

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Colonial Bank of Australasia and another v. Robert Willan, from the Supreme Court of the Colony of Victoria; delivered 23rd March, 1874.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THIS is an Appeal against an Order of the Supreme Court of the Colony of Victoria which, upon a return to a writ of *certiorari*, quashed an Order that had been made on the 18th of November, 1871, by the then Judge of the Court of Mines for the Mining District of Beechworth, for the winding-up of the Golden Gate Gold Company, Registered. The Appellants are the Colonial Bank of Australasia, the creditors on whose application the winding-up order was made; and the official agent for the liquidation of the Company under that order. The Respondent is one of the shareholders of the Company.

This Company was, in the month of May 1865, incorporated under the provisions of the Local Statute passed in the preceding year (No. 228 of the 27 Victoria), and known as "The Mining Companies Limited Liabilities Act, 1864."

It must be assumed that all the requirements of that statute were complied with; and, in particular, that a manager was appointed under the 6th section; that the Company was duly registered in the Court of Mines for the District of Beechworth under the 9th section; and that it had, at least for some time,

a registered office to which all communications and notices might be addressed pursuant to the 15th section of the Act. There were several changes in the person of the manager, the last registered manager being a Mr. William Scott.

The office first registered was No. 37, Market Street, Melbourne, and that continued to stand on the register as the office of the Company up to the date of the winding-up order.

That order was also made under the provisions of the "Mining Companies Limited Liability Act, 1864," as amended in 1867 by a subsequent statute, No. 324 of the 31 Victoria. It was made by the Judge of the district wherein the Company was registered; and therefore by the Judge having general jurisdiction over the subject-matter.

Before they consider the grounds upon which the Supreme Court has made this order, their Lordships will deal with some objections that have been taken to the action of the Supreme Court in this matter.

It has been argued that the Supreme Court had no power to issue a writ of *certiorari* to bring up the proceedings of the Judge of the Court of Mines.

That the Supreme Court has a general power to issue the writ to any inferior Court in the Colony, co-extensive with the like power of the Court of Queen's Bench in this country, is indisputable, and was finally admitted at the Bar.

It was, however, contended, 1st, that the Courts of Mines are not inferior Courts; and, 2ndly, that if they are inferior Courts, the power to issue a *certiorari* to them has been taken away by Statute.

The Courts of Mines were first created in 1857 by the local statute, No. 32 of the 21 Victoria, since repealed by the "Mining Statute, 1865." The latter now defines the powers and functions of the Courts of Mines, and regulates their procedure.

The jurisdiction given to these Courts to wind-up registered Companies was, as has already been stated, conferred upon them by the "Mining Companies Limited Liability Act, 1864," which was passed after the former, but before the latter of the two last mentioned Statutes.

By the "Mining Statute, 1865," it was enacted that, within and for every mining district there should be a Court to be called the Court of Mines;

that such Court should be a Court of Record; that the Court of Mines which, at the time of the commencement of the Act, should be in existence in any mining district existing at that time should be, and be deemed a Court of Mines constituted under that Act.

To these Courts this statute gave in very general terms jurisdiction to hear and determine all suits which might arise concerning miners' rights in Crown lands; or concerning or out of any partnership for or in relation to mining in any Crown land, or for or in relation to the searching for the metals and minerals mentioned in the Act; or generally concerning all questions and disputes cognizable by a Court of Law, or by a Court of Equity which might arise between miners in relation to mining on Crown lands. But it did not expressly refer to the peculiar jurisdiction to wind-up registered Companies, which had been given to the Judges of Courts of Mines by the Act of 1864.

Again, a material difference between the "Mining Statute, 1865" and the repealed Act of 1857 consisted in this. The latter had, by its 71st section, given an Appeal from the Courts of Mines to the Supreme Court; and by its 127th section had provided that no proceedings under that Act should be removable to the Supreme Court except as therein provided. The "Mining Statute, 1865," created a Chief Judge of the Court of Mines, who was to be one of the Judges of the Supreme Court, and, by its 172nd section, gave an Appeal to him in lieu of the Appeal given by the repealed Statute to the Supreme Court; providing, by its 244th section, that "no proceedings under that Act should be removed or removable into the Supreme Court save and except as thereinbefore provided."

