In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE BONANZA CREEK GOLD MINING COMPANY, LIMITED .. .. (Suppliants) *Appellants,*

AND

HIS MAJESTY, THE KING .. .. (Respondent) *Respondent.*

CASE FOR THE APPELLANTS.

10 **1.** This is an appeal by special leave from the judgment of the Supreme Court of Canada, dated 2nd February, 1915, which judgment by a majority (Idington and Anglin JJ. dissenting) affirmed the judgment of the Exchequer Court dated 28th April, 1914, dismissing the Appellants' Petition of Right. Record p. 89. Record p. 60.

2. The Appellants are a company incorporated under the Ontario Companies Act by Letters Patent of the Lieutenant-Governor of the Province of Ontario in Council bearing date 23rd December, 1904, for the purpose and objects, among other things, of carrying on the business of mining in all its branches, and of acquiring by purchase, lease or otherwise, real and personal property, rights, powers, concessions, privileges and franchises 20 to enable the company to properly exercise and carry on all or any of its objects. Record p. 4, l. 14. Record pp. 30-32.

3. The Appellants for some years prior to this litigation had been in possession of and engaged in the operation of certain leasehold mining properties situate in the Yukon Territory, to which they had obtained title by assignments, duly filed in the office of the Department of the Interior, and their operations had received from the respondent ostensible recognition by the issue of what is known as a free miner's certificate and license to do business in the Yukon Territory, and by their Petition of Right dated 27th Record pp. 4-17.

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January, 1908, they prayed for relief in respect of damage caused to the Appellants by reason of wrongful acts and omissions of the Respondent as represented by the Department of the Interior and its officers.

4. The Respondent, on the 16th January, 1909, delivered an answer to the Appellants' Petition of Right, the first two paragraphs of which were as follows:

Record p. 18, l. 16. et seq.

"(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 Dis- "trict of the Yukon, or to acquire any mines, mining claims or mining 10 "locations therein, or any estate or interest by way of lease or other- "wise in any such mines, mining claims or locations.

"(2) Should a free miner's certificate have been issued to the Sup- "pliant, 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."

Record p. 55, l. 21. et seq.

5. On the 14th March, 1914, The Exchequer Court, on the application of the Respondent, ordered a stay of proceedings, pending the determination 20 of the questions of law so raised by the Respondent, and directed that any such questions of law and any questions of fact necessary to their determination be raised and determined on the pleadings and on the admissions and documents agreed upon by the parties.

Record pp. 4-17 and pp. 28 and 29 and p. 53.

6. The relevant facts are to be found in the allegations contained in the Appellants' Petition of Right and Reply which are for the purpose of this appeal to be taken as established, and in the admissions between the parties.

These facts may be briefly summarized as follows:

Record p. 4, l. 28. et seq.

(1) On the 22nd July, 1898, and on the 2nd November, 1898, 30 respectively, applications to the Department of the Interior of Canada were made by J. J. Doyle and his associates, and by C. A. Matson and his associates, for adjoining hydraulic mining locations situated on the Bonanza Creek, in the District of Yukon. (For convenience Doyle and Matson and their respective associates are hereafter referred to as Doyle and Matson simply).

Record p. 5, l. 19. et seq.

(2) Notices of these applications were posted at Dawson in the office of the Gold Commissioner, who is one of the local officials of the Department of the Interior in the Yukon District, but, no further action being taken by the Respondent for several months, a number of indi- 40 viduals located placer mining claims along and adjacent to the Bonanza Creek in portions of the lands covered by these applications. These placer claims were located, in the majority of cases, not for the purpose of mining, but to force the applicants for the hydraulic locations to purchase the placer claims in order to obtain that access to the creek valley essential for hydraulic operations.

(3) On the 3rd December, 1898, while these applications were pending, an Order of the Governor-General of Canada in Council was issued which, after reciting that applications had been received for locations in the Yukon Territory "for the purpose of the ground being worked by hydraulic method of mining or by other means requiring operations on a large scale," introduced for the first time regulations for the disposal of mining locations to be so worked.

This order provided *inter alia* that the Minister of Interior might, subject to certain conditions, issue a lease to any person who prior to 10 that date had filed with the authorities therein specified, an application for a mining location, not provided for by the mining regulations then in force.

Where it had been decided to hold ground for the purpose of including it in locations under these Regulations, it was provided that notice should be posted in the office of the Mining Recorder of the District to that effect and that after such posting no occupation or right under the Regulations governing placer mining should be recognized.

