[HIGH COURT OF AUSTRALIA.]

H. A. STEPHENSON & SON LIMITED (IN LIQUIDATION) . . . . . APPELLANT;
DEFENDANT,

AGAINST

GILLANDERS, ARBUTHNOT AND COMPANY RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1931.

MELBOURNE, *Oct.* 13.

SYDNEY, *Dec.* 10.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Company—Ultra vires—Objects—Construction of—Company carrying on business of produce merchant—Speculations in jute goods—Losses occasioned thereby—Whether company had power to speculate in jute goods.

A company which carried on the business of a produce merchant entered into speculative contracts for the purchase of jute goods. Default in payment having been made by the company the vendors resold such goods and sought to prove for the balance against the company, which had gone into voluntary liquidation. The memorandum of the company contained extensive powers including the following: "(*j*) To carry on any other businesses whether manufacturing or otherwise as the company may deem expedient"; but the memorandum did not contain any express power to deal in jute goods.

Held, by *Starke*, *Dixon* and *Evatt* JJ. (*Rich* and *McTiernan* JJ. dissenting), that the transaction was within the powers conferred by clause (*j*) of the memorandum, and that the proof of debt should be allowed.

Decision of the Supreme Court of Western Australia (*Northmore* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

This was an appeal by the liquidator of H. A. Stephenson & Son Ltd. against a decision of *Northmore* J. given upon an originating summons which ordered (1) that the decision of Henry Keith

Watson, the voluntary liquidator of H. A. Stephenson & Son Ltd., rejecting the proof of the respondent, Gillanders, Arbuthnot & Co., against the former Company be reversed; and (2) that the claim of Gillanders, Arbuthnot & Co. in respect of transactions in cornsacks be admitted to proof.

In the course of speculations in jute H. A. Stephenson & Son Ltd. bought from the respondent, Gillanders, Arbuthnot & Co., large quantities of cornsacks to be shipped from Calcutta. The terms of sale required the buyer to establish a letter of credit in Calcutta. The Company failed to observe the condition, whereupon the respondent resold the sacks at a loss. For this loss the respondent sought to prove in the liquidation of the Company. The liquidator rejected the claim on the ground that the transaction was *ultra vires* of the Company, but on appeal to the Supreme Court of Western Australia the claim was admitted, and from the order admitting the claim the liquidator appealed to the High Court.

H. A. Stephenson & Son Ltd. had been formed some years previously to take over the business of H. A. Stephenson, who had carried on the trade of a produce merchant in Perth and Fremantle. His business consisted in buying and selling produce and had no concern with the jute market. The Company of which he and his son were, in effect, the only members, continued his business and until 1923 had no transactions in jute goods at all. Between 1923 and 1928 the Company bought quantities of branbags which were used as containers in connection with that part of the produce business which consisted of buying hay in stack and stook and cutting it into chaff. Such branbags were not purchased for sale, but whenever it was found that too many branbags had been purchased it was the practice to sell the excess branbags rather than hold them over for use in the following year. The records of the Company show that 267 bales of sacks were bought in 1926, 1,013 in 1927, 11,700 in 1928 (being 5,700 for delivery in 1928 and 6,000 for delivery in 1929) and 135 bales in 1929, in which year the Company went into voluntary liquidation. Of these quantities 27 bales were sold to farmers in 1926, 4 bales in 1927, 533 bales in 1928, and the whole of the 135 bales in 1929. The rest of the purchases were attributed to speculations with jute operators. Of the 6,000 bales purchased

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

in 1928, 2,000 bales containing 600,000 cornsacks were purchased through Brown & Dureau Ltd., Perth, as brokers for Gillanders, Arbuthnot & Co., Calcutta, for an approximate cost of £23,000 (9s. 4d. per dozen) for delivery in September 1929. A letter of credit was to be established before shipment. This transaction was covered by eight separate contracts for 250 bales each. The Company having failed to establish letters of credit and the cornsacks not being shipped, Gillanders, Arbuthnot & Co. resold the cornsacks in Calcutta. Upon the liquidation of the Company, Gillanders, Arbuthnot & Co. lodged a claim including £4,045 9s. 6d. representing the difference claimed to be due by the Company in respect of the resale of the 2,000 bales of cornsacks. Claims in respect of the remaining 4,000 bales amounting to £9,758 were also made against the Company.

The objects of the Company, as set out in its memorandum of association, included the following :—"(*a*) To purchase acquire and take over as going concerns the businesses assets and property of Henry Alfred Stephenson of Perth and Fremantle produce merchant. (*b*) To carry on the business of produce grain and provision merchants and bacon-curers in all branches and to buy and sell by wholesale or retail all kinds of produce grain growing crops and provisions. (*c*) To carry on the business of flour-millers in all branches. (*d*) To carry on the business of pastoralists graziers farmers cattle-rearers and sheep farmers and to acquire freehold and leasehold lands for such purposes. (*e*) To carry on the business of dealers in and makers vendors and purchasers of all kinds of machinery engines implements and agricultural machinery and implements. (*f*) To carry on the business of dealers in and purchasers and vendors of live and dead stock of all kinds including particularly horses cattle sheep and pigs. (*g*) To erect and build abattoirs freezing-houses warehouses sheds and other buildings necessary for or expedient for the purposes of the Company. (*h*) To purchase charter hire build or otherwise acquire steam and other vessels or ships and to employ the same in the conveyance of passengers mails and merchandise of all kinds and to carry on the business of shipowners barge-owners and lightermen in all branches. (*i*) To conduct such agencies in connection with any of the foregoing businesses goods chattels

property things wares and merchandise as the Company may deem expedient. (*j*) To carry on any other businesses whether manufacturing or otherwise as the Company may deem expedient. . . . (*cc*) To do all such things as are incidental or are as the Company may think conducive to the attainment of the above objects or any of them or which may be conveniently carried on or done in connection therewith or which may be calculated directly or indirectly to enhance the value of or render profitable any business or property of the Company."

The Supreme Court of Western Australia having reversed the liquidator's rejection of the proof of debt and allowed the same in full, the liquidator now appealed to the High Court.

Wilbur Ham K.C. (with him *Coppel*), for the appellant. The first consideration is the construction of the memorandum of association of the Company. This transaction was obviously a speculation in jute and was not within the powers of the Company for the purpose of carrying on its business (*Companies Act* 1893 (W.A.), sec. 11; *In re Crown Bank* (1)). The incidental power can only be used for the purpose of carrying on the Company's business (*Joint Stock Discount Co.* v. *Brown* (2)). This transaction is *ultra vires* of the Company (*Evans* v. *Brunner Mond & Co.* (3); *Cotman* v. *Brougham* (4)).

