7, 1935 No. 18 of 1934

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ANDREW FERGUSON personally and as Administrator of the Estate of Peter Ferguson, deceased, suing on behalf of himself and the said Estate and on behalf of all other shareholders of Pioneer Gold Mines Limited (in liquidation) except the defendants,

(Plaintiff) Appellant.

AND:

HELEN A. WALLBRIDGE and DAVID S. WALLBRIDGE as Executors and Trustees of the Estate of Adam H. Wallbridge, deceased, ALFRED E. BULL, J. DUFF-STUART, R. B. BOUCHER, FRANCIS J. NICHOLSON and JOHN S. SALTER as Liquidator of Pioneer Gold Mines Limited (in Liquidation),

(Defendants) Respondents.

APPELLANT'S CASE

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No 18 of 1934

RECORD

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(Defendants) Respondents.

CASE FOR THE APPELLANT

1. This is an appeal from a judgment of the Court of Appeal for British Columbia, dated the 3rd day of October, 1933, (Mr. Justice McPhillips dissenting), whereby the judgment of the Honourable The Chief Justice of the Supreme Court, dated the 13th day of April, 1933, dismissing the Plaintiff's action, was affirmed.

2. That part of the Plaintiff's action out of which this appeal arises was brought by the Plaintiff to obtain redress on behalf of himself and other minority shareholders in a Company known as Pioneer Gold Mines, Limited, against the Defendants, (the majority in control of said Company), for fraudulent, oppressive, harsh and unfair exercise of such control over the Company, whereby Defendants obtained for themselves the proceeds and benefit of a contract, in equity and in law, the property of the Company to the prejudice, detriment and loss of the Company and of the minority shareholders in the Company—in street parlance, "froze out" the minority.

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3. The Pioneer Mine was discovered and located by one, Charles Kinder, in 1897. Kinder sold the property in 1911 to the Plaintiff, Andrew Ferguson, and his brother Peter Ferguson. The price was $26,000. Shortly after this purchase Mr. Adolphus Williams, senior partner of the legal firm of Williams, Walsh, McKim and Housser, Solicitors for the Ferguson brothers, acquired a one-quarter interest in the property. The new owners, in addition to the purchase price, expended a further sum of $57,000 in machinery, equipment and development work. In 1915 they incorporated the Pioneer Gold Mines, Limited, with an authorized capital of $1,000,000, divided into 1,000,000 shares of the par value of $1.00 each. Of this capital 750,000 shares were allotted and issued as consideration for the transfer to the Company of the property, plant and equipment, in the following proportions: Andrew Ferguson, 269,999 shares; Peter Ferguson, 269,999 shares; Adolphus Williams, 195,000 shares; Mrs. Catherine Williams, 15,000 shares; Walter Walsh, 1 share; Harold C. N. McKim, 1 share. Between 1915 and 1920 the Company operated the property and extracted therefrom $135,000.00 in gold values, out of which they paid out, in dividends, $26,000, and expended the balance on the property. Apparently it was an error in judgment to have paid the $26,000 dividend, for, in 1920, the property was not producing and the Company had gone into debt in the sum of approximately $30,000.00.

4. In the latter part of 1920 a Syndicate, composed of six members—the late Adam H. Wallbridge, the Defendants, Bull, Boucher, Duff-Stuart, Nicholson, and one Harold C. N. McKim, a junior partner in the legal firm of Williams, Walsh, McKim and Housser—made an offer to purchase 51% of the issued shares in the Company. The terms upon which this Syndicate was formed are set out in Exhibit 3, page 366 of the Record. The salient point in this agreement, so far as the Appellant is concerned, is that the members took, not an aliquot number of shares, but an undivided interest in the whole 51% and that the purchase at all times stood in Wallbridge's name alone as trustee.

p. 283, l. 1-9
p. 291, l. 3-10

5. The Syndicate offer was accepted and a written agreement was entered into on the 6th January, 1921, giving to the purchasers the option to purchase the 51% of the shares on the terms set out.

Ex. 13, p. 367

6. The Purchasers' 382,500 shares were to be supplied as follows: By Andrew Ferguson, 137,700; by Peter Ferguson, 137,700; and by Mr. and Mrs. Williams, 107,100.

