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THE COLONIST PRINTING AND PUBLISHING COMPANY, JAMES DUNSMUIR, CHARLES EDWARD POOLEY, ALBERT G. SARGISON, J. A. LINDSAY AND H. MAURICE HILLS, (DEFENDANTS) ..... APPELLANTS;

*Nov. 5, 6.
*Nov. 17.

AND

JOAN OLIVE DUNSMUIR AND FORBES GEORGE VERNON, WHO SUE ON BEHALF OF THEMSELVES AND ALL OTHER HOLDERS SAVE THE INDIVIDUAL DEFENDANTS OF A CERTAIN ALLOTMENT OF SEVENTY-EIGHT PREFERENTIAL SHARES IN THE DEFENDANT COMPANY (PLAINTIFFS)..... ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Company law—"The Companies Act, 1890 "*(B.C.) and amendment—Construction of statute—Memorandum of association—Conditions imposed by statute—Public policy—Preference stock—Election of directors.*

In the memorandum of association of a joint stock company formed under the provisions of the British Columbia "Companies Act, 1890," and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act.

Held, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was *ultra vires* of the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy.

Judgment appealed from (9 B. C. Rep. 275) reversed.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia, (1), affirming an order by Drake J., at the trial, setting aside the election of five directors elected at a general meeting of the company on the 17th of February, 1902.

The company was not represented by counsel and took no part in the appeal which was prosecuted by the other defendants who were the directors elected at the meeting in question by a majority of the votes of all the shareholders present. The judgments now reported contain a statement of the questions of material importance raised on this appeal. The controversy arose in connection with a dispute as to the preference or privileges alleged to have been annexed to a certain block of shares in the capital stock of the company under the following circumstances.

In a written agreement, dated the 5th of September, 1892, entered into between William Harrington Ellis and Albert George Sargison, therein termed "Ellis & Co." of the one part, and James Dunsmuir, of the same place, therein termed "The Promoter" of the other part, respecting the incorporation of "The Colonist Printing & Publishing Company, Limited Liability," the sixth clause was as follows:

"6. It is agreed that the Colonist Printing & Publishing Company, Limited Liability, shall be managed by a board of five directors, of whom, notwithstanding anything to the contrary in the "Companies Act, 1890", the stockholders other than Ellis & Co., or other the owners or persons entitled to the said seventy-five shares to be held by them, or some part thereof, shall when and as from time to time trustees or directors are to be chosen, elect or choose three; and that the other two directors shall be elected or chosen by Ellis & Co., and such five directors, or a

(1) 9 B. C. Rep. 275.

majority of them, shall have all the powers of trustees under the "Companies Act, 1890."

In the memorandum of association of the company formed, the fourth clause was as follows:

"4. The number of trustees who shall manage the concerns of the company for the first three months shall be five, and their names are William Harrington Ellis, Albert George Sargison, James Dunsmuir, Cuyler A. Holland and Sydney Aspland, and in the election and appointment of directors the company shall be governed by the provisions of said agreement of the fifth day of September, 1892."

C. Robinson K. C. and *Gregory* for the appellants. The effect of secs. 3, 5, 9 and 11 of the "Companies Act of 1890" (B.C.), is that, in electing trustees, each stockholder shall have as many votes as he owns shares, one vote for each share, and that the persons receiving the greatest number of votes shall be trustees.

Neither the defendant company nor the shareholders entered into, acted on, ratified or adopted the agreement of 5th Sept., 1892, which was made before incorporation and is not binding on the company or shareholders. The company was not at that time in existence and could not contract, and even if they did act on it, that did not adopt it. *In re Empress Engineering Co.* (1); *In re Northumberland Avenue Hotel Co.* (2); *North Sydney Investment and Tramway Company* v. *Higgins* (3) at page 271.

As to the contention that the memorandum of association is equivalent to an agreement by the shareholdes, *inter socios*, that the agreement of 5th Sept., 1892 should govern them, and the cases under the English Acts cited in support, the English Acts provide expressly that both the memorandum and articles

(1) 16 Ch. D. 125. (2) 33 Ch. D. 16.
(3) [1899] A. C. 263.