Record p. 6, l. 25. *et seq.*

(4) On the 10th June, 1899, 5th January, 1900, and 13th January, 1900, respectively, the Respondent, represented by the Minister of the 20 Interior for Canada, granted leases to Doyle and Matson of the lands comprised in their several applications, excluding therefrom in each case so much of the land applied for as had been taken up and entered for as placer mining claims, the entries of which had not been cancelled at the dates of the respective leases.

(5) So many placer claims had been located within the boundaries of the lands comprised in the original applications, that it was found difficult if not impossible to undertake hydraulic mining on the land included in the leases. To meet this situation and to render it practicable to develop the leased territory, on the 9th January, 1900, and 15th 30 January, 1900, the Respondent entered into agreements with Doyle and Matson collateral to the respective hydraulic leases, whereby it was agreed that if any placer mining claims whatever within the tracts of land included in the applications for the leases should become forfeited because of noncompliance of the entrant with the conditions of the entry, or revert or be surrendered to the Crown for any reason or cause whatsoever, the lands comprised in such claim or claims should be leased to Doyle and Matson, respectively, on the conditions governing the original leases (subject to certain provisions not material to this appeal). All the estate, right, title and interest of Matson and Doyle in these 40 leases and agreements and in the mining properties therein referred to, were transferred to the Appellants, whose mining operations have been confined to the properties so acquired, by assignments duly filed in the Office of the Minister of the Interior at Ottawa.

Record p. 7, l. 22. *et seq.*

Record p. 8.

(6) Notwithstanding these leases and collateral agreements, and notwithstanding the protests of the Appellants and their predecessors in title, the Respondent in disregard and violation of said agreements, persisted for several years in permitting such reverted and lapsed claims

to be relocated with the result that the operations of the Appellants were most seriously interfered with and the Appellants suffered loss and damage amounting to a very large sum of money.

Record p. 49 and p. 50.

(7) On the 24th December, 1904, the Respondent, acting through the Deputy Minister of the Interior, issued to the Appellants a Free Miner's Certificate purporting to entitle the Appellants "to all the rights and privileges of a Free Miner under any mining regulations of the Government of Canada," and received and accepted therefor the sum of $100. From time to time the Respondent renewed said certificate and accepted the fees payable for such renewals until, owing to 10 a change in the regulations, such certificates ceased to be required.

The Regulations under which this Certificate was issued were promulgated on the 13th March, 1901, by order of the Governor-General-in-Council, and provided *inter alia* that every joint stock company (as defined by the Regulations) "Shall be entitled to all the rights and privileges of a free miner."

Record p. 52.

(8) On the 7th September, 1905, through the Yukon Territorial Commissioner and Secretary, a license was issued to the Appellants "authorizing them to do business in the Yukon Territory." This license, after reciting that the Appellants had petitioned "for a license 20 to carry on its business within the Yukon Territory" and that the Appellants had deposited with the Territorial Secretary a certified copy of their Memorandum and Articles of Association whereby it appeared the Appellants were incorporated under the laws of the Province of Ontario for the purposes and objects therein set out and had also deposited a Power of Attorney empowering an individual within the Yukon Territory to accept service of process and receive notices and do all acts and execute all deeds and other instruments relating to the matters within the scope of said power; authorized and licensed the Appellants "to use, exercise and enjoy within the Yukon Territory all such 30 powers, privileges and rights set out in their Memorandum of Association as are within the power of the Commissioner of the Yukon Territory in Council to authorize and license and to carry on within the Yukon Territory all such objects of incorporation."

The above license was issued "in pursuance of The Foreign Companies Ordinance, being Chapter 59 of Consolidated Ordinances of the Yukon Territory" (1902), which was originally an Ordinance of the North-West Territories made applicable to the Yukon by Dominion Statute, 61 Vict. cap. 6, Sec. 9.

The Second section of the said Ordinance provides in part as follows: 40

"2. Any company, institution or corporation incorporated other- "wise 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 (through the Territorial Secretary) "petition the Commissioner for a license so to do and the Commissioner "may thereupon authorize such company, institution or corporation to

"use, exercise or enjoy any powers, privileges and rights set forth in "the said license." Appellants' Case.

