

No. 89 of 1913.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Between—

JOHN DEERE PLOW COMPANY,
LIMITED (Defendants) - *Appellants*

— AND —

THEODORE F. WHARTON (Plaintiff)
Respondent.

10

— AND —

JOHN DEERE PLOW COMPANY,
LIMITED (Plaintiffs) - *Appellants*

— AND —

GARNET W. DUCK (Defendant) -
Respondent.

Case of the Appellants.

- 20 1. This is a consolidation of two Appeals made direct by special leave from trial decisions of Mr. Justice Gregory, of the Supreme Court of the Province of British Columbia, the question of law in each being the validity of certain provisions of the Companies Act of that Province.

2. The Appellant in both cases is a Company incorporated by Letters Patent issued by the Secretary of State of Canada under the authority of the Companies Act of Canada, and empowered *inter alia* to carry on throughout Canada the business of dealers in agricultural implements. The Company has in fact been carrying on such a business throughout Canada since its incorporation in 1907, but the Company is not licensed or registered as required under Part VI of the Companies Act of British Columbia.

Record p. 2. 3. The first of the cases appealed is an action by a shareholder of the Company to restrain the Company from carrying on business 10 in British Columbia on the ground that the Company is not so registered or licensed. The case was tried upon the pleadings and Record p. 5. exhibits, and judgment was rendered on the 26th May 1913 restraining the Company and its directors and agents from continuing to carry on business in the Province of British Columbia until the Company should have become registered or licensed as required by the Provincial Act. From this judgment the Company appeals.

Record p. 7. 4. The second case is an action brought by the Company against Garnet W. Duck for the price of certain goods amounting to \$5181.45 which goods the Defendant Duck ordered from the Company, but afterwards refused to accept and pay for. The 20 Defendant Duck pleaded that the Company not being registered or Record p. 9. licensed as required by the Companies Act of British Columbia was under the terms of that Act incapable of maintaining any action in connection with business carried on in the Province. Judgment Record p. 11. was given on the 28th May 1913 dismissing the Company's action, and from this judgment the Company appeals.

5. The question of law in each case is whether the provisions of the British Columbia Companies Act which purport to prohibit the Company from carrying on business without being licensed or 30 registered and to render the Company incapable of maintaining actions in the Provincial Courts are *intra vires* of the Provincial legislature.

6. The Letters Patents incorporating the Company, which are filed as an exhibit in both cases, are to be read in conjunction with Section 29 of the Companies Act of Canada, which provides that the Company "shall forthwith upon incorporation . . . become "and be vested . . . with all the powers, privileges and immuni- "ties, requisite or incidental to the carrying on of its undertaking, "as if it was incorporated by a special Act of Parliament, embody- 40

"ing the provisions of this part and of the Letters Patent and
"Supplementary Letters Patent issued to such Company".

7. Under Part VI. of the Companies Act of British Columbia it is provided that "every extra-provincial Company having gain for
"its purpose and object within the scope of this Act is hereby
"required to be licensed or registered under this or some former Act,
"and no company, firm, broker or other person shall, as the repre-
"sentative or agent of or acting in any other capacity for any such
"extra-provincial company carry on any of the business of an extra-
10 "provincial company within the province until such extra-provincial
"company shall have been licensed or registered as aforesaid".

Rev.
Stat.
B.C.
c. 39.
s. 139.

8. "Extra-provincial company" is defined by the Act to mean
"any duly incorporated company other than a company incorpor-
"ated under the laws of the province or of the former colonies of
"British Columbia and Vancouver Island"; and various provisions
of the Act clearly indicate that the term "extra-provincial company"
is intended to include companies incorporated by the Dominion
Parliament.

s. 2.

9. Upon becoming licensed or registered it is declared that the
20 Company "shall, subject to the provisions of the charter and regula-
"tions of the Company, and to the terms of the license, thereupon
"have the same powers and privileges in the Province as if
"incorporated under this Act".

s. 152.

