[HIGH COURT OF AUSTRALIA.

LE MESURIER . . . . . APPELLANT;
DEFENDANT,

AND

COPLEYS BANK LTD. . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1925.

PERTH, *Sept.* 11, 14-16, 18.

Knox C.J., Higgins and Rich JJ.

Company — Banking company — Company formed outside Western Australia — Application of Western Australian Acts—Action by company—Recovery of penalties—Companies Act 1893 (*W.A.*) (56 *Vict. No.* 8), *secs.* 5, 198, 202, 203, 244, 248—*Companies Act Amendment Act* 1897 (62 *Vict. No.* 28), *sec.* 3—*Companies Act Amendment Act* 1899 (63 *Vict. No.* 54), *sec.* 2—*Banks and Banking Companies Act* 1837 (*W.A.*) (8 *Will. IV. No.* 1), *secs.* 2, 6, 13, 14.

Sec. 5 of the *Companies Act* 1893 (W.A.) provides that, subject to certain exceptions, the Act shall not apply to "any company . . . formed or to be formed for the purpose of carrying on the business of banking."

Held, that that section applies not only to companies formed or to be formed in Western Australia but also to companies formed or to be formed elsewhere.

Johnson v. *National Bank of Australia Ltd.*, (1913) 15 W.A.L.R. 74, approved.

Sec. 2 of the *Banks and Banking Companies Act* 1837 (W.A.) contains provisions relating to public officers of banking companies in whose name "such company shall sue and be sued"; and by sec. 6 it is provided that all actions instituted on behalf of a banking company within the Act "shall and lawfully may" be commenced in the name of the public officer nominated by the company as the nominal plaintiff.

Held, that those sections apply only to banking companies formed in Western Australia.

Held, therefore, that the respondent, which was a banking company incorporated in England and carrying on business in Western Australia, was entitled to bring an action in its own name and recover from the appellant for money advanced by it to him.

Per Higgins J.: The rule in *Bradlaugh* v. *Clarke*, (1883) 8 App. Cas. 354, as to the recovery of penalties applies to proceedings for the recovery of penalties under sec. 2 (taken with sec. 13) of the *Banking Companies Act* 1837 for neglecting to make the returns and deliver the accounts therein prescribed.

Decision of the Supreme Court of Western Australia (*McMillan* C.J.): *Copley Bank Ltd.* v. *Le Mesurier*, (1925) 27 W.A.L.R. 131, affirmed.

APPEAL from the Supreme Court of Western Australia.

In an action by Copleys Bank Ltd. (which is a company incorporated in England and carrying on business in Western Australia) the plaintiff claimed from the defendant, Cecil John Reginald Le Mesurier, the sum of £333 13s. 9d. alleged to have been paid for, or money lent to, the defendant. In his defence the defendant (*inter alia*) said that the plaintiff could not maintain the action as it was a foreign mineral trading company and had not complied with the provisions of secs. 198, 202 and 203 of the *Companies Act* 1893 (W.A.) as amended by subsequent Acts nor with the provisions of sec. 3 of the Amendment Act of 1898 as amended by the Amendment Act of 1899; and, alternatively, that if the plaintiff was a banking company limited it could not maintain the action as it had not complied with the provisions of the *Banks and Banking Companies Act* 1837 (W.A.). In his counterclaim the defendant (*inter alia*) claimed damages for breach of an agreement relating to the sale of barytes, and penalties for alleged breaches of the Companies Acts and the Banking Acts.

McMillan C.J., who tried the action, gave judgment for the plaintiff for £250 on the claim; and for the defendant for £60 on the counterclaim in respect of the sale of barytes—as to the remainder of the counterclaim giving judgment for the plaintiff: *Copley Bank Ltd.* v. *Le Mesurier* (1).

From this decision (except so far as it related to the judgment for £60 on the counterclaim) the defendant appealed to the High Court.

Further material facts and the arguments sufficiently appear in the judgments hereunder.

(1) (1925) 27 W.A.L.R. 131.

H. C. OF A. 1925.

LE MESURIER v. COPLEYS BANK LTD.

Le Mesurier, the appellant, in person.

Sir Walter James K.C., with him *Leake*, for the respondent.