Tait, for the respondent. The only question before the Court is whether the Company had power to buy jute goods, not whether it had power to speculate in jute goods (*In re Contract Corporation*; *Claim of Ebbw Vale Co.* (5)). If goods were bought which the Company could buy in the legitimate course of carrying on its business the liquidator cannot say that the contract is *ultra vires*. The quantity of goods bought cannot be the criterion of the powers of the Company. The express powers of the Company are wide enough, and it is not necessary to rely upon the incidental power (*Street* on *Ultra Vires*, p. 58; *Peruvian Railways Co.* v. *Thames and*

(1) (1890) 44 Ch. D. 634.
(2) (1866) L.R. 3 Eq. 139, at p. 150.
(3) (1921) 1 Ch. 359.
(4) (1918) A.C. 514, at p. 520.
(5) (1869) L.R. 8 Eq. 14, at p. 20.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Mersey Marine Insurance Co.; *In re Peruvian Railways Co.* (1); *Cotman* v. *Brougham* (2)).

Wilbur Ham K.C., in reply. The question for determination is whether this particular transaction is *ultra vires* (*Cotman* v. *Brougham* (3); *In re David Payne & Co.*; *Young* v. *David Payne & Co.* (4)).

Cur. adv. vult.

Dec. 10.

The following written judgments were delivered :—

RICH J. This is an appeal from an order of *Northmore* J. (as he then was), which reversed the decision of the liquidator of the appellant Company rejecting the proof of the respondent. From such of the evidence as is admissible the facts emerge that the appellant Company had been engaged in a business until 1928 which did not include the business of speculating in jute. In that year the appellant Company began to speculate in jute and entered into contracts for that purpose with the respondent. It is in respect of these contracts that the respondent seeks to prove, and the ground upon which the proof is resisted and that upon which this appeal is based is that the contracts were *ultra vires*. It becomes necessary in order to determine this question to consider and construe the memorandum of association. This is an ill-drawn document containing in the objects clause a medley of objects and powers. Clause (*a*) authorizes the taking over of a going concern which did not, however, include dealings in jute. Clauses (*b*) to (*f*) inclusive authorize the carrying on of a large number of specific businesses of different kinds, none of which, however, involves speculation in jute, although in the case of the produce business in clause (*b*) the purchase of jute goods for use in the business and the sale of surplus jute goods are incidental to the carrying on of that business. As is usual in memoranda of association the objects clause contains a number of ancillary powers, and it concludes with the usual general ancillary power in clause (*cc*). Clause (*j*) is uncommon in its form. It states it to be an object of the Company " To carry on any other

(1) (1867) L.R. 2 Ch. 617.
(2) (1918) A.C., at p. 521.
(3) (1918) A.C., at p. 522.
(4) (1904) 2 Ch. 608.

businesses whether manufacturing or otherwise as the Company may deem expedient." It is unnecessary to consider what the position would be if this were stated as the Company's only object, but I think it is essential, in order to attribute a reasonable meaning to it, to treat it as being intended in the context in which it stands to be ancillary only to the carrying on of the businesses which are specifically authorized. In my opinion it is plain that the business of speculating in jute is not included within any of the businesses so specifically authorized. The carrying on of such a business was not in fact ancillary to any business actually carried on by the appellant Company, and I am unable to see how such speculative dealings in jute could be ancillary to any of the appellant Company's real objects. It is true that the purchase of jute is incidental to the carrying on of the Company's actual business, and, had that business grown, purchases equal to or exceeding in magnitude those which were in fact made for speculative purposes might have been necessary for the purposes of a business within the objects clause. In the present case, however, there is no doubt that the respondent was affected with notice through its agent that the purchases were being made by the appellant Company not for the purposes of any business which it was by its memorandum of association specifically authorized to carry on. The purchases were not, in fact, ancillary to the purposes set out in the objects clause; and, in my opinion, there was nothing which could justify the respondent Company in assuming that the speculation, which the respondent knew to be the purposes for which the purchases were being made, were or could be incidental to any class of business which the appellant Company could with propriety engage in.

The appeal, in my opinion, should be allowed.

STARKE J. The question in this case is whether, having regard to the memorandum of association of H. A. Stephenson & Son Ltd., it was within its powers to enter into contracts for the purchase of large quantities of cornsacks. In 1928 that Company purchased from Gillanders, Arbuthnot & Co., of Calcutta, 2,000 bales for delivery in 1929, and some 4,000 bales from other firms or companies. The objects of H. A. Stephenson & Son Ltd. were

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & Co.

Starke J.

very wide, but, so far as this case is concerned, only three need consideration :—(1) To carry on the business of produce grain and provision merchants and bacon-curers in all branches and to buy and sell by wholesale or retail all kinds of produce grain growing crops and provisions. (2) To carry on any other businesses whether manufacturing or otherwise as the Company may deem expedient. (3) To do all such things as are incidental or as the Company may think conducive to the attainment of the above objects or any of them or which may be conveniently carried on or done in connection therewith or which may be calculated directly or indirectly to enhance the value of or render profitable any business or property of the Company. "It must be borne in mind that the purpose of the memorandum" of association "is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise, and for this information they are entitled to rely on the constituent documents of the company" (*Egyptian Salt and Soda Co.* v. *Port Said Salt Association* (1)). "The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purpose to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers" (*Cotman* v. *Brougham* (2)).

The business of a grain merchant in Australia includes, I should say, the purchase and sale of cornsacks; or, at all events, the incidental power of this Company is sufficiently wide to cover it. This, I feel no doubt, though we have not been favoured with his reasons, was the view of the present Chief Justice of the Supreme Court of Western Australia, who decided the case below and whose large experience and knowledge of business affairs in Western Australia are entitled to the greatest weight. All that can be said against this view is that the purchases were beyond the ordinary requirements of the business of H. A. Stephenson & Son Ltd., and a speculation not within its scope. But a creditor would have no knowledge of the requirements of the Company's business, and he is entitled to rely upon the constituent documents of the Company.

(1) (1931) A.C. 677, at p. 682.

(2) (1918) A.C., at p. 520.

Another important object is that I have numbered "(2)": "To carry on any other businesses whether manufacturing or otherwise as the Company may deem expedient." It has been contended that this object is nugatory and void because it does not "delimit and identify" an object of the Company "in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined" (*Cotman* v. *Brougham* (1)). If this be so, I do not see how the certificate of the Registrar under sec. 21 of the *Companies Act* 1893 of Western Australia renders effective what is illegal and void by reason of the provisions of the *Companies Act* itself (*Bowman* v. *Secular Society Ltd.* (2); *Cotman* v. *Brougham*). But the true meaning of the object must be ascertained before the argument can be considered; the whole memorandum must be read together. The view pressed on us is that the object is so wide that it authorizes the Company to engage in any business whatever that it deems expedient, without limit and without specification. But, in my opinion, that is an extravagant and unnecessary interpretation of the object, and the right way to construe it is to confine the object to businesses allied to or connected with the particular businesses specified in the memorandum. So construed, the object does not contravene the *Companies Act*, even if the larger construction would do so—a matter upon which I express no opinion. On the narrower construction, however, the purchase and sale of cornsacks is a business allied to and connected with the other objects of the Company and consequently within its powers and capacity.

The appeal should be dismissed.

