***Judgment** of the Lords of the Judicial Committee of the Privy Council on the Appeal of Marshall* v. *Orpen, from the Supreme Court of the Cape of Good Hope; delivered* 29*th June* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The question raised in this appeal was decided by the Supreme Court on a special case stated in the suit. The Plaintiff, now Respondent, is Receiver-General of the Revenue. The Defendant, now Appellant, is the agent in Capetown of J. Hepworth & Co. Limited, a Joint-Stock Company which has through the agency of the Defendant carried on business there continuously since May 1893.

The Plaintiff asserts, and the Defendant denies, that the Company is bound to take out a license on which duty is payable at the rate of one shilling for every 100*l.* of the subscribed capital of the Company. That capital is 360,000*l.*, and the sum claimed is 360*l.*, being license duty for two years.

86484. 100.—7/95.

The enactment under which duty is claimed is Schedule 17 of No. 3 of 1864, Sections 2 and 5 of which originally stood as follows :—

2. " Every joint stock Company carrying on business in this " colony shall annually take out a license for which there shall " be payable for every £100 of the subscribed capital of such " Company 1*s*.

" The term joint stock Company shall for the purpose of " the above license embrace :

" (A.) Every Company having a capital stock divided into " shares of which Company the chief seat or prin- " cipal place where its business is managed shall " be within this colony.

" (B.) Every such Company, of which the chief seat or " principal place where its business is managed " shall not be within this colony, but of which " any of the dealings shall, by the deed or other " instrument regulating such Company be de- " scribed as to be carried on in this colony. But " the license of any such last-mentioned Company " shall be reckoned upon one-half, instead of " upon the whole of its subscribed capital.

" 5.—When any joint stock Company, not being such a " Company as has been above described, but are doing " business in this colony through the instrumentality of some " agency in this colony, then such last-mentioned Company " shall annually take out a license of the value of fifty " pounds."

By subsequent Acts, No. 20 of 1884, and No. 38 of 1887, the second sentence of Head " B," and Section 5 have been repealed, and other provisions made. But these alterations of the law do not affect the question whether the Defendant's firm falls within the terms of Head " B."

By their Memorandum of Association the registered office of the Company is to be situate in England, and its objects are :—" to carry on " in any part of the world the businesses " of clothiers etc., and do certain subsidiary things " in the United Kingdom or elsewhere." There is nothing to indicate more specifically any place of business or dealing.

The Supreme Court have decided that the Company so formed falls within Head " B."

The opinion of the three learned Judges who formed the Court is the most fully stated by Mr. Justice Buchanan the Acting Chief Justice. He says:—

"The issue narrows itself down to this. Can it be held that
" a deed of incorporation which authorises a joint stock com-
" pany to carry on business in any part of the world is an
" instrument in which the business of the Company is
" 'described as to be carried on in the colony'? . . . .
" I admit that the section must be strictly construed, but in
" my opinion it would be a straining of the rules of construc-
" tion to say that the Defendant Company does not come
" within the section. The Company is not acting beyond its
" Memorandum of Association in directly carrying on business
" in this colony. Having opened such a business here, and not
" merely an agency, we are I think bound to hold that the
" deed in authorising business to be carried on in any part of
" the world includes and describes this Colony as a place in
" which such business is to be carried on."

Their Lordships are unable to follow this reasoning. If the Company's Memorandum had been absolutely silent as to locality, it would not have been acting beyond it in directly carrying on its business in Capetown, and yet to say in such a case that its business was described as to be carried on in Capetown would be little short of an abuse of language. To say that a business is to be in a place named, is one thing. To say that it may be carried on anywhere, which of course includes every conceivable place, is a totally different thing.

It is true that the foregoing remarks only go to show how an ordinary reader of the Memorandum would answer the question whether any of the Company's dealings are described as to be carried on in Cape Colony; whereas the controversy is, what the Cape Legislature meant by those expressions. But on that point the Plaintiff is in still greater difficulty; especially having regard to the wholesome maxim that the subject is not to be taxed under ambiguous expressions.

It appears to their Lordships that Heads "A" and "B" are intended to serve as a definition or limitation of the general expression "Every joint-stock Company carrying on business "in this colony." For though the Act uses the word "embrace," it is so obvious that the Companies described in "A" and "B" must be embraced in the more general expression, that it would be idle to add two clauses for the purpose of saying that they are. The inference is that the draftsman has used inaccurate, but by no means uncommon, language; and has said only that the general terms embrace the specified particulars, meaning to say that they embrace no more. No Company therefore is to be taxed under section 2 unless it comes within the terms of "A" or "B."

Many other Companies doing business by agency must fall within the repealed section 5, as the Defendant says that his Company does. Whether that section was intended to include all Company business not within "A" or "B," or whether, if so intended, it does include all, need not be discussed. Nor is the Defendant bound to show for what reason, fiscal or political, Head "B" was enacted. It is for those who seek to tax him under that Head to show that he falls within it. For some reason or other the Legislature have thought fit to make three divisions of Companies:—first, those who have their chief seat of business in the Colony, and who are taxed on their whole capital at the higher rate; secondly, those of which any of the dealings are described as to be carried on the Colony, who are taxed on their whole capital at the lower rate; and thirdly, those who, not coming under either of the above heads, do business in the Colony by some agency, and who are taxed at a fixed sum. According to the Plaintiff's reasoning the second class comprises all Companies not under Head "A,"

whose Charters do not preclude them from carrying on business in the Colony. To their Lordships it seems reasonably clear that the second class is intended to comprise those only in whose constitution there is at least something specially pointing to the Cape as a place of business. What kind or amount of indication would attract Head "B" cannot be decided beforehand. Each case must turn upon its own facts. In this case there is nothing whatever to indicate the Cape as a place of business any more than any other part of the world.

Furthermore it appears that this point has already been the subject of decision in the Colony, in the case of *The Colonial Government* v. *British South African Company* (9 Juta 280). In that case the Petitioners for a Charter stated that their object was to carry into effect certain operations, within a described region "or else-"where in Africa." The Charter approves of the purposes of the Petitioners, and empowers the Company to acquire rights and property "in "Africa," and to hold land and to establish "agencies in any of our Colonies or possessions "or elsewhere." The Company made a railway in Cape Colony, and set up an office in Capetown. The Treasury sought to bring them under Head "B." The judgment of the Supreme Court was delivered by Chief Justice De Villiers, who said that he could find nothing in the Charter which describes this Colony as the place in which the business of the Company is to be carried on.

Two of the learned Judges who sat in that case sat also in the present case, but they do not address themselves to the question how it can be that Cape Colony is not indicated in the permission to carry on business in Africa, but is indicated in the permission to carry on business anywhere in the world. Mr. Justice Buchanan indeed appears

to think that the ground of the earlier decision was the fact that the Company was not carrying on business in Cape Colony. That, however, is not so. The Chief Justice did, it is true, think that such was the effect of the evidence, probably because the Company had ceased to work their railway, but there was an express admission by the Company that they were so carrying on business, and the judgment proceeded on that footing. The two decisions cannot stand together, and in their Lordships' opinion the former is the right one.

The result is that their Lordships will humbly advise Her Majesty to discharge the judgment appealed from, and to dismiss the action with costs. The Respondent must pay the costs of this appeal.