1916
*Nov. 30.
1917
*Feb. 6.

KILDONAN INVESTMENTS LIMITED (PLAINTIFF)..... } APPELLANT;

AND

JNO. THOMPSON AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Jurisdiction—Company—Revocation of letters patent—Revival of charter—R.S.M. c. 35, ss. 77, 130.

At the time leave to appeal to the Supreme Court was granted, the letters patent of the company appellant had been cancelled under section 77 of the "Manitoba Companies Act;" but subsequently its charter was revived under section 130 of the same Act.

Per Fitzpatrick C.J. Davies, Anglin and Brodeur JJ. — The revocation of the charter operated as a mere suspension of the powers and functions of the company and the order-in-council reviving the letters patent of incorporation restored the company to its legal position at the time of the revocation as to the proceedings instituted between such revocation and the re-instatement of the company for an order allowing the present appeal to the Supreme Court of Canada.

Per Duff J.—Without deciding whether acts of the officers of the company during the interregnum are in all respects to be deemed acts of the company, it is clear that the company, by virtue of the statute, is to be deemed to have been in possession of its powers during that period, and the act of its officers in applying for the order allowing the appeal, done in the name of the company, could be and has been ratified.

So long as there is no Dominion legislation inconsistent therewith, the capacity of a provincial corporation, as a legal *persona* to initiate and carry on an appeal in this court, is determined by the provincial law.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the judgment of Mathers

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

(1) 25 Man.R. 446.

C.J. at the trial, by which the plaintiff's action was dismissed with costs.

The judgment of the Court of Appeal for Manitoba, dismissing the appeal of the present appellant, was rendered on the 17th of May, 1915. The appellant company, having failed to make the annual summary showing the lands it possessed as required by section 77 of the Manitoba "Companies Act," the letters patent evidencing its incorporation were duly cancelled by Order-in-Council on the 14th day of July, 1915. During the time the charter of the company appellant was so revoked, the solicitors for the appellant obtained from Mr. Justice Richards, on the 6th of August, 1915, an order allowing the present appeal to the Supreme Court. But, on the 18th of October, 1916, the disability of the appellant company was removed, under the provisions of section 130 of the Manitoba "Companies Act," which declares that the Lieutenant-Governor-in-Council may order that the charter of a company "be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender."

The respondents moved to quash on the ground that the company appellant had virtually ceased to exist when the appeal to the Supreme Court has been instituted.

The motion to quash the appeal and the merits of the case were argued at the same time.

Tilley K.C. for the appellant.
Fullerton K.C. for the respondents.

THE CHIEF JUSTICE.—As to the question of jurisdiction I agree with Mr. Justice Anglin. The order-

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in-council reviving the letters patent of incorporation restored the company to its legal position as at the time of the revocation in the same manner and to the same extent as if there had been no such revocation.

On the merits I agree, with some hesitation, that this appeal should be dismissed with costs.

The evidence does not support the defence originally set up, and, in my opinion, it is not very satisfactorily established that all the respondents were induced to enter into the agreement in question exclusively by the representations made by Batters and Baldwin. Some of them on their own evidence were certainly guilty of gross neglect and would appear to me to have been willing to take considerable risks. Little or no inquiry was made as to the site or possibilities of the property. The only consideration with the purchasers apparently was the possibility of a quick turnover in a rising real estate market. For instance, respondent Irwin says that had he known that Batters was getting a commission on the sale of the property that fact would not have affected his mind and there are others who testify to the same effect. Men who are so regardless of the ordinary rules of caution do not deserve much consideration, but the transaction was certainly not an honest one and the presumption is that the company must have known of the relations existing between the secretary-treasurer Hansen, and Baldwin and Batters.

I defer to the better opinion of my colleagues and of the judges in the courts below and am content to let the tree lie where it has fallen.

Davies J. concurred with Anglin J.

IDINGTON J. (dissenting).—This is an appeal by a company incorporated under "The Companies Act"

of Manitoba in an action in which the learned trial judge had maintained charges of fraud set up by way of defence and counterclaim against the company's action and therefore dismissed, on the 27th February, 1915, the action and gave effect to the prayer of those respondents who had counterclaimed. Thereupon the appellant appealed to the Court of Appeal for Manitoba and its appeal was unanimously dismissed on the 17th May, 1915.