This Section also provides for the deposit in the office of the Territorial Secretary of the instrument incorporating the company and a power of attorney of the character described above, and that "*notice* of the *granting of such license shall be given* forthwith by the Territorial Secretary in the Official Gazette"; that the license shall be evidence in any Court of the Territory "of the due licensing of the company"; that the company shall every year make a detailed statement to the Territorial Secretary of its affairs; that no company shall carry on any part of its business in the Yukon Territory until duly licensed under this Ordinance; and that a license granted to any company failing to comply with the provisions of this section might be suspended by the Commissioner, the rights of creditors remaining as at the time of suspension.

Section 7 provides *for a penalty* for the carrying on of business without a license within the Territory, and enacts that a company having no resident agent and no office in the Yukon shall not be deemed to be carrying on business there if engaged in taking orders, buying and selling goods, etc., within the boundaries of the said Territory.

Section 8 provides that no unlicensed company shall be capable of maintaining an action in Court in respect of any contract executed within the Territory, and that the onus of proof of whether or not a company has been duly licensed rests upon the company.

(9) The Appellants paid to the Respondent through the Secretary of the Yukon Territorial Council the *sum of $500, being the fee required* for *such license*. This license, issued to the Appellants on the 7th September, 1905, has never been cancelled or withdrawn. Record p. 51.

(10) On the 6th July, 1905, an Order of the Governor-General-in-Council was issued which recited *inter alia* that the holders of what is known as the Matson and Doyle location, had made application for permission to impound by means of dams constructed on Adams Creek, a tributary of Bonanza Creek, the surplus water of that stream, and that the provisions of the Regulations having been complied with, their application had been approved by the Gold Commissioner, and this approval had been confirmed on the 14th October, 1904; *that* application having been made by these holders for permission to use the water so impounded for their own purposes and to distribute and sell the same for mining purposes, the Minister recommends, as there appears no objection to the granting of such permission, that he be authorized to permit said holders to store, divert, distribute and dispose of the unentered and unappropriated waters of Adams Creek at a certain point on that stream for a period of fifteen years, upon terms and conditions which so far as material may be summarized as follows: Record p. 15, l. 26. *et seq.*

The applicants' rights to be confined to the unentered and unappropriated water only, and satisfactory measurements of the intake and outtake of such water to be made by the applicants;

The applicants, within one year from the date of the said Order of the Governor-General-in-Council to furnish proof to the satisfaction of the Minister of the Interior of the expenditure of not less than $5,000 in actual construction and to prosecute construction with reasonable diligence to the satisfaction of the Minister, and to complete all works necessary for the storage and diversion of the water not later than the 1st June, 1908;

The price for water to be fixed by the holders subject to amendment by the Governor-General-in-Council;

No permission to divert and dispose of such water to be given until 10 a certificate of the Government Mining Engineer that he is satisfied as to the safety of the dams constructed had been issued; the holders to be responsible for any damage or loss occasioned by any leak or break, or imperfection in any part of the works, and to grant suitable indemnity to the satisfaction of the Minister of the Interior for such damage or loss;

The applicants to be required to purchase at a price to be fixed by the Commissioner of the Yukon Territory the surface rights of the lands which may be submerged by reason of the construction of the dam or reservoir.

Record p. 15, l. 31. *et seq.*

(11) Immediately after the passing of this Order-in-Council, the 20 Appellants proceeded with the construction of the works authorized by the said Order-in-Council and brought same to completion before the first October, 1906, after having expended a very large sum of money thereon.

(12) On the 21st May, 1906, an Order of the Governor-General-in-Council was issued which recited *inter alia* the granting of the Doyle and Matson leases, and that at the time of such granting there were included within the boundaries of these locations, placer mining claims not forming part of these leases; that the lessees represented that a large number of these claims were issued after application by them for 30 these hydraulic locations to grantees who had no serious intention of working same and asked that any reverted or forfeited claims be granted to themselves; that the agreements of the 9th and 15th January, 1900, had been entered into between the said hydraulic lessees and the Department of the Interior; that a large number of claims since the dates of these agreements had been abandoned or forfeited and no supplementary leases thereof had been issued; that the hydraulic lessees complain of the requirements necessitating the filing of plans in the Department of the Interior of such reverted or abandoned claims, as unnecessary and expensive; that the Commissioner of the Yukon Territory is 40 of opinion that a survey of each reverted or abandoned claim within the boundaries of these hydraulic locations is unnecessary and recommends that the beforementioned agreements be cancelled and new agreements be entered into which will not require the lessees to have such survey made, and will provide that all such claims within the limits of their leaseholds will revert to the Crown and not be open to entry, but will be granted to the lessees, provided all rights of the former own-

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ers have expired; that a survey of these placer claims is unnecessary; that when abandoned or forfeited they shall not be subject to re-entry, but shall revert to the Crown, and that he be permitted to enter into an agreement with the hydraulic lessees for the issue of supplementary leases for such reverted claims upon their complying with such conditions as it may seem reasonable to impose.

