sec. 11), authorizes the incorporation of companies whose operations are confined, territorially, to the limits of the incorporating province.

Per Idington and Anglin JJ.—Such company has capacity to avail itself of the sanction of any competent authority outside Ontario to operate within its jurisdiction.

Per Duff J.—The term "provincial objects" in said sub-section means provincial with respect to the incorporating province, and the business of mining in the Yukon is not an object "provincial" with respect to Ontario. The question whether capacity to enter into a given transaction is compatible with the limitation that the objects shall be "provincial objects" is one to be determined on the particular facts.

Also, *per* Duff J.—On the true construction of the Ontario "Companies Act," the appellant company only acquired capacity to carry on its business as an Ontario business; and there was no legislation by the Dominion or the Yukon professing to enlarge that capacity.

Held, per Fitzpatrick C.J. (Duff and Anglin JJ. contra), that to enable a joint stock company to obtain a free miner's certificate

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1914

BONANZA CREEK GOLD MINING CO. v. THE KING.

under the regulations in force in the Yukon Territory it must be authorized by an Act of the Parliament of Canada, and at present only a British or foreign company could be so authorized (61 Vict. ch. 49, sec. 1 (D.)).

APPEAL from the judgment of the Exchequer Court of Canada dismissing the appellants' petition of right.

The suppliant is a joint stock company, incorporated by the Province of Ontario, under the provincial "Companies Act." Its charter professes to authorize it to carry on the business of mining.

Being so incorporated, it purported to obtain tranfers of two certain hydraulic mining locations in the Yukon Territory, theretofore issued by the Dominion Government to certain individuals, and to enter into certain agreements in respect thereof with the Dominion Government which are set out in the case, and to obtain certain certificates which are referred to in and form part of the evidence taken in the case.

Disputes having arisen between the suppliant and the government regarding the alleged rights of the suppliant in respect of the hydraulic leases above referred to and under the agreements also referred to, the suppliant filed its petition of right in January, 1908, claiming damages against the Crown.

In January, 1909, His Majesty filed an answer to the said petition, raising two grounds of defence:—

(*a*) Want of corporate capacity on the part of the suppliant company to carry on its business in the Yukon Territory, or to enter into agreements with the government in respect thereof, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the suppliant to carry on its business of mining in the Yukon Terri-

1914

BONANZA CREEK GOLD MINING CO. v. THE KING.

tory, or to acquire any rights under such certificates or licenses;

(*b*) Want of authority on the part of either the Yukon or the Dominion executive to issue any such certificates or licenses to the petitioner, or to confer any such rights upon the petitioner, as the petition of right claims.

These particular grounds of defence were, in due course, directed to be determined in advance of any general trial of the petition, and without prejudice to the other matters which the record presented.

Mr. Justice Cassels, who tried these preliminary questions of law upon such evidence as the parties saw fit to present upon the particular points raised by the preliminary questions, determined them adversely to the suppliant, who appealed from this determination of the preliminary questions.

Hellmuth K.C. and *Moss K.C.* for the appellants.

Shepley K.C. and *Newcombe K.C.* (*Mason* with them) for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court on a petition of right launched to recover damages in respect of breaches of agreements and leases alleged to have been vested in the appellant by assignments in the circumstances set forth in great detail in the petition.

The claim was disposed of in the court below on the short ground that the appellant was without capacity to accept the assignments of the leases and collateral agreements or to carry on mining operations in the Yukon Territory or to recover damages for the breach of the said agreements.

The appellant is a joint stock company incorporated by the Province of Ontario under the provincial "Companies Act." The charter professes to authorize it to carry on the business of mining.

Being so incorporated it purported to obtain transfers of two certain hydraulic locations in the Yukon Territory, theretofore issued by the Dominion Government to one Doyle and one Matson, and to enter into certain agreements in respect thereof with the Dominion Government, and to obtain certain certificates which are referred to in the documents introduced and the admissions made with a view to the final determination of the questions which arise upon the two grounds of defence hereinafter referred to.

The petition of right was granted to settle certain disputes which arose between the appellant and the Government in respect of these leases and agreements. In answer to the petition two grounds of defence were raised which I think are fairly set out in the respondent's factum as follows:—

(*a*) Want of corporate capacity on the part of the suppliant company to carry on its business in the Yukon Territory, and, in consequence thereof, incapacity to acquire the hydraulic leases already referred to, or any rights thereunder, or to enter into the agreements with the Government in respect thereof also already referred to, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the suppliant to carry on its business of mining in the Yukon Territory, or to acquire any rights under such certificates or licenses;

(*b*) Want of authority on the part of either the Yukon or the Dominion executive to issue any such

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

The Chief Justice.

certificates or licenses to the petitioner, or to confer any such rights upon the petitioner, as the petition of right claims.

This defence raises squarely in the first paragraph the important question, so frequently considered here and, in my opinion, now finally disposed of by the Judicial Committee, of the power or capacity of a company incorporated by a local legislature to carry on its operations in a territorial area over which the incorporating legislature has no jurisdiction. I adhere to what was said by me on this point in *The Companies Reference*(1) :—

> The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province. Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jursdiction. Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in international relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Dominion and the provinces under the "British North America Act."
>
> This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside of the province in matters which are ancillary to the exercise of its substantive powers. I use the terms "substantive" and "ancillary" as descriptive of the two classes of powers inherent in the company, as these are used in the judgment of the Judicial Committee in *City of Toronto* v. *Canadian Pacific Railway Co.*(2).

It is not, of course, suggested that a provincial legislature may not incorporate a company for one of the objects enumerated in section 92 of the "British North America Act," which upon its incorporation enters into existence as an entity clothed with corporate powers; but the question raised and which must

(1) 48 Can. S.C.R. 331, at p. 339. (2) [1908] A.C. 54.

be decided in this appeal is: Can such a company exercise its functions or pursue the activities of its particular organization beyond the jurisdictional limits of the constituting power? In other words, can a properly constituted provincial company exercise its powers (purposes or objects) locally outside of the province of incorporation. It may be that a provincial company can with the consent of another province exercise its civil capacities within the area of that province, but I am still of opinion that a provincial company cannot either with or without that consent fulfil the purpose for which it was organized, that is, discharge what may be described as its functional capacities, in this case mine for gold, outside the limits of the constituting province. To admit juristic persons to the enjoyment of civil rights is not the same thing as to admit them to exercise their functions or to pursue the activities of their particular organization or in other words to transplant their institution to a foreign jurisdiction (Lainé, des Personnes Morales en Droit International Privé, 282).

The Ontario "Joint Stock Companies Act" under which the petitioner obtained its charter, enables a provincial charter to be granted

> for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends.

The legislative authority of Ontario has never been deemed to extend to mining upon lands geographically or jurisdictionally situated beyond the province, and a provincial charter, issued to a company for the purpose of mining, must find "the object or purpose" for which it was created within and only within the field to which the legislature itself has deemed its

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

The Chief Justice.

authority to extend. There is not, it is quite true, a geographical limitation in the appellant's charter as to the territory in which it may carry on its operations, but the limitations of the constituting power must be read into the charter which must be construed as if it read: "the subscribers to the memorandum of agreement are created a corporation for the purposes and objects described in the letters patent in so far as these purposes and objects are geographically and jurisdictionally situate within the province."

As the Lord Chancellor said in *John Deere Plow Co.* v. *Wharton*(1), at page 339,

> the incorporation of companies with provincial objects cannot extend to a company the objects of which are not provincial.

The business of mining in the Yukon Territory is not a provincial object with respect to Ontario. The Yukon Territory is not a province and is exclusively with respect to its public lands under legislative jurisdiction of the Dominion.

If this limitation is inherent in its constitution how could the appellant company acquire by transfer or otherwise hydraulic mining locations in the Yukon Territory or enter into agreements for the purpose of operating those mines with the Dominion Government.

I agree with counsel for the Crown on the second branch of his defence for the reasons given in his factum.

Assuming that the company had the power to engage in mining operations in the Yukon Territory it did not comply with the statutory conditions subject to which it was entitled to carry on its operations. No joint stock company is recognized under the statute

(1) [1915] A.C. 330.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

The Chief Justice.

and the regulations as having any right or interest in any placer claim, mining lease or minerals in any ground comprised therein unless it has a free miner's certificate unexpired. No joint stock company can obtain a free miner's certificate unless it is incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada, and I interpret the statute 61 Vict. ch. 49, sec. 1, to mean that a British company and a foreign company are the only sort of joint stock companies that could be licensed there.

