

[HIGH COURT OF AUSTRALIA.]

THE CHAFF AND HAY ACQUISITION COM-
MITTEE AND OTHERS } APPELLANTS ;
DEFENDANTS,

AND

J. A. HEMPHILL AND SONS PROPRIETARY }
LIMITED } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Private international law—Statutory committee created in South Australia—Liable to sue and be sued in its own name in that State—Whether competent to sue and be sued in another State—Unincorporated body—Separate entity apart from members—Comity of nations—Chaff and Hay (Acquisition) Act 1944 (S.A.) (No. 4 of 1944).

H. C. OF A.
1947.
SYDNEY,
May 2, 5.
MELBOURNE,
June 12.
Latham C.J.,
Starke,
McTiernan and
Williams JJ.

The appellant was a statutory body created under the *Chaff and Hay (Acquisition) Act 1944 (S.A.)*. It consisted of a committee of four persons which was authorized, *inter alia*, to acquire within and without the State certain property which, on acquisition, it held in its collective name ; to dispose of that property and to sue and be sued in its collective name. The Act contained no express words of incorporation and the committee had no common seal.

Held, by the whole court, that the committee was not a corporation but, (McTiernan J. dissenting), that, though unincorporated, it was a legal entity in South Australia and as such was entitled to recognition outside that State in accordance with the principle of the comity of nations.

Decision of the Supreme Court of New South Wales (Full Court) : *J. A. Hemphill & Sons Pty. Ltd. v. Chaff and Hay Acquisition Committee* (1946) 47 S.R. (N.S.W.) 218 ; 64 W.N. 3, affirmed.

APPEAL from the Supreme Court of New South Wales.
J. A. Hemphill & Sons Pty. Ltd., on 10th March 1946, by writ of summons commenced an action in the Supreme Court of New South

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

Wales against the defendant, the Chaff and Hay Acquisition Committee. An unconditional appearance was entered by the defendant committee on 26th April 1946, and pleadings were filed.

The declaration, dated 8th May 1946, contained two counts, the first the common money counts and the second on a special contract alleging payment due to the plaintiff of the sum of £5,656 8s. 2d. for hay purchased by the defendant from the plaintiff in New South Wales.

By pleas dated 23rd May 1946 and filed, the defendant pleaded never indebted to the first count and non-assumpsit to the second count and filed a third plea by way of cross-action claiming damages in the sum of £10,465 3s. 2d. for breach of a condition that the hay should be of merchantable quality.

A replication joining issue was filed on 12th June 1946. On the application of the defendant the claim was then transferred to the commercial causes list to be tried by a judge and jury, the plaintiff refusing to dispense with a jury.

The defendant's solicitors thereupon, on 6th September 1946, took out a summons to set aside the plaintiff's writ on the ground that the defendant committee had no legal existence in New South Wales, not being a corporate entity entitled to sue or be sued in that State.

The defendant committee was constituted under the *Chaff and Hay (Acquisition) Act* 1944 (S.A.) which was assented to on 3rd October 1944.

The preamble to the Act is as follows :—" Whereas it is expedient, in view of the drought now prevailing in the State of South Australia, to make extraordinary provision for ensuring that there will be sufficient supplies of chaff and hay available for the use of persons requiring the same: Be it therefore enacted. . . " Section 3 constituted a committee to be called the Chaff and Hay Acquisition Committee consisting of four members appointed by the Governor upon the nomination of the Minister administering the Act. The members held office for such term and upon such conditions as were from time to time fixed by the Minister, and it was expressly provided that the committee should be deemed to be an instrumentality of the Crown. It had power to acquire chaff or hay within the State of South Australia, but could exercise this power only up to 30th September 1945 (s. 4). Acquisition could be either by purchase or by notification in writing to the owner or apparent custodian of chaff or hay of its intention to acquire it (s. 5 (1)). Thereupon the ownership of the chaff or hay vested in the committee (s. 5 (2)), free from all mortgages, charges or liens (s. 7 (1)), and the rights and interests of persons interested in the chaff or hay so acquired were

converted into claims for compensation (s. 7 (2)). In the absence of agreement the amount of compensation was to be determined in "an action for compensation against the committee" (s. 7 (3)). The committee was empowered to purchase chaff or hay outside the State of South Australia, but this power could not be exercised after 30th September 1945 (s. 8). Subject to conditions prescribed by regulations under the Act the committee had power to sell chaff or hay to any person (s. 10), and to do all things necessary to store, protect and insure chaff or hay acquired by it (s. 12). The Treasurer of the State of South Australia was authorized to borrow £250,000 for the purposes of the Act and to apply the amount so borrowed without further appropriation (s. 13). Section 14 of the Act was in these terms :—

"(1) All legal proceedings by the committee with respect to any matter arising out of this Act shall be commenced in the name of the committee and all proceedings against the committee or any member of the committee with respect to any such matter shall be instituted against the committee in the name of the committee.

(2) The Treasurer of the State shall, from the moneys appropriated for the purpose of this Act, satisfy all orders made by any court against the committee in any such legal proceedings.

(3) No matter or thing done or suffered by the committee or by any member thereof, *bona fide* in the execution of this Act, or the exercise or discharge, or intended exercise or discharge, of any of its or his powers or duties, shall subject any member of the committee to any liability in respect thereof."

Owen J. sitting in Chambers ordered that the writ in the action be set aside on the ground that the committee was not a corporation under the law of South Australia and therefore it should not be recognized as a corporation in New South Wales. An appeal from this order was allowed by the Full Court (*Jordan C.J.* and *Street J.*, *Davidson J.* dissenting): *J. A. Hemphill & Sons Pty. Ltd. v. Chaff and Hay Acquisition Committee* (1).

From that decision the defendant committee, and also Thomas Francis Rice, Herbert John Modra, Robert Colin Scott and Thomas Shanahan, members of the committee, who were joined as appellants pursuant to an order of the High Court made on 12th December 1946, by leave appealed to the High Court.

The notice of appeal, pursuant to the leave to appeal granted by the Court, was filed one day out of time. Upon an application by the appellants for an order extending the time in which to file the notice or other appropriate order, it was shown to the satisfaction

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

of the Full Court of the High Court that the delay in filing the notice was due to causes beyond the control of the appellants and that immediately upon the granting of the leave to appeal they had by letter advised the respondent thereof, whereupon the Full Court, on 31st March 1947, vacated the order granting leave to appeal and granted special leave to the appellants to appeal from the judgment and order of the Full Court of the Supreme Court of New South Wales.