Record p. 46, l. 1. et seq.

(13) On the 16th March, 1907, an agreement was entered into between the Respondent, represented by the Minister of the Interior, therein referred to as "the Minister," and the Appellants described as "a body corporate and politic duly incorporated under the laws of the Province of Ontario," and therein referred to as "the lessees."

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This agreement recited *inter alia* the granting of the above-mentioned leases to Doyle and Matson; the vesting of these leases and the interests therein of Doyle and Matson in the Appellants; the exclusion from these leases at the time of their issue of lands included in claims lying within the boundaries of the hydraulic locations and the location of other claims since the dates of the issue of said leases within those boundaries; the provision by regulation under the Dominion Lands Act and by way of ordinance under the Yukon Territory Act, that abandoned or forfeited claims within these locations should not be open to entry, but should revert to the Crown and the authorization of the Minister to enter into an agreement with the Appellants for the issue to them of supplementary leases of such claims; and that the claims enumerated in the schedule to this agreement have been abandoned or forfeited, and other claims are likely to revert to the Crown during the pendency of these hydraulic leases.

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After which recitals the indenture proceeds to grant unto the Appellants the lands comprised in the claims enumerated in the said schedule and the mining rights and privileges in connection with such claims and the Respondent promises and agrees that in every case where land within the boundaries of these locations becomes vested in the Crown, His Majesty will grant to the Appellants a lease of such land, —a memorandum signed by the Minister or Deputy Minister of the Interior describing the claims and stating that the lands comprised therein are thereby incorporated in and shall form part of these hydraulic mining locations, being sufficient for the purpose of leasing them to the Appellants.

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(14) The Appellants' capacity to accept assignments of the above-mentioned leases and collateral agreements, which had been repeatedly recognized and acted upon by both parties as valid and subsisting, was for the first time questioned by the Respondent in his answer to the Appellants' Petition of Right.

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Record pp. 56-59.

7. The Senior Judge of the Exchequer Court, Cassels, J., delayed hearing argument on the objections thus raised by the Respondent until delivery of their judgment by the Supreme Court, in what is known as the Companies Case (48 S.C.R. p. 331). After the delivery of this judgment and the hear-

Appellants' Case. ing of argument on the Respondent's objections, he dismissed the Appellants' Petition of Right.

Record p. 57, l. 12. et seq. Cassels, J., thought, erroneously as it appears, that he was giving effect to the reasons of the majority of the judges in the Supreme Court in the Companies Case. He says that he was not "sure that technically he was bound by these reasons," but that he had too much respect for the opinions of the Appellate Court not to follow their views, no matter what his own opinion might be. He thought the opinions of the Chief Justice, Sir Louis Davies and Duff, JJ., were to the effect that a company such as the Appellants', had not the capacity to carry on business in the Yukon Territory; 10 and that the opinions of Idington and Brodeur, JJ., were the other way. Upon consideration of the judgment of Anglin J., he infers therefrom that the latter entertained the view that a provincial mining company must be confined in the exercises of its main functions to the Province incorporating it.

Record p. 58, l. 28. et seq. The judgment of Cassels, J., concludes as follows: "It seems to me that "on this state of facts, the proper course for me to pursue is to give effect "to the opinion of the learned Judges in the Supreme Court. The question "at issue is one of great moment to a large number of companies. It is a "question that must be finally decided by the Privy Council in order that "the law should be settled definitely once and for all. This can be attained 20 "by an appeal from my judgment dismissing this petition. I wish it to be "clearly understood, that I am following as I conceive it my duty to do, the "reasons of the learned Judges of the Supreme Court, as I understand them, "and am not expressing any opinion of my own on this important question. "It may turn out later that the real question is not one of capacity, but that "it is a matter of internal regulation as between the shareholders of the "company and their directors. In the case of a trustee, a trustee if recog-"nized by a foreign country, could enter into contracts in a foreign state, "and as between the trustee and the party with whom he contracts, the "contract would be valid and enforceable. Nevertheless, the trustee might 30 "be restrained by the *cestui qui trustent* from imperilling the trust funds "by investments beyond the state in which the trust is to be administered. "And so it may be that while the incorporation created by a province is "brought into being with full capacity to contract beyond the confines of "the province, and to enforce their contracts if recognized by the comity of "nations, nevertheless, the shareholders of this company incorporated by a "province may perhaps have the right to restrain the directors from imperil-"ling their funds beyond the borders of the province. This would not in "any way be a question of capacity. I simply mention this point incident-"ally. I do not see it referred to in any of the opinions of the learned Judges 40 "of the Supreme Court.