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are to be deemed a covenant, (secs. 11, 16, Imperial Act of 1862,) which is not done in the British Columbia Acts. As to the reference to it in paragraphs 2 and 4 of the memorandum and the contention that thereby it became part of the memorandum, and the stock was created preference stock under the Amending Act of 1891, it is submitted that under sec. 3 of the Act of 1890 everything essential must be stated in the memorandum itself.

The provision in the memorandum as to the election of trustees as directed by the agreement of 5th Sept., 1892, is different from the mode directed by sec. 11 of the Act, and is inconsistent with the company's by-law and the provisions of and conditions imposed by the Act, and, therefore, *ultra vires*. The corporation is subject to the conditions in that Act imposed and to none others. The Act is the Company's Code to the extent, at least, of the provisions and conditions in the Act contained. *Payne* v. *The Cork Company* (1); *Trevor* v. *Whitworth* (2); *In re Railway Time Tables Publishing Company* (3); *Welton* v. *Saffery* (4); *In re Peveril Gold Mines* (5).

The plaintiffs' shares are not preference shares at all and certainly are not so within the amending Act of 1891. They have no preference as to dividends, division of profit, or proceeds of capital. The mere right to vote in respect of a certain class or number of trustees does not constitute that class of shares preference shares.

The cases of *Re Walker and Hacking* (6); *Beatty* v *North-west Transportation Company* (7) and *Andrews* v. *Gas Meter Co.* (8), do not support the contention that shares of the nature of those in question might

(1) [1900] 1 Ch. 308.
(2) 12 App. Cas. 409.
(3) 42 Ch. D. 98.
(4) [1897] A. C. 299.
(5) [1898] 1 Ch. 122.
(6) 57 L. T. 763.
(7) 12 Can. S. C. R. 598.
(8) [1897] 1 Ch. 361.

have been created independently of the authority to issue preference shares conferred by the amending Act of 1891, because shares of that nature deprive some shareholders of their one vote for every share in electing the trustees, a right created in the interest of the public. *Walker* v. *London Tramways Company* (1).

This action is not maintainable on the principle of the rule in *Foss* v. *Harbottle* (2). The contention is as to who can elect the majority of trustees. If that end can be attained by the majority of the shareholders the court will not interfere. *Mozley* v. *Alston* (3); *Macdougall* v. *Gardiner* (4); *Purdom* v. *Ontario Loan and Debenture Co.* (5).

Peters K.C. for the respondents. We contend that all the shareholders in the company are bound by the memorandum of association, and that under its terms the plaintiffs were absolutely entitled to elect three directors, notwithstanding the clause in the original Act and consistently with that clause.

By the amending Act of 1891 the power to create preference stock was given Such a power would exist without any such special legislation. The memorandum of association created two kinds of shares, one, preferred, issued to the public who put up the money, and the other, ordinary, issued to the promoters. It is not necessary that the memorandum should say, in so many words, that there is preferred stock; it is quite sufficient if it contains stipulations which give any particular stock any preference or privilege over other stock. Lindley on Companies (5 ed.) p. 396-7. The holder of such stock may be entitled to some advantage in voting. The appointment of directors is a matter entirely of internal arrangement, and does

(1) 12 Ch. D. 705.
(2) 2 Hare 461.
(3) 1 Ph. 790.
(4) 1 Ch. D. 13.
(5) 22 O. R. 597.

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not affect the company's rights with regard to outsiders; and even although a statute should provide how the directors should be elected, there is nothing to prevent the shareholders agreeing between themselves that some different mode should be adopted. *Andrews* v. *The Gas Metre Co.* (1). The memorandum of association is the charter of the company. *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2), at page 670; *Ashbury* v. *Watson* (3); *In re Barrow Hæmatite Steel Co.* (4), at page 603.