During the argument the following were referred to: *Bateman* v. *Service* (1); *Johnson* v. *National Bank of Australia Ltd.* (2); *Shackleford, Ford & Co.* v. *Dangerfield* (3); *Bradlaugh* v. *Clarke* (4); *Attorney-General* (*N.S.W.*) v. *Smith* (5); *Maclaurin* v. *Hall* (6); *Gilmour* v. *Bastian* (7); *Buckley on the Companies Acts*, 9th ed., p. 4; *Lindley on Companies*, 6th ed., p. 156.

Cur. adv. vult.

Sept. 18.

The following written judgments were delivered:—

KNOX C.J. AND RICH J. The respondent (hereinafter referred to as "the Bank") sued the appellant to recover £333 13s. 9d. alleged to have been paid for the appellant or advanced to him. The appellant defended the action on the following grounds: (a) denial of indebtedness; (b) that the Bank had not complied with the provisions of secs. 198, 202 and 203 of the *Companies Act* 1893 as amended by subsequent Acts, or with the provisions of sec. 3 of the *Companies Act Amendment Act* 62 Vict. No. 28 as amended by the Act 63 Vict. No. 54, and therefore could not maintain the action; (c) alternatively, that the Bank had not complied with the provisions of secs. 2 and 6 of the Banking Act 8 Will. IV. No. 1, and therefore could not maintain the action. The appellant, by his counterclaim, sought to recover (i.) damages for breach of an agreement relating to the formation of a company to take over an option offered to the appellant; (ii.) damages for breach of an agreement relating to the manufacture of fireproof plaster; (iii.) damages for breach of an agreement relating to the sale of barytes; (iv.) penalties for carrying on business in breach of the Companies Act above referred to; (v.), by amendment, penalties for breach of the provisions of the Banking Act; (vi.) payment for work done as solicitor for the Bank and for money paid at its request.

(1) (1881) 6 App. Cas. 386.
(2) (1913) 15 W.A.L.R. 74.
(3) (1868) L.R. 3 C.P. 407.
(4) (1883) 8 App. Cas. 354.
(5) (1892) 13 N.S.W.L.R. (L.) 293.
(6) (1913) 13 S.R. (N.S.W.) 114.
(7) (1917) 24 C.L.R. 14.

The action was tried by *McMillan* C.J., who gave judgment for the Bank for £250 on the claim, and for the appellant for £60 on the counterclaim in respect of the agreement for the sale of barytes. He held that the appellant was indebted to the Bank in the sum of £250 for money lent, and that the appellant had failed to prove the agreements relating to the formation of a company and the manufacture of fireproof plaster referred to above. We agree in the conclusions at which the learned Chief Justice arrived on these questions, and find it unnecessary to add anything to the reasons which he gave in support of these conclusions.

There remain for consideration the following questions :—(1) Was the Bank bound to comply with the provisions of the Companies Acts above referred to ? (2) If so, did the Bank fail to comply with such provisions ? (3) Was the Bank bound to comply with the provisions of the Banking Act (8 Will. IV. No. 1) ? (4) If so, did the Bank fail to comply with such provisions ? (5) Was the appellant entitled to sue in the Supreme Court for penalties incurred by the Bank under (*a*) the Companies Acts, (*b*) the Banking Act ? (6) Was the appellant entitled to recover on his claim for work done and money paid ? We proceed to deal with these questions.

(1) and (2)—The appellant contends that the provisions of Part VIII. of the *Companies Act* 1893, as amended by later Acts, apply to the Bank notwithstanding sec. 5 of the Act, which provides that except as to Part VI. the Act shall not apply to any company formed or to be formed for the purpose of carrying on the business of banking. He says, firstly, that this section applies only to companies formed or to be formed in Western Australia ; and, secondly, that, even if the section applies to companies formed elsewhere, the Bank is not a company formed for the purpose of carrying on the business of banking. In our opinion neither contention can be sustained. The words of the section, read according to their natural and ordinary meaning, clearly extend to all companies formed or to be formed for the purpose of carrying on the business of banking, wherever formed, and no sufficient reason has been advanced in argument for giving a more restricted meaning to the words in question. On the contrary, the exception of the provisions of Part VI. from the exemption conferred on banking companies seems to indicate that

H. C. OF A. 1925.

LE MESURIER v. COPLEYS BANK LTD.

