FRANK K. BROWN (DEFENDANT) APPELLANT;

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*Oct. 19.
*Nov. 21.

AND

PHIL H. MOORE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Company—Sale of land—Implied powers—Exercise of option—Specific performance.

The charter of a pulp and paper company empowered it to purchase and hold lands, mill privileges, growing timber and other property.

Held, that from this power to purchase the power to sell is implied having regard to the nature of the business to be carried on.

Held also, Duff J. dissenting and Cassels J. expressing no opinion, that the company could sell all the property so acquired as long as it did not dispose of its whole undertaking.

M. obtained from the company a lease of all its real and personal property with an option to purchase the same at any time during the term. He assigned the lease to B. who agreed in writing that, if he exercised said option he would convey to M. a quarter interest in the property he acquired. B. did not formally exercise the option but with intent to defraud M. he acquired enough stock in the company to give him control. In an action by M. for specific performance of the agreement to give him a quarter interest.

Held, Duff and Cassels JJ. dissenting, that B. having complete control by his acquisition of the stock in fact exercised the option to purchase and may be compelled to procure the conveyance necessary to vest in M. the quarter interest to which he is entitled.

Per Duff J.—The option to purchase was *ultra vires* of the company; it dealt with all the land, etc., which the company was authorized to acquire and the powers given the company by its charter made it an undertaking in which the public must be presumed to have an interest; in such case the sale of all the land, the whole substratum of the undertaking, which the charter does not authorize would be an interference with the carrying out of the undertaking as authorized by the legislature and must be decmed to be prohibited.

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*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc.*

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APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above head-note.

Paton K.C. for the appellant. The appellant never exercised the option and cannot be compelled to convey a fourth interest in what he has not acquired.

The company cannot convey all its property. See Lindley on Companies (6 ed.) page 245; *Simpson* v. *Westminster Palace Hotel Co.* (1).

L. A. Lovett K.C. for the respondent.

IDINGTON J.—I agree for the reasons assigned in the courts below that this appeal should be dismissed with costs.

I do not think, however, that the resort to a voluntary winding up of the company is at all necessary or the only means of enforcing the contract.

The appellant is just as much bound to procure the conveyance to the respondent of what he is entitled to as if he had procured, pursuant to his agreement with the company's covenant with the respondent, the conveyance of the property to his own attorney or any one else he chose to select.

The court below can, no doubt, if necessary, find other means of enforcing the execution by the appellant of his obligation to the respondent.

DUFF J. (dissenting)—The Nova Scotia Wood, Pulp and Paper Company, Limited, was incorporated by a Nova Scotia Statute, 44 Vict., ch. 27, "for the purpose of manufacturing wood pulp and paper" in Nova Scotia

(1) [1860] 8 H. L. Cas. 712.

and of purchasing and holding lands, leases, privileges, growing timber and other property at and near Mill village and elsewhere in the County of Queens, and for transacting all business in connection therewith.

The Company was (sec. 7) invested with power to expropriate

lands and wood contiguous to or connected with lands and works of the company.

The municipality of Queen's County (sec. 10) was empowered to exempt the company from taxation.

By a lease dated the 2nd October, 1916, the company leased to the respondent all its

mills, buildings, machinery and all its lands, tenements, privileges easements and appurtenances situate in the County of Queens;

and by the same instrument it was provided that the appellant should have

the sole and exclusive option at any time during the existence of this lease, of purchasing the fee simple of the lands, tenements, easements and appurtenances hereby demised together with all buildings, plant and machinery thereon

on certain specified terms. On the same date the respondent assigned this lease to the appellant and again on the same date the appellant and the respondent executed an agreement by which the appellant agreed to engage the respondent as his manager upon certain terms as to remuneration and by which it was further provided:—

4.—If at any time Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement then and immediately thereafter the said Phil. H. Moore is to become the owner of 25 per cent thereof and the said Frank K. Brown is to assign and transfer to the said Phil. H. Moore 25 per cent or one quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood, Pulp and Paper Company, Limited.

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5.—In the event of the said Frank K. Brown being desirous to purchase the said property before the said aggregate net earnings as hereinbefore referred to, are sufficient to complete the amount of the said purchase price, the said Phil. H. Moore shall have the option of drawing from the said capital account of the said company his proportion of the profits to that date or of purchasing with his said proportion of profits and any other money which he may desire to invest in the said property an interest in the same not to exceed 25 per cent of the said property at the same valuation as the said Frank K. Brown will pay to the Nova Scotia Wood, Pulp and Paper Company, Limited, for the purchase of the said property, namely, $30,000.00.