Taylor K.C. (with him *Burdekin*), for the appellants. The committee is not a corporation. It has no independent legal existence to permit it to be sued in New South Wales. The provisions of the *Chaff and Hay (Acquisition) Act* 1944 (S.A.) are procedural. Even if there is a type of committee or association which may be sued in the name of the association in some circumstances, the circumstances of this case are not such that this committee may be sued in New South Wales. Reliance is placed upon the committee's relation to the Crown. It is conceded that the committee has all the characteristics of a corporation except that there is not the ordinary provision that there shall be a corporation with a common seal and perpetual succession. The absence of those very material features is vital, in the sense of being fatal. Section 14 is effective only in South Australia. No doubt a judgment obtained in New South Wales could under the *Service and Execution of Process Act* 1901-1934 be registered in South Australia but it could not be enforced against the property of that State. *Prima facie* the words "any court" in s. 14 (2) mean any court of the State of South Australia. The intent to incorporate the Air Council was more evident than is shown in respect of the committee in this case yet it was held in *Mackenzie-Kennedy v. Air Council* (1) that the Air Council was not a corporate body: See also *Rowland v. Air Council* (2) and *Rowland v. Air Council* (3). The intention of the legislature was to give a summary remedy for compensation claims, and possibly for other claims, therefore the intention was that these statutory provisions should be procedural only to provide a convenient remedy and there was no real intention to create a statutory body having a distinct legal existence such as a corporation. On the authority of *Mackenzie-Kennedy v. Air Council* (4) the committee was not a corporation in any strict sense; there was no intention to incorporate it. The only intention was to create a Crown agent and give a summary

(1) (1927) 2 K.B. 517, at pp. 520, 521, 523, 530, 532, 533. (3) (1925) 41 T.L.R. 545, at p. 546.
(2) (1923) 39 T.L.R. 228, at p. 229. (4) (1927) 2 K.B., at pp. 532, 533.

method of remedy in South Australia. The provisions of s. 14 are purely procedural. In *General Steam Navigation Co. v. Giullou* (1) there was no examination of the point whether the body there concerned was a corporation, there was simply a statement that it was analogous to a corporation. *La Banca Nazionale sede di Torino v. Hamburger* (2) is only an application of the law of agency. The point under consideration in this case was not touched in *Alivon v. Furnival* (3), the matter there under consideration being an extension of the right of an agent or representative party to sue. *Von Hellfeld v. Rechnitzer and Mayer Frères & Co.* (4) is not an authority for the proposition for which it was cited by the Chief Justice in the Court below. *Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 30 does not assist the Court on this point. The committee can discharge its duties and execute all its rights without it being treated as an incorporated body and without an express intention to incorporate it as a legal *persona* (*Borough of Salford v. Lancashire County Council* (5)). It should not be found that the committee had any independent legal existence. So far as legal intention is concerned the committee was to operate as a Crown agent and it was not intended to incorporate it so that it would be subject to treatment in other States where it would be liable to be sued. Questions of submission to the jurisdiction have not been raised. The individual members of the committee have not been sued, they are parties only for the purpose of this appeal. The circumstance that the committee is an agent of the Crown is relied upon to show that its constitution as a committee of persons was not such as to require that by comity of nations it should be recognized as a corporation liable to be sued in other countries.

[STARKE J. referred to *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (6).]

This is a different type of case. The other type is to be found in *London Association for Protection of Trade v. Greenlands Ltd.* (7). Here the question is: How far is the body to be recognized in a country outside that of its origin? Unless it has an independent existence it will not be recognized. The question here is whether the comity of nations requires that a body which is not incorporated should be recognized and there is no authority which determines that question.

(1) (1843) 11 M. & W. 877, at p. 895
[152 E.R. 1061, at p. 1069].

(2) (1863) 2 H. & C. 330 [159 E.R. 137].

(3) (1834) 1 Cr. M. & R. 277, at pp. 295, 296 [149 E.R. 1084, at p. 1092].

(4) (1914) 1 Ch. 748.

(5) (1890) 25 Q.B.D. 384.

(6) (1901) A.C. 426.

(7) (1916) 2 A.C. 15, at p. 17.

H. C. OF A.

1947.

CHAFF
AND
HAY

ACQUISITION
COMMITTEE

v.
J. A.

HEMPHILL
AND
SONS
PTY. LTD.

H. C. OF A.

1947.

CHAFF
AND
HAY
ACQUISITION
COMMITTEE

v.

J. A.

HEMPHILL
AND
SONS
PTY. LTD.

Barwick K.C. (with him *Windeyer*), for the respondent. The question involved ultimately resolves itself into one as to the construction of the *Chaff and Hay (Acquisition) Act* 1944 (S.A.). The liability of a defendant to be sued is determined by the *lex loci contractu*, but it is part of that law, so far as New South Wales is concerned, that the Courts of New South Wales will recognize any legal entity capable of suing or being sued in the country of its creation. Any legal entity, if it is capable of being sued in the country of its creation will be recognized in New South Wales as a plaintiff or a defendant (*Von Hellfeld v. Rechnitzer and Mayer Frères & Co.* (1)). In *General Steam Navigation Co. v. Guillou* (2) there is a recognition that what is recognized by comity is the entity no matter whether it has all the other attributes of a corporation or not. The form of the precedent in *Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 30, is that all that is required to be alleged is the constitution of the corporation abroad and liability to be sued, and to sue. It is shown in *La Banca Nazionale sede di Torino v. Hamburger* (3) that comity extends where there is an entity recognized abroad; that the entity there concerned had a right to sue in a particular way and although the statutory provision might be regarded as procedural nevertheless comity allowed the entity there concerned to sue for the bank in the form in which that bank would sue abroad. In *Alivon v. Furnival* (4) the basis of the decision was put on the same footing as one would recognize locally a foreign corporation. In *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (5) a trade union was regarded as a statutory body which was not incorporated and yet had a legal entity. The corporation under discussion in *Stevens v. Keogh* (6) is illustrative of corporations created by statute which still have not the characteristics of common law corporations. So long as the *persona* is able to be sued it is sufficient. Whether or not it is a *persona* is tested by two cardinal principles: (i) Has it separate liability from that of its constituent members; and (ii) Has it separate ownership of property as distinct from its members (*Von Hellfeld v. Rechnitzer and Mayer Frères & Co.* (1)). Even if our local law recognizes a number of entities which are not corporations, the legislature is free to create any *persona* it desires with any attributes it thinks fit. The legislature of South Australia was entitled to create any *persona* it thought fit and it was not limited to creating such *persona* as known to the

(1) (1914) 1 Ch., at p. 754.

(2) (1843) 11 M. & W., at pp. 895, 896 [152 E.R., at p. 1069].

(3) (1863) 2 H. & C., at p. 331 [159 E.R., at p. 138].

(4) (1834) 1 Cr. M. & R. 277 [149 E.R. 1084].

(5) (1901) A.C. 426.