DIXON J. The question for decision in this appeal is whether some transactions in jute were within the corporate capacity of the appellant Company. In the course of speculations in jute the Company bought from the respondent large quantities of cornsacks to be shipped from Calcutta. The terms of sale required the buyer to establish a letter of credit in Calcutta. The Company failed to observe the condition, whereupon the respondent resold the sacks

(1) (1918) A.C., at p. 522. (2) (1917) A.C. 406.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

DIXON J.

at a loss. For this loss the respondent sought to prove in the liquidation of the Company. The liquidator rejected the claim upon the ground that the transaction was *ultra vires* of the Company, but on appeal to the Supreme Court the claim was admitted. From the order admitting the claim the liquidator now appeals to this Court.

The Company was formed some years ago to take over the business of H. A. Stephenson, who had carried on the trade of a produce merchant in Perth and Fremantle. His business consisted in buying and selling produce and had no concern with the jute market. The Company of which he and his son were, in effect, the only members continued his business without devoting its funds to buying jute until his son fell in with a gentleman who, he says, came to Western Australia " with a high reputation and a very wide experience in extensive jute operations." From him he learnt that by buying jute in Calcutta for resale to jute merchants throughout Australasia substantial profits might be made without the need of much capital " if," as he says, " the early contracts were entered into with due regard to the possibilities of the seasonal rains in India, the activities of the bazaar operators, fluctuations in exchange, and also forthcoming seasonal conditions in Australia." In what he calls the light of the information conveyed to him, Stephenson junior embarked upon a course of jute buying in the Company's name. The records of the Company show that 267 bales of sacks were bought in 1926, 1,013 bales in 1927, 5,700 bales in 1928 for delivery in that year and 6,000 for delivery in the following year. In 1929 the Company went into voluntary liquidation, no uncommon end of attempting to pay " due regard to the possibilities " affecting the price of jute.

An attempt was made, chiefly by the use of inadmissible evidence, to justify the transactions as incidental to the conduct of the business of a produce merchant, partly upon the ground that produce merchants were prone to speculate in jute, and partly upon the ground that, after all, the purpose of cornsacks is to contain wheat and wheat is produce. The first ground may be dismissed as little more than an attempt to generalize upon the vocational tendencies discoverable in produce merchants. The second ground seeks to

isolate each contract of purchase and find validity for it in the hypothesis that the Company may have needed sacks to contain produce. The magnitude of the transactions, however, and the manner in which they were conducted determine their true character, and neither by the sellers nor by the buyer could the purchases have been considered as the supply of the commodity for use. The validity of the contracts depends upon other considerations than the course of a produce merchant's business and the distinction between buying bags for use and operating on the jute market.

When the Company was formed it was provided with a memorandum of association consisting of a jumble of objects assembled from former precedents with a seeming disregard of symmetry, coherence and, at times, even orthography and correct transcription. With the purpose of carrying on the business of produce, grain and provision merchants in all branches, there is included the function of bacon-curing. Then follow clauses directed to authorize the Company to become a flour-miller, a pastoralist, a farmer, a cattle-rearer, a dealer in or maker of machinery, of agricultural implements, a dealer in live or dead stock, particularly in horses, cattle, sheep and pigs. It is then empowered to erect abattoirs, freezing-houses, warehouses and other buildings necessary or expedient for the purposes of the Company, to acquire ships and carry on the business of shipowners and lightermen, and to conduct agencies in connection with the foregoing businesses. But none of these can include speculation in jute. The final clause in the memorandum contains an ancillary power of a familiar type. Although it is very widely expressed, it yet remains ancillary in its character, and therefore cannot authorize distinct and independent activities. Standing tenth among the twenty-nine "objects" which the memorandum ascribed to the Company is this: "To carry on any other businesses whether manufacturing or otherwise as the Company may deem expedient." It is upon this power or object that the validity of the respondent's contracts appears to depend. To suggest that the Company's speculations in jute did not possess enough of the attributes of system, frequency and notoriety to constitute a "business" is to give too narrow a meaning to the expression "carry on any other business" and to fail to recognize

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Dixon J.

the interdependence and the continuity of the transactions. It is undeniable that the Company " deemed it expedient " in the general sense of that term to undertake the speculations. No suggestion has been made that Stephenson junior acted without his father's knowledge or consent, or that, acting together, father and son could not exercise its powers without the formality of a meeting of the Company, even supposing that authority did not reside in them as directors to " deem a business expedient " under this object.

As it can be affirmed that the Company contracted with the respondent in the course of carrying on another business which the Company deemed expedient, why should not the clause suffice to answer the contention of *ultra vires* ? Two replies are given. First it is said that the clause cannot mean what its words, read apart from the rest of the memorandum, appear literally to say. Next it is said that if they do, then the clause is nugatory because it states no definite object but is equivalent to saying that the Company may do all things so long as it does them for gain. This second contention is founded upon the view that when the *Companies Act* requires the memorandum to state the objects for which the proposed Company is to be established, it refers to defined purposes capable of ascertainment. The dictum of *North* J. in the *Crown Bank Case* (1) was cited :—" I take that to mean this—that certain objects must be specified as those in which business is to be done. If the memorandum were to state, as the objects of the company, that it was to carry on any business whatever which the company might think would be profitable to the shareholders, in my opinion that would not be a statement of the objects of the company as required by the Act of Parliament." In that case the clauses of the memorandum of a banking company were widely enough expressed to enable its counsel to contend that, having relinquished banking, its existence should be allowed to continue in order to speculate in land, invest in securities and promote a foreign company, and therefore the company ought not to be wound up. He admitted to *North* J. that on his interpretation of the memorandum, i.e., a literal construction of each object, it would " warrant the company in giving up banking business and embarking in a business with the

(1) (1890) 44 Ch. D., at p. 644.

object of establishing a line of balloons between the earth and moon (1). But *North* J. considered the wide language in which the objects were expressed should be understood in reference to the main or real purpose of the company, and decided that, as the company had abandoned this purpose and was only doing business outside its powers, it ought to be wound up. "It would be ridiculous," he said (2), "to attach to this memorandum the meaning which I am asked to give to it—it would be perfectly absurd; and, in my opinion, it would not be a statement of objects within the provisions of the Act of Parliament at all." Among the objects specified in the memorandum upon which was decided *Ashbury Railway Carriage and Iron Co.* v. *Riche* (3), there occurred the words "to carry on the business of . . . general contractors." The House of Lords gave a restricted meaning to the expression, and Lord *Cairns* L.C. said, in the course of his opinion (4):—"My Lords, if the term 'general contractors' were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description, and the memorandum in place of specifying a particular kind of business would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning." When the question is whether a particular transaction binds the company, or is *extra vires*, the well-known principle may not apply by which, in considering whether a company should be wound up because the substratum of its constitution has failed, its true, main, dominant or paramount purpose is ascertained and general clauses are understood as subsidiary, as conferring powers not independent but subserving the main end. In the one case the ultimate question is whether it is just and equitable that the company should be wound up, and, for its determination, general intention and common understanding among the members of the company may be important. In the other case the question is one of corporate capacity only, and this must be ascertained according to the true meaning of the memorandum interpreted by a fair reading of the whole instrument. See

(1) (1890) 44 Ch. D., at pp. 641, 644.
(2) (1890) 44 Ch. D., at p. 645.
(3) (1875) L.R. 7 H.L. 653.
(4) (1875) L.R. 7 H.L., at p. 665.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Dixon J.