The respondent during the currency of the lease purchased from the shareholders of the company the whole of the shares of the company and the appellant thereupon demanded a transfer of a one-fourth interest in the property comprised in the lease and tendered one quarter of the purchase price paid. This the respondent refused offering at the same time to transfer one quarter of the shares purchased. The respondent thereupon brought this action and the courts of Nova Scotia upheld his claim that he is entitled to a conveyance from the appellant of an undivided one-fourth interest in the property comprised in the lease.

The purchase by the respondent was not technically a purchase in pursuance of the option. It was nevertheless, I think, a transaction within the scope and intendment of articles 4 and 5 of the agreement between the appellant and the respondent.

Article 4 provides that the respondent is to participate in the fruits of the exercise of the option upon the same footing as the appellant. If the conditions are fulfilled under which that article is to come into play, then whatever title or interest the appellant acquires by the exercise of the option is immediately to be effected by a trust in favour of the respondent. The article treats the appellant as a

trustee, it treats the rights under the option as trust property held for the benefit of the appellant and the respondent, and it is from this point of view also that we must construe article 5. Article 5 was intended to apply to every interest acquired by the appellant which (if the conditions of article 4 had happened), would have been of such a character that the trust thereby declared would have captured it.

The respondent's rights under these articles could not be affected by the form of the transaction between the appellant and the company. If what was done was done for the purpose of effectually securing, so far as possible, the benefits of the option, then the interest, whatever form it might take, of which the appellant was the recipient was to be subject to the respondent's rights as declared by these articles.

The respondent was to be entitled under the terms of article 5 to have transferred to him a one-fourth interest in what the appellant acquired and it is important to note that it was his right to demand an interest which, while differing in quantity from that of the appellant, should in point of quality be identical with the appellant's. He was entitled to be put in point of quality upon the same footing as the appellant.

Now it is quite obvious that what the appellant offered the respondent, namely, one quarter of the shares acquired by him, was not an interest which the appellant was bound to accept as in satisfaction of his rights. The acceptance of the appellant's offer would place him in the position of a minority shareholder, a position in which he might well find that share for share what he had accepted was not equal in value to that one-fourth the appellant had retained.

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He was clearly entitled to have a transfer of an undivided one-fourth interest in every share acquired by the appellant or at all events a declaration of trust by the appellant in respect of such a one-fourth interest.

On the other hand the claim made by the respondent which has been admitted in the court below is, I think, an inadmissible one. There can be no doubt that the method adopted by the appellant for securing the fruits of the option was adopted in good faith. There were at least two most cogent reasons for pursuing the course that was taken. 1st, it was gravely questionable (so much is admitted and I shall point out in a moment that the option was *ultra vires* and unenforceable) whether a conveyance literally in execution of the terms of the option would not be wholly inoperative at law, and 2nd, assuming such a conveyance could have any operation, it would have the effect of divesting the title to the company's properties from the company and depriving the purchasers consequently of the benefits of the compulsory powers given by the Act of incorporation as well as of the privilege in respect of taxation. That the parties were alive to these considerations is proved by the evidence of the respondent himself who says he pointed out the "value" of the "charter" and the importance of securing it. His precise words are:—

I pointed out the value of the charter and that we should get that with other assets when he exercised his option.

In these circumstances the respondent is in this dilemma. The shares acquired by the appellant are within the contemplation of articles 4 and 5 or they are not. If they are not he has no claim upon them or upon the appellant under article 5. If they are, and I have stated the reasons for concluding that they

are, then these shares are the subject in respect of which the respondent's rights under articles 4 and 5 are exercisable. Indeed, the conduct of the respondent as disclosed by the evidence just quoted, especially in a proceeding in which he invokes the equitable powers of the court, would preclude him from denying it.

This is sufficient to dispose of the questions raised by the appeal but it is not right, I think, that I should take leave of the appeal without expressing the opinion I have definitely formed after a most careful consideration of the subject that the option was *ultra vires* (I express no opinion about the validity of the lease itself) and that by the express terms of the articles the respondent is precluded from demanding from the appellant a title which the appellant did not and could not acquire from the company. As to the last mentioned point the words of article 4 are express, and, as I have already said, it is quite clear that the subject dealt with in article 5, that is to say, the subject of the rights vested in the respondent under article 5 is the same as that in respect of which rights are given him by article 4.