(6) (1946) 72 C.L.R. 1.

common law (*Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (1)). The organization in that case is an illustration of an entity created without corporate existence. This was recognized in *Brisbane Shipwrights' Provident Union v. Heggie* (2) and *Egan v. Barrier Branch of the Amalgamated Miners' Association* (3): see also *Maitland's Collected Papers* (1911), vol. III, pp. 210, 305, 390. Although the persons concerned in *Jefferys v. Gurr* (4) were not regarded as a corporation for all purposes they were regarded as a corporation for some purposes. In *Conservators of the River Tone v. Ash* (5) the right to sue for a corporate body could be got only by first deciding it was a corporation; one got to the liability for suit by means of deciding that it was a corporation. Here there is no such necessity. The corporate character of the associations created or registered under foreign law is recognized as a matter of international comity (*United Service Insurance Co. Ltd. (In Liq.) v. Lang* (6); *Re Transfer of Land Act 1915* (7); *Bateman v. Service* (8)). Apart from its own intrinsic difficulties there are two factors in *Mackenzie-Kennedy v. Air Council* (9) which differentiate it very much from the present case, namely (a) that the function there being performed was a function of the Department of State, and (b) that there were other duties *in pari materia* which assisted the construction that there was no intention to incorporate. The Act contemplates that there may be a variation in the personnel of the committee, and it provides for perpetual succession. The Act shows a sufficient intention to incorporate the committee, e.g. corporate liability, members not individually liable, perpetual succession, liability to suit under the committee name, and, over all, the intention of creating a body able to go abroad as a *persona* to purchase chaff and hay (*Conservators of the River Tone v. Ash* (10); *Borough of Salford v. Lancashire County Council* (11)). An illustration of a statutory corporation without a seal is shown in *Ex parte Annesley* (12). The fact that a corporation has not a seal is unimportant (*South of Ireland Colliery Co. v. Waddle* (13)).

Taylor K.C., in reply.

Cur. adv. vult.

- | | |
|---|--|
| (1) (1901) A.C., at p. 429. | (7) (1916) V.L.R. 397. |
| (2) (1906) 3 C.L.R. 686, at p. 703. | (8) (1881) 6 App. Cas. 386, at p. 389. |
| (3) (1917) 17 S.R. (N.S.W.) 243. | (9) (1927) 2 K.B. 517. |
| (4) (1831) 2 B. & Ad. 833, at p. 841 [109 E.R. 1352, at pp 1355, 1356]. | (10) (1829) 10 B. & C. 349 [109 E.R. 479]. |
| (5) (1829) 10 B. & C. 349, at pp. 376, 377 [109 E.R. 479, at p. 490]. | (11) (1890) 25 Q.B.D. 384. |
| (6) (1935) 35 S.R. (N.S.W.) 487, at p. 491. | (12) (1836) 2 Y. & C. Ex. 350, at p. 353 [160 E.R. 431, at p. 433]. |
| | (13) (1868) L.R. 6 C.P. 463. |

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
June 12.

The following written judgments were delivered :—
LATHAM C.J. The question which arises upon this appeal is whether the Chaff and Hay Acquisition Committee constituted under the *Chaff and Hay (Acquisition) Act* 1944 (S.A.) can be sued in the Supreme Court of New South Wales. The committee was sued upon a common money count and in assumpsit. An unconditional appearance was entered for it. It pleaded to each count and filed a further plea by way of cross-action claiming damages. A controversy arose between the parties as to whether the case should be heard with or without a jury, and the defendant then took out a summons asking that the writ be set aside on the ground that it was not a legal entity capable of being sued in New South Wales.

Owen J. set the writ aside on the ground that the committee was not a corporation under South Australian Law, and therefore should not be recognized as a corporation in New South Wales. The Full Court set aside this order, the majority, *Jordan C.J.* and *Street J.*, holding that the committee, though not a corporation, was a legal entity capable of being sued not only in South Australia, but also in other countries. *Davidson J.* was of the contrary opinion, but his conclusion was based upon the fact that the committee was an instrumentality of the Crown, and he considered that the rule that a foreign sovereign State could not be impleaded without its consent was applicable. This contention, however, was not raised on behalf of the defendant either in the Supreme Court or in this Court. It is not the Government of South Australia, but the committee, which is sued, and the committee has submitted to the jurisdiction by appearing unconditionally and by pleading and making a cross-claim.

The committee is constituted under the *Chaff and Hay (Acquisition) Act* 1944 of South Australia. That Act is prefaced by a preamble reciting that, in view of the drought prevailing in the State of South Australia, it was expedient to make extraordinary provision for ensuring sufficient supplies of chaff and hay. Under s. 3 it is provided that a committee, to be called the Chaff and Hay Acquisition Committee, is thereby constituted consisting of four members appointed by the Governor who hold office for such term as is from time to time fixed by the Minister. Section 3 (4) provides that “The committee shall be deemed to be an instrumentality of the Crown.” Section 4 provides that the committee may acquire any chaff or hay within the State or any standing crops which are capable of being harvested as hay. It is also provided that the powers conferred by s. 4 shall not be exercised after 30th September 1945. It should be observed that this limitation upon the powers of the committee refers only to the powers of acquiring chaff, hay and crops.

It does not have the effect of bringing the existence of the committee to an end on the date specified. Section 5 provides that the power of acquisition may be exercised by purchase or by compulsion, and that the chaff, hay or standing crop acquired "shall vest absolutely in the committee and shall, subject to any disposition thereof made by the committee under this Act, be and remain the property of the committee for the purpose of this Act." Thus the committee can acquire and hold property. The property is the property of the committee, not of the members of the committee. If a member of the committee died the interest in property acquired by the committee would not be part of his estate. It would remain the property of the committee as constituted under the Act.

Section 7 contains provisions for compensation in cases where the committee acquires chaff &c., and provides that in the absence of agreement the amount of compensation shall be such as is determined in an action for compensation against the committee. Thus compensation is to be determined in proceedings against the committee and not in proceedings against the individual persons constituting the committee. Here is a further recognition that the committee has a personality distinct from that of its members. Section 8 expressly authorizes the committee to purchase chaff or hay outside the State. The section confers authority upon the committee to act extra-territorially. Section 10 provides that the committee may sell chaff or hay. Under these two provisions the committee, but not the persons constituting it, may acquire rights and become subject to liabilities. Section 13 provides that the Treasurer may borrow, for the purposes of the Act, £250,000 and may apply that money for the purpose of carrying the Act into effect.

Section 14 is in the following terms:—" (1) All legal proceedings by the committee with respect to any matter arising out of this Act shall be commenced in the name of the committee and all proceedings against the committee or any member of the committee with respect to any such matter shall be instituted against the committee in the name of the committee. (2) The Treasurer of the State shall, from the moneys appropriated for the purpose of this Act, satisfy all orders made by any court against the committee in any such legal proceedings. (3) No matter or thing done or suffered by the committee or by any member thereof, *bona fide* in the execution of this Act, or the exercise or discharge, or intended exercise or discharge, of any of its or his powers or duties, shall subject any member of the committee to any liability in respect thereof."

Sub-section (1) of s. 14 expressly deals with procedure and can apply as law only in the courts of South Australia. The legislature of

H. C. OF A.
1947.
}
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
Latham C.J.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
Latham C.J.