On the fourteenth day of July, 1915, the letters patent evidencing the incorporation of the appellant were duly cancelled by order-in-council and such company had not been reinstated at least until after the 18th October, 1916.

Indeed we have no evidence before or beyond the oral admission of counsel that in fact there ever was a re-instatement and nobody seems to know the precise terms thereof.

The case has been hanging before us a long time and something desperate seems to have been done at the last moment.

An affidavit filed on this application to quash (which has been pending for a year or more) suggests, and it is not denied, that the proceedings to revoke the incorporating letters patent were taken under section 77 of the "Companies Act," which reads as follows:—

77. The Lieutenant-Governor-in-Council may, at any time, revoke any letters patent of incorporation granted under this part or under "The Manitoba Joint Stock Companies Act," or under any other Act or Acts for which the said Act was substituted, on account of the violation, by any such company, of any of the provisions hereinafter contained respecting the annual summary to be verified, deposited and posted up, in so far as it is required to show the number of acres of land held by the company, and when they were purchased. Any such letters patent of incorporation so revoked shall be null and void as to any matter occurring subsequent to such revocation. R.S.M. c. 30, s. 67.

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The notice of said order of rescission was advertised in the Manitoba Gazette on the 31st July, 1915, as required by the Act.

The "Companies Act" was amended on the 20th February, 1914, by the following:—

1. "The Companies Act," being chapter 35 of the Revised Statutes of Manitoba, 1913, is hereby amended by adding thereto the following sections:

130. In any case where, by virtue of section 86 of this Act, any charter or letters patent of incorporation of any company has become revoked and cancelled, or where any such charter or letters patent of incorporation has been revoked by order-in-council under section 76 of "The Manitoba Joint Stock Companies Act," being chapter 30 of the Revised Statutes of Manitoba, 1902, as amended by section 3 of chapter 13 of 5 & 6 Edward VII., or where any charter or letters patent of incorporation have been surrendered under the provisions contained in sections 78 and 79 of this Act, if it is made to appear to the Lieutenant-Governor-in-Council, on the application of any person, that the acts or neglects of the company or corporation which led to such revocation or surrender were due to inadvertence, accident or neglect of the officers or servants of the company, and that such cancellation, revocation or surrender of the charter or letters patent of incorporation will result in loss or serious inconvenience to the company or the applicant, and that the required returns have been filed with the Provincial Secretary and fees paid and all other defaults of such company remedied, then the Lieutenant-Governor-in-Council may order that the charter or letters patent of incorporation of the company be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

During the time the company was dead and its incorporation absolutely null in the language first quoted, the solicitors for the appellant had the temerity, on the 6th of August, 1915, to approach Mr. Justice Richards and obtain from him an order allowing this appeal to be made.

Mr. Fullerton in his affidavit, upon which (amongst other things) this notice to quash is founded, denies any knowledge at that time on his part of the revocation of appellant's charter.

I have not the slightest doubt that Mr. Justice Richards was equally ignorant of the fact and was improperly imposed upon, and that if the facts had been disclosed he would have refused to make said order and we would never have heard of this appeal.

The sixty days for an applicant to move had long expired before the appellant could get into any such position as entitled it to make the application.

There is no material filed on behalf of the appellant explaining anything, or excusing anything, and possibly the solicitor in this case was imposed upon; yet even so one cannot help regretting his failure to have ventured upon some explanation for having made an application so unjustifiable under the circumstances. The matter touched his honour as a professional man in a way not to be so lightly passed by.

The proceeding was null and void and the learned judge was entitled to have been frankly treated instead of being imposed upon. The successful despatch of an immense volume of business daily depends upon the most rigid care on the part of the solicitor that he never misleads the judge as to the facts to be considered by him.

In any way I can look at the matter I can find nothing to give vitality to that order so improperly got, or anything pertaining to this appeal founded thereon. And without that where is this appeal landed? The motion to quash was without any question entitled, upon any facts existent for nearly a year after it was launched, to prevail.

The words at the end of the amended section 130, in section 1 of the Act of 1914, do not seem to me to help the appellant.

The company's legal position is not improved by the literal terms of that section restoring it

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as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

These words do not touch or help an order absolutely void.

