Privy Council Appeal No. 9 of 1914.

The Canadian Collieries (Dunsmuir), Limited, and another - - - - *Appellants,*

v.

James Dunsmuir and others - - *Respondents.*

AND

James Dunsmuir - - - - *Appellant,*

v.

The Canadian Collieries (Dunsmuir), Limited and others - - - - - *Respondents.*

(*Consolidated Appeals*)

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY 1914.

Present at the Hearing:

LORD MOULTON.
LORD SUMNER.
SIR GEORGE FARWELL.

[*Delivered by* LORD SUMNER.]

On 3rd January 1910 Mr. James Dunsmuir entered into an agreement with Mr. Robert Thomas Elliott with reference to The Wellington Colliery Company, Limited, of British Columbia, and the Robert Dunsmuir Sons Company, of California, the benefit of which was subsequently assigned by Mr. Elliott to Sir William Mackenzie, and by him reassigned to the Canadian Collieries (Dunsmuir), Limited, now Appellants. On 16th June 1910 they paid the consideration moneys to

[59] J. 351. 90.—7/1914. E. & S.

Mr. Dunsmuir and took over most of the properties with which the contract dealt, except in so far as the disputes arose which are the subject matter of the present appeal. It is convenient to call Mr. Dunsmuir "the vendor," and the Canadian Collieries (Dunsmuir), Limited, "the purchasers," as little, if anything turns on the fact that the latter are only assignees from Mr. Elliott, who was the party described as "the purchaser" in the agreement itself.

In October 1910 the purchasers sued the vendor on the agreement of 3rd January 1910, joining with him the Robert Dunsmuir Sons Company and The Wellington Colliery Company, Limited, which may be called respectively "the San Francisco Company" and "the Colliery Company." About a month later the vendor began a cross-action against Sir William Mackenzie, the Colliery Company, and the purchasers. In the first action the purchasers claimed a conveyance of certain properties alleged to be transferable to them under the agreement, and an account of all dealings with those properties in the meantime; in the second the vendor claimed declarations of his rights under the same agreement and also other relief. Accordingly in substance the two actions raised the same questions from the different points of view of the opposing parties. They were tried together before Hunter C.J., and appeals and cross-appeals were taken to the Court of Appeal of British Columbia. Thence appeals have been brought, by leave of the Court of Appeal or of their Lordships, to this Board, and by order of this Board they have been consolidated.

Only parts of the matters originally in dispute have been debated before their Lordships. They may be and have been called (in inverse order of their importance) (1) the barge

Oregon, (2) the "Wellington Farm," (3) the Vancouver "stock pile" and its proceeds, and (4) the "earnings" of the properties.

The right of the purchasers to the barge *Oregon* depended upon its being "ordinarily "used . . . in connection with the Wel- "lington Collieries," within the meaning of the agreement. This raises a question of fact. The purchasers only faintly contested the adverse decision of the Court of Appeal before their Lordships' Board. It is enough to say that as regards the *Oregon* their Lordships see no reason to differ from the judgment of the Court of Appeal.

Both Courts below decided in the vendor's favour that the "Wellington Farm" did not pass under the agreement, except as to any coal-measures underlying the same. The point involved questions of fact and from these concurrent findings their Lordships have no mind to differ. Here too the purchasers' appeal fails.

Under an agreement between the Colliery Company and the Canadian Pacific Railway Company, dated 29th February 1908, the former bound itself to supply coal to the latter on specified terms, and for that purpose to keep a reserve of coal of not less than 20,000 tons at Vancouver for the use of the Railway Company, to be taken as and when required. This reserve was called the "Vancouver stock pile." The vendor contended that the whole "stock pile" as it existed at any given time belonged to the Railway Company, and that the removal of portions of the coal from it as required only caused proportionate sums to become due and payable on account of the price. The purchasers' case was that the coal only became the Railway Company's property as and when it was taken from the pile. The Trial Judge's decision in

favour of the vendor on this point was reversed, and as their Lordships think, rightly reversed, in the Court of Appeal. It is clear that no property passed to the Railway Company till it took the coal from the "stock pile" for railway purposes.