South Australia has no power to prescribe procedure in the courts of other countries. Sub-section (2) of s. 14, providing that the Treasurer shall satisfy all orders made by any court against the committee, is limited to orders made "in any such legal proceedings" and therefore applies only to legal proceedings in South Australia. These two sub-sections make it unnecessary, in order to enforce a claim against the committee, to pursue in South Australia the procedure by petition of right for which the *Supreme Court Act* 1935-1944 (S.A.) Part V. provides. In the absence of such provisions the declaration in s. 3 (4) that the committee is an instrumentality of the Crown would have imposed procedure by petition of right upon such claimants.

Sub-section (3) of s. 14, however, is a section which deals with more than procedure in actions. It provides that things done by the committee or a member thereof shall not subject any member to any liability in respect thereof. Previous provisions, as already stated, show that the committee may become subject to liabilities which can be enforced in a court, and s. 14 (3) shows that those liabilities are not the liabilities of the members of the committee but are liabilities of the committee itself, which is treated as a legal person separate from its members.

Section 15 provides that regulations may be made for various purposes, including regulations "(f) Authorizing the acquisition or requisition by the committee of any plant or machinery necessary for the purposes of this Act; (g) Authorizing the acquisition or requisition by the committee of facilities for the storage of chaff and hay acquired by the committee." These also are provisions showing that the committee may own property.

Consideration of the terms of the Act shows, therefore, that the committee is not a temporary body. The Act does not give the committee only a limited life. It continues in existence until it is dissolved by some means. The committee can own property, acquire rights, incur liabilities, and those rights and liabilities are the liabilities of the committee, and not of its members. Accordingly, in my opinion it must be held that the committee is a legal entity in South Australia distinct from the persons composing it from time to time, with property, rights, and liabilities which belong to it and not to those persons.

The learned judges of the Supreme Court were of opinion that the committee was not a corporation. It was recognized that it was not essential that express words of incorporation should be used in order to create a body as a corporation (*Conservators of the River*

Tone v. Ash (1)). But it was pointed out that the ordinary words used for the purposes of bringing about incorporation did not appear in the South Australian Act: Cf. *Mackenzie-Kennedy v. Air Council* (2). But even if it should be held that the committee is not a corporation, the provisions of the South Australian Act show that it is a statutory person, a *persona ficta* created by law. It is a subject of rights and duties. A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation.

If the committee is a legal entity in South Australia as distinct from the personalities of the natural persons who constitute it, then it is by comity recognized as a legal entity elsewhere. This principle is well established in relation to foreign corporations: *Bateman v. Service* (3): *Re Transfer of Land Act* 1915 (4), quotation from *American and Foreign Christian Union v. Yount* (5): See *Halsbury's Laws of England*, 2nd ed., vol. 5, p. 860, and the full discussion of the subject in *Foote, Private International Law*, 5th ed. (1925), pp. 161 et seq. The same principle is applied to the recognition of bodies created by foreign law which have rights and liabilities distinct from those of the natural persons who constitute them. In *General Steam Navigation Co. v. Guillou* (6) the Court stated that "a body established by the French law and analogous to an English corporation" (7) could be regarded in English law as the employer of the master of a vessel, and it was recognized that such a body was distinct from the individuals composing it.

In *Von Hellfeld v. Rechnitzer and Mayer Frères & Co.* (8), *Phillimore* L.J., referring to a foreign partnership, pointed out that it did not satisfy the requirements of legal personality in order to make it possible to regard it in England as a person as distinct from its constituting members. The reason for this statement was that the characteristics of the partnership were not enough to show that it was "like a corporation in this respect, not merely that it has a separate *persona*, but that it has a separate ownership of property and separate liability from the ownership or liability by or of the persons composing the aggregation" (9). His Lordship went on to say that in a case where it was doubtful whether a body was a corporation or not it might be sued in England if it were made clear that

H. C. OF A.
1947.

CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

Latham C.J.

(1) (1829) 10 B. & C. 349 [109 E.R. 479].

(2) (1927) 2 K.B. 517, at p. 534.

(3) (1881) 6 App. Cas. 386.

(4) (1916) V.L.R. 397, at pp. 407, 408.

(5) (1879) 101 U.S. 352, at p. 355 [25 Law Ed. 888, at p. 890.]

(6) (1843) 11 M. & W. 877 [152 E.R. 1061].

(7) (1843) 11 M. & W., at p. 893 [152 E.R., at p. 1069].

(8) (1914) 1 Ch. 748.

(9) (1914) 1 Ch., at pp. 754, 755.

H. C. OF A.
1947.
} CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

no relief was sought against any individual composing the entity, but only against the entity itself.

In the present case the committee has, in my opinion, all the attributes of a separate *persona*. It can own property, it can acquire rights and become subject to duties owed to other persons. These characteristics are conferred upon it by the law of its creation and by comity the committee should therefore be treated as an existing legal personality in New South Wales. I am therefore of opinion that the judgment of the Supreme Court was right and that the appeal should be dismissed.

STARKE J. Appeal on the part of the Chaff and Hay Acquisition Committee and others by special leave from an order of the Supreme Court of New South Wales in Full Court which allowed an appeal from an order setting aside the writ of summons dated 10th March 1946 in the action brought by the respondents, J. A. Hemphill & Sons Pty. Ltd. against the Chaff and Hay Acquisition Committee.

The question that arises in the appeal is whether it is competent for the respondent here to sue the Chaff and Hay Acquisition Committee, in its collective name, for moneys due to the respondent in respect of hay purchased in New South Wales for the Committee. Although the Committee objected that the action brought against it in its collective name was not competent, still it claims, under its collective name, against the respondent a considerable sum of money by way of cross-action.

The Chaff and Hay Acquisition Committee was constituted under the *Chaff and Hay (Acquisition) Act* 1944 of South Australia. The preamble of the Act sets forth that it was expedient in view of the drought then prevailing in the State to make extraordinary provisions for ensuring sufficient supplies of chaff and hay for the use of persons requiring the same. A committee called the Chaff and Hay Acquisition Committee was constituted under the Act. It consisted of four members appointed by the Governor upon the nomination of the responsible Minister. They hold office for such term as is from time to time fixed by the Minister and upon such conditions as are from time to time fixed by him. The Committee, it was provided, should be deemed an instrumentality of the Crown. Subject to certain limitations imposed by the Act, which are immaterial for present purposes, the Committee was authorized to acquire any chaff or hay and also any standing crop within the State capable of being harvested as hay. The Committee was also authorized to purchase any hay or chaff outside the State.

But these authorities were not, it was provided, to be exercised after 30th September 1945. H. C. OF A. 1947.