The same argument applies to the license given by the Deputy Minister of the Interior. He was without authority to grant any such license. To be effective such a license could only be issued by the Government through the Secretary of State and it is admitted that no such license was ever taken.

In effect I hold that the company was not competent to take the assignment from Matson and Doyle upon which it bases its claim, or enter into the alleged agreement with the Dominion Government with respect thereto, and also that the company could acquire no right or interest in or to a mining claim in the Yukon because it was excluded by the statute from obtaining a free miner's certificate.

The appeal should be dismissed with costs.

DAVIES J.—This action raises in a concrete form one of the questions referred to this court by His Royal Highness the Governor General in Council as to the limitations, if any, which the "British North America Act" imposes upon the legislatures of the provinces in giving them exclusive power to legislate in section 92, sub-section 11, respecting

the incorporation of companies with provincial objects.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Davies J.

In answering the questions submitted to us on that reference I gave at length my reasons for holding that the power conferred was a limited one and that its limitation was territorial.

I have seen no reason to change the opinions I there expressed. The company appellant in this case was incorporated in the Province of Ontario as a mining company. In my opinion it has neither the power nor the capacity to carry on mining operations in the Yukon Territory or district, that being a part of Canada thousands of miles distant from Ontario. It would seem quite unnecessary for me to repeat the reasons given by me in the reference above referred to.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—The questions raised herein relate to the limits of the capacity of a company incorporated by provincial authority acting within the powers conferred in section 92, sub-section 11, of the "British North America Act," to acquire property outside the province, or to contract for anything to be done for its benefit or omitted by it or any one else to be done for its use or benefit outside the province.

It has been heretofore usually assumed that men incorporated for any object might in their corporate capacity, acting within the scope of such object, do anything relative thereto for the purpose of serving such object, wherever the law of the country where done did not prohibit the doing thereof. This has been recently denied so far as provincial corporate creations are concerned. That denial is founded upon the discovery (long hidden from the ken of man) of manifold possible limitations inherent in said sub-section. It has assumed many shapes.

That involved in the absolute denial of capacity for either contracting beyond, or contracting for anything to be done or to be got beyond the territorial limits, is easily understood whatever may be thought of its legal validity.

But this denial of ordinary capacity which has assumed such various and varying shades of meaning that it is impossible to accurately define any line by which to bound the permitted operations of a limited sort beyond the territorial limits, is not quite so comprehensible.

The facts involved herein are so complicated that they may give rise to the application of any one of these propositions comprehended in such denial of capacity, or specific shade thereof, that I think better they should be set out with some detail.

The appellant was incorporated in 1904 by letters patent issued under and by virtue of the Ontario "Companies Act" (*a*) to carry on as principal, agent, contractor, trustee, etc., etc., the business of mining and exploration in all their branches, and (*b*) to apply for, purchase, lease, or otherwise acquire, patents, patent rights, trade marks, improvements, inventions and processes, etc.; and apparently incidental to these main purposes, by the means specified in ten succeeding clauses to do a great many things needless to state in detail here.

All we are concerned with is that what was specified either in said clauses (*a*) and (*b*) or in the other subsidiary clauses, or both combined, contemplated the exercise, without saying where, of contracting powers and the acquisition of such kind of rights and properties as involved in the issues raised herein. The place where operations of any kind were to be carried

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

on is not stated further than that the head office of the company is to be at the City of Toronto. That must, therefore, be taken as the home wherein it carried on its business.

From the pleadings and the contracts, licenses, and correspondence, made part of the case, we find the following facts or what have to be assumed such as to be dealt with herein.

The suppliant, now appellant, sets forth in its petition that one Doyle and his associates, and one Matson and his associates, each set respectively had, in 1899 and 1900, applied to the Department of the Interior for Canada, each for a separate hydraulic mining location, and each became entitled thereto, and got leases from Her late Majesty therefor; and thereupon looking to the further and better development of these properties, collateral agreements were entered into between Her late Majesty, represented by the Minister of the Interior for Canada, and each of said set of parties respectively, in January, 1900, whereby the Minister was to observe that certain other properties should, in certain contingencies which took place, be granted by way of lease to these parties respectively. These leases and agreements entitled each of said set of parties with whom they were made to valuable privileges. It is to be assumed for the present that they were valid and that there were moneys paid to the Crown thereunder and that, for or by reason of any breach of the obligations incurred on the part of the Crown, said parties or their assignee would thereby be entitled to claim heavy damages for losses so caused.

The appellant acquired these leases and agreements by assignment thereof, presumably in Ontario.

I presume it thereby became entitled to such indemnification as the original holders respectively might have had at the time against the Crown, besides acquiring the right thereafter to realize the hopes and expectations of said parties and of the appellant thereunder. The appellant on the 24th December, 1904, the day after its incorporation, got a free miner's certificate, under the regulations then in force, for which it paid the respondent a fee of $100 and kept it renewed, paying for such renewals, it is alleged, so long as the regulations governing mining in the Yukon required the owners of a hydraulic concession to hold a free miner's certificate. It is by no means clear that the possession of such a certificate was necessary to enable it or any one else to make such acquisitions, though probably needed before actively engaging in operating a mine.

The appellant upon acquiring said leases and agreements found the obligations of the Crown thereunder had not been lived up to and that land which fell within the scope and under the operation thereof, instead of being leased to appellant or its predecessor, had been relocated or let to other parties to the detriment of appellant either through its said predecessor in title or directly. Against such omissions, for a time, the appellant made fruitless protests.

On the 16th March, 1907, however, the Crown, represented by the Minister of the Interior, entered into an agreement with appellant — after reciting said leases, and that they had, and all the interests therein and thereunder of said lessee Doyle and others, and Matson and others, had become vested in the appellant and otherwise as appears therein — whereby the respondent leased to said appellant the lands in said

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

mining claims enumerated in the schedule thereto, together with the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other process, of royal or precious metals, etc., for the remainder of said terms of years, respectively, for which the said leases ran for the hydraulic mining locations within which the said claims were situate.

And there are assurances given therein that the Crown will in certain contingencies grant appellant a lease of other locations as and when reverting to the Crown. This agreement and lease from respondent was executed at Ottawa.

Founded upon those things of which the foregoing is a brief outline, the appellant alleges it became and was entitled to certain services of water and water-rights and other privileges, all of which are to be presumed to be admitted; and the loss of large sums of money expended by relying upon each and all of said agreements being observed and of profits which might have been got, I assume is also admitted for the present.

On the 7th of September, 1905, the appellant got a license in pursuance of chapter 59 of the Consolidated Ordinance of the Yukon Territory, authorizing it to use, exercise and enjoy within the Yukon Territory, the powers and privileges and rights set out in the appellant's memorandum of association; for which it paid a fee of $500.

The authority of this is section 2 of said ordinance and is thus expressed:—

> Any company, institution or corporation incorporated otherwise than by or under the authority of an Ordinance of the Territory or an Act of the Parliament of Canada desiring to carry on any of its business within the territory may petition therefor, etc., and the Commissioner may thereupon authorize such company, etc., etc.

Again by the issue of the free miner's certificate, already referred to, appellant seems to have been recognized pursuant to an Order-in-Council bound up with a Dominion statute for 1898, on page 39 of which the interpretation clause gives the following:—

> "Free miner" shall mean a male or female over the age of eighteen but not under that age, or joint stock company, named in, and lawfully possessed of, a valid existing free miner's certificate, and no other.
>
> * * * * *
>
> "Joint stock company" shall mean any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada.

The law of England relating to civil and criminal matters as it existed on the 15th July, 1870, was brought into force in the North- West Territories subject to certain exceptions, and the law in said territories continued in the Yukon by the statute 61 Vict. ch. 6, setting it apart saving also some exceptions.

Hence the English rule of law by which foreign corporations are by the comity of nations recognized, I presume must prevail, until the contrary is shewn.

No Dominion Act is shewn prohibitive of any provincial incorporation doing business in the Yukon. If such a purpose ever existed it was quite competent for the Dominion to have so enacted inasmuch as the Yukon is within its legislative jurisdiction. As there are many mining companies operating elsewhere than in the Yukon and by virtue of provincial legislation, I imagine the possibility of such being tempted to help develop the Yukon would forbid such an imprudent policy as forbidding them. Yet we are asked to imply such from the omission in the Dominion "Companies Act" to provide specifically for their being licensed by

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

the Dominion. The fact that the Yukon Ordinance as already pointed out did provide for such licenses and no objection made thereto, indicates the policy of Parliament as to the Yukon as does also the above order-in-council.