Cotman v. *Brougham* (1). No doubt before this decision some apprehension was felt lest these quite distinct reasons might be or had been confounded, and decisions that a failure of substratum had occurred appear to have been cited as direct authorities upon questions of *ultra vires*. It would be unfortunate to promote or revive any such confusion, but at the same time it would be wrong to fall into the error of supposing that none of the reasoning, which in the cases of winding up has been applied in construing the language of the memorandum and ascertaining the meaning which that instrument bears, has any relevance in a question of *ultra vires*. The meaning of the instrument cannot or ought not to vary, and the same construction should be assigned to it when occasion arises for ascertaining its meaning, whatever may be the purpose of the proceeding. Possibly the application was incautious which, in *Stephens* v. *Mysore Reefs Kangundy Mining Co.* (2), a case of *ultra vires*, *Swinfen Eady* J. made of the observations of *Lindley* L.J. in *In re German Date Coffee Co.* (3). But it is to be observed that when *Warrington* J. in *Pedlar* v. *Road Block Gold Mines of India Ltd.* (4) had occasion to offer some criticism of the judgment of *Swinfen Eady* J., he added: "I heartily concur with his statement that it is not right to accept a construction which would virtually enable a company to carry on any business or undertaking of any kind whatever, and I have not said a word, and I do not propose to say a word, which could in any way lead to the belief that I depart in the least from the principle so laid down." "A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs" (per Lord *Macmillan*, *Egyptian Salt and Soda Co.* v. *Port Said Salt Association* (5)).

In adopting a restrictive interpretation of wide general expressions among the object clauses, Courts have not departed from the strict canons of interpretation. "The golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would

(1) (1918) A.C., at pp. 520-521, per Lord *Parker of Waddington*; (1917) 1 Ch. 477, at p. 486, per *Cozens-Hardy* M.R.
(2) (1902) 1 Ch. 745.
(3) (1882) 20 Ch. D. 169, at p. 188.
(4) (1905) 2 Ch. 427, at p. 439.
(5) (1931) A.C., at p. 682.

be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favour of a different interpretation" (per *Bramwell* B., *Fowell* v. *Tranter* (1)). "It is a rule, that general words shall never be stretched too far in intendment, which the civilians utter thus: *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem rei*" (*Bacon, Maxims of the Law*, Regula III.). And again "All words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person" (*ib.*, Regula X.). In *Moore* v. *Rawlins* (2) the deed of settlement of a building society or company whose members were to ballot for dwellings contained widely expressed powers of making and selling bricks and purchasing and selling all kinds of building materials and performing all kinds of work in the building business, but the company, although consisting of more than twenty-five persons, was not registered under 7 & 8 Vict. c. 110, sec. 2, as a company established for a "commercial purpose or any purpose of profit." *Willes* J. said (3):—"The only question is, whether, looking to the whole scope of the deed, these clauses are not to be restricted to that which is manifestly the main object and purpose of the company's formation. If the words of the two clauses I have referred to are to be read by themselves, separated and disjointed from the rest of the deed, they would seem to give the directors such a power as would enure to make the deed void: but . . . having regard to the maxim that 'general words may be aptly restrained according to the subject matter or person to which they relate,' it seems to me that we ought if possible to put such a construction upon this deed as to make it valid. Generally speaking, a deed ought to be read as if there were no Act of Parliament affecting it in existence: if, so construing it, it comes within the language of an avoiding statute, it must necessarily be held void. There are many cases where the general rule of construction, that, where the words are ambiguous, they shall be read in a sense which will make the deed consistent and legal, has prevailed."

(1) (1864) 3 H. & C. 458, at p. 461; 159 E.R. 610, at p. 611.
(2) (1859) 6 C.B. (N.S.) 289; 141 E.R. 467; 28 L.J. C.P. 247.
(3) (1859) 6 C.B. (N.S.), at p. 320; 141 E.R., at pp. 479-480.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Dixon J.

But when an attempt is made to apply such principles to the construction of the memorandum of H. A. Stephenson & Son Ltd., the difficulties are great in assigning a scope to the instrument or in discovering a fitness of matter or thing in the random collection of seemingly unrelated purposes which it contains. In face of clauses which specify flour-milling, farming, dealing in and making machinery, and shipowning, it seems impossible to regard the purpose of carrying on the business of a produce merchant as predominant. Doubtless it is the initial purpose, the immediate purpose which the promoters had in view, and the first purpose which the Company proceeded to fulfil. But the other objects, although perhaps when written they were no more than expressions of distant hopes, cannot be treated as subservient. Secondary in point of time and illusory in point of fact they may be. In potency they rank as equal with and independent of the object with which the memorandum begins and of one another. Further they are directed to subjects which defy any construction *ejusdem generis*. Shipbuilding, farming and flour-milling are not pursuits which can be assigned to one genus. They are genera. Yet it is not for a Court to resign as hopeless the task of rationalizing the clauses of the memorandum, and to content itself with condemning them as grotesque and meaningless analects. It is not unreasonable to find in the instrument an intention so to constitute the Company as to enable it, if it could, to go from its primary business onwards by an expansion of its undertaking in any direction where commercial enterprise might conceivably lead a produce merchant. Thus, the produce merchant may become a farmer, the grain merchant a miller, the farmer a dealer in live stock; the dealer in live stock may slaughter and freeze carcasses; grain merchant, miller and carcass butcher may need freight and charter ships. The scope of the memorandum is to give capacity to allow of an imaginary progress through a gamut of activities. In the case of specific powers the Company might, of course, have proceeded *per saltum* or from one to another, or its undertaking might have expanded by the more usual process of gradual extension into trades or businesses with which its existing activities bring a connection, contact or association. If such is the rationale of the memorandum, the widely expressed general power to carry on any other business

should be interpreted as an attempt to provide against the possibility of avenues for extension appearing which have not been foreseen and expressly authorized. It cannot be construed as merely ancillary: because another clause exists conferring all incidental powers and, although tautology and redundancy are to be expected in memoranda of association, two such clauses cannot be supposed. The true meaning of the object would appear to be to authorize the Company to carry on any business found to be connected or associated with any existing business of the Company. When it speaks of such business as the Company may deem expedient, it fails to supply in terms any criterion of expediency. The rest of the memorandum suggests that it does not simply mean such businesses as the Company may choose to carry on, but such businesses as it may consider convenient to carry on because they are connected with or arise out of the course of business adopted by the Company. Wide as such a definition is, it does not appear to be considered too indefinite to pass muster as a lawful object, and upon this memorandum no greater restriction of the general words is justified. There yet remains the difficulty of applying this construction of the "object" to the facts of the case. Was the purchase of jute germane to the business carried on by the Company under its specific powers? If so, was buying jute by way of speculation an extension which might reasonably be considered expedient because connected or associated with or arising out of the business so carried on? The first of these two questions must be answered in the affirmative. It appears that of the sacks purchased in 1926, a little over ten per centum, and of those purchased in 1928 for delivery in that year, a little under ten per centum were supplied to farmers, and that in 1928, 135 bales were so disposed of. The objects specifically conferred included the business of grain merchants as well as the businesses already referred to.