Upon a review of these different enactments, and the consideration of the arguments addressed to them, their Lordships have come to the following conclusions—

1. That these Courts of Mines, which have been created by Acts of the local Legislature, and with a jurisdiction which, however wide, is limited both as to the persons and the matters within the Colony over which it is to be exercised, must, on the principle laid down by Lord Holt in *Rex v. Inhabitants of* \_\_\_\_\_, in Glamorganshire, 1 Lord



Raymond, 180, be taken to stand in relation to the Supreme Courts on the footing of Inferior Courts; and,

2. That the power to issue a *certiorari* to these Courts in respect of any proceeding under the "Mining Statute, 1865," has been taken away by statute.

It was, however, argued that a winding-up order made by the Judge of a Mining Court under the provisions of "The Mining Companies Limited Liability Act, 1864," was not a proceeding under the "Mining Statute, 1865," inasmuch as the latter contains no express reference to that particular jurisdiction, or to the orders made thereunder. And it therefore became material to consider whether an Appeal to the Chief Judge of Mines against such an order could be preferred under the Act of 1865; since, if such an Appeal would lie, the order itself would obviously be a proceeding under the Act. The words of the 172nd section are very general. They are "any party to any suit in any Court of Mines, or to any proceeding before the Judge of any such Court (except where the contrary is herein provided) who shall be dissatisfied with any Decree or Order of the said Court, or with the Order of a Judge thereof, not being an order of commitment made by such Court or Judge, may appeal from the same to the Chief Judge." They are, therefore, wide enough to embrace an Appeal by the shareholders of a mining company against an order made by a Judge of a Court of Mines for winding up the company upon such a proceeding as that prescribed by the 28th and following sections of the "Mining Companies' Limited Liability Act, 1864." And it may be remarked that the wording of this 172nd section differs herein from that of the 71st section of the repealed statute of 1857, which gave an Appeal from the Decrees and Orders of the Courts of Mines to the Supreme Court in terms that might well be taken to be confined to decrees and orders in regular suits. And it seems reasonable to suppose that the ampler terms of the more recent enactment were purposely used, in order to embrace the orders made under the provisions of the intermediate statute of 1864.

It may further be observed that the Act of 1867,

which amended that of 1864, by its 4th section, expressly provided that "All Orders made by the Court of Mines, or the Judge thereof, under any of the provisions of the latter statute might be enforced in like manner in which any order or decree of the Court of Mines in any suit pending therein might be enforced; and, consequently, expressly applied to such orders the machinery of executions contained in the 4th subdivision of the second part of the "Mining Statute, 1865."

Their Lordships are, therefore, of opinion that winding-up orders must be taken to be within the scope of the 244th section of the Act, and that the power to remove the proceedings relating to them into the Supreme Court has been taken away by statute.

It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*; but some of these authorities establish, and none are inconsistent with, the proposition that, in any such case, that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.

Some of these authorities will be hereafter considered. At present it is sufficient to mention that of *Reg. v. St. Olave*, 8 E. and B., 528, which supports both these propositions.

It does not, however, appear that the Supreme Court of Victoria has, in the present case, asserted the right to exercise powers in excess of what has been just laid down. Their Lordships understand the final judgment of that Court to state, as the grounds upon which the order ought to be questioned, that the Judge of the Court of Mines who made it had acted without jurisdiction, and that he had been misled into doing so by the fraud of the petitioning creditors. The question upon this appeal is whether the materials before the Court justified either conclusion. And as these two points, want of juris-

diction in the Judge, and fraud in the party procuring the order, are essentially distinct it will be well to consider them separately.

In order to determine the first it is necessary to have a clear apprehension of what is meant by the term "want of jurisdiction." There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide.

Accordingly, the authorities, of which *Reg. v. Bolton*, 1 Q. B., 65, and *Reg. v. St. Olave*, 8 E. and B., 528, may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein: and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. Nor is anything to be found in the cases which have been cited at the Bar, or, so far as their Lordships are aware, in any other decided case, which is really inconsistent with the



proposition just stated. In *Reg. v. the Cheltenham Paving Commissioners*, 1 Q. B., 467, the objection was that the Court which passed the order was improperly constituted, inasmuch as three of the magistrates who were interested took part in the decision. And *Reg. v. the Recorder of Cambridge* 8 E. and B., 637, proceeds on the same ground.