The memorandum, although not using the word "preferred," clearly indicates that certain stock is to be preferred stock by stating what special preference or privilege in voting its holders shall have: Cook on Corporations (4 ed.) pp. 268, 269. Rawlins and Macnaughton on Companies, 120, 496; Lindley on Companies (5 ed.) p. 396; *Re South Durham Brewery Co.* (5).

The cases following *Foss* v. *Harbottle* (6), have no application to the present dispute. This case turns upon the proper construction of the agreement, the memorandum of association, and the statutes of 1890 and 1891.

TASCHEREAU J.—This is an appeal from a judgment of the full court of British Columbia affirming an order made by Drake J. at the trial of the cause by which order the election of the appellants James Dunsmuir, Pooley, Sargison, Lindsay and Hills, as directors of the defendant company, on the seventeenth of February last, was held to have been illegal and set aside as such. These five directors are the present appellants. The company is not a party to the appeal.

(1) [1897] 1 Ch. 361.
(2) L. R. 7 H. L. 653.
(3) 30 Ch. D. 376.
(4) 39 Ch. D. 582.
(5) 31 Ch. D. 261.
(6) 2 Hare, 461.

At the said election the appellants were so elected directors by a majority of the votes of all the shareholders present, each shareholder casting one vote for each share held by him.

The respondents contend that they have an absolute right to elect three out of five of the directors of the company, though they have the minority of the shares, and that, consequently, the said election at which they were refused that right was illegal.

This contention is based upon an agreement entered into between Ellis & Co. and James Dunsmuir, prior to the incorporation of the company, by which it was agreed that the company, when formed, should be managed by five directors, of whom the stockholders other than Ellis & Co., or the person entitled to the seventy-five shares to be subscribed for by Ellis & Co. should elect three, and the other two directors should be chosen by Ellis & Co., which said agreement, the respondents allege, was incorporated in the memorandum of association and is now binding upon the company.

I may assume, in the view I take of the case, without passing upon it however, that, as contended for by the respondents, it was in fact the company provided for by this agreement that was thereafter formed and that the company did adopt it, or that part of it relating to the election of directors, though that is controverted by the appellants.

The only point, therefore, that is necessary for me to consider is whether or not that agreement is legal, and whether it was in the power of the company to covenant that, as contended for by the respondents, they, as holders of shares other than those issued to Ellis & Co., would have the right always to elect three out of the five directors of the company, whether they had the majority of shares or not.

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I would be of opinion with the learned Chief Justice, who dissented from the judgment appealed from, that such an agreement was illegal and *ultra vires* of the company, as being in direct contravention of both section eleven of the British Columbia Companies Act of 1890 (by which it is expressly decreed that at the election of directors, each stockholder is entitled to as many votes as he owns shares of stock), and section two of the same Act, which enacts that any corporation created under it shall be subject to the conditions in the Act imposed and to *none others*, anything contained in any law notwithstanding. The statute having so prescribed the mode in which the company has to exercise its powers, that mode must be followed and no other.

The respondents' contention that these enactments are merely directory cannot prevail. *Town of Trenton v. Dyer* (1). They are the conditions under which the legislative authority has authorized the creation of the company. These statutory conditions are to be read as if incorporated in express words in the charter or memorandum of association, for the very purpose of restricting the powers that the company or the shareholders might otherwise have in the matter. They cannot be read out of the statute, as the respondents would ask us to do. The statute means what it says, and it says it as being exclusively the law that governs such companies. If not imperative, the enactment would be futile and unnecessary.

Had the Legislature intended that the directors of the companies formed under the Act should be elected in any manner that the company or the shareholders should see fit, it would have modelled the enactment on the Imperial Companies Act or on the Federal Act, R. S. C., ch. 119, sec. 33, instead of decreeing that the

(1) 24 Can. S. C. R. 474.