The second question is more difficult. It must be answered without regard to the actual manner in which Stephenson junior was led to imperil the Company's assets in the jute trade. On the contrary, it is more useful to consider what aspect the transactions might bear to an intelligent stranger who studied the memorandum

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

DIXON J.

in the light of nothing but a general acquaintance with the use the Company made of its powers. Is not the speculative purchase of jute the kind of business which might reasonably be expected to arise out of its purchases for actual use or for supply to those who needed sacks? It is not an activity ancillary or conducive to that purpose; but is it not another step in the extension of an undertaking to which that purpose might be considered naturally to lead? On the whole I think this question should also be answered Yes. It follows that the respondent's contracts with the Company were *intra vires* and their proof was properly admitted.

The appeal should be dismissed with costs.

EVATT J. The Company which is now in liquidation—H. A. Stephenson & Son Ltd.—was incorporated under the provisions of the Western Australian *Companies Act* 1893 as a company limited by shares. The question for decision on this appeal is whether the Company was competent to enter into a contract with a Calcutta firm dated September 21st, 1928, for the purchase of 600,000 cornsacks (2,000 bales). The approximate cost was £23,333. Delivery was not to take place until September 1929. The transaction was covered by eight separate contracts for 250 bales each.

The person acting for the Company in its purchase was J. O. Stephenson. The brokers acting for the Calcutta jute firm were Brown & Dureau Ltd. The manager of this company, one Leslie Sharpe, saw Stephenson in September 1928 and told him that very substantial profits were being made through speculating in jute on the basis of "early extensive purchases from Calcutta," and reselling to merchants throughout Australia. Mr. Sharpe "explained" to Stephenson, the Company having little capital at command, that "finance was unnecessary if the early contracts were entered into with due regard to the seasonal rains in India, the activities of the bazaar operators, fluctuations in exchange, and also the forthcoming seasonal conditions in Australia."

Stephenson took Sharpe's advice, and purchased the 2,000 bales mentioned. In addition he bought 4,000 more bales from two other Calcutta jute firms. The rest of the story has a familiar ring about it. The speculation failed, the Company went into liquidation

and one of the Calcutta firms has duly presented its claim for damages for breach of contract.

From what has been said, one would suppose that H. A. Stephenson & Son Ltd. was a company expressly empowered to carry on the business of buying and selling jute bags. One need not pay too much attention to the word "speculation," so often used by Stephenson in his evidence. The jute business may not unfairly be described as a continuous speculation.

The memorandum of association does not expressly refer to proposed dealings in jute or cornsacks. Object (*a*) as stated, was to take over the business of H. A. Stephenson, produce merchant of Perth (the father of J. O. Stephenson). That business seems to have consisted exclusively of buying and selling agricultural produce in the containers in which such produce was packed. At any rate H. A. Stephenson's business did not include transactions in jute or jute goods, merely for the purpose of dealing in these goods. How then was the Company by its memorandum empowered to enter into this very large transaction in jute ?

It is contended that the business of produce merchants as carried on in Perth and Fremantle ordinarily includes the purchase and importation of jute from India, for the purpose of resale here at a profit. The evidence in support of this suggestion is that of a number of persons who say that "grain and produce merchants do usually and customarily deal in cornsacks and other jute goods, such dealing being recognized by mercantile brokers as a natural function for grain and produce merchants." Probably it is better to take little account of the opinion of the "mercantile brokers," as they are called. The question as to what is a "natural" function of a grain and produce merchant opens up an interesting vista. Everything that individual merchants do is or becomes "natural" to them, because they do it. If they desire to gamble in jute, or at the races, there is no law to stop them. As produce merchants they are only on the fringe of the business of the jute trader—a trade which may appear to such outsiders to hold out a share in the countless riches of the Orient. Of course, a produce merchant must deal in jute goods to an extent, because the produce which he buys and sells may have to be put into bags which are made of jute. He

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Evatt J.

may occasionally overpurchase and be compelled to sell bags which do not contain produce. This is well illustrated by the operations of the Company itself which, until its disastrous venture of 1928-1929, purchased and sold branbags, but only to a comparatively small extent.

I am satisfied that the impeached transaction was of so special and extensive a nature that it did not take place in the course of the business of grain and produce merchants described in the memorandum of association.

Another object of the Company (*cc*) is "to do all such things as are incidental or are as the Company may think conducive to the attainment of the above objects or any of them or which may be conveniently carried on or done in connection therewith or which may be calculated directly or indirectly to enhance the value of or render profitable any business or property of the Company."

But the transaction now questioned was not incidental to the carrying on of any of the enterprises specified in the memorandum of association. The true character of the dealings of 1928-1929 is that they evidence the entry by the Company into a field of business quite foreign to those actually specified in the memorandum. It is suggested that one of the objects of the Company was to carry on the business of flour-millers (*c*) and of graziers and farmers (*d*), and that the bags purchased might be used for the purpose of carrying on those businesses. So they might. But the Company itself was never in business as a flour-miller or a grazier or a farmer, and it never intended to get these cornsacks for the purpose of assisting in any such undertaking. It does not appear that the Company ever did consider that the Calcutta purchases of 1928-1929 would assist it in the promotion or advancement of any business it was actually carrying on. Object (*cc*) is of no assistance to those who affirm the Company's power to purchase in the way it did.

It was boldly contended for the respondent that if the Company could validly purchase 100 bales of cornsacks, it could purchase 10,000 bales with equal validity, and that the Company's motive in purchasing was not material. This argument overlooks the fact that the nature, purpose, and extent of each transaction is of the utmost importance in showing what object or purpose was being

pursued by the Company when it bought. The purchase of 100 bales by a grain merchant company would possibly be regarded as an ordinary and proper transaction incidental to the business of a grain merchant. An enormous difference in degree may, as here, evidence a difference in kind.

Finally the respondent was driven, somewhat against its will, to rely on clause (*j*) of the memorandum, which purports to authorize the Company "to carry on any other business whether manufacturing or otherwise as the Company may deem expedient."

What does this clause mean? After giving the best consideration to the matter, I have reached the conclusion that it is not reasonably possible to say that the "other" businesses contemplated can be limited to the class or classes of enterprise described elsewhere in the memorandum. The *ejusdem generis* rule is obviously inapplicable. Nor is it feasible to read down the clause upon any satisfactory scheme. I think that it was intended by the clause to confer upon the Company authority to carry on, in addition to all those specified in the memorandum or those ancillary thereto, any other business the Company considered desirable. The question then arises whether the attempt made has been successful, and whether it is possible for the Court now to hold that notwithstanding clause (*j*) the transaction was *ultra vires*.