7. The Company was at the time of the sale indebted to various creditors in the sum of approximately $30,000.00, and this

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debt the vendors of the shares agreed to assume and pay. The Fergusons being in straitened financial circumstances, the burden of dealing with the old creditors of the Company fell very largely on the shoulders of Mr. Williams, who was a man of considerable means. The Fergusons left all their shares in the possession of Mr. Williams, and assigned to him their share of the purchase money as security for their proportionate contribution toward payment of the creditors above mentioned, and also to facilitate the completion of the sale when the purchasers became entitled to the shares. This document was attested by H. C. N. McKim, a member of the Syndicate and solicitor for the Fergusons.

Ex. 48, p. 370

p. 372, l. 42

8. Forthwith on execution of the agreement, qualifying shares were transferred to the nominees of the Syndicate, and such nominees were promptly elected to the Directorate of the Company, and from that time on the Syndicate had a controlling majority on the Board of Directors of the Company and took full control of the management of the Company in every respect.

Ex. 37, p. 373 l. 27-39

Ex. 13, p. 369, l. 41

9. In September, 1921, Mr. Adolphus Williams died, leaving as Executors of his Estate Mr. W. W. Walsh, his partner, Mr. Godfrey, local Manager of the Bank of Montreal; and Mrs. Williams, his widow.

10. On the 6th June, 1922, the Executors of the Williams' Estate had transferred to their names on the Company's books, 112,298 shares from Peter Ferguson's account and 72,297 shares from Andrew Ferguson's account. Prior to this date Andrew Ferguson had made the following disposal of shares in the Company:—

Ex. 93, p. 500

Aug. 11, 1920—Sold to V. Lloyd Owen .....10,000 shares
Jan. 13, 1921—Sold to V. Lloyd Owen .....10,000 shares
May 26, 1922—Pledged to H. C. Seaman....10,000 shares
May 26, 1922—Sold to Wm. J. Twiss .....30,000 shares

Ex. 93, p. 493 and p. 494

and in reserve 137,700 shares for the Syndicate sale, and Peter Ferguson had made the following disposal of shares:—

Mar. 29, 1922—Pledged to H. C. Seaman....20,000 shares

Ex. 93, p. 493

and in reserve 137,700 shares for the Syndicate sale.

11. Both Andrew and Peter Ferguson had, at all times material, one share registered in their respective names, free and clear of any charges or encumbrance. Andrew Ferguson was in addition possessed of an equitable interest in the 72,297 shares so held by the Williams Estate and in the 10,000 shares pledged to H. C. Seaman. Peter Ferguson was possessed of an equitable interest in the 112,298 shares held by the Williams Estate and in 20,000 shares pledged to H. C. Seaman. All entries in the Register

p. 282, l. 1

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and Company books were made by Wallbridge, a member of the Syndicate.

12. The Syndicate, on entering into the agreement to purchase the 51% of the shares, had paid $15,000.00, of which they, in accordance with the agreement, expended $10,000 in the purchase and instalment of a cyanide plant on the property, and $5,000 was applied in reduction of the old debts of the Company assumed by the vendors of the shares. This was the only payment ever made by the Syndicate on account of purchase of the shares.

Ex. 13, p. 367

p. 197, l. 32

13. A. H. Wallbridge, who had no technical qualifications or training, but who had been dabbling more or less in mining ventures, was made manager. The other members of the Syndicate were apparently without any experience or training in the business of operating a mine.

14. When the Syndicate took over control of the property it had been opened and worked to three levels. It was the working of these three levels which produced the $135,000 for the Company, above referred to. On the floor of the tunnel at the 300-foot level, nearly 200 feet in length, was exposed a vein of ore of an average width of four feet and of an average value of $20.00 per ton. The obvious thing to do was to sink a shaft to test the continuity in depth of this ore. In 1921, instead of vigorous and well directed efforts to develop the ore body in sight, the management spent their time and money trying to salvage the old tailings dump left from the previous workings and picking over the old workings. They did no development work whatsoever. The result was wasted time, effort and money, and the outcome was very disappointing. In 1922 the same conditions existed, and by the end of 1922 the Syndicate had advanced moneys for operations and had guaranteed bank loans whereby their liabilities had grown to approximately $30,000 in addition to the $15,000 on account of purchase of the shares.