10. The Act provides that "so long as any extra-provincial
"company remains unlicensed or unregistered under this or some
"former Act, it shall not be capable of maintaining any action, suit
"or other proceeding in any Court in the Province in respect of any
"contract made in whole or in part within the Province in the course
"of or in connection with its business, contrary to the requirements
30 "of this Part of this Act".

s. 168.

11. And further "if any extra-provincial company . . .
"shall without being licensed or registered pursuant to this or some
"former Act, carry on in the Province any part of its business,
"such extra-provincial company shall be liable to a penalty of fifty
"dollars for every day upon which it so carries on business"; and
"if any company, firm, broker, or other person acting as the agent
"or representative of or in any other capacity for any extra-provin-
"cial company not licensed or registered under this or some
"former Act shall carry on any of its business contrary to the require-
40 "ments of this Part of this Act, such company, firm, broker, agent

s. 167.

s. 170.

"or other person shall be liable to a penalty of twenty dollars for every day it, he or they shall so carry on such business".

12. Under Section 18 of the Act the Provincial Registrar of Companies is given discretion to refuse to license or register a Company. Acting upon the authority of this section the Registrar of Companies for the Province has refused to grant a license to the Appellant Company, and if the provincial legislation is valid the Company is permanently excluded from exercising its powers in British Columbia.

13. The learned Judge (Gregory J.) gave no reasons in writing 10 for the judgment appealed from in the case of Wharton. In the second case (Duck's) reasons were given which will be found on pp. 11 and 12 of the record but they do not discuss the questions of the validity of the Companies Act of British Columbia. No official report was made of what transpired at the hearing, but counsel for the parties agree in their recollection of what took place. The substance of what was said by the learned Judge appears in a memorandum signed by Counsel. The decisions appealed proceed upon the authority of previous judgments by the Courts of the Province, in particular 20 that of Mr. Justice Morrison in *Waterous Engine Works Company v. Okanagan Lumber Company*, and that of Mr. Justice Murphy in *John Deere Plow Company v. Agnew*.

Record p. 12.

14 B.C.R.
238.

8 Dom. Law
Rep. 65.

14. It is submitted that the judgment of Mr. Justice Gregory in each of the cases is wrong and ought to be reversed on the following grounds:—

15. The powers, privileges and immunities conferred upon the Appellant Company under Section 29 of the Companies Act of Canada and the Letters Patent of the Company must have effect notwithstanding any provisions of the British Columbia Companies 30 Act to the contrary; and the latter are ineffective in so far as they purport to affect the right of the Company to carry on business in the Province and to maintain actions in the Courts.

16. The decision of Mr. Justice Morrison in *Waterous v. Okanagan Lumber Company* rested upon the reasoning that while the Act and Letters Patent of the Dominion conferred the Company's corporate status and capacities, the Company was subject to Provincial laws, one of which required the taking out of a license. It is submitted that this reasoning is wrong.

1909
App.
Cas.
194.

17. The same argument was advanced in the case of *La 40 Compagnie Hydraulique de St. Francois v. Continental Heat and*

Light Company and was expressly negated by their Lordships in that case.

18. Under the principle laid down in the *Compagnie Hydraulique* case and other judgments of the Judicial Committee, even if the legislation in question were expressly authorised by an item of Section 92 of the British North America Act it could not displace the paramount authority of the Dominion under Section 91.

19. It is submitted that the provincial legislation in its application to Dominion Companies is not even *prima facie* sanctioned
10 by any item of Section 92 of the British North America Act.

20. It has been pointed out in several cases that in deciding whether a given enactment falls under Section 92 the Court will as a first step determine the true nature and character of the legislation in question, and in doing this will examine not merely the form of the legislation but its pith and substance; and that legislation outwardly conforming to Section 92 may in reality be referable to an item in Section 91 and *ultra vires* of the Province.

21. In its true nature and character Part VI of the British
20 Columbia Companies Act deals with the recognition of the corporate status and capacity of companies incorporated in jurisdictions foreign to the Province, and the assimilation of such Companies to those incorporated by the Province.