The *Companies Act* 1893 of Western Australia directs that the memorandum of a limited company "shall contain . . . the objects for which the company is established" (sec. 11 (1) (*b*)). Other parts of the Act recognize that what a commercial company exists for is to carry on business (secs. 48, 120 (2)). A company may be wound up by the Court when it "does not commence *its business* within a year from its incorporation, or suspends *its business* for a whole year" (sec. 107 (2)). Sec. 68 enables the memorandum to be altered "with respect to the objects of the company" if, for instance, it is desired to carry on "the company's business" more economically or more efficiently, or to carry on some businesses which may advantageously be combined with "the business of the company."

It is reasonably clear, therefore, that the Act intended those desiring to form a limited company to make the business

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Evatt J.

undertakings proposed appear from the statement of objects in the memorandum. *North* J., in the case of *In re Crown Bank* (1), dealing with the English *Companies Act* 1862, sec. 9 (3) of which required the memorandum of association to state "the objects" for which the company was proposed to be established, said:—"I take that to mean this—that certain objects must be specified as those in which business is to be done. If the memorandum were to state, as the objects of the company, that it was to carry on any business whatever which the company might think would be profitable to the shareholders, in my opinion that would not be a statement of the objects of the company as required by the Act of Parliament." Lord *Wrenbury*, in *Cotman* v. *Brougham* (2), said: "My Lords, I cannot doubt that when the Act says that the memorandum must 'state the objects' the meaning is that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined."

Now, if those who caused the present Company to be incorporated were guilty of a failure to observe the mandate mentioned in sec. 11 (1) (*b*), this is only because clause (*j*) does not itself delimit or identify any field of industry to which the Company was to be confined. The Act nowhere limits the number of businesses which may be lawfully conducted by a limited company, and Legislatures have tacitly acquiesced in the modern practice of including in a company's memorandum almost every possible business activity. What was done in framing clause (*j*) was to carry this process to its logical conclusion by adding to the enormous area of enterprise already covered every other lawful enterprise. An outsider, reading the memorandum and seeing clause (*j*) in it, would reasonably infer that the business of buying and selling jute commodities could be undertaken by the Company whenever it thought desirable to do so.

It can, of course, be contended that clause (*j*) itself does not state any objects to be pursued by the Company. No doubt it does not refer to any actual business, but it is capable of meaning that *every* enterprise of a commercial character will be undertaken as and when the Company thinks fit. At one time, no doubt, so

(1) (1890) 44 Ch. D., at p. 644.

(2) (1918) A.C., at p. 522.

far-reaching an object would be condemned as "altogether unmeaning" (*Ashbury Railway Carriage and Iron Co.* v. *Riche* (1)).

It would be a very serious matter for persons dealing with such a corporation, transacting business with it on the faith of the statutory memorandum, to be told afterwards that clause (*j*) does not really mean what it says and that the Company is incompetent to travel outside the area bounded by the businesses actually specified and those incidental thereto. But has this danger not been foreseen? Sec. 21 of the *Companies Act* of Western Australia provides that "After signing and sealing such certificate of incorporation, the Registrar shall insert a notice in the *Government Gazette* stating the issue of such certificate, and the terms thereof, and the said certificate, or a copy thereof, certified as correct under the hand and seal of the Registrar for the time being, or the *Gazette* containing such notice, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." Sec. 9 of the Act enables five or more persons to form an incorporated company by "subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration." The requisites of the memorandum are set out in sec. 11. Sec. 20 directs the Registrar to retain and register both memorandum and articles of association, when duly delivered to him; and the Registrar is then bound to certify that the company is incorporated, whereupon subscribers to the memorandum become members of the new corporate entity.

Now, the Registrar is not bound to accept and register a memorandum of association which does not conform with the requirement of sec. 11 (1) (*b*) (*Cotman* v. *Brougham*, per Lord *Finlay* L.C. (2), Lord *Parker of Waddington* (3)). Lord *Wrenbury* said (4): "Before registering a memorandum of association the Registrar ought to consider whether the requirements of the Act have been complied with and to refuse registration if he conceives that they have not . . ." The requirement in point was that the memorandum should specify the objects.

(1) (1875) L.R. 7 H.L., at p. 665.
(2) (1918) A.C., at p. 517.
(3) (1918) A.C., at p. 519.
(4) (1918) A.C., at p. 523.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Evatt J.

In the present case, however, the Registrar did accept and register the memorandum and the Company came into existence for the very objects described in the memorandum (*Ashbury Railway Carriage and Iron Co.* v. *Riche* (1)). The certificate of incorporation which he then gave is conclusive evidence that there was a compliance with every statutory "requisition . . . in respect of registration." If the statutory direction that the memorandum shall contain the objects for which the Company is incorporated is a "requisition . . . in respect of registration" the appeal must fail.

Sec. 17 of the English *Companies Act* 1908, which was considered in *Cotman* v. *Brougham* (2), made the certificate conclusive as to the "requirements of this Act in respect of registration and of matters precedent and incidental thereto." This section had a curious history. In the *Companies Act* of 1862, sec. 18 provided that a certificate of incorporation should be conclusive evidence "that all the requisitions of this Act in respect of registration have been complied with." The section retained that form until 1900. Meanwhile the Court of Appeal in the case of *In re National Debenture and Assets Corporation* (3) expressed the opinion that the certificate was not conclusive of the fact that the statutory number of persons had signed the memorandum. In 1900 Parliament (63 & 64 Vict. c. 48, sec. 1) made the certificate conclusive not only as to compliance with the *Companies Act* in respect of registration but also of "matters precedent and incidental thereto."

In *In re Barned's Banking Co.—Peel's Case* (4), Lord *Cairns* had said, "when once the memorandum is registered, and the company is held out to the world as a company undertaking business, willing to receive shareholders, and ready to contract engagements, then it would be of most disastrous consequence if, after all that had been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration, and the regularity of the execution of the document originally received by the Registrar" (5). In *Oakes* v. *Turquand and Harding* (6) Lord

(1) (1875) L.R. 7 H.L., at p. 669.
(2) (1918) A.C. 514.
(3) (1891) 2 Ch. 505.
(4) (1867) L.R. 2 Ch. 674.
(5) (1867) L.R. 2 Ch., at p. 682.
(6) (1867 L.R. 2 H.L. 325.

Chelmsford L.C. said: "I think the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case, that all previous requisites had been complied with" (1).

These views were not acted upon by the Court of Appeal in 1891. *Bowen* L.J. said that the certificate of the Registrar could not "cure a fatal blot which is caused by a smaller number of persons purporting to form a corporate body than the Act of Parliament requires" (2). *Kay* L.J. said that, to hold otherwise, "would be to give the Registrar practically the power of incorporating a company consisting of fewer than seven members" (3).