p. 70, l. 7

p. 198, l. 16

p. 271, l. 22

Ex. 34, p. 399
Ex. 81, p. 410, l. 45

15. In the midsummer of 1922, Andrew Ferguson, who up to this time resided in the City of Vancouver, having lost everything he owned except his interest in this Company, and in despair over the mismanagement of that asset, went to the City of Seattle, in the State of Washington, to live.

p. 115, l. 13-20
p. 247, l. 7-11
p. 268, l. 15-21
Ex. 30, p. 396
Ex. 32, p. 397

16. During 1921 and 1922, Mr. Williams, and after his death, his Executors, pressed by the old creditors of the Company, had discharged most of the old liabilities assumed by Williams and the Fergusons under Exhibit 13, and the Ferguson brothers' proportion of such debts amounted to approximately $22,500.00.

p. 368, l. 40

17. On the 25th September, 1922, Mr. Bull, on behalf of the Syndicate, well knowing the relationship between the Williams

p. 208, l. 6-28

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Estate and the Fergusons, wrote Mr. Walsh, as Executor of the Williams Estate, a letter set out in extenso in paragraph 59 of the Statement of Defence, threatening an action against the Estate and the Fergusons for alleged misrepresentation in the sale of the 51% interest. He wrote no letter to Ferguson. Walsh, in a panic, without investigation into the matter or conference with Ferguson, on the 27th September, wrote Ferguson a letter set out in the Defence, paragraph 60, demanding an immediate compliance with the Syndicate's demands. Ferguson, exasperated by what he considered the unfairness and oppression of the demand, instructed Mr. James Noble, of the legal firm of Noble & St. John, to act for him in the matter. The correspondence between Mr. Noble and the firm of Walsh, McKim & Housser is set out in extenso in the Defence, paragraph 61, page 26 *et seq.* It is of the utmost significance that the firm of Walsh, McKim & Housser apparently acted for both the Company and the Williams Estate and it is further significant that Mr. H. C. N. McKim, who personally handled this correspondence, was himself a member of the Syndicate. The Syndicate was thus not only quite aware of the indebtedness of the Fergusons to the Williams Estate but took advantage of that knowledge to bring about pressure on the Fergusons, and this actually culminated in the issue of a writ against the Fergusons by the Executors of the Williams Estate.

p. 267, l. 20-42
p. 278, l. 15-17
p. 24, l. 19
p. 25, l. 40
p. 207, l. 31
p. 267, l. 8-16
p. 201, l. 15-20
p. 208, l. 16
Ex. 9, p. 416

18. The result of the struggle was that Fergusons, unable to meet their obligations to the Williams Estate, were compelled to settle on the terms dictated by the Syndicate, and, on the 15th February, 1923, executed an agreement of settlement. For the purposes of this appeal the main points in the agreement are:—

p. 241, l. 22 to p. 242, l. 13
p. 266, l. 17 to p. 268, l. 20
p. 31, l. 24

(a) Discharge of the Syndicate from obligation to pay the remaining $35,000 of the purchase price of the shares and immediate delivery of the 382,500 shares.

(b) Authorization by the Fergusons to the firm of Walsh, McKim and Housser to make delivery of the Ferguson shares included in the Syndicate purchase.

(c) Provision that out of the Ferguson and Williams Estate shares, 193,750 shares should be available to raise further working capital for the Company, if a sale of same could be had.

19. Collateral to, and in reality part of the foregoing settlement with the Syndicate, the Ferguson brothers were compelled to execute an hypothecation of certain of their shares to the Williams Estate as security for their proportion of the old debts paid by Williams and the Executors. The significant features in this hypothecation for the purposes of this appeal are:—

p. 34, l. 30

RECORD

p. 27, l. 18-30
p. 37, l. 15

(a) Its close connection with the Syndicate settlement and that McKim, a member of the Syndicate, was so closely identified with both agreements.