All the foregoing claims, and possibilities thereof, are held by the Exchequer Court to have been answered by the legal effect of the following two paragraphs of the defence:—

1. The respondent denies that the suppliant has now or ever has had the power either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the District of the Yukon, or to acquire any mines, mining claims or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations.

2. Should a free miner's certificate have been issued to the suppliant the respondent claims that the same is and always has been invalid and of no force or effect — that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate.

And the said petition has been dismissed.

The learned trial Judge assigns as reason for said dismissal, the answers given by the majority of this court in the *Companies Case*(1).

With great respect I do not think that position is tenable unless by first forming an opinion which the learned trial judge disclaims. If a person approaches the problem of ascertaining what the said judges meant with the preconceived opinion that a limitation is necessarily implied in appellant's charter, or in any other provincial charter, then his conception of what the majority had agreed in is possibly warranted, but not otherwise. However, as expressed by the court above, these opinions bind no one. And unless ap-

(1) 48 Can. S.C.R. 331.

proached in the way I suggest there is not a majority maintaining the view the learned judge acts upon.

On the other hand this court had decided in the concrete case of the *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1), against the view which the learned trial judge adopts as that of this court. True in that case, if the refusal of the late Mr. Justice Girouard to express an opinion is counted as against what seems to have been the opinion of three members of the court, it would then be an equally divided court and the appeal resting upon the like contention set up herein failed. In such a case in appeal the negative thereby established the rule of law binding it for the future, for whatever it may be worth.

It is not for the mere triviality of the marshalling, so to speak, of judicial opinion in this court with which I am concerned. It is the fact that the seat of the Dominion Government is in Ontario, the home of appellant and that the transactions in question herein took place with that government there and by virtue thereof, and that the appellant paid moneys to respondent which at all events it is entitled to recover back on the principle this court almost unanimously followed in the said case. More than that, the same principles as supported by a majority of this court in that case would, I submit, entitle appellant to take an assignment of a lease and of a claim such as those parties had under whom appellant claims. How far the facts would have carried the matter and entitled the appellant to relief I cannot say.

It is to be observed further that the matter of a contract being *ultra vires* and hence unenforcible is

(1) 39 Can. S.C.R. 405.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J

not the same as one to be held void by reason of what may more accurately be described as illegal. From the latter nothing can spring entitling a plaintiff to recovery. There may arise herein such rights as to be cognizable by the court in order that justice may be done. Indeed, in the said case of the *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1) the right was asserted alternatively by the plaintiff to a recovery of the premiums paid, and that right was maintained by the opinion of the judgments of the Chief Justice of this Court and Mr. Justice Davies, though holding the contract in question *ultra vires* of the defendant company.

In this case the recovery sought was not limited thereto, but I apprehend the greater might well have been held to include the less if that was all the suppliant had been found entitled to.

It hardly seems right (or indeed consistent with what one should expect to find following that decision) that the Crown having recognized the standing of the appellant and taken its money when denying appellant's capacity to pay, should yet refrain from at least tendering so much amends.

Moreover, the opinion of Mr. Justice Davies, concurred in by the Chief Justice, recognized the possibility of a provincial incorporation being entitled, in the way of that which might be found ancillary to its business, of going beyond the boundaries of the incorporating province and thereby acquiring rights of property and rights of action arising out of such contracts as it may thus have engaged in. (See page 431 of the report of that case.)

(1) 39 Can. S.C.R. 405.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

What the range of possibilities may be of putting into operation such a view, I do not intend to attempt to define. Certainly the acquisition by assignment of the leases and agreements to the company do not seem necessarily excluded therefrom.

Exploration was one of the objects written in this charter and as incidental thereto there are specified many things it is permitted to do in the way of acquisition. The ultimate aim of such exploration and that incidental thereto doubtless was gain.

Proceeding upon any and all of the foregoing grounds and having regard to these results of a concrete case in this court, I most respectfully submit that the petition should not have been dismissed.

Passing these considerations let us come to the broader issue presented by the denial of the inherent capacity of any provincial corporate company going beyond the territorial limits of its parent province, either to contract there, or acquire there, property or rights of any kind, serving its uses in pursuit of its objects. Such companies are incorporated by virtue of the power in sub-section 11 of section 92 of the "British North America Act," expressed as follows:—

The incorporation of companies with provincial objects.

Such a view as involved in that denial I rather think was never presented in any court in Canada till the *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1) case, already referred to. Assuredly the contrary view was acted upon for forty years, to such an extent as to involve in the aggregate enormous sums of money in the way of contracts, by and with com-

(1) 39 Can. S.C.R. 405.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

panies, which must be held *ultra vires* and void, if the contention set up should prevail.

A microscopical examination of the phrase "provincial objects" cannot help much.

It is to be observed, however, that the word "objects" had been used prior to said Act, both in the English "Joint Stock Companies Act of 1862" and the Canadian Act, in chapter 65, section 1, of the Consolidated Statutes of Canada, as an apt description of what by the articles of association must form the basis of incorporation in either case respectively falling thereunder. And the word "provincial" can be given full force and effect, in the way I am about to submit, without further qualifying or restricting the well known use of the word "objects" in relation to companies so as to produce something as curious as contended for.

No one pretends the whole item No. 11 can apply to anything relative to the purposes, aims or affairs of the Government or its direction of the public institutions of the province, which are *primâ facie* the only "provincial objects" as such. Counsel for the Dominion in the *Companies Case* (1), by introducing history, let us see how the unhappy phrase was begotten. If permissible to refer thereto, I have recorded it in pages 362 and 363 of 48 Can. S.C.R., containing the report of that case.

Is there another possible meaning of the phrase "provincial objects"? Seeing it is an incorporation of companies that is designated it can surely mean nothing else than a provision for the incorporation of persons likely to develop the business activities of any

(1) 48 Can. S.C.R. 331.

kind seeking such development in any province. Does that necessarily imply that the business in any such case seeking development is to be confined in all or any of its operations within the territorial limits of the incorporating province? Surely such a limitation is and always has been since before the "British North America Act," something quite inconsistent with the requirements and expectations of business men looking to commercial success.

But why should we suppose it was by the word "provincial" intended to engraft upon each provincial incorporation of a company the limitation that it could not transact any business beyond the limits of the incorporating province? Those provinces which negotiated and arranged for this creation of a federal system and thereby determined what as result thereof should appear in the Act, had each up to its enactment coming into force, absolute power over the subject of the creation of incorporate companies. It is somewhat difficult to understand why they should be supposed to have intended to surrender that power essential to their local prosperity save in so far as necessary to facilitate the furtherance of the purpose had in view.

Can it fairly be said that such extreme limitations and restrictions as argued for herein were so necessary? Was there not something else to be guarded against?

In assigning the control of property and civil rights in the provinces to the exclusive jurisdiction of provincial legislatures which would impliedly carry with it the right of incorporation, it may have been thought that the power of incorporation relative to the subject matters assigned to the Dominion might be

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

impaired, or indeed render it necessary for its Parliament to look to the province possessed of such far-reaching powers, relative to property and civil rights, to aid it in that regard. To have thus by any possibility impliedly rendered Parliament subservient to the will of any legislature, would have been embarrassing.

Again, it may have been conceived undesirable that there should be the possibility of any conflict between the provinces by reason of one asserting as of right the power over or against another to invade its territory against its will, by any such legislation relative to companies. That view was upheld later by Ministers of Justice for the Dominion, as will presently appear.

By framing the enactment as it is, these, and possibly other contingencies, were averted and the general rule of private international law (which I submit was well known) relative to the recognition of corporations abroad by virtue of what has been called the comity of nations, was left to work out the solution of the question; as it has been in each individual case for nearly half a century with great benefit to all and detriment to none.

Some such reasons, as well as the desirability of marking the contradistinction between the provincial corporations, which ought not to have for their objects any of the subject matters assigned to the Dominion, and Dominion corporations, or such of them as relate to any of the subject matters assigned to the exclusive legislative jurisdiction of the Dominion, one can understand as having been deemed, if not necessary yet desirable, to facilitate the working out smoothly of the scheme as a whole. But why should

that necessity have reached to the wholly unnecessary exclusion of trading either with the mother country or its other colonies or the United States or any other foreign country, as had been done for many years by provincial companies ?