And the section 122 evidently refers to steps taken in the course of proceedings in Manitoba by virtue of its legislation and not by virtue of the "Supreme Court Act."

The legislature had no power over the subject matter of the appeal to this court and could not, even if it intended so by anything it could enact, affect our right to hear an appeal so launched. I do not think any such thing was ever intended or the words bear any such meaning.

Moreover section 122 of the Manitoba Act may not be applicable to this which is a case of revocation of a charter and not the mere revocation of the licence which it must obtain and lose by revocation of its charter.

The motion to quash should prevail with costs.

Notwithstanding this being my decided opinion at the hearing I listened attentively to the argument and am yet unable to dissent from the holdings below and hence on the ground of any such merits as the case may have, I think it should be dismissed with costs.

DUFF J.—First, as to jurisdiction. The judgment appealed from was pronounced on the 17th day of May, 1915. On July 14th, 1915, the letters patent of incorporation of the appellant company were cancelled by order-in-council under the authority of section 77 of the "Manitoba Companies Act." On the 6th August, 1915, an order was made on the application of persons professing to act on behalf of

the appellant company whose letters patent had been cancelled in the previous month and Mr. Justice Richards made an order allowing the appeal under the provisions of the "Supreme Court Act." In October, 1916, an order was made by the Lieutenant-Governor-in-Council reviving and restoring the letters patent. The objection to be considered is whether or not the order made by Mr. Justice Richards was a valid order.

The decision depends on the effect of the statutory provisions under which, first, the order was cancelled, and secondly, the order of revivor was made, section 77 of the "Companies Act" (1), and section 130 introduced into the Act by an amendment passed in 1914. The effect of the order for revivor is declared by the last mentioned enactment in these words:—

> The Lieutenant-Governor-in-Council may order that the charter or letters patent of incorporation of the company be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender, in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

When, therefore, an order for revivor has been made under the authority of this enactment the company is deemed in point of law to have retained its corporate character and its corporate capacities and powers without interruption notwithstanding the order of cancellation. The enactment does not explicitly declare that acts done by officers of the corporation are to take effect as if no cancellation had taken place; and whether that is or is not involved in the provision that the company is to be

> restored to its legal position as at the time of cancellation

is a point upon which it is unnecessary to pass and upon which I desire to say nothing.

(1) Ch. 35 R.S.M. 1913.

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It is now in point of law deemed to have been in possession of its corporate powers at the time the order of Mr. Justice Richards was made and the act of its agents in applying for the order in the name and on behalf of the corporation is an act which could be and which has been ratified.

I am not losing sight of the fact that an appeal to this court is an independent proceeding which can only be instituted by a competent legal *persona* and that the right to institute it is a right enjoyed in virtue of a Dominion statute. In the absence of some federal enactment relating to the subject, the capacity of a provincial company in this respect is determined by provincial law and we must consequently give effect to the order of revivor in conformity with section 130.

As to the merits, the Chief Justice, who tried the action, in effect found as a fact that Batters was the agent of the company, and that finding was concurred in unanimously by the Court of Appeal. This finding, it is true, rested to a considerable degree upon inference, but this does not detract from the weight of the consideration that two courts have concurred in it. *Johnston* v. *O'Neil*(1). Batters' agency established, there is nothing more to be said.

The appeal should be dismissed with costs.

ANGLIN J.—The effect of section 130 of ch. 35 of the R.S.M. 1913, as enacted by the Manitoba Legislature in the session of 1913-14 (ch. 22, s. 1), is, in my opinion, that, in cases where revivor under its provisions subsequently takes place, any revocation, cancellation or surrender of a charter therein dealt with operates as a mere suspension of the powers and functions of the company

(1) [1911] A.C. 552 at p. 578.

so that upon such revivor the status and rights of the company are in all respects

as if there had been no such revocation, cancellation or surrender.

Thus, for instance, no reconveyance to it or revesting in it of its real or personal property is required. After revivor it is seized and possessed of such property as it was before the revocation, cancellation or surrender and as if the latter had never taken place. All acts done in its name, which would have been lawful and effective had there been no revocation, cancellation or surrender, are after revivor to be deemed acts of the company and of the same efficacy and force and entailing the same consequences

as if there had been no such revocation, cancellation or surrender.