(b) The postponement of the Ferguson brothers' liability to the Estate until 15th February, 1928.

p. 35, l. 9

(c) Hypothecation of 21,147 shares only of Andrew Ferguson, Nos. 448,856 to 470,002, and of 46,148 shares only of Peter Ferguson, Nos. 703,853 to 750,000. This left 51,150 shares of Andrew Ferguson's stock and 66,150 shares of Peter Ferguson's stock, free from any charge, lien or encumbrance in favor of Williams Estate. These shares so left free were the Ferguson contribution to the 193,750 shares referred to in clause (c) of paragraph 18 of this case again showing the close co-ordination of the two agreements.

p. 35, l. 19

(d) On default of payment of their debt by 15th February, 1928, there is reserved to the Executors expressly a power of sale exercisable on notice to the debtors in care of James B. Noble, their Solicitor. This is the only power reserved.

p. 35, l. 43

(e) The security is limited to the shares in the agreement specified.

p. 36, l. 24

(f) This agreement contains the only hypothecation of shares between the parties and provides that all former agreements or assignments are cancelled and of no further force or effect.

p. 257, l. 14-43
p. 277, l. 11-29

20. The shares which were to be contributed for sale to raise working capital were never sold and consequently remained the property of the Ferguson brothers, in their respective proportions, free from any claim of the Williams Estate.

p. 246, l. 1-7
p. 260, l. 31

21. During the season of 1923 no effective work on the property was carried on. The management, however, did one thing in 1923 which they should have done at the beginning, viz., they engaged a thoroughly capable and experienced mining engineer, in the person of David Sloan, to examine the property and make a report with recommendations as to what should be done. On the

Ex. 60, p. 435
p. 205, l. 40
p. 252, l. 26

10th July, 1923, Sloan made a complete and very favorable report on the property and its possibilities. This was done at the expense of the Company.

22. After the receipt of the Sloan report the Syndicate carried on a series of negotiations with Sloan looking toward enlistment of Sloan's efforts and ability to manage the property. Various suggestions were made and rejected.

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23. In May or early June, 1924, the Syndicate approached W. W. Walsh and W. J. Twiss, two of the minority shareholders, with a suggestion that each shareholder should contribute a voluntary assessment of 2 cents per share to raise funds for company operations. These two men refused to consider this suggestion. No other minority shareholder was consulted in the matter. Ex. 88, p. 467 p. 277, l. 30-45

24. Upon receipt of the foregoing refusal to contribute voluntary aid to a management so disastrous in the three preceding years, the Syndicate then expressly determined that they would from that time on protect themselves and would refuse to carry the rest of the shareholders any longer. p. 284, l. 28 Ex. 88, at p. 468, l. 11

25. Having arrived at this definite conclusion the Syndicate renewed negotiations with Sloan, who, in the meantime, had revised his estimate, set out in his report, that $25,000 at least would be required to undertake his plan of operations. His revised estimate, privately made to the Syndicate, when he determined to go in with them, was $16,000. At a meeting between the Syndicate and Sloan, held at Wallbridge's house, an agreement was arrived at that Sloan should appear as a disinterested purchaser and that the Company would grant him a working bond on the property and option to purchase the entire assets of the Company for $100,000.00. This, however, was conditioned on Sloan delivering to the Syndicate a secret declaration of trust that, in becoming such purchaser, he would hold the same, as to an undivided half interest, in trust for the Syndicate. These negotiations for participation by the Syndicate were carried out by the Syndicate on behalf of the Syndicate and not in any way for the Company and this is the crux of the Plaintiff's complaint. p. 202, l. 21 to p. 203, l. 19 p. 269, l. 26 to p. 270, l. 18 p. 270, l. 1-18 p. 55, l. 16 Ex. 63, p. 469 p. 203, l. 1-19 p. 210, l. 41 to p. 211, l. 16

26. On the 16th July, 1924, a meeting of the Directors of The Pioneer Gold Mines, Limited, was held. The Directors of the Company at that time and present at the meeting were Defendants Duff-Stuart, Bull and Wallbridge and W. W. Walsh. The first named three of these Directors were personally interested in the contract as *cestuis que trustent* under the Sloan declaration of Trust. The meeting thus constituted purported to authorize the execution by the Company of the Sloan working bond and option. Article 102 of the Company's Articles of Association permits, under certain conditions, contracts between Directors and the Company, but in express language prohibits any interested Directors from voting "in respect of any contract or arrangement in which he is interested." Article 93 of the Articles of Association fix the quorum of Directors at two. The alleged meeting of Directors purporting to bind the Company in the Sloan working bond and option was therefore void and a nullity. Ex. 155, p. 468 Ex. 63, p. 469 Ex. 147, p. 361 l. 40 p. 361, l. 28

RECORD

p. 205, l. 3
p. 215, l. 22
p. 249, l. 41
Ex. 29, p. 472
Ex. 65, p. 475

27. The Syndicate, having taken the first step to protect themselves and to free themselves from the minority, then decided to have the Pioneer Gold Mines, Limited, wound up. Accordingly, on the 8th August, 1924, an Extraordinary General Meeting was called for 22nd August to authorize a voluntary winding-up. No mention was made in this notice of any participation by the Syndicate in the acquisition of the Company's assets.