In short, why should it be supposed to have been intended to render trading by provincial companies impossible ?

The scheme of the Act was primarily to arrange for the federal union of four or five provinces until then having very large powers of self-government. The framers thereof followed the example of the United States constitution and its method of assigning very large powers of legislative or administrative control to the Governments to be created, by merely specifying the subject matter over which such powers were to be exercised, without elaboration of how; and in like manner prohibiting in terse terms the exercise of power over other subject matters.

They departed, as experience had then dictated in a marked degree, from the substance of the model. All I here desire to press is for a realization of the fact that they made the best use they could, under the circumstances, of such a model, endeavouring to avoid rocks ahead, while trying to cure the ills the provinces laboured under.

Incidentally thereto it is not conceivable that they shut their eyes either to the commercial necessities, to which I have already adverted, or to the history of the development of the recognition of corporate capacity both in the United States and elsewhere, when transacting business beyond the limits of the corporate-creating state. That question had theretofore, both in England and Canada, as well as in the United

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

States, received much consideration. In the United States the question had also been considered with relation to the constitutional limitations of the incorporating state as it is now presented relative to the powers of the provinces.

The discussion it gave rise to in the United States was long and keen. It culminated there in the decision of the case of *Bank of Augusta* v. *Earle*(1), decided in the United States Supreme Court in 1839, which stands good law to-day.

The argument there as here was that the company should not go beyond its home state to do business, and the limitations of state powers were also relied upon. That eminent and able court held it could go wherever the comity of state or nations might permit.

The very different question, of a foreign company, by its constitution inherently incapable of going abroad, had been presented to our old Upper Canadian Court of Queen's Bench in the case of the *Genesee Mutual Insurance Company* v. *Westman*(2). Indeed, some *obiter dicta* therein would go further, but the day was young then. Shortly after Confederation there arose in same court, the case of *Howe Machine Co.* v. *Walker*(3), where the issue of the right of a foreign corporate company to do business in Canada was likewise presented and the right maintained with the proper distinction made between that and the *Genesee Case*(2). This was in 1873.

The decision is only of significance here as indicative of the view then taken and thus likely to have been held six years earlier by those framing the clause

(1) 13 Peters 519. (2) 8 U.C.Q.B. 487.
(3) 35. U.C.Q.B. 37.

now in question. The English view is presented by the authorities collected in Westlake, at section 305 of his work on Private International Law.

Is it conceivable that men, presumably holding the views of English law as thus expressed by either Canadian or English authorities, and knowing how that had been applied and worked out at that time under a federal system, deliberately designed the creation of something new and wonderful to be operated with under the Canadian federal system? I cannot assent to such a proposition. Those men had sense, and some of them, wide experience and great grasp of public affairs. To say that they had not in view the daily experience of Canadian trade and industries before their eyes and the futility of providing therefor by a new kind of corporate creature which it would take forty years to discover, is paying them a compliment which, I submit, is undeserved.

The relevancy of all this is that the instrument under consideration is not an ordinary contract or Act of Parliament, but one which if we would rightly understand it must be read with the eye of the statesman measuring the future range of its effective yet harmonious operation in all its parts so as to make each and all productive of the best results when put in actual practice.

Then there is another practical aspect to be considered along with and consistent with that general survey of the question from a legal or constitutional point of view. It is this: In each of the provinces there are industries peculiar to its people. The adaptation of legislative contrivances needed to aid such people in promoting the development of its resources, whether of an agricultural, mining, fishing, lumber-

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

ing, mercantile or mere financial (not banking) character, may have to be suited thereto and to the peculiar character or habits of life, of the people of the province. That which would meet the wants of Nova Scotia might be quite unsuited to the requirements of Ontario or that suited to either fall short of promoting the welfare of the farmer on the western plains.

The promotion of any scheme needing legislation for its assistance, is most likely to bear speedy results when an appeal is made to those most directly interested. The vast extent of Canada and diversity of its natural resources, render in many cases the promotion at Ottawa of legislation only subservient to local needs, almost an impossibility, and even where not impossible, very likely to lead to something less efficacious than what might be obtainable if a local legislature were appealed to.

Such considerations or something like thereunto. no doubt were present to the minds of the framers of the Act and of this provision. And it was to give ample scope to the legislative activities of each province in relation to these provincial objects that it was designed.

Having regard to the situation of the then Canadian provinces, and what was then present to the minds of those acting, can anything more absurd be conceived, than to suppose that those men realizing such a situation and looking to the future, deliberately planned that the incorporating power to be given the legislatures of the provinces for such objects as I have outlined, should be hampered by such limitations as are contended for herein, and never had existed elsewhere in the constitution of any legislature to which the like subject matters had been intrusted ?

A company incorporated with the objects of exploring as indicated in appellant's charter might seek something in the United States or Mexico, for example. That is conceivable as a business enterprise. Why should its promoters in Halifax, Toronto or Victoria have to go to Ottawa at a loss of time and money for such authorization as needed to obtain that common every-day business convenience and contrivance used by business men ?

What difference can it make whether incorporated at Toronto with a home there, or at Ottawa with a home there ? Neither province nor Dominion can give it any right or power to go into those countries. All either can do is to give it a form or fashion by creating the legal entity by means of which men may co-operate for that object had in view. Beyond that in a foreign state it must depend entirely upon the comity of the nation concerned whether or not it can do anything.

The Ontario Legislature has always, I think, abstained from ostensibly proposing such ventures abroad. Its companies have been incorporated for a specific object or objects relative to some specified sort or kind of business and within that object in going abroad they have depended for effective recognition entirely upon comity.

In this case the appellant was recognized not only directly by the respondent by virtue of the transactions entered into between them, but also by the local executive of the Yukon.

It is said, however, that the word "provincial" so plainly indicates that it was designed that such corporations should not carry on business beyond the province that there is an implied limitation in the capa-

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

city of each precluding it from availing itself of the advantages of recognition by virtue of the doctrine of comity. It is hard to get two to agree exactly in what that proposition does mean. If it ever had been conceived, as once suggested in argument, but which no one has been bold enough judicially to affirm, that nothing could be done or be contracted for being done outside the territorial limits of the province, the situation of each province and the commercial relations of its people with those of the other provinces and of countries beyond the Dominion, were and remain such as to forbid a moment's serious consideration for such a curious proposition. Besides, such a simple conception if ever entertained could have been concisely stated.

I, therefore, discard once and for all this very improbable conception of territorial limitations as ever having been intended to rest in the language used.

Let us then proceed to consider the theory of the implied limitations restricting business within lines including only that which may be ancillary to the main object and be an "incidental necessity" thereof as, for example, the buying abroad of raw material, etc., and possibly the marketing of a company's goods, without regarding other refinements which might be suggested, and see how it will stand the practical test.

If we apply our common knowledge of the actual facts in an attempt to realize what such corporate activity means, we may find how impossible it would be to make the theory a workable success.

The actual operations of these industrial concerns, of provincial origin, daily furnish us with illustrations.

Of the vast and ever-increasing volume of business done by them with people in other provinces or abroad, more than one-half of what it represents is an actual carrying on, by the agents of such companies, of business outside the province. The production of the article is but a part of the business operation in order to reap the gain for which the corporation was created.

If, as has been suggested, the company has the right, of necessity, to go abroad for supplies, then the division of the carrying on of the business, within and without the province, is such that the part done outside the province greatly preponderates over that done within.

In such cases the company has to acquire abroad its raw material, arrange there for its importation, and then when manufactured, has often, of the like necessity, to send it again abroad to be marketed. Where, in such case, if not as I suggest, is the major part of the business operation carried on? And where has the money been got to carry it on, and how? Has the business man as he ventures on each step of this process to stop and ask himself if he is within the incidental necessities of his corporate business? Has his foreign customer also to say "stop and shew me, not how to answer the easy old formula of whether the transaction is within the scope of the objects of your company; but how to solve the queer puzzling riddle of what some lawyers in your country of curiosities may say about the actual 'incidental necessities'" of the company in relation to the proposed transaction. And he might, if a foreigner of deep thought, ask what "necessities" can mean anyway. Perhaps he might wisely conclude the transaction proposed was not a necessity for him.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

Then the poor obfuscated, beaten Canadian travelling homewards might well ask himself why any one ever conceived he was such a fool as to try to do something that was not necessary for his business.