"I am of the opinion I should dismiss the petition. I think that under "the circumstances of the case, and the fact that the Respondents have "recognized the corporate capacity by their acts, the dismissal should be "without costs.

"It is pressed upon me that the Crown are estopped by reason of what "has taken place, but I cannot understand how, when the capacity does "not exist, such capacity can be created by estoppel."

8. The Appellants appealed to the Supreme Court of Canada and the judgment of that Court was rendered on the 2nd February, 1915, when it became evident that Cassels, J., had misapprehended the opinion expressed by Anglin, J., in the Companies Case.

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Mr. Justice Anglin defines the questions presented in this case as follows:

Record p. 84, l. 6. et seq.

"(*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.

10 "(*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."

He then proceeds to point out that in the Companies Case he had expressed the view that a company such as the Appellants, incorporated by the Province of Ontario to carry on mining operations without territorial limitation had capacity to avail themselves of the sanction of any competent authority which should permit them to carry on their business within the limits of the jurisdiction of such authority. In the Companies Case he had expressed the opinion that the purpose and effect of Enumeration 11 of Sec-20 tion 92 of the British North America Act was to preclude the contention that the sole power of incorporation, if considered as a distinctive head of legislative jurisdiction, was vested in the Parliament of Canada. The words "with provincial objects," he thought inapt to impose a territorial restriction and intended merely to exclude from the provincial powers of incorporation such companies as had objects distinctly Dominion in character, either because they fell under one of the heads of legislative jurisdiction enumerated in Section 91, or because they were unquestionably of Canadian interest and importance. In his view both Dominion and Provincial corporations had capacity to operate throughout Canada—Dominion corporations as of 30 right, and Provincial corporations by reason only of such comity as might be extended to them by the other Provinces.

9. The Chief Justice adhered to the opinion expressed by him in the Companies Case (48 Can. S.C.R. 339) that the Parliament of Canada could alone constitute a corporation with capacity to carry on its business in more than one province; and that companies incorporated by provincial legislatures are limited in their operations to the territorial area over which the incorporating legislature has jurisdiction, but that "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 40 which are ancillary to the exercise of its substantive powers." He thought that it might be that a provincial company could with the consent of another province exercise its civil capacities within the area of that province, but proceeds, "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." He considered that the Appellants' charter must be construed to read: "The subscribers to the memorandum of agreement are created a corporation for

Record p. 62, l. 4. et seq.

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," and adds, "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."

Assuming that the Appellants had power to engage in mining operations in the Yukon Territory, he thought that they had not complied with the conditions, as a Free Miner's Certificate was necessary and such could only be obtained by a British Company or a Foreign Company. The license 10 given to the Appellants by the Deputy Minister of the Interior was ineffective, as such license could only be issued by the Secretary of State. The Appellants being excluded from obtaining a free miner's certificate, could not acquire any right or interest to a mining claim in the Yukon or enter into an agreement with the Dominion Government with respect thereto.

Record p. 64, l. 6. et seq.

10. Sir Louis Davies, J., rendered a short judgment referring to the Companies Case, as follows:

"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. 20

"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 over these reasons given by me in the Reference above referred to."

Record pp. 64-79.

11. Idington, J., delivered a lengthy judgment dealing in some detail with the facts of the case. He points out that the capacity of a provincial company to do anything relative to the objects of incorporation when not 30 prohibited by law, had not, until recently, been questioned. The denial of such capacity as to certain operations impossible of accurate definition and the admission of such capacity as to certain other operations equally impossible to define, he thought a proposition difficult to understand.

He reviews the facts set out above in this petition showing the repeated recognition accorded by the Respondent to the Appellants and the loss suffered by them due to the Respondent's acts and omissions.

After reciting the recognition accorded to the Appellants by the issue of a license in pursuance of the Yukon Consolidated Ordinances, cap. 59, and of the Free Miner's Certificate issued in pursuance of a Dominion Order- 40 in-Council, he points out that the law of England, by which foreign corporations are by the comity of nations recognized, "was in force in the Yukon."