The broad answer to this last statement of the position seems to be that the effect of formal incorporation is not regarded by the Legislature as empowering the Registrar to ignore compliance with the Act; but the Legislature wishes to ensure that after the new legal entity has been brought into existence by the formal act of a State functionary, it will not be necessary for persons dealing with the company to ascertain at their peril whether the various statutory requirements have been complied with. Lord *Cairns* regarded the conclusiveness of the certificate from this point of view. It is not so much a power given to the Registrar by the Legislature, as a protection given to the public who may be dealing with the company because of the assumption that the Registrar will be careful in the matter.

In *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff* (4) Lord *Macnaghten*, speaking for the Judicial Committee, said that the observations made by the Court of Appeal in *Re National Debenture Corporation* (5) were "mere dicta," and that the decision of Lord *Cairns* in *Peel's Case* (6) was "of unquestionable authority." He added that the Act of 1900 "put the words of Lord *Cairns* and Lord *Chelmsford* in a legislative enactment repeated in the Imperial Act of 1908" (7).

(1) (1867) L.R. 2 H.L., at p. 354.
(2) (1891) 2 Ch., at p. 519.
(3) (1891) 2 Ch., at p. 520.
(4) (1912) 28 T.L.R. 505.
(5) (1891) 2 Ch. 505.
(6) (1867) L.R. 2 Ch. 674
(7) (1912) 28 T.L.R., at p. 506.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

Evatt J.

The decision of the House of Lords in *Cotman* v. *Brougham* (1) clearly establishes that sec. 17 of the English *Companies (Consolidation) Act* 1908 makes the certificate of incorporation conclusive evidence that there has been a compliance with the requirement of the Act that the objects of the company shall be stated in its memorandum of association. It has already been pointed out that sec. 17 makes the certificate conclusive as to compliance not only with all the requirements of such Act in respect of registration but also "of matters precedent and incidental thereto." After the formal incorporation certificate is given, the position in England is that the Courts must interpret the memorandum as it stands. But Lord *Chelmsford's* statement in *Oakes* v. *Turquand and Harding* (2) to the effect that the certificate prevents "all recurrence to prior matters essential to registration" was given at a time when the English Act was identical with the provision in the present Western Australian Act. If so, the decision in *Cotman* v. *Brougham* and the last observation quoted from Lord *Macnaghten's* judgment in *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff* (3) would appear to show that under the Western Australian statute one of the essential requirements in respect of registration is that the memorandum tendered to the Registrar shall contain a statement of the company's objects. The certificate is conclusive evidence of compliance with this requirement.

It does not follow that a company may proceed towards the attainment of every object stated in its memorandum. The object may be illegal and it may be void because of some inconsistency with the provisions of the *Companies Act* itself other than those relating to registration (*Bowman* v. *Secular Society Ltd.* (4)). It does follow that after the certificate is given, it is no longer possible to treat as void, and thus delete from the objects clause, one paragraph merely because that paragraph discloses in general terms the intention of entering upon all fields of trade, commerce or manufacture not elsewhere mentioned. After incorporation and the acceptance of the memorandum by the Registrar, the members of the public dealing with the company are entitled to say that the objects clause shall be interpreted to mean what it and all of it says.

(1) (1918) A.C. 514.
(2) (1867) L.R. 2 H.L., at p. 354.
(3) (1912) 28 T.L.R. 505.
(4) (1917) A.C. 406.

Assuming, therefore, that clause (*j*) of the memorandum evidences a non-compliance with sec. 11 (1) (*b*) of the Western Australian Act, the Registrar saw fit to register the document with all its contents. It is too late to say that the Registrar acted wrongly. He gave his certificate. The Company came into existence for all the purposes stated in the memorandum. It decided to embark upon the hazardous jute business. But clause (*j*) enabled it to do so.

The appeal should be dismissed.

McTIERNAN J. This is an appeal from an order of *Northmore* J. (as he then was) made on 8th day of April 1931, reversing a decision of the liquidator, by which a claim in respect of transactions in cornsacks presented by Gillanders, Arbuthnot & Co. was rejected. His Honor's order admitted the claim to proof. The liquidator stated that he disallowed the claim "on the grounds that it was *ultra vires* for the Company to engage in the business of dealing or speculating in jute goods." The contracts out of which the claim arose were made by the appellant with Brown & Dureau Ltd., Perth, as brokers for Gillanders, Arbuthnot & Co., Calcutta, for the purchase of 600,000 cornsacks, that is 2,000 bales, at an approximate cost of £23,333, that is, 9s. 4d. per dozen. Delivery was to be made in September 1929, and a letter of credit was to be established in Calcutta before shipment. This transaction consisted of eight separate contracts, each contract being for 250 bales. The appellant having failed to establish a letter of credit, Gillanders, Arbuthnot & Co. did not ship the cornsacks, but resold them in Calcutta. The appellant having gone into liquidation, Gillanders, Arbuthnot & Co. made the above-mentioned claim, "including," the liquidator says in his affidavit of 15th January 1931, "£4,045 9s. 6d., representing the difference to be due by the appellant in respect of the resale of the said 2,000 bales of cornsacks." It appears that the appellant Company entered into similar contracts with other jute shippers in Calcutta for the purchase of a large number of cornsacks, stated to be 1,350,000, or 4,500 bales, for the sum of £47,291. The appellant Company failed also to fulfil the obligation which these contracts purported to impose

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

McTiernan J.

upon it, and claims, amounting to £9,758, which arose out of these contracts, were presented to the liquidator and rejected by him.

The appellant was incorporated on 13th January 1914 under the provisions of the *Companies Act* 1893 of the State of Western Australia. The memorandum of association states (*inter alia*) that the Company was established "to purchase, acquire, and take over as going concerns the business, assets and property of H. A. Stephenson of Perth and Fremantle, produce merchant." The nominal capital of the Company is stated to be £10,000, divided into 10,000 shares of £1 each, of which it appears that £5,000 had been issued as paid up, and £4,781 of this sum was represented by the purchase of the goodwill of the above-mentioned business. This appears to have been a modest capital for a company embarking on the jute market in order to engage in dealings of the dimensions shown by the above-mentioned contracts. The business of H. A. Stephenson, which the Company acquired, consisted of buying and selling produce, and there were never any speculations in jute, nor was that commodity ever bought or sold in the business. The Company went into liquidation in December 1929.

It was not until September 1928 that the Company commenced to involve itself in the business of speculating in jute; that is, buying and selling the commodity in order to make profits by a rise or fall in the market value. This new activity, in fact, appears to have begun with the contracts made with Gillanders, Arbuthnot & Co. The circumstances in which they were made are described by J. O. Stephenson in his affidavit of 17th December 1930. He says that Mr. Sharpe, who was the manager of the jute department of Brown & Dureau Ltd., brokers for Gillanders, Arbuthnot & Co. of Calcutta, explained to him that substantial profits had been made by a certain other company "through heavy speculation in jute on the basis of early extensive purchases from Calcutta and reselling to merchants throughout Australia." Mr. Stephenson continues: "I informed Mr. Sharpe that I did not have the capital at my command to finance such extensive speculations; but he explained to me that finance was unnecessary if the early contracts were entered into with due regard to the possibilities of seasonal rains in India, the activities of the

bazaar operators, fluctuations in exchange, and also the forthcoming seasonal conditions in Australia." Mr. Stephenson then avers that, "in the light of the information conveyed to him by Mr. Sharpe and acting upon his advice," he completed the contracts with Gillanders, Arbuthnot & Co.