The remaining question as to the stock pile is one of those which arise upon the words "earnings of the properties." By paying the balance of the consideration moneys mentioned in the agreement of 3rd January 1910, which they did on 16th June 1910, the purchasers became entitled to a transfer of the "properties" with which it dealt. The vendor, conceiving that he was entitled to do so, caused the Colliery Company to declare a dividend of $700,000.00 thirteen days previously, and received this sum by cheque or in account. His case was that, even if in form he was not entitled to receive a dividend so declared, he was in substance entitled to a like sum as earnings of the properties within Section 7 of the agreement; that the whole price payable for the coal in the stock pile was included in such earnings, and that in any case the true effect of the transaction was that he was not bound to give up either coal or coke, or book debts, or cash in hand, belonging to the Colliery Company at any date prior to 16th June 1910. He submitted that all were *de facto* in his hands or in his control down to 16th June 1910, and that on the true view of the contract they all belonged to him. They might be called the property of the Colliery Company, but that was mere form. This is the substantial question in issue upon these appeals.

When the Esquimault and Nanaimo Railway Company was formed and its railway was made, it received by virtue of legislation of the province of British Columbia and grants from the Dominion of Canada, a subsidy consisting among

other things of valuable coal-bearing lands, which were exempt from provincial taxation unless and until the Railway Company used them for other than railroad purposes, or leased, occupied, sold, or alienated them. The Colliery Company was incorporated to work these coal-bearing lands, and did so under an agreement with the Canadian Pacific Railway Company, which had acquired the issued share capital of the Esquimault and Nanaimo Railway Company. By that agreement the former Railway Company covenanted that the latter should, on demand, convey all the coal in these lands to the Colliery Company. This was done in order to keep alive the valuable concession of freedom from taxation. So much of the share capital of the Colliery Company, as could be held by one person, belonged to the vendor. He controlled the Colliery Company absolutely and no doubt thought and often spoke of it as his own.

The argument on behalf of the vendor is this. In substance he carried on one big business, that of getting, shipping, and selling coal. In form part of that business belonged to and was carried on by the Colliery Company, which was under his control and was virtually, if not in name, under his management through his ownership of nearly all the shares. Mr. Elliott sought an option over this business, which would enable him within certain limits of time to acquire the mineral areas and the fixed plant and assets at a price, leaving the goodwill and the liquid assets unaffected. An option was accordingly granted to him. If he failed to use it he forfeited any payments made during its currency and was under no future obligation; if he exercised it, he acquired the above properties as they stood on the date, when his option was exercised and became converted into an agreement to purchase. Nothing else was affected. Meantime the vendor would go on as before, subject to not wasting the

assets in question, and, going on as before, he would make what he could out of it. In form he sold shares, but this was mere machinery; in substance and in the contemplation of the parties he sold fixed assets, and it was understood that they were his and were sold as his. The transfer of shares was substituted for the conveyance of the assets themselves, so far as they were in law the property of the Company, so that the Company might be kept alive and the exemption from taxation might remain unaffected.

Such a view is entirely intelligible and the parties might well have decided to give effect to it and to carry out the transaction accordingly. Evidence was given with the apparent object of proving that they did so, but it was irrelevant, and before their Lordships the admission of it was not defended. As the questions in the actions arose between the vendor and mesne or ultimate assignees for value from Mr. Elliott, common mistake and a right to rectification was not, and probably could not have been, set up. Both courts below in substance concluded that the transaction was such as the vendor submitted that it was and construed the agreement accordingly. Their Lordships only differ from those conclusions after very full consideration of the terms of the agreement, but they are of opinion that its terms are unambiguous and will not bear that construction.