Record p.67, l. 12. et seq.

"No Dominion Act is shown prohibitive of the provincial corporation 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."

Cassels, J., was in his opinion wrong in the conclusions which he derived from the opinions expressed by the majority of the Supreme Court in the Companies Case, and in any case these opinions were not binding on anyone.

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"On the other hand, this Court had decided in the concrete case of The Canadian Pacific Railway Company v. Ottawa Fire Insurance Company, (39 Can. S.C.R. 405), against the views which the learned trial judge adopts as the opinion of this Court." On the principles followed in that case and in view of the fact that the seat of the Dominion Government is in Ontario, and the transactions between the Respondent and the Appellants had taken 10 place in that province, he considered that the Appellants had paid moneys to the Respondent which they were at all events entitled to recover and that they were entitled to take an assignment of a lease and of a claim such as was held here by their predecessors in title.

Record p. 68, l. 5. et seq.

A contract uninforceable on account of being *ultra vires*, not being void in the sense of being illegal, might give rise to rights cognizable by the Court in order that justice might be done.

"It hardly seems right or, indeed, consistent with what one should expect to find following that decision" (*i.e.*, Canadian Pacific Railway Company v. Ottawa Fire Insurance Company) "that the Crown having recog-20 nized the standing of the provincial company and taken its money when denying its capacity to pay, should yet refrain from at least tendering so much amends."

Record p. 68, l. 39. et seq.

As to the denial of the capacity of provincial companies to go beyond the territorial limits of their parent province, "either to contract there or acquire there property or rights of any kind, serving its uses in pursuit of its objects," he pointed out that such denial was contrary to the view which had been acted on 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 companies, which must be held *ultra vires* and void if the contention set up 30 should prevail."

That business seeking development should be confined in all or any of its operations within the territorial limits of the incorporating province, was to his mind inconsistent with the requirements and expectations of business men looking to commercial success. The provinces "which negotiated and arranged for the creation of the federal system" had each 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 in view." * * * * *

Record p. 70, l. 16. et seq.

40 "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 Do-"minion might be 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.

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"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 sub- "mit 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 10 "the solution of the question; as it has been done in each individual case for "nearly half a century with great benefit to all and detriment to none."

He points out that the framers of the British North America Act were no doubt aware of the recognition of corporate capacity in the United States and elsewhere. They had before them the constitution of the United States and the judgment of the Supreme Court of that country which, in 1839, had decided that companies incorporated by the States of the Union could do business wherever the comity of State or nation might permit.

After discussing certain English, American and Canadian decisions and authorities, and pointing out the necessity and advantage of provincial legis- 20 lation in regard to development of the varied resources of Canada, and the difficulty of such development by companies with their capacity to do business limited to the territory of the province incorporating them, he says:

Record p.75, l. 25.

"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."

The situation of the provinces and the commercial relations of their inhabitants were such as to forbid in his view serious consideration of the proposition that companies incorporated in one province could not extend their activities beyond the territorial limits of the province of incorporation. 30

He proceeds to show how impossible it is to define satisfactorily the difference between "substantive" and "ancillary" objects, and how unworkable such a distinction would prove in practice; asking whether the business man and his foreign customer is to be put on inquiry as to what were or were not the "incidental necessities" of the company with whom he proposed doing business. This difficulty of definition would occur with mining and other provincial companies sending their raw products to be treated in another province, or treating at home products obtained from one province and disposed of in another, in accordance with the spirit and working of Sec. 121 of the B.N.A. Act, which provides for free admission of "all articles 40 of the growth, produce or manufacture" between the provinces.

Until Parliament had entered the field of legislation in respect to the regulation of trade and commerce, he did not think the capacity of a provincial corporation to receive recognition outside the creating province could be called in question, as it in no way interfered with such possible Dominion legislation over corporations as might be necessary to give efficacy to Dominion jurisdiction over matters within Dominion legislative control.

He inquires as to what is the effect of the recognition of the Appellants by the Respondent and whether such recognition is not in effect a re-incorporation and without expressing an opinion on this question he does not think it disposed of by the fact that the Crown is not bound by estoppel. The honor and dignity of the Crown he thought to be "deeply concerned" and this question of recognition by the Respondent and of the range of the Exchequer Court jurisdiction ought to be considered (if his view of the Appellants' capacity is not maintainable) "in order that justice may be done" in this case. If the Appellants possessed capacity, they were en-10 titled to succeed apart from such considerations, as there has been in manifold ways recognition of the Appellants by the Respondent.