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uniform rule should be one share one vote, as it is decreed, for instance, in the Federal Bank Act, R.S.C., ch. 120, secs. 9 and 10, and in the Railway Act, R. S. C., ch. 100, sec. 18. It is expressly, we may well assume, to differentiate on the subject from the said English or the Federal Companies Acts that this legislation of the British Columbia Legislature was passed. It could not be pretended, I presume, that, under the Banking Act or the Railway Act, *ubi supra*, such an agreement as the one contended for by the respondents here would be legal. Now, I cannot see that simply because this company is more of a private character than those authorized by the said Acts, the same enactment would be merely directory as to it, though it is imperative as to the others.

Owing to the great difference on the question between the Imperial statutory law and that which governs this litigation, the cases from England, cited so copiously on both sides, have no practical application to this case. They merely illustrate rules and principles upon which there is no room for controversy.

As to the respondents' contention that the agreement in question is authorized by the Amendment Act of 1891, I do not see that I can usefully add anything to the remarks of the Chief Justice in the British Columbia court. There is no preference stock in this company, as sanctioned by that statute. The Memorandum of Association does not provide for any. Then that statute has no retroactive effect, and the requirements of sections five and six thereof have never been complied with.

I would allow the appeal with costs, set aside the final order made by Mr. Justice Drake and dismiss the action with costs.

SEDGEWICK J. concurred in the judgment allowing the appeal with costs for the reasons stated by their Lordships Justices Taschereau and Girouard.

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Girouard J.

GIROUARD J.—I think sections two and eleven of the British Columbia Act dispose of this appeal. Whether the concessions or stipulations in dispute in this matter are considered as merely private or domestic, or as affecting the public, I cannot understand how we can declare them valid and binding, when the statute under which they were made prohibits them in most express terms.

Section two of "The Companies Act, 1890," says:

> Corporations for any lawful purpose may be formed according to the provisions of this Act, if the purpose comes within any of the classes of subjects in respect of which the legislature of the province has power of legislation; and any such corporation, the members and stockholders thereof, shall be subject to the conditions and liabilities in this Act imposed, and to none others, anything contained in any law to the contrary notwithstanding.

Then, section eleven provides that

> each stockholder shall be entitled to as many votes as he owns shares of stock, and the persons receiving the greatest number of votes shall be trustees.

We are now asked to declare that such persons shall not be such trustees, in pursuance, it is alleged, of the memorandum of association. I look at the clause of the memorandum of association as contrary to the express enactment of the statute and, therefore, null and void.

The English authorities quoted at the argument have no application, as the British Columbia statute is very different from the English Act or Acts.

An attempt has been made to shew that the stock held by the respondents is preferential stock within the meaning of the Amendment Act of 1891. I cannot agree to this proposition, and have come to the conclusion that the appeal must be allowed with costs.

DAVIES J. concurred in the judgment allowing the appeal with costs for the reasons stated by his Lordship Mr. Justice Taschereau.

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Mills J.

MILLS J.—I am of the same opinion. The promoters of the company have endeavoured to form the stockholders into two groups, and to give to the shares of the one group a greater voting power than to those of the other, so that the one group may elect three trustees and the other but two. Under this arrangement the management of the affairs of the company may be controlled by the holders of a minority of the shares. This is contrary to the terms of the statute under which the incorporation of the company has taken place.

By section two of the Companies Act, 1890, any corporation shall be subject to the conditions and liabilities therein imposed, and to none others; and by section eleven, it is enacted that each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, and the persons receiving the greatest number of votes shall be trustees. There is no authority bestowed to vary these conditions by any agreement between the stockholders, either at the time of the organisation of the company, or subsequently.

None of the shares subscribed for here can be regarded as preference shares, and so the provisions of the statute passed in 1891, in respect to preference shares, do not apply.

I think that the order of Mr. Justice Drake should be set aside, the appeal allowed with costs and the action dismissed.

Appeal allowed with costs.

Solicitors for the appellants, other than the appelant Sargison: *Pooley, Luxton & Pooley.*

Solicitors for the appellant Sargison: *Fell & Gregory.*

Solicitors for the respondents: *Tupper, Peters & Griffin.*