The general rule as to the powers of the modern statutory companies is stated by Lord Blackburn in *Attorney General* v. *Great Eastern Ry. Co.* (1), in these words;

> where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited;

and where extraordinary powers are conferred such as compulsory powers to take land or such as a right to treat with a municipality for exemption from taxes, a stricter rule is applied. Such powers are presumed

(1) 5 App. Cas. 473 at page 481.

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to be conferred in the public interest, and it is conclusively presumed that the undertaking is one in which the public has an interest and any dealing with the property of the company which interferes with the carrying out of the undertaking as authorized by the legislature is deemed (in the absence of some provisions to the contrary effect) to be prohibited and rendered inoperative if attempted.

In *Esquimalt Water Works Co.* v. *Victoria* (1), I stated the principle thus:—

> The power to dispose of its property is, in the case of a quasi public corporation, created by special Act of Parliament, such as the plaintiff company (see *Proprietors of Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigation* (2) and *Reg.* v. *South Wales Rly. Co.*, (3) a limited power. It is limited by this rule, namely, that apart from authority expressly given or appearing by necessary implication from its incorporating Act such a corporation may not dispose of its property if by such disposition it should disable itself from carrying out the objects (in which the public have an interest) for which its special powers were conferred upon it.

To the cases cited in this passage may be added *Mulliner* v. *Midland Ry. Co.* (4).

The option now before us was in form a contract by which the company professed to agree upon certain conditions to dispose of property constituting the whole substratum of its undertaking. I do not think it is affirmatively established in the evidence that the company was not in possession of other property; it may have had, for example, a bank account; but the power to acquire property given by the statute, that is to say the power to acquire lands, etc., was limited in its territorial operation to the county of Queens and the lease professes to deal with the whole of the company's landed property in that county. Such a virtual alienation of all its property would be beyond

(1) 12 B.C. Rep. 302 at page 318.
(2) (1886) L.R. 1. H. L. 254.
(3) (1850) 14 Q. B. 902.
(4) 11 Ch.D. 611 at page 622.

the power of a trading company possessing powers of selling its property in the course of its business in the absence of authority given by its charter or by statute; *Simpson* v. *Westminster Palace Hotel Co.* (1); a disability which can, in some cases where the undertaking is not affected by a public interest, be overcome by the consent of all the shareholders. Where the transaction, however, concerns an undertaking of the class to which that now in question belongs, namely, an undertaking in which the public is conclusively presumed to have an interest by reason of the extraordinary powers given to the corporation authorized to carry it out, the consent of the shareholders is of no effect.

It does not appear that the property of the company was in fact procured by means of the exercise of its compulsory powers; but this is immaterial. A company endowed with such powers enters upon a negotiation for purchase armed with a powerful weapon which gives it a real advantage. But generally speaking such weapons are not put into its hands to enable it to make a profit by trading with the property so acquired and selling it at an advanced price to a purchaser less advantageously situated.

There are one or two subsidiary points to which perhaps one ought to refer. It was suggested by Mr. Lovitt in the course of his ingenious argument that there were cases in which the proprietor of a "one man company" had been directed to bring about the winding up of the company in order to carry out an agreement to convey property. Such cases may be quite intelligible where a public interest is not involved but obviously they have no sort of application to an undertaking of the class with which we are now dealing.

(1) 8 H.L. Cas. 712.

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Further I cannot help observing that it seems a strange misapplication of equitable powers to exert them in lending assistance to the design of the respondent to dismember this undertaking, to deprive it of very important elements of value (on that his own evidence is conclusive) by separating the ownership of the property from the valuable privileges vested in the company itself by statute. Under articles 4 and 5 the respondent, as I have said, is entitled to be put as regards the quality of his interest in the same case with the appellant; he is entitled to have his share of every kind of economic benefit which the ownership of shares gives; but, by the articles themselves as well as by his own conduct, and as well indeed by the plain dictates of justice, he seems to be precluded from demanding that which he had demanded in this litigation.

ANGLIN J.—It has been found by the learned trial judge and the court *en banc* that in acquiring the stock of the Nova Scotia Wood, Pulp, and Paper Company and thus obtaining control of its property and assets the defendant in fact exercised an option which he held to purchase that company's mills, buildings, machinery and lands for $30,000. It has further been held by the Supreme Court of Nova Scotia that in putting the transaction for the acquisition of the property from the company into this form, the defendant acted in bad faith, i.e., as I understand it, with the intent of defrauding the plaintiff of the interests he had contracted to give him in the property to be acquired from the company in the event of the option to purchase it being exercised. It is not possible to set aside these findings. There is evidence to warrant them. The principal question

in issue is whether the plaintiff by the device to which he resorted has created a situation that renders the court impotent to give to the plaintiff the relief of specific performance which he claims.