Knox C.J. Rich J.

sec. 5 was meant to extend to all companies wherever formed, for the provisions of Part VI. are clearly applicable to all companies whether formed in Western Australia or elsewhere which are not registered under the Ordinance or Acts mentioned in sec. 191. The words of sec. 5 being clear, and there being nothing in the context of that section or in the other provisions of the Act which requires an artificial or secondary meaning to be given to those words, it is unnecessary to speculate on the reasons which induced Parliament to deal specially with the companies formed for the purpose of carrying on the business of banking. Our opinion on the point is in accordance with that expressed by the Full Court of Western Australia in *Johnson v. National Bank of Australia Ltd.* (1). We entertain no doubt that the Bank is a company formed for the purpose of carrying on the business of banking. In its memorandum of association one of the objects is stated to be " to carry on the business of banking in all its branches and departments," and evidence given at the trial that it carried on such business in Western Australia was not contradicted.

For these reasons we are of opinion that the Bank was not bound to comply with the provisions of Part VIII. of the *Companies Act* as amended. It is unnecessary to consider whether the exemption from liability to comply with the provisions of the Principal Act extends to relieve the Bank from the obligation to comply with the provisions of sec. 3 of the Act 62 Vict. No. 28 as amended by sec. 2 of the Act 63 Vict. No. 54, for in our opinion the appellant has failed to prove that the Bank has not complied with those provisions. A book purporting to be the Colonial Share Register of the Bank was produced and put in evidence at the trial, and there is no evidence whatever to show that that book was not in existence at all relevant times. The conclusion at which we have arrived on the question now under discussion renders it unnecessary to consider whether the Bank had failed to comply with the provisions of Part VIII. of the *Companies Act* 1893 as amended by later Acts.

(3)—Was the Bank bound to comply with the provisions of secs. 2 and 6 of the Banking Act 8 Will. IV. No. 1 ? The preamble of that Act is as follows : " Whereas it appears that the establishment of

(1) (1913) 15 W.A.L.R. 74.

companies consisting of a number of individuals associated together for the purpose of carrying on the business of banking by the joint capital and enterprise of many, which the capital and exertions of a few might be insufficient to accomplish, would tend to advance the interests and facilitate the business of this Colony; and whereas, in order to avoid the difficulties which may arise in carrying on any legal proceedings either by or against any such companies, it is convenient and just that some particular member should be appointed who may sue and be sued in the place and stead of the whole; and whereas these purposes cannot be effected without the aid of the Legislature." This appears to us to indicate that the object sought to be attained was the establishment in Western Australia under the laws of that Colony of companies for the purpose of carrying on the business of banking. The provisions of secs. 1 to 12 of the Act are directed towards giving effect to this intention, and some of such provisions—e.g., secs. 10, 11 and 12—seem to us to be entirely inappropriate to foreign partnerships or companies. We observe also that, throughout these sections, whenever mention is made of a company the expression "such company" is used—clearly referring to the companies first mentioned in the preamble, i.e., companies the establishment of which could not be effected without the aid of the Legislature of Western Australia. Then in sec. 13, which deals with the issue of bank notes, there is a change of language—from "*such* companies" to "*all* companies carrying on banking business"—showing clearly that Parliament recognized that there were or might be companies, other than those dealt with by secs. 1-12, carrying on business in Western Australia. These considerations in our opinion lead to the conclusion that the provisions of secs. 2 and 6 of the Act apply only to banking companies established—i.e., formed—in Western Australia.

(4)—The opinion which we have expressed above renders it unnecessary to determine this question.

(5) (*a*) and (*b*)—The Bank being, in our opinion, under no obligation to comply with the provisions of these Acts, the question whether appellant is entitled to sue to recover penalties for non-compliance with these provisions does not arise.

H. C. OF A. 1925.

LE MESURIER v. COPLEYS BANK LTD.

Knox C.J. Rich J.

(6) It appears that the appellant sued the Bank in the Warden's Court on the same cause of action as is now alleged. On 24th May 1922 the Warden dismissed the action. The appellant appealed unsuccessfully first to *Burnside* J. and then to the Full Court of Western Australia. In these circumstances it is clear that he cannot be heard to make the same claim in this action.

In our opinion the appeal should be dismissed.

HIGGINS J. The defendant's appeal in this case is confined to (a) the judgment for the plaintiff for the sum of £250 said to be advanced to the defendant, and (b) the dismissal of that part of the counterclaim which is contained in pars. 6 and 7 (penalties and work done as solicitor). The defendant does not appeal from the adverse findings of *McMillan* C.J. as to the agreements alleged in pars. 1 and 2 of the counterclaim; and there is no cross-appeal on the part of the plaintiff as to the finding under par. 3 of the counterclaim, or as to the sums other than £250 claimed under par. 7, or as to interest on the £250.