Again, in *Reg. v. Arkwright*, 12 Q. B., 960, the objection was that certain notices which, on the true construction of the statute, ought to have preceded the inquiry, were not given until after the adjudication; and, consequently, that the order had been made in the absence of that which the Legislature had made an essential preliminary to the exercise of jurisdiction.

In cases which fall within the principles of the last-mentioned decisions the question is, whether the inferior Court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry.

There is a third class of cases, in which the Judge of the Inferior Court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the inquiry beyond it. To this category belong such cases as *Thomson v. Ingham*, 14 Q. B., 710, which was much relied upon in the argument; *Pease v. Clayton*, 3 B. and S., 620; and *Reg. v. Stimpson*, 4 B. and S., 301. In all these cases the inferior Court, being incompetent to try a question of title, was bound to hold its hand when a *bonâ fide* dispute as to title arose before it. And the general rule in such a case is that stated in the passage from the Judgment of the Exchequer Chamber in *Banbury v. Fuller*, 9 Exch., 111, which is cited by Mr. Justice Blackburn in *Pease v. Clayton*. "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be

open to inquiry in the Superior Court." And, accordingly, the cases show that the decision of the inferior Court on such a point is examinable either on formal proceedings in prohibition, as in *Thomson v. Ingham*, or in an action of trespass, as in *Pease v. Clayton*, or on *certiorari*, as in *Reg. v. Stimpson*. Whether the Court, in the latter case, would have exercised its summary jurisdiction by quashing the order if there had been evidence on which the magistrates might have reasonably concluded that the question of title was not raised *bonâ fide*, may be doubtful.

All these cases, however, leave untouched the authority of *Reg. v. Bolton*, and that class of cases; and the question is, within which class the present case falls.

The first ground upon which the rule *nisi* to quash the winding-up order was granted was, that there was no jurisdiction to make the order, as at the time of serving the notice of demand, and of making the said order, the Golden Gate Gold Mining Company Registered was not indebted to the Colonial Bank of Australasia in any sum; and the judgment of the Supreme Court, upon which this rule *nisi* was made absolute, found that "there was no petitioning creditors' debt proved, and that there was, therefore, no foundation for the winding-up order."

The order, however, of the 18th November, 1871 (which is set out at p. 20 of the Record), is, on the face of it, strictly regular. It recites that, on the 11th August, 1871, the Colonial Bank of Australasia had served on the Mining Company a demand, under their seal, requiring the Company to pay the sum of 3,223*l.* 11*s.* 8*d.* then due to the Bank, and that the Company had, for the space of three weeks succeeding the service of that demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the Bank. It further recites that, on the 18th November, 1871, the Bank had presented their petition, setting forth the facts before recited, and praying that the Company might be wound up; that an affidavit verifying the petition had been filed in Court; that the Mining Company had been duly served with a notice to appear and show cause why the Judge should not make an order in the terms of the statute; that it had failed



to appear or show any sufficient cause as required by the notice; and states that therefore, upon the hearing of the said petition, and upon reading the said affidavit, and upon proof as well of the facts and matters aforesaid as that the said sum was then due from the said Company to the said Colonial Bank of Australasia; and upon hearing Counsel for the said Bank, he (the Judge) ordered that the said Company should be wound up forthwith. The order, then, was one made by a competent Judge; showing, on the face of it, that every requirement of the statute under which it was made had been complied with; ordering that which the Judge, on proper grounds, had power to order; and containing an express adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the Mining Company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt.

This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior Court. To do this, and to quash the order upon a conclusion thus drawn, is clearly contrary to the principles established by *Reg. v. Bolton* and that class of cases. Their Lordships are, therefore, of opinion that the order under appeal cannot be supported on the ground that there was no jurisdiction to make the order of the 18th November, 1871, because no petitioning creditors' debt was proved.