Upon the purchase of any chaff, hay or standing crop the same vested absolutely in the Committee and subject to any disposition thereof made by the Committee under the Act remained the property of the Committee for the purpose of the Act. The Committee was also authorized to sell chaff or hay to any person. CHAFF AND HAY ACQUISITION COMMITTEE v. J. A. HEMPHILL AND SONS PTY. LTD.

It is also provided that all legal proceedings by the Committee with respect to any matter arising out of the Act shall be commenced in the name of the Committee and all proceedings against the Committee or any member of the Committee shall be instituted against the Committee in the name of the Committee. The Treasurer of the State, it is provided, shall, from the moneys appropriated for the purpose of the Act, satisfy all orders made by any court against the Committee in any such legal proceedings. Starke J.

The South Australian Act has no extra-territorial force or effect. It is not in force in New South Wales. But it has long been settled that a foreign corporation may sue and be sued by its corporate name in English courts (*Dutch West-India Co. v. Henriques Van Moses* (1); *Henriques v. Dutch West-India Co.* (2); *Newby v. Von Oppen and Colt's Patent Firearms Manufacturing Co.* (3); *La Compagnie Générale Trans-Atlantique v. Thomas Law & Co.*; *La "Bourgogne"* (4)). "There is no technical objection to suit in England by a foreign corporation or other artificial person" (*Westlake, Private International Law*, 6th ed. (1922), s. 305, at p. 373). "It is obviously only by a comity of nations, in the strictest sense of the word, that this recognition (of an artificial person) can be given" (*Foote, Private International Law*, 5th ed. (1925), p. 161). The existence of this artificial person depends upon the law of the place of its creation but its capacity is limited both by the law of its constitution and by the law of the country where a given transaction takes place (*Von Hellfeld v. Rechnitzer and Mayer Frères & Co.* (5); *Dicey, The Conflict of Laws*, 4th ed. (1927), pp. 520, 521). The right, however, of such an entity to sue and be sued in English courts "necessarily depends on the extent to which recognition is accorded to the law of such State" (*Foote, Private International Law*, 5th ed. (1925), p. 162; *Westlake, Private International Law*, 6th ed. (1922)).

According to English law corporations are said to exist either: (1) at common Law, (2) by prescription, (3) by Act of Parliament, (4) by charter, (5) or by implication (*Grant, The Law of Corporations*

(1) (1724) 1 Strange 612 [93 E.R. 733].

(2) (1727) 2 Ld. Raym. 1532 [92 E.R. 494].

(3) (1872) L.R. 7 Q.B. 293.

(4) (1899) A.C. 431.

(5) (1914) 1 Ch. 748.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
Starke J.

(1850) p. 6; *The Case of Sutton's Hospital* (1)). The South Australian Act does not explicitly create the Chaff and Hay Acquisition Committee a corporation. The characteristics of an English company appear to be perpetual succession, a name, a common seal, authority to hold property in its corporate name, to sue and be sued in that name, and to make by-laws (*Grant, The Law of Corporations* (1850) pp. 4, 5; *Lloyd's Law of Unincorporated Associations*, p. 193). The South Australian Act does not confer upon the Chaff and Hay Committee all these characteristics or attributes either explicitly or by implication. "It is sufficient if the intent to incorporate be evident" but "if it had been intended to incorporate the" Chaff and Hay Acquisition Committee "one would have expected the well-known precedents to be followed with express words of incorporation" (*Mackenzie-Kennedy v. Air Council* (2); *Borough of Salford v. Lancashire County Council* (3)).

The Committee is a statutory body authorized to acquire certain property which is vested in it in its collective name, to dispose of that property and to sue and be sued but it has not been created a corporation according to the requirements of English law in force in South Australia.

But that is not decisive, for recognition is given in the case of companies or artificial persons which have come into existence in countries whose law of incorporation is based on principles different from those of England and Australia. The law of the *forum* determines whether the company or artificial person is recognized. Thus in the case of the *Liverpool and London Life and Fire Insurance Co. v. Massachusetts* (4) an English joint stock company, which several Acts of the Imperial Parliament expressly declared should not be so construed as to incorporate the company, the Supreme Court of the United States, speaking through *Miller J.*, (*Bradley J.* dissenting) said:—"But whatever may be the effect of such declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these Acts, is the exemption from individual liability of the shareholder for the contracts of the Corporation. Such local policy can have no

(1) (1612) 10 Co. Rep. 23 (a), at p. 29 (b) [77 E.R. 960, at pp. 968, 969].

(2) (1927) 2 K.B. 517, at p. 534.

(3) (1890) 25 Q.B.D. 384, at p. 389.

(4) (1871) 77 U.S. 566 [19 Law. Ed. 1029].

place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body. The question before us is, whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave these powers, that it is only a partnership of individuals. We have no hesitation in holding that, as the law of corporations is understood in this country, the Association is a Corporation" (*Liverpool Insurance Co. v. Massachusetts* (1); cf. *Beale, The Conflict of Laws* (1935), vol. 2, pp. 736-739, ss. 154, 155; cf. *Edwards v. Warren Linoline and Gasoline Works & Trustee* (2)). Be this as it may "the essence of incorporation according to English law is the bringing into existence of an entity with status as a person and capacities distinct from those of its members": (*Young, Foreign Companies and other Corporations* (1912), p. 218) or in other words ownership and liability separate and distinct from its members (*Lloyd, Law of Unincorporated Associations*).

In the present case, as already mentioned, the Chaff and Hay Acquisition Committee has many of the characteristics and attributes of a corporation. It has a collective name and property vested in it in that name. It may make purchases and sales in that name in and outside South Australia, subject to certain limitations upon the power of acquisition. It may sue and be sued, in its collective name, and regulations may be made by the Governor in Council for the conduct of its affairs (cf. *The Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (3)).

But it is said that the Committee is not a corporation in the strict technical sense according to the principles of English law in force in both South Australia and New South Wales and that the difficulties which arise from the different principles of foreign law do not affect the case.

This may be admitted but it is not, I think, decisive.

The Chaff and Hay Acquisition Committee is a statutory body endowed with the essential characteristics and attributes of a body incorporated by English law. It is an "artificial person," to use the description of *Westlake, Private International Law*, 6th ed. (1922), s. 305, p. 373, and therefore entitled to recognition "in accordance with what is called 'comity'". It would be anomalous, I think, that the Chaff and Hay Acquisition Committee can be sued in that name in South Australia and yet in respect of transactions which it is expressly authorized to enter into outside South Australia, in

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
Starke J.

(1) (1871) 77 U.S., at p. 576 [19 Law. Ed. at pp. 1032, 1033].

(2) (1897) 168 Mass. 564.

(3) (1901) A.C. 426.

H. C. OF A.
1947.

CHAFF
AND
HAY
ACQUISITION
COMMITTEE

v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

Starke J.

its collective name, the Committee cannot be so sued outside South Australia.