Two obstacles were urged by counsel for the appellant; (a) that while the Nova Scotia Wood, Pulp and Paper Company has statutory power to acquire lands, it has not the power to sell them; (b) that the property in question is vested, not in the defendant, but in the company.

As to the first objection, I think the power to sell its lands and other property (short of disposing of its whole undertaking—and it is not established that the option covered the entire undertaking of the company) is implied in the nature of the business which the company was incorporated to carry on. *In re Kingsbury Collieries*, and *Moore's Contract* (1).

As to the second objection, I do not see sufficient reason for presently reversing the decision of the Supreme Court of Nova Scotia that its jurisdiction *in personam* should be exercised to thwart the dishonest purpose of the defendant and compel him to fulfil his obligation to the plaintiff on the ground that the decree pronounced may prove to be *brutum fulmen*. Having secured complete control of the company the defendant can, and may probably be forced to, procure the execution by it of any conveyances necessary to vest in the plaintiff the one-quarter interest to which he has been found entitled. Should any insuperable difficulty to carrying out the decree supervene, it will be within the power of the court,

(1) [1907] 2 Ch. 259.

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under the reservation of further consideration, to order an assessment of damages in lieu of specific performance or to award the plaintiff such other alternate relief as the circumstances may call for. *Vide* N. S. Rules Nos. 517 and 538.

I would dismiss the appeal.

MIGNAULT J.—The only question in this case which requires consideration is the objection of the appellant that he is asked to do something which cannot legally be done, to wit, to assign or cause to be assigned to the respondent one quarter interest in the properties mentioned in the lease and option. His objection that he has acquired only the shares of the Nova Scotia Wood, Pulp and Paper Company and that that company alone can dispose of these properties, does not impress me, for the appellant, as owner of all the shares, can certainly cause such an assignment to be made by the company. But would the assignment, if made by the company, be of legal effect?

The objection of the appellant is that while this company can acquire lands it has not the power to sell them. I have examined the company's charter, 44 Vict. (Nova Scotia), ch. 71. It gives the company the power to manufacture wood, pulp and paper in the province, to purchase and hold lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the county of Queens, and to transact all business in connection therewith. In my opinion, such a company has the power to sell any land which it has acquired, this power being implied in the authority given it to purchase and hold lands, mill privileges, growing timber and other property and to transact all business in connection

therewith. *In re Kingsbury's Collieries* (1). Any other decision would force the company to hold in perpetuity or until its dissolution the property acquired by it.

But here the evidence shews that the properties mentioned in the lease and option to purchase were all the properties belonging to the company. All the shares in the Nova Scotia Wood, Pulp and Paper Company several years before had been acquired by one Davison, and after his death belonged to his son and two daughters. For some time the company's operations had not been carried on and the mill property was in a somewhat dilapitated condition, and no doubt the lease in question was made for the purpose of securing some one who would carry on the business, improve the property and who might eventually purchase the mill property.

If this lease had conferred an option to purchase the whole undertaking of the company with its charter as well as its properties, it might well be beyond its powers. But the option is an offer to sell for $30,000.00 the fee simple of the lands, tenements, easements and appurtenances demised by the lease, together with all buildings, plant and machinery thereon. The lease covered all the mills, buildings, machinery and all the lands, tenements, privileges, easements and appurtenances of the company situate in the county of Queens and more particularly described in some twenty-four deeds. I think such an offer of sale comes well within the decision in *Wilson* v. *Miers* (2), where a navigation company had agreed to sell its entire fleet of twelve ships, and it was held that such a sale was within the powers of the directors. Under the clauses of settlement of the company the

(1) [1907] 2 Ch. 259. (2) [1861] 10 C.B.N.S. 348.

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directors were authorized to sell, let to hire and charter the company's vessels. In the present case the power to sell the properties of the company, I have said, must be implied, while in the case of *Wilson* v. *Miers* (1), it was expressed, but the point here is that there is a distinction between selling the business of a company as a whole and selling all its existing goods and chattels. (See Lindley, Law of Companies, 6th ed., 1902, vol. 1, p. 256.) I therefore think that a sale can legally be made to the respondent of one quarter interest in the fee simple of the properties covered by the lease and option to purchase.