Ex. 36, p. 471

28. On the 11th August, 1924, Mr. McKim (a member of the Syndicate) wrote a long explanatory letter to Mr. James B. Noble, Solicitor for the Fergusons, purporting to furnish full explanation of the whole situation and strongly urging Ferguson's concurrence in the winding up proposed. This letter closes with the statement, "This letter is written you so that you will have an opportunity of advising your clients to take such action as they may see fit in the matter." The full significance of this letter is, that, written by a member of the Syndicate, also a member of the legal profession, to another member of the legal profession, for the purpose set out in the letter, the writer does not refer to or mention the participation of the Syndicate in the purchase of the property. The whole tenor of the letter is to discourage any opposition to the scheme then being deliberately worked out by the Syndicate to protect themselves and get rid of the minority.

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p. 472, l. 32

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p. 84, l. 30 to p. 85, l. 8
Ex. 11, p. 476

29. The Plaintiff in due course heard from his Solicitor, Mr. Noble and from a friend Geo. M. Stephenson, and concluding that this mining venture had turned out a failure and that nothing but routine steps were being taken to dispose of the Company did not attend the meeting.

Ex. 64, p. 475

30. An Extraordinary Meeting was held on the 22nd August, pursuant to the above notice. The only shareholders in attendance were four members of the Syndicate—Bull, McKim, Wallbridge and Nicholson. The meeting then passed the resolution for winding up voluntarily and appointed the Defendant J. S. Salter (at that time auditor of the Company and a personal friend of the Defendants) liquidator.

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p. 187, l. 36
p. 190, l. 40

Ex. 65, p. 475

31. The special confirmatory meeting was duly held on the 9th day of September, 1924, and the extraordinary resolution to wind up voluntarily was confirmed.

Ex. 67, p. 474

32. At the time of winding up the Company was indebted in the following sums:—

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R. B. Boucher	$15,184.35
A. E. Bull	1,904.30
Union Bank of Canada (guaranteed by the members of the Syndicate)	4,231.90
A. H. Wallbridge	11,055.68

H. C. N. McKim	633.35
J. Duff-Stuart	1,353.00
F. J. Nicholson	9,862.20
Harris, Bull & Mason (Defendant Bull was a member of this firm)	384.00
A. Williams Estate	325.25
Walsh, McKim & Housser (Solicitors for the Company)	318.02
	$45,252.05

The complete dominance of the Syndicate over any creditor's action in the liquidation is evident from the above list of creditors.

33. The next step in self protection and severance from the minority shareholders was taken at the meeting of the creditors of the Company in Liquidation, held at the office of Walsh, McKim & Housser, the 26th September, 1924. The only creditors in attendance were five members of the Syndicate—Duff-Stuart, Wallbridge, Nicholson, Bull and McKim. At this meeting two points were decided (1) that there would be no Court supervision in the winding-up and (2) that the assets of the Company (in liquidation) should be offered for sale by tender. The Syndicate knew that there was no danger of any mining man attempting to buy the property while subject to an option and it is equally apparent that no money lender would discount payments which were merely optional.

Ex. 59, p. 502 at l. 32

Ex. 158, p. 477

p. 251, l. 16

34. Pursuant to the creditors' directions the Liquidator called for tenders. There are three points in the advertisement to be noticed:—

Ex. 68, p. 478

(1) The entire assets of the Company were offered for sale en bloc, subject to the Sloan option to purchase.

(2) The terms of the sale were 2% of the bid in cash and the balance within one month.

(3) Further particulars were to be had on application to Messrs. Walsh, McKim & Housser.