22. Nothing in Section 92 of the British North America Act authorizes the provincial legislature to treat a Dominion Company as a "foreign" Company whose status is a matter for comity as between the Province and the Dominion, and this proposition may be treated as a phase or corollary of a wider proposition, viz., that as to Companies with objects other than "Provincial" the Provincial
30 legislatures are not the custodians of rules of comity. In so far as the legislation deals with foreign Companies of the class of those comprised under Item 11 of Section 92, viz., Companies with Provincial objects, there might be some foundation for the assertion of this jurisdiction, but as to foreign Companies whose objects would, under the Canadian federal system, be regarded as other than "Provincial" it may be submitted the question of recognition or comity is one for the Canadian Parliament; and this view has been maintained by the Dominion Department of Justice in advising upon the validity of Provincial Licensing Acts.

23. But whatever may be the jurisdiction of Provincial legis-
40 latures in respect to Companies of other Provinces and other Countries it is submitted that as to Dominion Companies the

Province cannot raise any question of recognition. Such Companies operate in a different plane and the fact of their incorporation by the Dominion places them in respect to their corporate capacities and organic functions outside the Provincial orbit. In other words, the "Company law" applicable to Dominion Companies is a matter for Dominion legislation.

24. The Provincial Act in imposing a general prohibition upon the Company's "carrying on business", as a Company, and declaring it to be not capable of maintaining actions or proceedings in the Courts of the Province, seeks to invade not only the objective 10 powers and rights conferred by the Dominion Parliament but also the Company's subjective capacities. The capacity to sue and be sued is one of the vital, if not the most vital, of the group of capacities which by attribution of law constitute a corporation. It is not within the competence of a Provincial legislature to abstract any of these capacities and restore them to the Company on terms, as the Provincial Act expressly purports to do in Section 152.

25. The principle above submitted was affirmed by the Judicial Committee in *Dobie v. Temporalities Board* and in the judgments 7 App. Cas. 136. in this case and that of *Citizens Insurance Company v. Parsons* it 7 App. Cas. 96. is impliedly indicated that legislation dealing with the status of a Dominion Company would not be within the competence of a Provincial legislature. 20

26. Further, and apart from the above considerations, it is a prime requisite of Provincial legislation that it should be "local" in its scope. The Appellant Company could not have been incorporated with the powers it has by a Provincial legislature. Its scope is Dominion-wide and inter-Provincial. Jurisdiction to incorporate such Companies is conferred on the Dominion Parliament by Section 91 of the British North America Act, and this 30 jurisdiction has in numerous instances, been recognized by the Judicial Committee. The Provincial legislation would operate as an amendment of the Company's corporate powers, which are not "local" powers though they may be capable of local application.

27. It is submitted that either of the respective lines of argument, in the *Compagnie Hydraulique* case and the *Temporalities Board* case, is conclusive in favour of the Appellant.

28. The provisions of Part VI. of the Companies Act of British Columbia do not fall under Item 9 of Section 92 of the British North America Act, "shop, saloon, tavern, "auctioneer and other licenses". This item must be con- 40

strued with reference to the *ejusdem generis* rule; or at least the principle of *noscitur e sociis*; otherwise there would have been no object in mentioning "shop" and "saloon" licenses, and no specific power of taxation would have been necessary. In the *Brewers and Maltsters* case their Lordships expressed themselves as unable to assign a genus which would include licenses such as those enumerated in Section 9, and would not include a brewer's or distiller's license. It may well be that the genus is that of particular trades or occupations. It is submitted at all events that the genus

10 does not include a license or permission to enjoy corporate status, or exercise corporate rights. In other words a Province might under this head license a brewing Company *qua* brewer, but not *qua* Company.