Again, the mining and lumbering industries of some provinces and the development thereof are parts of the development of the natural resources therein and of the local Crown domain. These having thus peculiarly close relations with the local governments, who better fitted than these powers to determine how the corporations engaged therein are to be created and controlled ?

We also know from common knowledge that the miner has often to send his raw product abroad to be treated and then marketed, and in such cases bargains have necessarily to be made abroad involving a great deal more expense and variety of business transactions than the mere expense of digging it out of the earth. In the same way the incorporated lumberman may, indeed often does, find his timber in one province and his mill in another and his market in a third province, or abroad, and occasionally he has to be an importer from abroad of his raw material.

The courts in which a corporation has appeared as suitor or defendant always had, if its status was in question, to determine whether or not the business involved was of the kind which it was incorporated to transact. This new view of "incidental necessities" in substitution of primary objects as the measure of capacities, presents new puzzling possibilities hitherto unimagined.

What a fine field for the ingenious mind to roam over and dream in! True, all these difficulties may be averted by practically blotting out the item No. 11

of the section in question and resorting entirely to the Dominion powers. But again, was that the meaning and purpose of the item ?

Take another mode of testing this alleged limitation. The province is given by item No. 10 the exclusive power of legislation relative to local works and undertakings except those of an interprovincial character as specified. Railways and other works have been constructed by companies which had to rest, I submit, on no other authority than this item No. 11. It is all comprehensive or nothing. It will not do to say the grant of power to incorporate might be implied in No. 10 itself, without resorting to No. 11. I admit the province as such could undertake such works.

I am referring to the numerous cases of railroads and other works constructed by companies empowered by a legislature to do so and incorporated by it for that purpose.

I submit such companies rest upon this very item No. 11 or nothing. For if implications relative to "companies" are to be permitted in item No. 10 then likewise does No. 13, "property and civil rights" carry in such case the like implication and so would end all this contention.

It seems generally conceded that this specific enactment excludes such implications so far as "companies" are concerned under provincial legislation and if so I do not see how they can exist relative to No. 10 any more than independently under No. 13.

Now these companies, beyond question, have gone abroad for almost everything, including the money got from stock-holders and bond-holders as well as rails and all else. Who ever thought they were acting *ultra vires ?* Are their contracts void ?

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

And indeed no companies can be incorporated to execute such local works or undertakings save by local legislatures unless of the kind declared by virtue of sub-section (*c*) of section 10, to be for the general advantage of Canada or of two or more provinces.

The enactment in item No. 11, by its terms does not express any such thing as urged; then why, with such obvious consequences of so reading it as abound on every hand, adopt that instead of the way it has been read so long ?

With the limitations sought to be implied in such charters they may mislead and must be of little use. Not only that, but they must obviously conflict with the true working out of section 121 of the Act, in its true spirit so far as the incorporated producer is concerned.

Moreover, what must never be lost sight of, there is the fact, that the interpretation which I submit should prevail, has in actual practice been so long observed and acted upon and so much depends thereon that even if otherwise doubtful it should be upheld.

The products of our industrial activities of every kind have been and still are handled by provincially incorporated companies and sold abroad and commercial exchanges effected. Are these transactions all *ultra vires* and these companies engaged in doing so liable to be met by the foreign dealer with a plea such as respondent sets up herein ? These companies have often exchanged such products abroad for other goods, or bought goods abroad with the money so got. Are they in any or all of these transactions liable to be met by such a plea ?

And perhaps quite as frequently they have been, by the credit thus acquired, enabled to buy goods on

credit; and are they in such cases entitled to say they were not liable as they were acting *ultra vires* in thus abusing their credit ?

They have borrowed money abroad by virtue of direct contracts or manifold indirect transactions entered into in London, Paris, New York or elsewhere. Are they to be permitted to answer the claims of such creditors by a plea of the kind we are asked herein to give effect to ?

And what of the shareholders who have put their money into such concerns as like as possible in principle to the venture herein involved ?

Then the authority of Ministers of Justice insisting upon the exercise of the veto power is relied upon. Supposing each and every one of these reports of such Ministers had stated that the Act must be so interpreted as counsel for the Crown desires, are we to abandon our functions ?

These Ministers, however, never ventured to enforce their opinions, if to be read in the way counsel suggests they do read, else we should have had the matter tested long ago in ways open to them. But the reports do not so far as I have seen bear that construction he puts upon them. Time and again legislatures have apparently been alleged to have exceeded their authority by passing bills which expressly provided for the company thereby chartered acting abroad or in other provinces than its own. The Lieutenant-Governor in each of many such cases was told the bill would be vetoed unless withdrawn, and I presume each of these requests was duly complied with. It is not necessary here to express any opinion whether or not that cautious view was right or wrong.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

That attitude towards such legislation is a long way from maintaining what is contended for herein. I respectfully submit that it is only by a confusion of thought that what the Ministers in question then forbade must necessarily prohibit those incorporated companies with specified objects, suitable to the commercial needs of those in one of the provinces, from entering into contracts outside the province for the due execution of the purpose for which they were created.

For example, there is nothing inconsistent in the late Sir Oliver Mowat as Attorney-General or Premier of Ontario, permitting scores of Ontario companies when so created to grow and flourish by reason of their foreign connections and trade, and his insisting later as Minister of Justice at Ottawa, that if a provincial legislature should expressly enact that a company was entitled to carry on business in another country or province, it was acting improperly and possibly *ultra vires*.

This appellant is only a small concern following no doubt that practice which grew up under the eye of that able man who so long and so successfully managed provincial affairs in and for Ontario. And he is now curiously quoted in argument as if, when acting as Minister of Justice, condemning it.

Counsel for respondent addressed to us an argument of some length based upon the recent decision of the Judicial Committee of the Privy Council in *John Deere Plow Co.* v. *Wharton*(1) from British Columbia.

I am unable to understand the exact relation supposed thereby to exist between that long sought for

(1) [1915] A.C. 330.

but belated recognition of the power resting in item No. 2 of section 91 of the "British North America Act" assigning the regulation of trade and commerce to the Dominion, and the question of the quality of the capacity inherent in a provincial corporation to receive recognition outside the creating province. In an appeal to Parliament, to exercise its power over the subject so assigned to it, and to enact legislation which would curb the aspirations of the provinces and their creatures, that decision might be used to justify such legislation.

It strikes me the argument is submitted to the wrong court.

Meantime until Parliament has legislated in that direction, if it ever does, we must continue to keep within our judicial functions.

The practically minded might say that decision renders needless any disturbance of the long recognized capacity of provincially incorporated companies either herein or otherwise.

Indeed, counsel presented, briefly but stoutly, mining as a trade and hence within the sphere of the operative effect of that decision. I hardly think such a view is necessarily to be attributed to their Lordships whatever may grow hereafter out of the said decision in the way of centralizing our Government.

Nothing remains eternally stationary. Let us be patient and wait upon the evolutionary process which may spare us the probably painful consequences of rashly accepting counsel's theory of trade and commerce.

I must adhere to the view I have always taken, and maintained in the cases above cited, of our constitu-

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

tion as set out in the Act; that its aim and that of the framers thereof was to eliminate friction as much as possible and yet give freedom a chance; and trust to the results of experience to be gotten thereby. It was a distinct recognition of how utterly astray domineering minds may be inherently prone to treat the rest of mankind as children when resorting to needlessly repressive measures. In that converse spirit of freedom every case presenting problems, arising under said Act, for judicial solution should be weighed and the Act worked out accordingly in harmony with the ideals of those who framed it.

I do not see how the recognition of provincial company corporations as possessing the usual qualities of and capacities of other business corporations can fail to subserve what the Act so read was intended to subserve, but I do see how any of the other interpretations contended for will materially tend to defeat such aims, intentions and purposes.

That view which I maintain, in no way extends to an interference with the very wide field of possible corporate activity, which may fall within the range of any of the subject matters assigned to the exclusive jurisdiction of the Dominion, and needing the exercise of corporate power to give efficacy to the enjoyment thereof.

It is not germane to the issues raised herein to enter upon a discussion of the limits of the Dominion's incorporating power, further than to point out and illustrate how, relative to the said issues, there is no conflict between that and the exercise of the ordinary corporate capacity by the provincial companies.