35. The next step in the scheme for self protection of the Syndicate and exclusion of the minority shareholders was the meeting of creditors on the 22nd day of October, 1924, to consider any tenders for the assets of the Company. Present at this meeting were all the members of the Syndicate save Dr. Boucher; Mr. Bull, a member of the Syndicate, represented his legal firm, Harris, Bull & Mason, and Mr. McKim represented the legal firm of Walsh, McKim & Housser, while Mr. Walsh represented the Williams Estate.

Ex. 159, p. 479

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Ex. 159, p. 479

36. The only tender submitted was one from Dr. R. B. Boucher, made on behalf of the Syndicate, to purchase the assets, subject to the Sloan working bond and option, at the price of $45,000.00, which was only sufficient to pay the creditors' claims as they then stood. Mr. Walsh, on behalf of the Williams Estate,

p. 480, l. 11-15

objected, but notwithstanding this protest, the meeting authorized the acceptance of the offer. The result of such acceptance, if carried out by sale, would be the complete absorption by the Syndicate of all the assets of the Company, free from any claim or interest of the minority shareholders; in other words, complete performance and fulfilment of the intention expressed by the Syndicate in June, 1924, to protect themselves and abandon the minority shareholders.

p. 468, l. 11

37. In the meantime Sloan, once he got his working bond and option, started energetic and well directed work on the property. He got in supplies, reconditioned the existing plant and let a contract for the sinking of a shaft on the vein exposed in the floor of the 300-foot level. In addition, he worked out and milled any ore left in the three levels already opened. On 19th September, 1924, Sloan deposited in the Government assay office bullion to the value of $2,754.79; on the 4th November, to the value of $6,365.36; and on the 5th December, to the value of $6,412.21; a total of $15,532.36. By the middle of November, 1924, this shaft was sunk a depth of 142 feet and a short cross-cut through the vein exposed ore at that additional depth of a value and extent much greater than appeared on the 300-foot level.

p. 204, l. 27-42

p. 68, l. 29-38

p. 279, l. 26
p. 280, l. 3
p. 312, l. 19 to l. 35

38. As stated above, (paragraph 25 of this case), Sloan, in his final calculation privately made to the Syndicate, estimated that he would require $16,000 to bring the mine to a self-sustaining basis. This money was to be supplied, half from Sloan and half from the Syndicate. Sloan called for $2,000.00 from the Syndicate in August and another $2,000 in September, which is the full amount ever called for by him. The mine before October, 1924, had become self-sustaining.

Ex. 63, p. 469

p. 270, l. 7-40

39. At some time before the middle of November, 1924, the Syndicate, apparently recognized the nullity of the action of the Directors of selling to themselves, decided that they should have some kind of ratification from the shareholders or waiver of the rights of the shareholders. They directed the convening of an Extraordinary General Meeting of the Company. Notices convening such meeting, dated 13th November, were sent out by post on the 14th November. This notice did disclose in general terms—

p. 253, l. 4

p. 192, l. 35

Ex. 72, p. 480

(1) That the Syndicate was participating with Sloan in his purchase of the Company assets;

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(2) That the Syndicate, being the creditors of the Company, proposed to take over the assets of the Company in liquidation (subject to the Sloan bond and option) at the price of $45,000;

(3) That if the Syndicate offer of $45,000 for the assets were not ratified authority would be sought for a sale by the Liquidator of such assets.

Accompanying this notice and in reality part of the notice was a letter to the shareholders, signed by A. H. Wallbridge, Secretary of the Company. This notice and letter, taken together, amounted to a clever and adroit *suggestio falsi et suppressio veri.* There was no disclosure of the following facts:— p. 193, l. 11 Ex. 73, p. 481

(a) That David Sloan, a thoroughly capable and experienced mining engineer and mine manager, had in 1923, at the expense of the Company, made a thorough and exhaustive examination of the property and had made an extremely favorable written report thereon, nor that Sloan's verbal reports privately made to the Syndicate were much more optimistic and favorable than his written report. p. 205, l. 40 Ex. 60, p. 435 Ex. 86, p. 444, l. 16 p. 149, l. 13-15

(b) That while Sloan's written report recommended a minimum of $25,000 for working capital he, when he arranged to engage personally in the enterprise, reduced that requirement to $16,000. p. 440, l. 33 Ex. 61a, at p. 446, l. 13 p. 270, l. 14