The agreement is one by which the vendor agreed to sell shares which were his, not property belonging to the Colliery Company or the San Francisco Company which was not his. It must be so construed. Whether it was an option or not does not much matter. It is called an "option" in Clause 9, but Clause 1 states an agreement to sell *in præsenti* for a price to be paid *in futuro*. It is clearly a contract relating to a sale of shares, and the price is

one very large lump sum, no attempt being made to value the items whether of real or personal property separately. The sale and transfer of the shares would of itself give the right and the means to obtain possession and enjoyment of the assets of the respective companies, subject to the rights of the other shareholders. The vendor on ceasing to hold any shares would neither be able to help nor to hinder such enjoyment. Clauses 2 and 3 contain statements of the properties belonging to the two companies, so far as it was thought material to name them. In their Lordships' opinion they are brief enumerations, which both serve to define the vendor's obligation under Clause 9 that "the properties of the two companies will "be kept intact," and also to warrant that the assets of the companies, whose shares are being sold without any concurrence of the companies themselves, are such and such specified things. This is clearly so in the case of Clause 3. The words in Clause 2—"which pass under the sale "of the shares at the above price," and "which "is to pass with the assets of such companies "to the purchaser" are certainly not enough to alter the expressed character and basis of the contract. They do no more than clumsily state that the purchaser, to whom a controlling interest passes on the transfer of the shares, will find that he can thus get the control of these properties, which will have passed away from the vendor. The words in Clause 1 "together "with all the benefits . . of him the vendor . . "by virtue of every existing contract between "the vendor and the Canadian Pacific Rail-"way Company" are sufficiently and correctly referable to the fact that he was himself a party to the contract above-mentioned, under which the Canadian Pacific Railway Company covenanted to convey on demand the coal lying

within the Esquimault and Nanaimo Railway Belt. The words in Clauses 1 and 2 to the effect that the shares in the companies or "the companies the shares of which are to be so transferred" are to be "free from any contracts for the sale "and delivery of coal except such as have been "heretofore made in the ordinary course of "business and current cargo contracts at the "time of completion of purchase hereunder" and "shall be free and clear of all debts and liabilities at the time of such transfer" are the vendor's personal undertakings, appropriate enough in view of the fact that he had had and still retained the practical control. They might be enforced against him as virtual covenants of indemnity, if, at or after the transfer, the companies proved to be fettered by any contractual obligations contrary to those clauses. Again the statement in Clauses 5 and 6, that the vendor will not give up possession of the properties owned by the said companies until paid in full and when paid in full will turn over the properties of the said companies to the purchaser or assignee has reference to his business control *de facto*, not to any legal possession *de jure*. No one could contend that this agreement was artistically drafted. Its clauses are often obscurely expressed and sometimes use language inconsistent with its main purpose, but, whatever difficulties may thereby arise, it is in their Lordships' opinion impossible to press them, so as to convert language effecting a transfer of the vendor's legal rights into language operating to cause the companies to suffer legal wrongs. It is fundamentally a sale by the vendor of shares which were his, not an agreement to give up possession of assets which were not his, but his companies'.

Specific stress was laid on the words of Clauses 7 and 9. The latter is put in for the protection of the purchasers and by itself does

not go far to determine the choice between the vendor's submission and that of the purchasers. Upon the former the vendor's case was put in two ways :—(*a*) If the contract be treated as disregarding the distinction between the vendor and his companies the clauses simply state *ex abundanti cautelâ* that when by the exercise of the option an agreement of purchase and sale arises the properties will be bought as they stand at that time, and that in the meantime the vendor will use them for his own benefit and at his own cost in the ordinary way of business except that he promises to keep them intact and not to squander them ; (*b*) in any case, as he is to retain " all the earnings of the properties up to " the day of giving up possession " without specifying from what time those earnings are to be taken to commence, he is entitled to all earnings before as well as after the date of the agreement, and in view of the payments that he engages himself to make, the earnings are simply the receipts of the business and that too in the widest sense of money due as well as money in hand, and of coal gotten and won and coke manufactured, for which when sold money will be receivable, and not merely proceeds of coal and coke shipped and sold. In this view what he promises to keep intact is what is called " the fixed assets " only, and even these, it is said, may be diminished by severing coal, and not merely shipping coal, in the ordinary course of business.