That, I take it, was the purpose of the legislature in enacting section 130, and that purpose would be defeated in this case were we to quash the present appeal because it was instituted and perfected during the period of suspension, *i.e.*, in the interval between the revocation or cancellation of the appellant company's charter under section 86 of the "Companies' Act" (1), and its revivor under section 130.

On the merits, however, the appeal, in my opinion, fails. The facts found and the inferences of fact drawn by the learned Chief Justice who presided at the trial established the agency of Batters for the appellant company. Its responsibility for his misrepresentations follows. That such misrepresentations were made and were material is sufficiently proved by the evidence. I have not been convinced that the findings made and the inferences drawn by the Chief Justice are so clearly wrong that we should reverse

(1) R.S.M. 1913, ch. 35.

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them, after they have been unanimously affirmed by the provincial Court of Appeal, the judgment of the trial court having been in its opinion apparently so clearly right that it was unnecessary to state any reasons for dismissing the appeal from it.

BRODEUR J.—The first question on this appeal is whether we have jurisdiction.

The appellant company having failed to make the annual summary shewing the lands it possessed as required by law (Manitoba Company Law, ch. 35, R.S.M. 1913, s. 77), the charter was revoked, and when the security on this appeal was received the letters patent as a result of that revocation were null as to any matter occurring afterwards. But the parties admit that the disability has since been removed under the provisions of ch. 22 of 1914, sec. 1, which declares that the Lieutenant-Governor-in-Council may order that the charter

> be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender.

The respondents contend that the company having virtually ceased to exist when the appeal had been instituted the appeal should be quashed and they move accordingly.

The provisions of the Act just quoted are wide enough to lead me to the conclusion that the company has always subsisted and if at one time the company was under some disabilities they have been removed by the action of the Lieutenant-Governor-in-Council with a retroactive effect.

In general principle a statute is not to be construed so as to have retrospective operation unless there is

something in its language and contents indicating a contrary intention, but in looking to the general scope and purview of the statute and at the remedy sought to be applied, it seems to me that the provisions of the statute of 1914 must be considered as having a retrospective effect since the company is not only restored to its legal position and has the right to exercise the same corporate powers, but the cancellation is declared as never having existed.

The motion to quash should be dismissed.

On the merits of the case I find that the consent of the plaintiffs on the counterclaim to the sale of the lots of land in question was obtained by fraud and misrepresentation.

The selling agent of the appellant company retained the services of one Batters to carry out negotiations with the plaintiffs in order to induce the latter to purchase those lots. Batters had lived in their locality for a great number of years and was carrying on an agricultural implement business which put him in the best of relations with those people who were farmers. Though he was to have a commission from the selling agent of the company, appellant, he represented to the defendants, respondents, that he was taking some shares in the purchase.

False representations were made to the farmers by Batters and the other agent, Baldwin, as to the vicinity of the lots to the street car lines and as to the erection of valuable houses across the street from those lots and as to their value.

The courts below found against the appellant company on these representations. Their findings should not be disturbed.

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But the appellant contends that Batters was not its agent.

The general selling agent of the company, Skuli Hannson, was at the same time the secretary of the company.

A real estate agent named Baldwin had for some years occupied desk room in Hannson's office and he had undertaken to sell the lots in question. He put himself in relation with Batters to the knowledge of Hannson. Remittances were made direct to Hannson by Batters and as the latter was indebted to Hannson his commission was to be credited on his indebtedness with Hannson.

He did not pay anything on his share of the purchase price but that share was to be paid by way of commission, as he says himself.

I concur in the view expressed by the trial judge that it was intended and agreed between the company and their selling agent, Hannson, that the latter should appoint sub-agents for the purpose of disposing of those lots.

Batters and Baldwin were both sub-agents of the company. The latter recognized Batters as its agent since he was not required to pay any part of the cash payment provided in the contract, but was given credit thereon for his share of the commission he was entitled to.

I may add that it was the duty of the Company on becoming aware that Batters was a co-purchaser with the plaintiffs respondents to satisfy itself that they were aware of the agency of Batters. *Hitchcock* v. *Sykes* (1).

(1) 49 Can. S.C.R. 403.

For these reasons the appeal should be dismissed with costs.

Motion dismissed without costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Graham, Hannesson & McTavish.*

Solicitors for the respondents: *Aikins, Fullerton, Foley & Newcombe.*