On the other points I accept the findings of the two courts that the appellant acquired all the stock of the company under the terms of the original agreement, and that, as between him and the respondent, he must be held to have purchased the property within the meaning of the agreement between them. In the opinion of Ritchie E. J., in the appellate court, the appellant acted in bad faith and is subject to the control of a court of equity. The trial court, after declaring that the respondent is entitled to have the appellant assign and transfer or cause to be assigned and transferred to the respondent one quarter interest in the premises by good and sufficient deeds thereof, retained further consideration of the action, so that it will no doubt be able to make any additional order which may be necessary to give effect to its decree, the action being one *in personam*.

I would therefore dismiss the appeal with costs.

CASSELS J. (dissenting). With all respect I am unable to arrive at the conclusions come to by the learned trial judge (Mr. Justice Mellish) and the learned judges in the Court of Appeal.

(2) [1861] 10 C.B.N.S. 348.

The Nova Scotia Wood, Pulp and Paper Company, Limited, were incorporated by special charter, ch. 71, 44 Vict. (1881). They were incorporated for the purpose of manufacturing wood pulp and paper in the province of Nova Scotia, and purchasing and holding lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the county of Queens, and for transacting all business in connection therewith.

On the 2nd day of October, 1916, the Nova Scotia Wood, Pulp and Paper Company, Limited, leased to the present respondent, Phil. H. Moore, the properties set out and described in the statement of claim. By the terms of the lease, the lessee was to hold the said lands, premises, easements and appurtenances for the term of three years from the 1st of October, 1916, paying the rent provided for in the said lease. The lease further provided as follows:

> The lessee shall have the sole and exclusive option at any time during the existence of this lease of purchasing the fee simple of the lands, tenements, easements and appurtenances hereby demised together with all buildings, plant and machinery thereon at and for the sum of $30,000.00 with the proviso that all monies paid on account of said yearly rentals of $2,000 shall be credited on the said purchase price.

It is also provided as follows:

> And it is hereby declared and agreed that this indenture and everything herein contained shall enure to the benefit of and be binding on the parties hereto, their heirs, executors, administrators, successors and assigns respectively.

On the 2nd day of October, 1916, the same date as the lease, an agreement in writing was made between the plaintiff, Moore, and the defendant, Brown, which is set out in the statement of claim.

By this agreement Moore assigned and delivered the said lease and option to said Frank K. Brown. The fourth clause of this agreement provides as follows:—

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4. If at any time the said Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement then and immediately thereafter the said Phil. H. Moore is to become the owner of 25 per cent thereof and the said Frank K. Brown is to assign and transfer to the said Phil. H. Moore 25 per cent or one quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood, Pulp and Paper Company, Limited.

There is no covenant or agreement binding Brown to exercise the option of purchase.

I quote a few sentences from the evidence of Moore:—

Q.—Now about this option, did you have any conversation with Brown about exercising the option at any time? A.—Yes, we discussed it a number of times.

Q.—As to the method of transfer of the properties, did you have any discussion with Brown about that prior to the end of the option? A.—Yes, I pointed out the value of the charter and that we should get that with other assets when he exercised his option.

Q.—Did you discuss the way the property should be taken over under the option? A.—I don't think we went into details about that; it was to be transferred by some method satisfactory to the two parties.

Q.—Was any different method of transfer discussed with Brown? A.—No, not with me.

At the hearing of this appeal a very elaborate argument was presented by Mr. Paton as to the power of the company to sell these assets. In the view I take of the case it is unnecessary to consider these nice questions of law.

In point of fact Brown never did exercise the option. What happened was that, very likely acting on the suggestion of Moore, he acquired practically the whole of the stock of the company, and it would appear from the argument and the statement that Brown is quite willing to assign to Moore one quarter in value of the stock subject to payment by Moore of the amount due to him. The ownership of the stock would carry with it the ownership of the assets.

It is said on behalf of Moore that the ownership of one quarter of the stock is not the same thing as the ownership of one quarter of the assets. This may be so but Brown, not having exercised the option, is not in a position to convey 25 per cent of the assets. The right of Moore to the 25 per cent of the assets is necessarily based upon the option being exercised by Brown.

I am of the opinion that the offer made by Brown to transfer 25 per cent of the stock is a reasonable one and will practically give Moore one fourth interest. It will also prevent the breaking up of the company and will enable the company to carry on the business for which they were incorporated.

I would allow the appeal with costs of the trial and of the appeal to the court of appeal in Nova Scotia, and also of the appeal to this court.

I think the judgment should contain an undertaking on the part of the appellant Brown to transfer to Moore 25 per cent of the stock upon Moore paying what is properly due by him, if not already paid. In other respects the judgment should stand.

Appeal dismissed with costs.

Solicitor for the appellant: *V. J. Paton.*

Solicitor for the respondent: *L. A. Lovett.*