I see no ground for setting aside the finding of fact of the learned primary Judge under par. 7 of the counterclaim that the plaintiff Company is not liable to the defendant for services as solicitor or for money paid by him at its request.

Nor do I find any room for doubt that the £250 was in fact advanced by the plaintiff Company to the defendant as a loan. The only difficulty as to this loan arises from the provisions as to foreign companies contained in Part VIII. of the *Companies Act* 1893 (secs. 198-212) and the amendments thereof. By sec. 203 a foreign company carrying on business contrary to this part of the Act is not only liable to a penalty of £20 per day, but it "shall not be entitled to bring or maintain any action, set-off, counterclaim, or legal proceeding in respect of any . . . contract," &c., "until it shall have complied with this part of this Act." Assuming, first, that, notwithstanding sec. 5 of the Act of 1893, the plaintiff Company is subject to the provisions of that Act, my opinion is that at the date of the writ in this action (15th June 1922) the plaintiff Company—a foreign company, incorporated in England—had in fact complied with all the conditions imposed by Part VIII. of the *Companies Act* 1893.

The only doubt that I have had on this subject is as to the condition imposed by sec. 3 of the Act 62 Vict. No. 28 (as amended by the Act 63 Vict. No. 54, sec. 2), that every foreign company shall open, keep and maintain at the registered office of the company in the colony a register of shareholders, to be called a colonial register, for the registration of all shareholders in such company who may apply in writing to such attorney (*sic*) to be registered therein; and under sec. 203 of the *Companies Act* 1893 no action can be brought until there has been compliance with this condition. Counsel for the plaintiff Company has argued that compliance with this condition as to a colonial register is not essential unless and until application be made by a shareholder in the company. Such an application was necessary under a previous Act, 61 Vict. No. 35, sec. 2; but sec. 3 of the subsequent Act, 62 Vict. No. 28, imposes the condition even if no such application has been made by a shareholder. I cannot, therefore, accept this argument; and I look to the evidence to see whether such a register was opened.

Looking at the evidence, I find that the manager of the plaintiff company produced "the Colonial Register," which was put in without objection. The manager said in cross-examination:—"No one has asked me to enter his name on the register. It is a pure formality. It was opened on our solicitors' advice." There is no entry in the book, but it is marked on the outside "Colonial Register." Mr. Le Mesurier suggests that the book was opened after the action was brought; but he has not produced any evidence in support of the suggestion. I shall assume, in favour of the defendant, that the burden of proof that such a register was kept when the action was brought lay on the plaintiff; for the fulfilment of this condition precedent was disputed by par. 1 of the defence, and no particulars of this defence were sought for or given. But as soon as the book called "Colonial Register" was produced and put in without objection, the burden of proof shifted, and it was for the defendant to show that the register did not exist at the date of the writ. This position is highly technical; but so is the defendant's argument; and there has been no application on the part of the defendant for special leave to produce further evidence (High Court Appeal Rules, Sec. I., r. 10). As pleadings and evidence stand, I think it must be

H. C. OF A. 1925.

LE MESURIER v. COPLEYS BANK LTD.

Higgins J.

accepted that the Colonial Register was kept at the Perth office at all material times. This conclusion makes it unnecessary for me to consider the effect of sec. 5 of the Act of 1893. But it might be misleading if I were not to say that, on the materials before us, I see at present no sufficient reason for treating the provisions of Part VIII. of that Act as being applicable to this plaintiff Company, a company "formed for the purpose of carrying on the business of banking." "To carry on the business of banking in all its branches" is one of the objects for which the Company was established under its memorandum (object 4); and it appears on the evidence (if such evidence is material) that this company "does banking work" (see cross-examination of Martin, the manager). Mr. Le Mesurier has urged that "formed" must mean formed under the laws of Western Australia; but I see no justification for treating the word as so limited. We are not entitled to limit the meaning by conjecture. If the Legislature mean to except from the operation of sec. 5 such banking companies only as are formed under Western Australian statutes, it must say so. What may have been the motive of the Legislature in excepting banking companies from the operation of the Act, it is hard to say. The existence of the Act 8 Will. IV. No. 1 is not a sufficient reason in itself; but it may have been intended to deal with banking companies specially by a special Act, and such a special Act has not yet been passed. In this case, as in other cases involving State legislation, I feel that there may very possibly be Acts or sections which would throw light on this exception in sec. 5; but such Acts or sections have not been brought to our notice. We are dependent in this Australian Court on the diligence of counsel to put before us every provision that is relevant to the subject of appeal: we cannot well be expected to study for ourselves all the legislation of the particular State for the purpose of a particular appeal. But in this case it is fortunately unnecessary for the purpose of my decision to pronounce finally as to the full scope and operation of sec. 5.