(c) That Sloan had been from the time of his working bond so energetically and capably conducting mining operations that he had required only $8,000 instead of the $16,000 estimated, that he had successfully sunk a shaft and cross cut a heavier and richer body of ore at a further depth of 140 feet, thereby verifying his original estimate. p. 205, l. 17-25 p. 207, l. 16 p. 316, l. 9 p. 319, l. 17-28 p. 215, l. 30

(d) That the mine had been put on a producing basis. p. 194, l. 5-11

(e) That the Syndicate in its proposal to purchase the assets planned to use as purchase money only the moneys to be received from Sloan, if, as and when received from Sloan, and intended to retain for themselves any surplus of the $100,000 of the Sloan fund left over after their estimated $70,000 price had been delivered to the Liquidator. p. 45, l. 36-45 p. 207, l. 18

(f) That the Syndicate as a unit was working out a definite scheme and design for their own protection and to get free from the minority shareholders. p. 291, l. 28-39 p. 295, l. 33-45 p. 298, l. 17.

(g) The shareholders were given no opportunity to see the terms of the Sloan option, nor the Sloan declaration of trust, nor any other material documents affecting the matter. p. 55, l. 16 Ex. 63, p. 469

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p. 45, l. 36-45

(h) That the purchase money for the acquisition of the Company assets, in the final analysis, *was to come,* if it came at all, *from the net proceeds of ore milled on the property itself.*

(i) No reference was made to Walsh's objection to the scheme of the Defendants to purchase or acquire the entire assets of the Company.

The notice and letter combined painted a false and misleading picture of the situation, in the following respects:—

Ex. 73, p. 481, l. 42
p. 313, l. 1-20
Ex. 145, p. 467
Ex. 146, p. 467

(1) That the refusal of the New York and Washington capitalists to exercise their option was a serious condemnation of the mine. Wallbridge knew that the engineer for these capitalists had not made any fair or reasonable inspection of the property.

p. 203, l. 1-19
p. 183, l. 22-46
Ex. 88, p. 467

(2) That the other local shareholders had refused to participate in the Sloan deal. This is not true. Twiss and Walsh were asked to consent to a voluntary levy of 2c per share (see paragraph 23 of this Case) and it was after the refusal of this suggestion to Twiss and Walsh that the combination between Sloan and the Syndicate was entered into. The Sloan deal was strictly limited to the six members of the Syndicate and was entered into expressly to protect the Syndicate and get free from the minority shareholders.

p. 84, l. 30 to p. 85, l. 36

(3) The plain inference from Wallbridge's letter is that the local shareholders were agreeable to the plan and would approve of it, whereas Walsh at least was strenuously objecting to the easy acquisition of the assets planned by the Syndicate and the Fergusons were wholly ignorant in the matter.

p. 316, l. 9

(4) The whole picture presented by the notice and the letter was a picture of loss, grief and discouragement, when as a matter of fact the prospects for success had never been better. This communication to the shareholders was but another step in the scheme and design to get rid of a minority no longer useful or desirable in the plans of the Syndicate.

40. As pointed out in paragraph 36 of this Case, W. W. Walsh had protested against the scheme of the Syndicate to purchase the entire assets of the Company (including the Sloan option) for the bare amount due the Syndicate in their capacity as creditors. Apparently negotiations had been carried on between the Syndicate and the Executors of the Williams Estate, subsequent to the meeting of creditors on the 22nd October, because

p. 42, l. 19

Mr. Bull, on behalf of the Syndicate, made a new proposition to Mr. Walsh, on the 28th of November. This new proposition indi-

cates clearly how carefully the Syndicate was working out its scheme. The new proposition amounted to this: If 95% of the shareholders would ratify the Sloan bond and option and would permit the Syndicate (instead of the Liquidator) to take the entire assets of the Company (including the $100,000 purchase money from Sloan should he exercise his option) the Syndicate would, out of the Sloan purchase money, if, as and when he paid it, hand over to the Liquidator of the Company sufficient money to pay the debts, the costs of the liquidation and a further sum of $20,000 to be distributed pro rata amongst all the shareholders, including the 51% interest held by the Syndicate. The debts were, roughly, $45,000; costs and interest, $5,000; and for shareholders, $20,000; a total of $70,000. This was to become payable only if, as and when Sloan paid his $100,000. What was to become of the remaining $30,000 was not suggested.