The Respondent, however, also relies on the second ground stated in the order *nisi*, viz., that the sum mentioned in the winding-up order was not, nor was any part thereof, due to the Bank by the Mining Company; and that the order was obtained by undue and improper means, calculated to deceive the Judge who made the same, and to prevent the Company from showing reasons to the Judge for refusing to make the order, and that so the order was obtained by fraud on the said Judge.

The case of fraud made by the affidavits, and insisted upon by the learned Counsel for the

Respondent at the bar is shortly this:—It is not disputed that, in May 1866, the Mining Company had, by its Manager or other person or persons professing to act on its behalf, overdrawn its account with a bank called the Union Bank, and that, on the 7th day of that month, it was resolved at a meeting, professing to be an extraordinary meeting of the shareholders, that the banking account should be removed from the Union Bank to the Colonial Bank of Australasia, and that Mr. Hogarth, one of the shareholders, should wait on the Manager of the Colonial Bank and make arrangements with him regarding the over-draft to the Union Bank. Nor is it disputed that, in consequence of the arrangements so made, the Colonial Bank paid to the Union Bank the amount of the over-draft, and that the debt claimed to be due from this Mining Company at the date of the winding-up order was the amount so paid with the interest that had accrued thereon.

It was, however, contended that, inasmuch as there is no proof of any resolution sanctioning the borrowing of money except that of the 7th of May, 1866; and that resolution, if it implied such sanction, was passed at an extraordinary meeting of the shareholders which had neither been regularly convened, nor duly advertised, pursuant to the provisions of the 23rd section of "The Mining Companies' Limited Liability Act, 1864;" there was an absence of that sanction to the borrowing of money which is required by the 21st section of the same Act; and, consequently, that the transaction with the Colonial Bank was not binding on the shareholders of the Mining Company; and the debt proved was not the debt of the Company. I was further alleged that the Bank having, in the month of September 1866, commenced an action against the Mining Company for the recovery of this debt, was met by a defence (the precise nature whereof is not stated on the affidavits), and after various postponements had failed to proceed further with that action.

It was further stated that the Mining Company had been "virtually defunct" since the 10th of June, 1868, having permitted its claim to be sold to another Company; that the Manager about that time ceased to be employed by the Company, or to

draw his salary ; and that the name of the Company was then or soon after, taken down from No. 37, Market Street. And it was suggested, if not positively alleged, that the Bank knowing all these facts, and with the object of obtaining the amount due to them, which they knew they could not recover in the actions, had fraudulently entrapped the Judge into making the winding-up order, by serving the demand and the notice required by the statute, and recited in the order upon the Manager, and at the office of the defunct Company ; the notice being purposely framed, so as to give the Company an unusually short period within which to appear and show cause against the making of the winding-up order.

Their Lordships, after a full consideration of the case as disclosed in the affidavits, and of the arguments addressed to them, are not satisfied that there is any ground for imputing fraud to the Colonial Bank. The gist of the supposed fraud is that the Bank was seeking to recover from the shareholders, by means of these proceedings taken behind their backs, a debt for which they were not liable ; and which the Bank knew it could not otherwise recover against them. Their Lordships, however, are by no means prepared to say that the Company (meaning thereby the shareholders) was not liable to repay to the Bank, the money which the latter had unquestionably advanced for the purposes of the Company. The Respondent relied on the case of *Cherry and Another v. The Colonial Bank of Australasia*, 6 Moore, N. S., 225. In that case the Appellants, two of the Directors of a Mining Company, had written a letter to the Bank, stating that they had authorized Clarke, the manager, to draw cheques on account of the Company. Clarke overdrew the account, and the Company having repudiated their liability for the overdraft, the Bank sued the Appellants on the warranty to be implied from their letter. The case proceeded on the assumption that Clarke had not such authority, and the Directors were held to be personally liable on the implied warranty. There seems, therefore, to be nothing in that authority which governs the present case. On the other hand, the cases of *The Royal Bank v. Turquand*, 5 E. & B. 248, and 6 E. & B. 321 ; *Fountain v. Carmarthen Railway Company*,