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12. Duff, J., thought that the Appellants had not received from their Letters Patent or any other source, capacity to acquire the right to carry on their business in the Yukon. He thought the Yukon Ordinance relating to the registration of extra territorial companies did not authorize such companies to carry on within the territory any business which they would otherwise be disabled from carrying on by reason of restrictions upon their capacity laid down by their original constitutions.

Record p. 79, l. 23. *et seq.*

The province could limit the operation of the doctrine of *ultra vires* 20 provided it did not legislate inconsistently with the terms of the clause under which companies were created by it, but, he thought, a company having capacity to enter into valid transactions having no relation to any objects which could be described as "provincial," was not a "company with provincial objects" within Section 92 (11), and the Appellants must be held to possess only such powers and capacities as have relation to the business of mining as an Ontario business.

He did not think that any object was provincial merely because it could be carried out within the province and was not committed by the B.N.A. Act to the control of the Parliament of Canada, nor that the province while 30 unable to invest a company with the rights to carry out "objects" not provincial, yet could endow such company with the capacity to acquire rights and powers "having no relation to such objects," from any other competent legislative authority.

He thought that the limitation "with provincial objects" had reference to the business or undertaking the company is capable under its constitution of carrying on, and to the powers and capacities with which the company is for that purpose endowed—looked at as a whole—and that by the force of such a limitation the company was incapable of pursuing objects which were not provincial.

40 **13.** The judgment of Anglin, J., part of which was summarized above in paragraph 8 of this Petition, concludes in part as follows: "The recent decision "of the Judicial Committee in John Deere Plow Co. v. Wharton was pressed "upon us by counsel for the Respondent. After a careful study of the judg- "ment 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

Record p. 87, l. 23. *et seq.*

Appellants' Case. "'the laws of the province restricting the rights of the public in the province "'generally. What it does mean is that the status and power of a Dominion "'company as such cannot be destroyed by provincial legislation.'

"Certain provisions of the British Columbia Companies Act requiring the "Appellant, a Dominion company, 'to be registered in the province as a con- "'dition of exercising its powers or of suing in the Courts,' were to be held "'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 10 "'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 con- "'ferred 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 an- "'swered in the negative.'

"I may, perhaps, be pardoned if I quote from my opinion in the Com- "panies Case the short passage dealing with this point (pp. 455-6):

"'The Dominion company, on the other hand, is a domestic com- "'pany in all parts of Canada. It exercises its powers as of right in every "'province of the Dominion. While a Dominion company is, generally 20 "'speaking, subject to the ordinary law of the province, such as the law of "'Mortmain (Citizens Ins. Co. v. Parsons 7 App. Cas. 96 at p. 117)— "'while it may be taxed by the province for purposes of provincial revenue "'(Bank of Toronto v. Lambe 12 App. Cas. 575), while it may be required "'to conform to reasonable provisions in regard to registration and licens- "'ing (The Brewers' Case (1897), A.C. 231) a provincial legislature may "'not exclude it, or directly or indirectly prevent it from enjoying its cor- "'porate rights and exercising its powers within the province (City of "'Toronto v. Bell Telephone Co., (1905) A.C., 52); Compagnie Hydrau- "'lique de St. Francois v. Continental Heat and Light Co., (1909) A.C. 30 "'194), as (subject perhaps in the case of alien corporations to the pro- "'visions 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.'"

14. The Appellants lodged a Petition praying for special leave to appeal and pointing out *inter alia* that: "A great number of companies have been "incorporated by or under the authority of the provincial legislatures since "the enactment of the British North America Act in 1867, a very large pro- "portion of which companies have transacted business and acquired property "and other rights outside the territorial limits of the province under the laws 40 "of which they have been incorporated and these transactions and rights "would appear to be invalid if the judgment of the majority of the Supreme "Court in this case is correct."

15. The Appellants, having obtained leave to appeal from the judgment of the Supreme Court, submit that their appeal should be allowed, and the questions raised by the Respondent in answer to their Petition of Right should be decided in the Appellants' favour, for the following, among other,

REASONS.

1. BECAUSE the Appellants, by reason of Letters Patent granted to them by the Lieutenant-Governor of Ontario, and the comity and recognition accorded to them by the Respondent, were clothed with capacity to accept the benefit of such recognition and comity and to acquire the rights and interests on which their claim against the Respondent is based.