1897
App. Cas. 231.

29. The distinction between the regulation of particular trades and the regulation of trade generally was recognized in the judgments of the Judicial Committee in *Citizens Insurance Company v. Parsons*. The enactment in question in the *Brewers and Maltsters* case related to a particular trade and was general as to persons, natural or corporate engaging in the trade. The enactment in

20 question in this case is general as to trade but particular as to the form of person who may engage in trade. Corporations, or rather certain classes of Corporations, including Dominion Corporations, are singled out for treatment *qua* Corporations, and not in relation to any particular trade.

7 App. Cas. 96.

30. The provisions in question do not fall under the head of Item 2 of Section 92 "direct taxation within the Province": The Act does not in any sense purport to deal with taxation.

31. The provisions in question do not fall under Item 14 of Section 92, "the administration of justice in the Province". A

30 reasonable provision, which in its "true nature and character" required Corporations having their head office outside the Province to name someone within the Province upon whom process could be served, or even requiring reasonable security for costs of litigation might be within the jurisdiction of the Province under Item 14. But it is submitted that while compliance with such a provision might be made a pre-requisite to bringing or carrying on actions, it could not be made a pre-requisite to carrying on business. The Provinces have no power under guise of legislation respecting the administration of justice to deny the capacity of a Corporation

40 validly created by Dominion legislation to appear in the Courts. The Courts, though constituted by the Provinces, exist for the pur-

poses of Dominion laws as well as, and as fully as, they do for the purpose of Provincial laws.

32. The Appellant submits that these Appeals should be allowed; that the action of the Plaintiff (Respondent) Wharton should be dismissed; and that the claim of the Plaintiff (Appellant) against the Defendant (Respondent) Duck should be allowed, for the following among other

REASONS.

1. Because the reasoning of Mr. Justice Morrison in the case of *Waterous v. Okanagan Lumber Company*, upon which the judgments of Mr. Justice Gregory in these cases are founded, is wrong. 10
2. Because the judgment in *Waterous v. Okanagan Lumber Company* has been overruled in subsequent cases before the Judicial Committee of the Privy Council.
3. Because the provisions of the Companies Act of Canada affirmatively conferring upon the Company the powers, privileges and immunities 20 necessary for the carrying out of its objects are effective notwithstanding Provincial legislation to the contrary.
4. Because the provisions of the British Columbia Companies Act requiring the registration or licensing of a Company before its capacity to carry on business or to maintain actions is recognized by the Courts of the Province are *ultra vires* of the Provincial legislature in so far as they refer to Companies duly incorporated by the Dominion 30 Parliament with objects other than Provincial.
5. Because the provisions of the Companies Act of British Columbia, in so far as they purport to affect Companies incorporated by the Dominion Parliament, are not referable to any item of Section 92 of the British North America Act.
6. Because the Provincial Act deals with Company law and not with taxation, licensing, administration of justice or property and civil rights, in the

sense in which those terms are employed in Section 92 of the British North America Act.

7. Because the Provincial Act deals with Corporations *qua* Corporations and not with any particular trade or business.
8. Because Part VI of the Companies Act of British Columbia deals directly with the recognition of Companies foreign to the Province and classes Dominion Companies with such foreign Companies.
- 10 9. Because the fact of the Appellant Company being incorporated by the Dominion places it outside the sphere of Provincial incorporation laws.
10. Because the Company's objects are not "local" or "provincial".
11. Because the provisions of the Act incapacitating the Company from carrying on business and maintaining proceedings in the Courts both in essence and in form seek to invade the Company's corporate status and capacity.
- 20 12. Because it is not competent to a Provincial legislature to modify or amend the constating legislation of a Dominion Company.
13. Because the Dominion power of incorporating Companies with other than Provincial objects is not a mere power to confer abstract capacities or attributes.
14. Because the Dominion Companies Act and the Company's Letters Patent expressly confer upon the Company certain powers, privileges and immunities.
- 30 15. Because where a given field of legislation is within the competence both of the Parliament of Canada and the Provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict as they are in the present case.

F. W. WEGENAST.

In the Privy Council.

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— AND —

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— v. —

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Respondent.

Case of the Appellants.

LAWRENCE JONES & Co.,
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Appellants' Agents.