Further, it was contended that the Chaff and Hay Acquisition Committee is a governmental board for the purpose of administering the *Chaff and Hay (Acquisition) Act*: in short a mere government department (*Mackenzie-Kennedy v. Air Council* (1)). The Act declares that the Committee shall be deemed an instrumentality of the Crown. It is true enough that corporate bodies may be set up as departments of government, for instance a Board of Land and Works in Victoria (*Public Works Act* 1928, (Vict.), s. 4) or entirely separate and independent of any department of government, for instance the Victorian Railways Commissioners (*Railways Act* 1928 (Vict.), s. 50). The Chaff and Hay Acquisition Committee is not a department of government: it is an independent statutory body set up to control the acquisition and distribution of supplies of chaff and hay for the relief of persons affected by drought. Its activities are more nearly related to commercial transactions than to transactions of government departments.

Therefore, in my judgment, the Chaff and Hay Acquisition Committee is an artificial person which may be sued, in its collective name, in the Supreme Court of New South Wales, which is all that is now decided.

The question whether the Committee is entitled to any and what immunity from suit as an instrumentality of the Crown and what are its obligations towards and its rights against the respondent do not fall for decisions in this appeal and remain open for consideration and determination in the action.

The appeal should be dismissed.

McTIERNAN J. The defendant in this action is described in the writ as the Chaff and Hay Acquisition Committee. This is the name given by the *Chaff and Hay (Acquisition) Act* 1944 of South Australia to the committee, which it constitutes. The question to be decided is whether the committee can be sued by that name in the Supreme Court of New South Wales. The committee cannot be sued by that name unless it is a legal personality. The courts of one country give recognition, by a comity of nations, to a legal personality created by the law of another country. The Act does not expressly incorporate the committee. There is no indication of an intention to incorporate it given by the words of the Act. The committee is competent to discharge its duties and exercise its powers under the Act without the aid of the status of a corporation. It follows from

these considerations that the committee is not a corporation (*Conservators of the River Tone v. Ash* (1); *Mackenzie-Kennedy v. Air Council* (2); *Borough of Salford v. Lancashire County Council* (3)). The Act says that the committee shall consist of four members to be appointed by the Governor of South Australia upon the recommendation of the Minister of the Crown to whom he commits the administration of the Act. Section 3 (4) says that the committee shall be deemed to be an instrumentality of the Crown. The Chaff and Hay Acquisition Committee is therefore nothing else than the name of a group of four natural persons carrying out certain duties for the Crown. In *Mackenzie-Kennedy v. Air Council* (4) Lord Atkin said: "But, unless incorporated, the Air Council is but a name for several important officials, who have administrative duties assigned to them on behalf of the Crown" (5). If the committee is nothing more in the eye of the law than an unincorporated body of persons it is, of course, not a legal personality: and recognition ought not to be given to it as a legal personality in the Courts of New South Wales.

There is an alternative argument that the committee is a *persona juridica* other than a corporation. Parliament can create a legal personality of any type. It is another question whether any legal personality which the legislature of one country pleased to create would be recognized in the courts of another country as a legal personality. In *National Union of General & Municipal Workers v. Gillian* (6), there is a statement by Scott L.J. illustrating the range of artificial legal persons which could be created by Act of Parliament: "There is a *tertium quid*. A trade union has many activities; it has some existence: and it is something. The omission of Parliament to christen it with some new generic name is immaterial; for Parliament has absolute sovereignty and can make new legal creatures if it likes. It is able, for instance, to create a *persona juridica* not previously known to law if it so chooses; or to clothe an existing association of natural persons with what I may call co-operative personality, so as to give it the status of a *persona juridica*. In my view, that is just what it did in 1871. It expressly assumed the possession by every trade union, when duly registered, of so many of the main attributes of judicial personality that I find any other inference of the intention of Parliament impossible" (7). The test of the sufficiency of the expression of legislative intention to create a corporation is, in reason, applicable to determine whether an Act

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
McTiernan J.

(1) (1829) 10 B. & C. 349, at p. 384
[109 E.R. 479, at pp. 492, 493].

(2) (1927) 2 K.B. 517, at p. 534.

(3) (1890) 25 Q.B.D. 384, at p. 389.

(4) (1927) 2 K.B. 517.

(5) (1927) 2 K.B., at p. 531.

(6) (1945) 2 All E.R. 593.

(7) (1945) 2 All E.R., at p. 603.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
McTiernan J.

creates any legal personality other than a corporation. The intention which it is necessary to find in the words of this Act, is to make the four members of this committee the corpus or substratum of a new legal personality other than a corporation. The intention to invest the committee as a body with the status of a corporation is not evident in the Act. I am unable to find in the words of the Act the intention to constitute, besides the visible committee consisting of the four members appointed by the Governor, a fictitious person also called "the committee." It was not necessary for the legislature to invest the committee with the status of artificial legal personality to make the Act work. The committee is not constituted to stand over against the members of the committee as an incorporated company stands over against its shareholders. The Act confers powers upon the committee and also empowers a member of the committee to do certain things. For example, the power of compulsory acquisition is conferred upon the committee: the power to purchase is conferred upon any member of the committee. The intention of the legislature is that in one case the power should be exercised by the four members of the committee collectively or by as many of them as would be a quorum, and in the other case that the power should be exercised by one of those visible persons. The members of the committee do not exercise the powers conferred upon "the committee" as the executants of a legal personality called the Chaff and Hay Acquisition Committee: they exercise those powers in their own right. They do not stand in the position of directors of a quasi-corporate "committee" of which they are also members. The four members of the committee are collectively the instrumentality of the Crown. They are not appointed to act as agents of some new *persona juridica*. If the Act did not otherwise provide, any chaff or hay purchased or acquired would vest in and become the property of the Crown. Section 5 (2) says that upon purchase or acquisition the chaff or hay "shall vest absolutely in the committee and shall, subject to any disposition thereof made by the committee under this Act, be and remain the property of the committee for the purposes of this Act." This provision gives the committee the rights of property in the chaff and hay acquired or purchased pending its distribution under the Act. It does not warrant the conclusion that the committee is by implication a legal personality. The provision vests the chaff and hay in and gives the rights of property to the four members collectively. They become trustees for the Crown of the chaff and hay for the purposes of the Act. Section 5 (2) does not raise any question of whether there is a quasi-corporation or a different legal entity from the members of the committee. This