5 L. R., Eq. Cases, 316; and *Agar v. Athenæum Life Insurance Company*, 3 C. B., N. S., 725, are authorities for holding that it was not incumbent on the Bank, before it advanced the money, to satisfy itself that all the proceedings of the Mining Company and its shareholders *inter se* had been strictly regular. The money so advanced was advanced at least two years before the Mining Company is alleged to have transferred its claim, or to carry on business. It was advanced in order to free the Company from an existing liability, the debt then due to the Union Bank, which the shareholders could not have resisted, if they could have resisted it at all, without destroying the credit of their Company. Again, it appears from the Affidavit of Mr. Bouly, that the action was suspended, in consequence of negotiations with the shareholders for the payment of the debt; and, as regards the Respondent, it appears that, on the 21st of June, 1867, he, as Chairman of the Board of Management, signed a Minute in which it was resolved, in answer to a letter from the Bank demanding the debt, "that no steps be taken to arrange matters with the Colonial Bank until the amalgamation" (presumably the amalgamation with the other Mining Company), is finally completed. Their Lordships, therefore, are unable to affirm on a summary proceeding, at the instance of this Respondent, that the Mining Company were not liable to the Bank for this debt, or that the Bank must be taken to have known that they were not liable.

In this state of things it was unquestionably open to the Bank, acting fairly, to abandon the further prosecution of the action, and to take the steps indicated by the latter part of the 28th section of "The Mining Companies Limited Liability Act, 1864," in order to obtain an order for the winding-up of the Company. In doing this it was bound, under the statutè, to serve as it did the demand and the notice upon the registered manager at the registered office of the Company. The Company which had taken no steps formally to wind up its concerns, but had left the name of its manager and the description of the office to stand on the register, cannot be heard to say that the first was not its officer, nor the second its office. Then, can the shortness of the notice be treated as conclusive evidence of fraud?

The Judgment of the Supreme Court does not so treat it; and upon the application to set aside the order which was tried in August, 1872, before the Deputy Judge, Mr. Bowman, that notice was ruled to be legally sufficient. Nor does it appear that, if a much longer notice had been given to the manager, the shareholders and especially the Respondent would have acted upon it. On what then does the finding that the Judge was imposed upon by the petitioning creditors rest? They made a regular application for a winding-up order; they swore to a sufficient debt; they gave a sufficient notice to the opposite party, on whose failure to appear the order was made. Their Lordships cannot see that the Bank was bound to inform the Judge that some of the shareholders were contesting their liability for this debt, on grounds of which it is sufficient to say that it is extremely doubtful whether they constitute a legal defence. Their Lordships are therefore of opinion that no fraud is established against the Bank, and that that ground for granting the order also fails.

Their Lordships desire to add that, even if the conduct of the Bank had been such as to raise in their minds a much stronger suspicion of unfairness, they would nevertheless have thought that the Supreme Court ought not summarily and on *certiorari* to have quashed the winding-up order on that ground. The Court of Queen's Bench, whose exercise of this jurisdiction is discretionary, would certainly not quash an order of an Inferior Court upon the ground of fraud in the procuring of it, unless the fraud were clear and manifest. Here the question whether a fraudulent use had been made of the machinery for winding-up registered companies, was a complicated one, dependent on a variety of circumstances capable of explanation and requiring nice consideration. In such a case the parties, conceiving themselves to be aggrieved, ought to have been left to other and more formal remedies. Such remedies were open to them. Their Lordships cannot but think that, on a proper application, the Judge of the Court of Mines who made the order would, on a suggestion of fraud, have had power to review it. They are not satisfied that it might not have been reviewed generally by the Deputy Judge on the occasion of the application made to

him in August 1872, under the 3rd section of the Act No. 324, although both parties seem to have then concurred in thinking that, under that enactment, the order could not be set aside unless it had been made *ex parte*. Again, for the reasons before given, their Lordships are disposed to think that an appeal against the order to the Chief Judge of the Court of Mines would have lain; and lastly, it is clear that, failing any of the above remedies, if the Bank had made a fraudulent use of the process of the Mining Court, the parties aggrieved might have had their remedy by regular suit in the Supreme or other competent Court.

For the above reasons their Lordships are of opinion that the order of the Supreme Court quashing the winding-up order cannot be supported. And they will humbly recommend Her Majesty to reverse that order, and to direct that, in lieu thereof, an order be made discharging the rule to show cause of the 22nd November, 1872, with costs. The Appellants must also have their costs of this Appeal.