And as to the rights of other provinces, they may be quite within their rights in refusing recognition

if the incorporating province attempted what it should not. Even if they should stupidly seek to curb or curtail the commercial activity and enterprise of a neighbour (unless so far as in conflict with section 121 to which I have referred) experience, and the power of public opinion thus engendered, will rectify such mistakes if any.

With every desire to condense, so far as consistent with perspicuity, I find this opinion already too long drawn out.

Yet the neat point involved herein is within a very narrow compass. I have attempted by manifold illustrations to exemplify how unworkable the contentions set up might, if successful, prove and how little in harmony they are with the probable conceptions of the framers of the Act.

The extreme importance of what may be involved in the ultimate decision and the desire to make that clear and meet the varying shades of opinions put forward, can alone justify such length.

Whether such companies may in transactions involving the sanction of the shareholders or board of directors got beyond the confines of the province be held, as according to some American decisions in like cases, inherently incapable of dealing with such transactions outside the province is entirely another question than here involved.

In the alternative view as bearing upon the present case I may make an observation or two.

The case of *Comanche County* v. *Lewis*(1), cited to us by appellant's counsel, was decided by an eminent judge holding that the mere recognition by the

(1) 133 U.S.R. 198, at p. 202.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington J.

legislature of an alleged corporation which might not otherwise have been held validly constituted, entitled that doubtful creation to recognition by the courts and, therefore, liable to be sued and judicially dealt with.

That decision typical of what in many other cases has been treated as recognition of *de facto* corporations, suggests a good many curious questions more or less bearing upon one aspect of what we have in hand.

Is the power of incorporation so existent in the Crown in right of the Dominion as to enable it to incorporate without direct legislative authority relative thereto? If so what is the effect of the recognition by the Crown of the appellant in these transactions now in question?

Re-incorporation can exist, indeed, has more than once been legislatively effected. Can that be effected by the Crown? What more is necessary therefor than recognition? I express no opinion, and, indeed, have none in relation thereto, or to the point made in the pleading of recognition and otherwise in argument, but not based on the suggestion I make. It may be that want of assent to re-incorporation is complete answer to such suggestions.

That branch of the case was not thoroughly argued and, therefore, I have formed no opinion upon it. The point is not to be disposed of by the common-place that the Crown is not bound by any estoppel.

The honour and dignity of the Crown are, I respectfully submit, deeply concerned; and the principles just now adverted to, or the range of the Exchequer Court jurisdiction which remains an unexplored field so far as argument in this case is concerned,

ought to be fully considered if my view of appellant's rights are non-maintainable, in order that justice may be done.

In the manifold ways I have pointed out there has been that recognition of the appellant which entitles it, if possessed of the inherent capacity which I hold it has, to succeed without resorting to these considerations.

The appeal should be allowed with costs and that part of the proceedings below, involved in this disposal of the first two paragraphs of defence, and the case be remitted to the Exchequer Court for further trial and disposal of remainder of the case.

DUFF J.—Two minor points were taken by Mr. Newcombe which I shall dispose of first. "The regulations touching the disposal of mining locations to be worked by hydraulic process" approved 3rd December, 1898, which admittedly govern the appellants in respect of the rights in question in this action provide, by paragraph 4, that one of the conditions of the right to acquire any such location is the obtaining of a free miner's certificate under the "regulations governing placer mining." Paragraph 1 of the regulations governing placer mining then in force authorizes the issue of free miner's certificates to persons over 18 years of age and to joint stock companies, and "joint stock company" is defined in the interpretation clause as meaning

> any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada.

Mr. Newcombe's contention is that "Canadian" here means "Dominion" and "Canadian charter" means an

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Duff J.

Act of the Parliament of Canada or an instrument emanating from the Government of the Dominion or deriving its validity from a statute of the Dominion Parliament. I think this contention is not well founded. It is no doubt proper to read the adjective "Canadian" as describing the kind of charters intended to be included by reference to the authority from which they emanate; and "Canadian" in this connection may doubtless be read in two different ways. It may be treated as indicating the relation of the authority to Canada — as an entity — to the Dominion of Canada. On the other hand it is quite capable of being read as embracing every lawful authority in that behalf exercised within the territorial limits of Canada. Reading "Canadian" in this latter sense "Canadian charter" would mean a "charter" emanating from any lawful authority in Canada — capacity to acquire the right to pursue the business of mining in the Yukon being, of course, assumed. I think this is the meaning that ought to be attributed to it. The proposed construction would exclude not only companies incorporated under provincial authority, but a company incorporated by Yukon authority or by the North-West Territories Council before the erection of the Yukon into a separate territory. It would likewise disqualify companies incorporated by the provinces of Canada before Confederation, by British Columbia, for example, before 1871. These consequences appear to me to afford a sufficient reason for rejecting the proposed construction.

The other contention is that by force of 61 Vict. ch. 49, an Act of the Parliament of Canada, the carrying on of mining operations in the Yukon by any joint stock company or corporation excepting companies or

corporations owing their existence to some Act of the Parliament of Canada or licensed under the statute is prohibited. The statute is permissive only. It does not contain a single word expressing prohibition. Nor can I find a single word in it which seems to imply a prohibition such as that contended for. If, indeed, there were any implied prohibition it is difficult to understand upon what ground the implication could be limited in the way suggested. If this statute is to be read as *conditionally prohibiting* the carrying on of mining operations, as it most certainly does under the construction proposed, by a company incorporated by the old Province of Canada, or by the Province of British Columbia before Confederation, or by a "chartered company" in the strict sense, such, for example, as the Hudson's Bay Company, it is difficult to imagine what principle can justify such a construction which would not equally involve a like prohibition as against companies existing at the time the Act was passed and owing their existence to some Dominion statute. Any distinction between the two classes of cases could rest upon nothing in the statute itself, but must be founded upon mere speculation as to the policy of it.

As to the point of substance.

The specific authority conferred by section 92 (11) (the incorporation of companies with provincial objects) in relation to the subject there dealt with cannot be enlarged by reference to the more general terms of section 92, items 15 and 16,

property and civil rights within the province

and

matters merely local and private within the province.

(*John Deere Plow Co.* v. *Wharton*(1); *Canadian*

(1) [1915] A.C. 330.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Duff J.

Pacific Railway Co. v. *Ottawa Fire Ins. Co.* (1), at pp. 461 and 462.) This appeal turns upon the answer to the question: What is the effect of the qualification "with provincial objects" as regards the capacity of the appellant company to enter into the contracts which the appellant company's suit is brought to enforce and upon the validity of those contracts? The word "company" obviously does not embrace every kind of corporation. (See items 7 and 8 of section 92 and section 93.) But the appellant company is indisputably a "company" within the meaning of the clause. "Provincial" means, I think, provincial as to the incorporating province; and although it is perhaps conceivable that as regards companies formed for some communal or governmental purpose, the word "provincial" might be read as having reference to the province as a political entity, I think that as regards companies formed for the purpose of carrying on some business for private gain it must be read as having reference to the province as a geographical area.

It results, I think, from a series of dicta (which, if they have not the force of decisions, are still of such weight that it is my duty to follow them) that the undertaking or business of such a company and the powers and capacities conferred upon the company must when considered as an entirety be so limited that the "objects" of the company fall within the description "provincial" in the sense mentioned. See *Citizens Ins. Co.* v. *Parsons*(2); *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(3), at pages 165 and 166; *John Deere Plow Co.* v. *Wharton*

(1) 39 Can. S.C.R. 405. (2) 7 App. Cas. 96, at pp. 117, 118.
(3) 9 App. Cas. 157.

(1). I think that whether the "objects" of a company under a given constitution or "charter" are "provincial" in this sense (or whether the possession of capacity to enter into a given transaction is compatible with the condition that the *company's "objects" shall be "provincial"*) is a question to be determined upon the circumstances of each case as it arises; and I doubt whether upon this point any more specific test than that supplied by the language of section 92(11) itself can usefully be formulated now.