The defendant, however, by par. 2 of his defence, raises alternatively the point that if the plaintiff Company is a banking company it cannot maintain this action as it has not complied with secs. 2 and 6 of the Act 8 Will. IV. No. 1. By sec. 6 it is provided

that all actions instituted on behalf of a banking company within the Act "*shall* and lawfully may" be commenced in the name of a public officer nominated by the company as nominal plaintiffs. The consideration of this Act, in its setting of 1837, opens a long vista of the history of legislation as to joint stock companies—a history which it might be tempting to relate; but it is sufficient for the present purpose to say that the Act applies to banking companies established in Western Australia, by Western Australian statutes—it does not, in my opinion, apply to a banking company incorporated in England. If, as a result, there is not adequate regulation of foreign banking companies by the law of Western Australia, it is for the Legislature of Western Australia, not for us, to make the regulation adequate.

Then comes the question as to penalties claimed by the defendant from the plaintiff Company under par. 6 of the counterclaim. If my view is right, that the plaintiff Company has not been guilty of the offences charged under the *Companies Act* (with amendments), then there can be no penalties to be recovered under that Act. But any claim for penalties has to be heard and determined—the penalties have to be imposed—not by the Supreme Court of Western Australia, but by and before justices of the peace in Petty Sessions (*Companies Act* 1893, sec. 244). It is true that sec. 244 applies only "where no other provision for the recovery thereof is in that behalf made" (sec. 244); but Mr. *Le Mesurier* has not shown to us any other provision. It appears from the judgment below that an amendment was put in the counterclaim claiming penalties under the Act 8 Will. IV. No. 1 also. The amendment does not appear in the counterclaim as set out in the transcript, and it is not clear to what penalties the amendment related. The only sections of this Act to which the defence refers are secs. 2 and 6 (par. 2 of defence). Sec. 2 provides for annual returns in the form in Sched. A; sec. 5 prescribes further returns in the "quarterly returns hereinafter mentioned," and quarterly returns are prescribed afterwards by sec. 13, but only when the company carrying on banking business makes and issues notes payable to bearer on demand (bank notes). This company does not issue bank notes. But in a later part of sec. 13 there is a provision that "if any company . . . so *carrying on banking*

H. C. OF A. 1925.

LE MESURIER v. COPLEYS BANK LTD.

Higgins J.

business shall neglect . . . to make out such returns, or deliver all or any of such accounts as are required by *any of the sections* of this Act," the company shall forfeit for every such offence the sum of £100. The result seems to be that a failure on the part of a company to which the latter part of sec. 13 refers, to make out and deliver annual returns in the form in Sched. A, involves a penalty of £100. Assuming—not deciding—in favour of the defendant, that this later part of sec. 13 applies to this plaintiff Company, although it does not issue bank notes and although it is not formed under the Western Australian law, the rule in *Bradlaugh* v. *Clarke* (1) holds good, that "where a penalty is created by statute and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it." Under sec. 14 of the Act, the penalties can be sued for in the "Civil Court" of Western Australia, and are reserved for the Crown, but the defendant cannot sue for them. This seems to be an obvious answer to any amended claim put in for penalties under 8 Will. IV. No. 1. If, as is assumed, in the latter part of sec. 13 the words "any company . . . so carrying on banking business" comprise a banking company which is not formed under Western Australian law, it is not by any means clear that this company is not liable to the penalty, and liable in the Supreme Court. For, by the Ordinance 24 Will. IV. No. 15, sec. 26, the powers and jurisdiction of the "Civil Court" have been transferred to the Supreme Court. I prefer, therefore, to rest my opinion as to penalties under sec. 2 (taken with sec. 13) on the principle stated in *Bradlaugh* v. *Clarke*.

In my opinion, the decision of the learned Judge is right, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *C. J. R. Le Mesurier.*

Solicitors for the respondent, *Stone, James & Co.*

(1) (1883) 8 App. Cas. 354.