The first of the two above-mentioned views of Clause 7 is disposed of by the considerations already advanced with regard to the construction of the agreement generally. The second depends upon an interpretation of the word "earnings," which their Lordships think it is wholly unable to bear. It was admitted by counsel for the vendor that the declaration of the dividend gave

him no better right than he had without it, and in their Lordships' opinion "earnings" clearly cannot cover coals and coke in hand at the date of the contract, and is equally inapt to describe cash and book debts and other choses in action then belonging to the Colliery Company. Nor again can coal won and coke made but not shipped or sold between the 3rd January and 16th June 1910, be called "earnings." These clauses have an appropriate meaning in connection with the sale of a number of shares sufficient to control the fortunes of the companies. They mean that, between the date of the contract and that of the exercise of the purchasers' rights under it by payment in full, the vendor, though in full control, will on the one hand keep the properties intact, and on the other hand make what he can out of his control by operating, manufacturing, and trading in the ordinary way of business, so far as the purchasers' consent can authorise him to do so. He will pay all the outgoings, and keep for himself all the incomings so obtained during that period, which thus become for him and from his point of view "earnings of the properties." It follows that full effect can be given to these clauses without detriment to the fundamental scheme expressed in the previous part of the agreement. It may be that in the result the vendor will get less than he expected, or indeed than Mr. Elliott expected, but parties must be held to their written agreements, and confusion between a man and his companies must all the more be avoided by courts of law, because it is common and even natural among men of business. In their Lordships' opinion the order, which the Court of Appeal of British Columbia should have made, would have omitted the words commencing "but that all moneys payable by the Canadian "Pacific Railway Company" and ending "at

" a time or times prior to the said 16th day " of June 1910," that is from line 19 to line 31 inclusive of page 283 of the Record, and would have instead contained declarations—

(i.) that, as against the Canadian Collieries (Dunsmuir), Limited, and Sir William Mackenzie, the receipt of monies by Mr. James Dunsmuir in respect of the dividend, purported to be declared by the Wellington Colliery Company on 2nd June 1910, was wrongful, and that he must account to them for all monies so received by him ;

(ii.) that, as against the same parties, Mr. James Dunsmuir was not entitled to any monies, which, prior to 3rd January 1910, were in the hands of and formed part of the assets of the Wellington Colliery Company, Limited, and must account to them for all monies so received by him ;

(iii.) that, as against the same parties, Mr. James Dunsmuir was not entitled to the proceeds of any coal gotten or coke made forming part of the assets of the Colliery Company on that date, even though sold after that date, and that he must account to them for all monies so received by him ;

(iv.) that, as between himself and the same parties, and subject to his having paid all expenses of operation and upkeep of the said colliery up to 16th June 1910, Mr. James Dunsmuir was and is entitled to all monies received either by him or persons acting on his behalf, or by the Colliery Company or its agents in respect of coal gotten, sold, and shipped, and of coke manufactured, sold, and shipped between 3rd January and 15th June 1910, and to all nett monies received since 16th June 1910 by the Canadian Collieries (Dunsmuir), Limited, or its agents, or the Wellington Colliery Company, Limited, or its agents, or Sir William Mackenzie or his agents, in respect of such coal or

coke, and that for all such monies so received by them respectively, or by agents on their behalf, the three last-named parties must account to Mr. Dunsmuir; and the said order of the Court of Appeal should further have remitted the case to the Trial Judge to direct such accounts to be taken and inquiries to be held, and to make such orders and to allow such set off, and to direct such payments and to enter such final judgment or judgments, as might be necessary to give effect to the order so made by the Court of Appeal.

Their Lordships think that in all other respects the order of the said Court was right, and should stand. Accordingly their Lordships will humbly advise His Majesty that the appeal of the Canadian Collieries (Dunsmuir), Limited, and Sir William Mackenzie should be allowed with costs, and the order appealed from should be set aside in part and varied as aforesaid and no further, and that the appeal of Mr. James Dunsmuir should be dismissed with costs.

In the Privy Council.

THE CANADIAN COLLIERIES (DUNSMUIR), LIMITED, AND ANOTHER

v.

JAMES DUNSMUIR AND OTHERS;

AND

JAMES DUNSMUIR

v.

THE CANADIAN COLLIERIES (DUNSMUIR), LIMITED, AND OTHERS.

(Consolidated Appeals.)

[DELIVERED BY LORD SUMNER.]

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