The appellant company's title to relief rests upon the proposition that the letters patent (by which it is incorporated) granted under the authority of the Ontario "Companies Act" authorizing it to acquire mines and to carry on the business of mining generally without restriction as to locality do confer upon it capacity to acquire the right to carry on the business of mining in the Yukon Territory or elsewhere under the territorial law as established by competent authority or that such capacity has been derived from some other source. I think the possession of such capacity does not flow from the letters patent on the ground that the business of mining (*i.e.,* working mines) generally without restriction as to locality is not a business that is "provincial" as to the Province of Ontario, and that a company having as one of its objects the carrying on of such business would not be a company "with provincial objects" within the meaning of section 92(11); and that consequently letters patent professing to create a company to carry on such business could not be validly granted under the Ontario "Companies Act." I do not think it follows

(1) [1915] A.C. 330.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Duff J.

as a consequence that the letters patent of the appellant company are void, but only that the description of the objects of the company in the letters patent should be read as subject to the restriction necessarily imported by the reason of the overriding enactment in section 92(11). It follows that the appellant company, a company incorporated pursuant to the provisions of the Ontario "Companies Act" to carry on the business of mining, must be deemed to be a company created with the object of carrying on that business only as a "provincial" (*i.e.,* Ontario) business in the sense mentioned.

What then is the effect of this restriction as regards the validity of the contractual engagements entered into between the appellant company and the Crown upon which the appellant company's suit is based ? It has never been doubted in this country that the doctrine of *ultra vires* applies to companies incorporated under the Ontario "Companies Act" and that it does so apply was not disputed by the appellant's counsel and indeed it is not arguable that the reasoning of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), by which His Lordship reached the conclusion that the doctrine governs companies formed under the "Companies Act," 1862, does not apply to the provisions of the Ontario "Companies Act." It results inevitably that the company had no capacity to enter into the contracts upon which the action is brought unless some additional capacity over and above that imparted to the company by the Ontario "Companies Act" has been acquired by it from some other source.

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

It does not appear to me to be necessary to consider for the purposes of this case whether the Yukon Council or the Dominion Parliament from which the Yukon Council derives its legislative capacity has the power constitutionally to legislate with regard to a company "incorporated" by a province "with provincial objects" in such a way as to change fundamentally its corporate nature and capacities. Our attention has not been called to anything in the Yukon law which properly construed can, in my opinion, be held to profess to authorize extra-territorial companies to carry on within the territory any business which such company would otherwise be disabled from carrying on by reason of restrictions upon its capacity laid down in its original constitution. The ordinance relating to the registration of extra-territorial companies cannot, I think, be held to contemplate any such enlargement of the corporate powers of companies taking advantage of its provisions.

This appears to be sufficient to dispose of the appeal. But an observation or two may be proper upon the contentions advanced on behalf of the appellant company.

First, it is argued that assuming it would be incompetent to a province exercising the powers conferred by section 92(11) to incorporate a company for objects other than "provincial objects" in the sense above mentioned still that clause does not necessarily subject companies effectively incorporated for "provincial objects" to the principle of *ultra vires* in such a way as to incapacitate such a company from entering into valid transactions having no relation to such "provincial objects."

The doctrine of *ultra vires* reposes upon statute

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Duff J.

(Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1) at p. 658; Lord Haldane in *Sinclair* v. *Brougham*(2), at pp. 414 and 417. See also an article by Sir Frederick Pollock, 27 Law Quarterly Review at p. 223); and not upon any theory as to the inherent nature of corporations. It is very doubtful if it applies to corporations created by letters patent in exercise of the prerogative (*Sutton's Hospital Case*(3); *British South Africa Co.* v. *De Beers Consolidated Mines*(4); *Riche* v. *Ashbury Railway Carriage and Iron Co.*(5), at p. 263; *Attorney-General* v. *Manchester Corporation*(6), at p. 651; *Baroness Wenlock* v. *River Dee Co.*(7), at p. 685; *Bateman* v. *Borough of Ashton under Lyne*(8)), and there can be no doubt that as regards companies created under section 92(11) a province can limit the operation of the doctrine provided that it does not legislate inconsistently with the limitations upon its authority imported by the terms of that clause.

I find, however, two (to me) insuperable objections to this contention as applied to the present controversy: (*a*) A company having capacity to enter into valid transactions having no relation to any "object" which can be described as "provincial" does not appear to me on the assumption above stated to be a "company with provincial objects" within the meaning of section 92(11), and (*b*) assuming a province to be competent to limit the application of the doctrine of *ultra vires* in the way supposed, still there remains the difficulty that if the "objects" of the appellant company

(1) L.R. 7 H.L. 653.
(2) [1914] A.C. 398.
(3) 10 Rep. 30*b*.
(4) [1910] 1 Ch. 354.
(5) L.R. 9 Ex. 224.
(6) [1906] 1 Ch. 643.
(7) 36 Ch. D. 674.
(8) 27 L.J. Ex. 458.

as stated in the letters patent are read as the carrying on of the business of mining as an *Ontario business* and not without restriction as to locality (as they must be read to bring the "objects" under the category "provincial") then since it is not disputed that the doctrine of *ultra vires* applies to companies incorporated under the Ontario "Companies Act" (and it is self-evident as I have said that Lord Cairns' reasoning in *Riche* v. *Ashbury Railway Carriage and Iron Co.*(1) applies to that Act) the appellant company must be held to possess only such powers and capacities as have relation to the "objects" so construed.

2nd. It is argued that "with provincial objects" does not define the class of companies in respect of which the legislative powers conferred upon the provinces by section 92(11) are exercisable. The construction put upon section 92(11) according to this contention is this: The clause is read as dealing with two subjects (*a*) the incorporation of companies, (*b*) the "rights" as distinguished from the corporate capacities with which the incorporating province may endow the company when incorporated. Such "rights" it is said, must fall within the designation "provincial objects," but that restriction has nothing whatever to do with corporate capacities which may include every capacity (excepting capacities that by section 91 (enumerated heads) can only be conferred by the Dominion) with which an incorporeal subject of rights and duties can be endowed. Any "object" according to this interpretation is "provincial" which can be carried out within the limits of the province provided at all events that it is not one committed by the "British North

(1) L.R. 9 Ex. 224.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Duff J.

America Act" to the exclusive control of the Parliament of Canada. While in this view the province cannot invest the company with the right to carry out "objects" which are not "provincial" it can nevertheless endow the company with capacity to acquire rights and powers having no relation to such "objects" from any other competent legislative authority.

I have already indicated certain passages in the judgments of the Privy Council which appear to me to be incompatible with this construction and to which I think effect ought to be given in this court whether they strictly possess or do not possess the authority of decisions.

As may have been collected from what I have written above I think that fairly read the observations referred to mean, that the limitation expressed by "with provincial objects" has reference to the business or undertaking the company is capable under its constitution of carrying on, and the powers and capacities with which the company is for that purpose endowed, looked at as a whole; in other words, that by force of the phrase "with provincial objects" such a company is affected by a "constitutional limitation" which makes it incapable of pursuing "objects" not "provincial."

ANGLIN J.—Two questions are presented in this case:—

(*a*) Whether the appellant company, incorporated by the Province of Ontario to carry on mining operations without territorial limitation, has capacity to avail itself of the sanction of any competent authority outside Ontario to operate within its jurisdiction.

(*b*) Whether the appellant company was duly

sanctioned to acquire and operate mining properties in the Yukon Territory by authority competent to confer those rights.

On the first question, but for a misconception by the learned judge of the Exchequer Court of what I there stated — as inexplicable to me as it is unfortunate — I should merely refer to my views expressed in the *Companies' Case*(1), p. 452 *et seq.*, as a sufficient presentation of my reasons for an affirmative answer. But, if what I said in that case is so ambiguout that it is open to the interpretation put upon it by Mr. Justice Cassels, it would seem advisable that I should endeavour to re-state my opinion in unmistakable terms. The learned judge says:—

> As I read the judgment of Mr. Justice Anglin, I would infer from it that his view would also be that a company incorporated by a province for the purpose of mining would be confined in the exercise of its main functions to the province incorporating it. He does state that he finds "nothing in the language of clause 11 of section 92 of the "British North America Act," which compels us to hold that the ordinary mercantile, trading or manufacturing company, incorporated by a province to do business without territorial limitation is precluded from availing itself of the so-called comity of a foreign state, or of a province, which recognizes the existence of foreign corporations and permits their operations in its territory."
>
> From this it would appear that the learned judge is dealing with the case of ordinary mercantile trading and manufacturing companies. I would not infer from his reasons that his view would be that where the business of the company is that of a mining company, such a company would have the capacity to carry on its mining business, namely, that of mining in a foreign country.