provision vests the property only in the persons of whom the committee consists and creates rights of property only in those persons. It is not necessary that the committee should be a legal personality to avoid the transmission of any legal interest of a member of the committee. That result is avoided by the terms of the section. If a member dies or the appointment of a member terminates, he would cease to be a member of the class to which s. 5 (2) applies. The vesting and rights of property brought about and conferred by s. 5 (2) depend upon membership of the committee. It operates to vest property in and to give rights of property to the persons who are from time to time the members of the committee. Although the committee has not permanent legal unity like a corporation, s. 5 (2) gives the committee in respect of the ownership of property the advantages of a corporation: the Parliament can do this without making the committee a *persona juridica* of any kind. Section 14 regulates proceedings with respect to matters arising out of the Act. The committee is an instrumentality of the Crown: a member is also in that position when exercising any powers conferred upon him by the Act. Proceedings by or against the committee or a member, in such a case, are really proceedings by or against the Crown. In the absence of s. 14 such proceedings would need to be taken in the way in which the Crown sues or is sued in South Australia. Section 14 (1) provides that with respect to matters arising out of the Act all legal proceedings by the committee are to be commenced in the name of the committee and all legal proceedings against the committee or any member are to be instituted in the name of the committee. The effect of s. 14 (1) is that the committee is empowered in proceedings arising out of the Act to represent the Crown either as plaintiff or defendant. In the former case they displace the Attorney-General: in the latter case the committee act as a nominal defendant: s. 14 (1) supplants the procedure of petition of right. Section 14 (1) lends no support to the argument that the committee is an artificial person. The object of this provision is not to make the liability of the committee separate from the liability of the members of the committee. There is here no analogy to the position of a company *vis-a-vis* its members. Further, s. 14 (1) does not authorize proceedings which bind any assets of the committee. Section 14 (2) says that the Treasurer of South Australia shall, from the moneys appropriated for the purposes of the Act, satisfy all orders made by any court against the committee in any such legal proceedings. This provision demonstrates that s. 14 (1) makes the committee a nominal plaintiff or defendant for the Crown. It follows that the committee cannot be sued or sue by the name of

H. C. OF A.

1947.

CHAFF
AND
HAYACQUISITION
COMMITTEE

v.

J. A.

HEMPHILL
AND
SONS

PTY. LTD.

McTiernan J.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
McTiernan J.

the Chaff and Hay Acquisition Committee by virtue of a status of a corporate or quasi-corporate character. They can sue or be sued because they are given a statutory right to represent the Crown in proceedings arising out of the Act. Section 14 (1) is procedural: it gives no title to the Chaff and Hay Acquisition Committee to be recognized in the Courts of New South Wales as a legal personality. Section 14 (3) gives the committee and any member of the committee immunity from liability for anything done bona fide under the Act. This immunity is conferred upon the committee as a number of officials: not upon an artificial personality. The Chaff and Hay Acquisition Committee is a name only for four officials: it is not also a name given by the Act to a fictitious person. There is no ownership or liability of the committee separate from an ownership or liability of the members who compose the committee in their official capacity. I am of opinion that the Chaff and Hay Acquisition Committee is not a corporation or other legal personality: that it is but a name for an unincorporated body: and that an action cannot be brought in New South Wales against a defendant described as the Chaff and Hay Acquisition Committee. I should allow the appeal.

WILLIAMS J. The preamble to the *Chaff and Hay (Acquisition) Act 1944* (S.A.) stated that a drought was then prevailing in South Australia, and that it was expedient that extraordinary provision should be made for ensuring that there would be sufficient supplies of chaff and hay available for the use of persons requiring the same. The Act then proceeded to constitute a committee to be called the Chaff and Hay Acquisition Committee, which was to consist of four members to be appointed by the Governor upon the nomination of the Minister of the Crown administering the Act, and to provide that the committee should be deemed to be an instrumentality of the Crown.

The Act empowered the committee, until 30th September 1945, subject to certain limitations, to purchase or acquire by compulsory acquisition any chaff or hay or standing crop which was capable of being harvested as hay within South Australia. The chaff, hay or standing crop so purchased or acquired was to vest absolutely in the committee, and subject to any disposition by the committee under the Act, to remain the property of the committee for the purpose of the Act. Where the chaff, hay or standing crop was acquired by compulsory purchase, the rights of the owner and other persons interested therein were to be converted into claims for compensation; the amount of compensation, if not settled by agreement, to be

determined in an action for compensation against the committee. The Act empowered the committee, until 30th September 1945, to purchase chaff or hay outside the State of South Australia. The Act empowered the committee to sell chaff or hay to any purchaser. The Act authorized any member of the committee to act as the agent of the committee for certain purposes, and the committee to appoint persons to act as its agents for these purposes. The Governor was empowered to make regulations for a number of purposes including, *inter alia*, regulations for the protection of the property of the committee and for the acquisition of plant and machinery, and facilities for the storage of chaff and hay required by the committee.

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
Williams J.

The committee was therefore empowered to purchase or otherwise acquire chaff and hay for a short period. But the committee might have to continue in existence for a considerable period in order to obtain payment from the persons to whom it sold the chaff and hay. The Act does not expressly incorporate the committee or provide for a common seal. It is not therefore a corporation in the strict sense. But it can contract to buy and sell chaff and hay as a corporate body, and the chaff and hay and other property which it acquires for the purposes of the Act becomes the property of the committee as a corporate body.

Section 14 of the Act is in the following terms :—“(1) All legal proceedings by the committee with respect to any matter arising out of this Act shall be commenced in the name of the committee and all proceedings against the committee or any member of the committee with respect to any such matter shall be instituted against the committee in the name of the committee. (2) The Treasurer of the State shall, from the moneys appropriated for the purpose of this Act, satisfy all orders made by any court against the committee in any such legal proceedings. (3) No matter or thing done or suffered by the committee or by any member thereof, *bona fide* in the execution of this Act, or the exercise or discharge, or intended exercise or discharge, of any of its or his powers or duties, shall subject any member of the committee to any liability in respect thereof.”

The committee is therefore not only empowered to contract and hold property as a corporate body, but it is also empowered to sue or be sued as a corporate body with respect to any matters arising out of the Act. And its individual members are protected against liability for all matters and things done or suffered by the committee or any member thereof in the bona-fide execution of the Act, or the exercise or discharge of any of its or his powers or duties. Thus the effect of the Act is to create for certain purposes an artificial

H. C. OF A.
1947.

CHAFF
AND
HAY
ACQUISITION
COMMITTEE

v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

Williams J.

corporate entity which is separate and distinct from its individual members.

The crucial question is whether the committee can be sued in an action brought in the courts of New South Wales in respect of a matter arising out of the Act, namely for money alleged to be owing by the committee to the appellant, upon a contract for the purchase of hay made in New South Wales. The question first arose upon a chamber summons to set aside the writ in the action. *Owen J.*, who heard the application, thought that it was reasonable to assume that s. 14 was enacted for the purpose of relieving claimants in actions for compensation from the necessity of going through the somewhat cumbersome procedure of presenting petitions of right under the South Australian *Supreme Court Act* 1935-1944, Part V., and of allowing the committee to take proceedings in its own name in the South Australian courts which otherwise could have only been taken by the Attorney-General. He held that s. 14 was intended to be procedural only, and limited in its application to actions brought in the courts of South Australia, and set aside the writ.