The question arises whether upon the true construction of its memorandum of association, the appellant had power to enter into these contracts. Having regard to the large quantities of jute which were purchased and the circumstances in which the contracts were made, the suggestion that these purchases of this commodity could have any relation to the businesses or enterprises enumerated in clauses 2 (*a*) to 2 (*h*), inclusive, of the memorandum of association, or any of them, is quite untenable. These contracts cannot be supported by reference to the statement of the objects of the Company which is embraced by those clauses. But it is submitted that the contracts are within the contemplation of clause 2 (*j*), which is in these terms: "To carry on any other businesses whether manufacturing or otherwise as the Company may deem expedient." If a subsidiary role should not be assigned to this clause, there does not appear to be any doubt that it is wide enough to empower the Company to engage in speculative enterprises, even on such a hazardous field as the jute market. The question whether clause 2 (*j*) should be read as the expression of a substantive object or merely as an incidental or ancillary clause should be determined by the fair construction of the memorandum as a whole. Upon a consideration of the clauses of the memorandum from 2 (*a*) to 2 (*h*) it is clear, I think, that 2 (*b*) is not incidental to 2 (*a*), nor is 2 (*c*) incidental to 2 (*a*) or 2 (*b*); and so on with respect to clauses 2 (*d*), 2 (*e*), 2 (*f*), 2 (*g*) and 2 (*h*) respectively. The businesses and enterprises which are enumerated in each of the clauses from 2 (*a*) to 2 (*h*) respectively may fairly be described as activities which the Company was established to pursue. The question now arises whether the succeeding clauses, including clause 2 (*j*), add to the list of these primary or dominant objects. I do not think that they have that effect. Upon a perusal of the remaining clauses, I think it will be apparent that the compilation of the list of clauses,

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

McTiernan J.

in which the main objects of the Company are expressed, conclude at the end of clause 2 (*h*). While each clause preceding clause 2 (*h*) is the expression of a distinct substantive object, clause 2 (*i*), in my opinion, was intended to be subservient to the objects already stated. It is in these terms: "To conduct such agencies in connection with any of the foregoing businesses goods chattels property things wares and merchandise as the Company may deem expedient." Clause 2 (*j*) is next. This is, in my opinion, the statement of an object which is merely of a subordinate or ancillary character. The clauses which follow it contain a profusion of matter which appears to be incidental or ancillary to the attainments of the objects for which the corporation was established, and the concluding clause, 2 (*cc*), appears to have been inserted for the purpose of filling any gaps which might exist in what is expressly prescribed by those clauses and of rendering the memorandum complete in the provision of incidental or ancillary authority. It would be strange if the framers of the memorandum inserted a clause containing a new substantive object between clause 2 (*i*) on the one side and 2 (*k*) and the following clauses on the other side, in view of their function, which is to elaborate what has already been stated, or to express the implication of preceding clauses, or to stand in a subservient or ancillary relation to them, instead of placing such a clause earlier in the memorandum amongst kindred clauses—that is, in a group of clauses where undoubtedly the memorandum is expressing the main objects of the Company. I think that the words "any other businesses" in clause 2 (*j*) were intended to mean any other businesses the carrying on of which is consequent upon or incidental to the "foregoing businesses." These words are used in clause 2 (*i*) to embrace businesses enumerated in clauses 2 (*a*) to 2 (*h*). The consciousness of the framers of the memorandum of the limited sense in which they were using the word "business" in clause 2 (*j*) is disclosed by the addition of the words "whether manufacturing or otherwise." If clause 2 (*j*) should be read so as to give the Company power to carry on any other business whether it is consequent upon or incidental to any of the businesses mentioned in the preceding clauses or not, the

Company could, subject to it being deemed expedient to do so and not contrary to any other law, carry on any business whatsoever. Upon this construction the range of its activities would be limited only by the confines of the world of business. It could, in the view that clause 2 (*j*) is a substantive object, for example, exercise itself in businesses so diverse as the buying and selling of jewellery, life, fire and accident insurance, the conduct of a stadium or a crematorium, circuses and menageries, or, in the language of *North* J. in *In re Crown Bank* (1), it would have the legal capacity to " establish a line of balloons between the earth and moon." The Company could also, of course, speculate in jute. There does not appear to me to be any stage between a construction which limits the general words of clause 2 (*j*), as in my opinion they are limited by the context of the document, and a construction which gives to those words unlimited scope. The meaning of clause 2 (*j*), which determines its true nature as a statement of powers which are ancillary to the objects of the Company, should, I think, be preferred. It was not suggested, and I do not think there would have been any foundation for the suggestion, that the transactions represented by these contracts were entered into in connection with any business which was incidental or subordinate to the main objects of the Company. As there is no other clause in the memorandum to which reference can be made to authorize these contracts, in my opinion they were *ultra vires* the Company.

The profusion of objects and the heterogeneous character of the matter contained in the memorandum mark this memorandum as a severe example of the fashion which eschews conciseness and, with a view of leaving no power or object to implication, overloads the memorandum of association with a multitude of objects and packs it with a plethora of powers. But there are limits to the elasticity of even this distended memorandum. The present memorandum, in my opinion, does not cover, in addition to those which are mentioned, every other business to which a corporation may apply itself. Notwithstanding the diversity of objects and the amplitude of verbiage, recourse to the art of legal interpretation—a necessity

(1) (1890) 44 Ch. D., at p 641.

H. C. OF A. 1931.

H. A. STEPHENSON & SON LTD. (IN LIQUIDATION) v. GILLANDERS, ARBUTHNOT & CO.

which the document was designed to obviate—cannot, in my opinion, spell out of it any authority for the Company to gamble on the jute market.

The appeal should be allowed.

Appeal dismissed with costs.

Solicitor for the appellant, *Morris Crawcour.*

Solicitors for the respondent, *Robinson, Cox & Wheatley.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

A. H. McDONALD AND COMPANY PROPRIETARY LIMITED . . . . DEFENDANT, APPELLANT;

AGAINST

WELLS . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1931.

MELBOURNE, *June* 29; *July* 4.

Rich, Starke and Dixon JJ.

Contract—Rescission—Restitutio in integrum—Whether possible—Damages—Translating damages from foreign currency into sterling—Translating damages from currency of one Dominion to currency of another.

Rescission must be of the entire transaction, and a substantial restoration of the parties to the position they occupied before they embarked upon it must be possible.

Held, in a transaction made up of successive agreements, that there could be no rescission unless the parties were restored substantially to the same situation as before the first of them.