2. BECAUSE the Appellants' Charter contains no words either expressly or by implication imposing a prohibition upon their corporate capacity as to the acceptance of comity, and there is no justification for the reading of such 10 words into their Charter.

3. BECAUSE the judgment of the majority of the Supreme Court is wrong in holding that the Appellants may either with or without the assistance of comity exercise certain corporate activities beyond the confines of the Province of Ontario, while incapable, either with or without the same assistance, of exercising other corporate activities beyond the same limits, the distinction drawn in their judgment between "functional" and "ancillary" powers being incapable of application and without warrant under any interpretation of the B.N.A. Act.

4. BECAUSE the Provinces have power to create corporate entities cap- 20 able of exercising their functions both within and without the Province of incorporation—within that Province by inherent right, and without, if permitted to do so, by comity extended by competent authority.

5. BECAUSE capacity to accept comity was at the time of Confederation and is now a recognized attribute of all incorporated companies, and the elimination of such capacity in respect of provincial companies involves the creation of a new species of corporation without a prototype, and unknown then or now to British jurisprudence.

6. BECAUSE the Provinces before the Union had the power to incorporate companies with capacity to accept comity, and it cannot be inferred 30 from the language of Enumeration 11 of S. 92 that it was intended that they should relinquish or be deprived of this power.

7. BECAUSE the whole scope and purpose of the B.N.A. Act is favourable to the extension, and opposed to the restriction of comity between the component parts of the Dominion and between the inhabitants of the various Provinces and Territories which then formed or which might thereafter form such component parts.

8. BECAUSE the word "provincial" is never used in the B.N.A. Act to define the ambit of the jurisdiction of the Provinces by reference to their respective geographical areas.

40 9. BECAUSE "local undertakings" which with certain express exceptions may extend beyond the territorial area of the Provinces are brought by Enumeration 10 of Section 92, within the exclusive legislative jurisdiction of the Provinces and such undertakings, among others not necessarily local in.

their character, fall within the "provincial objects" of Companies incorporated under the powers conferred by virtue of Enumeration 11 of that Section and no exception to the extension of these "objects" beyond the area of the Provinces is expressed or implied.

10. BECAUSE Enumeration 11 of S. 92 of the B.N.A. Act cannot have been intended to involve the result that the Respondent has no power to extend to the Petitioners as a corporation that comity which could be extended to those forming the corporation as individuals, or as members of some recognized group, partnership or association.

11. BECAUSE the Dominion has repeatedly passed legislation recognizing the interpretation of Enumeration 11 of Section 92 of the B.N.A. Act contended for by the Appellants. 10

12. BECAUSE the capacity of provincial corporations to accept comity has been recognized and acted upon both by the Dominion and by the Provinces and has received judicial recognition in the Courts throughout the Dominion ever since Confederation, and a large number of provincial corporations have entered into transactions and acquired property and other rights outside the territorial area of the Province under the laws of which they were respectively incorporated, and these transactions, rights and interests, accepted and acted upon since Confederation, would be invalidated 20 if the contention now put forward by the Respondent that provincial corporations lack such capacity is adopted.

13. BECAUSE the Appellants have been clothed by the Respondent with authority sufficient to enable them to maintain their claim even if, which the Appellants do not admit, the legality of the transactions in question can otherwise be brought in question.

14. BECAUSE, in the alternative, if the authority to grant capacity to accept comity rests with the Dominion, then the Respondent has granted such capacity and clothed the Appellants with sufficient authority to acquire the rights and interests in question, and to enable them to maintain their 30 claim against the Respondent.

15. Generally, the Appellants rely on the favourable reasonings of the judgment of Cassels, J., in the Exchequer Court, and of Idington and Anglin, JJ., in the Supreme Court, and on the favourable opinions expressed in the Companies Case, and on the favourable judgments in the C.P.R. Company vs. Ottawa Fire Insurance Company and other cognate judgments, and on the reasons contained in the body of this Case.

I. F. HELLMUTH,

JOHN H. MOSS.

In the Privy Council.

On Appeal from the Supreme Court of Canada.

BETWEEN

THE BONANZA CREEK GOLD MINING COMPANY, LIMITED - (Suppliants) *Appellants*,

AND

HIS MAJESTY, THE KING (Respondent) *Respondent*.

CASE FOR APPELLANTS

BLAKE & REDDEN,
17, Victoria Street, S.W.