There was an appeal to the Full Supreme Court of New South Wales, which by a majority (*Jordan C.J.* and *Street J.*, *Davidson J.* dissenting) allowed the appeal, set aside the order of *Owen J.*, and dismissed the summons with costs. The appeal to this Court is by special leave from the order of the Full Supreme Court.

I agree with the opinion of the majority of that Court. The effect of the Act is, in my opinion, to form the committee into a separate corporate body from that of its members for the purposes of the Act. It has the corporate powers already mentioned. Persons who sell chaff or hay to the committee sell their goods to the corporate body. It is to the corporate body that they must look for payment. The members of the committee are not liable as individuals for the chaff or hay purchased by the committee. The vendors of the chaff and hay are liable to the committee and not to the individual members for any breach of contract on their part.

For the purposes of private international law, South Australia is a foreign country in the courts of New South Wales. In *Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse* (1), Lord Wrenbury said :—"There is no question but that according to private international law and according to the comity of nations a foreign corporation is for many purposes recognized as a corporation here. It may sue and be sued here in its corporate name" (2). There is no reason that I can see why this principle should not extend to the recognition as a juristic body of an artificial entity created

(1) (1925) A.C. 112.

(2) (1925) A.C., at pp. 148, 149.

under foreign law which has some, but not all, of the capacities of a corporation according to English law. This view is supported by the dictum of *Phillimore* L.J. in *Von Hellfeld v. Rechnitzer and Mayer Frères & Co.* (1). Quasi-corporations, as such bodies are often called, are well known in English law : See *Grant, The Law of Corporations*, (1850) pp. 600 et seq. ; *Halsbury, Laws of England*, 2nd ed., vol. 8, p. 6, note (r). In my opinion the Chaff and Hay Acquisition Committee is a statutory entity created by the law of South Australia which should be recognized in the courts of New South Wales as a foreign quasi-corporation, having the corporate powers conferred upon it by the Act.

It is a quasi-corporation which is an instrumentality, that is to say an agent, of the Crown in right of the State of South Australia. It was contended that the existence of this agency shows that the provisions of s. 14 must be procedural only, because the legislature of South Australia could not have intended to surrender the sovereign rights and immunities to which such Crown would otherwise be entitled under international law in a foreign State. It was contended that if the committee could be sued at all in the courts of New South Wales, it would be the individual members and not the committee as a corporate being which would be liable, so that the proper defendants would be the individuals and not the committee.

I cannot agree with these contentions. It is clear of course that questions of procedure are determined by the *lex fori* (in this case the law of New South Wales). But the provisions of s. 14 (3) have nothing to do with procedure. As the learned author of *Cheshire, Private International Law*, says :—" If the effect by that law (that is the foreign law) is to relieve the party whom it is desired to cite as defendant in England of all liability entirely, it is a rule of substance binding on an English Court, even though, had the transaction been governed throughout by English law, the liability of the defendant would have been undeniable. A foreign rule must not be labelled as procedural, and therefore as inapplicable to English proceedings, if the result will be to impose a liability that does not exist by the proper law of the transaction " (*Cheshire, Private International Law*, 2nd ed. (1938), p. 649). The learned author relies for this proposition on *General Steam Navigation Co. v. Guillou* (2), where, as he says, the third plea clearly alleged a denial of liability on the part of the defendant by French law, and the judicial difference of opinion was not upon whether this would have been a good plea if the defendant was not liable under this law, but upon whether he was or was not so liable.

H. C. OF A.
1947.

CHAFF
AND
HAY
ACQUISITION
COMMITTEE

v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.

Williams J.

(1) (1914) 1 Ch. 748.

(2) (1843) 11 M. & W. 877 [152 E.R. 1061].

H. C. OF A.
1947.
CHAFF
AND
HAY
ACQUISITION
COMMITTEE
v.
J. A.
HEMPHILL
AND
SONS
PTY. LTD.
Williams J.

Further it is clear from the decision of the Court of Appeal in *Minister of Supply v. British Thomson-Houston Co. Ltd.* (1) (followed in *Minister of Health v. Bellotti* (2)) that the committee is not made a mere agent of the Crown by the provision that it is deemed to be an instrumentality of the Crown. In the *British Thomson-Houston Case* (1), *Goddard L.J.* said (of a section in *The War Department Stores Act 1867* (Imp.), similar to s. 14 (1) of the *Chaff and Hay (Acquisition) Act*) :—" It is said that this section relates only to procedure and neither confers nor alters rights or causes of action. . . . The object of this section seems to me to confer on the minister a cause of action which otherwise would be only in his principal, and thus to enable him to sue as though he were the principal " (3). And :—" There have been several statutes, some earlier, some later, than the Act we are now considering, containing a similar provision, and it is only reasonable to suppose that the object was a simplification of the law and the provision of an alternative remedy to information on the one side and petition of right on the other. This is effected by clothing the minister with the rights and obligations of a principal, so that he can enforce rights and remedies by the ordinary process of litigation, and at the same time enables the subject to sue him as though he were himself a contracting party and not the agent of the Crown " (4). The provisions of the Act as a whole, and particularly s. 14, clearly indicate an intention on the part of the legislature that the committee should contract and hold property, and sue and be sued as a principal. The arguments for the appellant based on the earlier decision of the Court of Appeal in *Mackenzie-Kennedy v. Air Council* (5), are fully answered by the judgments of the same Court in the *British Thomson-Houston Case* (1).

There is nothing strange that I can see in attributing to the legislature of South Australia an intention to make the revenues of that State liable to satisfy the orders of the courts outside South Australia made with respect to any matters arising out of the Act. The committee was empowered to purchase chaff and hay outside South Australia, and therefore to acquire legal rights and incur legal liabilities as a principal beyond its borders. The committee might want to sue in the courts of other countries to enforce such rights. Presumably the legislature of South Australia might reasonably consider itself under an obligation to pay the costs of such an action if unsuccessful. Presumably a vendor of chaff and hay in another State might be unwilling to sell his goods to the committee except

(1) (1943) K.B. 478. (4) (1943) K.B., at p. 490.
(2) (1944) K.B. 298. (5) (1927) 2 K.B. 517.
(3) (1943) K.B., at p. 488.

for cash, if it was incapable of being sued where the debt was incurred. The presumption would be, I should think, that the legislature of South Australia would intend to create a body capable of suing and being sued wherever it was authorized to carry on business, whether within or without South Australia. In my opinion, this is the true effect of the Act. The provision that members of the committee are not to be liable except for *mala-fide* acts is not procedural only. It is part of the constitution of the quasi-corporation, and a matter of substance binding in comity upon the courts of a foreign State. For these reasons I would dismiss the appeal.

H. C. OF A.

1947.

CHAFF

AND

HAY

ACQUISITION

COMMITTEE

v.

J. A.

HEMPHILL

AND

SONS

PTY. LTD.

Appeal dismissed with costs.

Solicitors for the appellants, *Norton, Smith & Co.*

Solicitors for the respondent, *Sly & Russell.*

J. B.