"The ordinary mercantile, trading or manufacturing company" was referred to in the passage quoted from my opinion in contrast to bodies incorporated "for the establishment and maintenance of a hospital or the building of a railway," mentioned in the sen-

(1) 48 Can. S.C.R. 331.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Anglin J.

tence immediately preceding as examples of corporations the nature of whose objects implies territorial limitation, and because in the second part of the question then under consideration a company incorporated "for the purpose of buying and selling or grinding grain" was preferred as an example. The inference that a mining company was intended to be excluded from the class of provincial corporations entitled to avail themselves of international comity by the reference to an "ordinary mercantile, trading or manufacturing company" and to be placed rather within the class of which the hospital corporation and the railway company were given as examples, seems to me, with respect, to be scarcely warranted. But, without discussing further the question whether a mining company falls within the category covered by the description, a "mercantile, trading or manufacturing company," in order to remove any possibility of future misapprehension, I shall state explicitly that the nature of the objects of a mining company incorporated by a province does not, in my opinion, involve an implication that its operations are to be confined within the limits of the province, and that, if its letters patent, or incorporating statute impose no territorial limitation, it may avail itself of the comity of another state or province.

Mr. Justice Cassels, however, proceeds to deal further with my opinion in the *Companies' Case*(1). He says:—

> The second question submitted for the opinions of the court is as follows:—
>
> "Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article 11, of the

(1) 48 Can. S.C.R. 331.

'British North America Act,' 1867, power or capacity to do business outside of the limits of the incorporating province ? If so, to what extent and for what purpose?"

The answer of Mr. Justice Anglin is as follows:—

"Yes — subject to the general law of the state or province in which it seeks to operate and to the limitations imposed by its own constitution — but not 'by virtue of (the powers conferred by its) provincial incorporation.'"

If this answer is taken by itself, I infer from it that the learned judge was of opinion that the capacity of the corporation was limited to the province in which the business was being carried on, as he limits his answer by the words "but not by virtue of (the powers conferred by its) provincial incorporation."

Why the learned judge should have taken this answer by itself and without reference to the reasons on which it was based can only be surmised. In the answer "taken by itself" I have sought in vain for anything which warrants reading the categorical answer, "Yes," as "No." The quoted words, "but not 'by virtue of (the powers conferred by its) provincial incorporation'," were taken from the second part of the question being answered. The allusion — sufficiently obvious, I thought — was to the passages in my opinion where I had discussed this question and stated the grounds on which I based my affirmative answer. For instance:—

If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred on 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

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Anglin J.

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 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.

* * * * *

When the "British North America Act" was passed the doctrine of comity in regard to foreign corporations was well established as a rule of international law universally accepted. It had been long acted upon in English courts and had received Parliamentary recognition. Modern law acknowledges this capacity of every corporation, not expressly or impliedly forbidden by its state of origin to avail itself of privileges accorded by international comity, as something so inherent in the very idea of incorporation that we would not, in my opinion, be justified, merely by reason of the presence in the clause expressing the provincial power of incorporation in such uncertain words as "with provincial objects," in ascribing to the Imperial Parliament the intention in passing the "British North America Act" of denying to provincial legislatures, otherwise clothed with such ample Sovereign powers, the right to endow their corporate creatures with it. *Bateman* v. *Service*(1), at page 391. The impotency which such a construction of the statute would, in many instances, entail upon provincial companies affords a strong argument against adopting it. Had Parliament intended in the case of the provincial power of incorporation to depart from the ordinary rule by confining the activities of every provincial corporation within the territorial limits of the province creating it, it seems to me highly improbable that the words "with provincial objects" would have been employed to effect that purpose. Some such words as "with power to operate only in the province" would have expressed the idea much more clearly and unmistakably. Inapt to impose territorial restriction the words "with provincial objects" may be given an effect, which seems more likely to have been intended and which satisfies them, by excluding from the provincial power of incorporation such companies as have objects distinctly Dominion in character either because they fall under some

(1) 6 App. Cas. 386.

one of the heads of legislative jurisdiction enumerated in section 91, or because, they "are unquestionably of Canadian interest and importance."

How the learned judge of the Exchequer Court, with these passages before him, reached the conclusion that the answer given by me to the second question propounded in the *Companies Case*(1) meant that in my opinion the capacity of a provincial corporation, without territorial limitation expressed in its charter or implied in the nature of its objects, "is limited to the province in which the business was being carried on" (*sic*), assuming that he meant "limited to the province which granted the incorporation," I am at a loss to understand. But to remove the possibility of further misunderstanding I shall again state explicitly that a provincial corporation, not territorially limited by its letters patent or Act of Incorporation, or by the nature of its objects, in my opinion has capacity, within the limitation of its constating instrument as to the character and extent of its undertaking, to avail itself of the comity of a foreign state or of another province.

The recent decision of the Judicial Committee in *John Deere Plow Co.* v. *Wharton*(2) was pressed upon us by counsel for the respondent. After a careful study of the judgment in that case I fail to find in it anything which conflicts with the views above expressed. All that was there decided is that a

> province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

(1) 48 Can. S.C.R. 331. (2) [1915] A.C. 330.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Anglin J.

Certain provisions of the British Columbia "Companies Act" requiring the appellant, a Dominion company,

to be registerd in the province as a condition of exercising its powers or of suing in the courts,

were held to be "inoperative for these purposes."

The question, says the Lord Chancellor, is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

I may, perhaps, be pardoned if I quote from my opinion in the *Companies' Case*(1) the short passage dealing with this point (pp. 455-6) :—

The Dominion company, on the other hand, is a domestic company in all parts of Canada. It exercises its powers as of right in every province of the Dominion. While a Dominion company is, generally speaking, subject to the ordinary law of the province, such as the law of mortmain (*Citizens Ins. Co.* v. *Parsons* (2), at p. 117)—while it may be taxed by the province for purposes of provincial revenue (*Bank of Toronto* v. *Lambe*(3)), while it may be required to conform to reasonable provisions in regard to registration and licensing (*The Brewers' Case*(4)), a provincial legislature may not exclude it, or directly or indirectly prevent it from enjoying its corporate rights and exercising its powers within the province (*City of Toronto* v. *Bell Telephone Co.*(5); *Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(6)), as (subject perhaps in the case of alien corporations to the provisions of any general Dominion legislation dealing with them under clause 25 of section 91) it may do in the case of other corporations not its own creatures.

I am, for these reasons, of the opinion that question (*a*) should be answered in the affirmative.

(1) 48 Can. S.C.R. 331.
(2) 7 App Cas. 96.
(3) 12 App. Cas. 575.
(4) (1897) A.C. 231.
(5) (1905) A.C. 52.
(6) (1909) A.C. 194.

This case affords a striking illustration of the undesirability of having the judges of this court express opinions upon abstract questions. Although it has been authoritatively stated time and again, and most emphatically in the *Companies' Case* itself(1), at p. 589; *In re References*(2), at pp. 561, 588 and 592; (see also *In re Criminal Code*(3), that the opinions expressed in answer to such questions

> are only advisory and will have no more effect than the opinions of the law officers,

and that they

> do not affect the rights of the parties or the provincial decisions,

and are "not binding upon us," "or upon any of the judges of the provincial courts," the learned judge of the Exchequer Court has deemed it

> the proper course for (him) to pursue to give effect to the opinion of the learned judges in the Supreme Court. * * * I am not sure (he says) that technically I am bound by these reasons, but I have too much respect for the opinions of the Appellate Court not to follow their views no matter what my own opinion might be on the question,

and he carefully abstains from expressing any opinion of his own, determining the case, as he apparently thought (though erroneously), in conformity with the views expressed by a majority of the judges of this court in the *Companies' Case*(4). While wishing to refrain from an animadverting on the course adopted by the learned judge, I may perhaps venture the observation that if a superior court judge of his experience finds advisory opinions given by the judges of this court so embarrassing that, although "not sure that technically (he is) bound" by them he deems it his duty to follow them regardless of his own views, they

(1) [1912] A.C. 571.
(2) 43 Can. S.C.R. 536.
(3) 43 Can. S.C.R. 434.
(4) 48 Can. S.C.R. 331.

1915

BONANZA CREEK GOLD MINING CO. v. THE KING.

Anglin J.

are likely to prove even more embarrassing and productive of trouble and uncertainty in courts of inferior jurisdiction.

I would answer question (*b*) in the affirmative for the reasons given by Mr. Justice Duff.

Appeal dismissed with costs.

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Solicitor for the respondent: *George F. Shepley.*