41. On the 5th December 1924, the meeting of shareholders was held. The record of attendance at the meeting was:— Ex. 160, p. 483

W. W. Walsh, allegedly representing (These were the Ferguson shares, both the hypothecated shares and those not hypothecated).	184,592	shares
A. H. Wallbridge, representing (These were the Syndicate 51%).	382,499	shares
H. C. Seaman, allegedly representing (These were Ferguson's shares pledged to secure a debt).	30,000	shares
W. J. Twiss, representing	30,000	shares
J. Duff-Stuart	1	share
A. E. Bull	1	share
W. W. Walsh, Executor of the Williams Estate, representing	102,899	shares
	729,992	shares

There were ten shareholders of the Company resident in England, none of whom were present or represented by proxy or otherwise. p. 487, l. 42
Vernon Lloyd-Owen, of Birken, B. C., was not present, nor were either of the Ferguson brothers, nor were Dr. Boucher, Dr. Nicholson, nor Mr. McKim. The meeting lasted about half an hour, the greater part of which was taken up with reading letters and notices. The meeting had all the appearance of a cut-and-dried arrangement, hurriedly rushed through, and resulted in the predetermined scheme of the Syndicate receiving formal approval. This adoption was put through on a show of hands, no poll being demanded nor taken. Article 84 of the Articles of Association provides that p. 297, l. 20
p. 298, l. 13
p. 303, l. 40
p. 304, l. 3
Ex. 147, p. 361, l. 21

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on show of hands each member present in person shall have one vote, and that only on a poll shall proxies vote or shall there be a vote for each share. There were only six members of the Company present in person, out of a total membership of twenty-three, and of these six members, four were instrumental in putting through the Sloan deal. The disposal of the assets of the Company was not a "sale" as suggested in the notice, it was in fact a gift to the Syndicate.

p. 193, l. 13-29
p. 262, l. 22-43
p. 193, l. 19-25
p. 284, l. 20
Ex. 91, p. 487
p. 486, l. 20
p. 42, l. 19
Ex. 93, p. 493
p. 85, l. 19
p. 6, l. 40
p. 17, l. 31
p. 45, l. 16
p. 49, par. 4
p. 50, l. 7-14
p. 52, l. 23-34
p. 193, l. 26
p. 60, l. 28
p. 85, l. 19

42. The notices for the meeting had been mailed on the 14th of November. The meeting was held on the 5th of December, thus purporting to give 21 days' notice of the meeting. It was admitted that 24 days was the minimum of time to permit, even under the most favorable chances, a return by mail from any part of England. Both Salter, the Liquidator, and the Syndicate expressly admit that it was never intended nor expected that the English shareholders, who held a total of 9,420 shares, should or would pay any attention to the matter. The same treatment had been meted out to the English shareholders in regard to the meeting called to provide for the winding up. That notice was mailed out the 8th day of August, 1924, convening a meeting for the 22nd day of August, 1924. This allowed only 14 days between the date of mailing and the date of the meeting, hardly time to reach the English shareholders let alone permit them to take any action thereon. The stipulation for a 95% ratification or validation of the Syndicate plan, demanded by Mr. Bull, is clear evidence of this state of mind in regard to the English shareholders. Andrew Ferguson's address in the Company books was Seattle. He had never received any notice of this meeting and so alleged in his Statement of Claim. This allegation was denied by the Defendants and an affirmative plea of notice sent was made by Defendants and by Salter. The plaintiff demanded particulars of the mailing of this notice. In reply to this demand the Defendant Salter pleaded that two notices had been sent to Andrew Ferguson, one in care of Peter Ferguson, addressed to Saanichton, Vancouver Island, B. C., and the other addressed Vancouver, B. C., neither of which addresses was the address registered in the Company books. Moreover, in paragraph 4 of the Particulars so given by the Liquidator, it is affirmatively stated that the notices sent to Ferguson had been returned to him by the Post Office and this is admitted by Salter on discovery. The other Defendants, in their reply to the above Demand for Particulars adopt the reply of Salter. These particulars were never amended, nor was any special leave granted at the trial to permit the Defendants to go beyond or outside same, and Ferguson's uncontradicted testimony is that he never had any notice, intimation or knowledge of this meeting until many years later.

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At the trial, Counsel for the Defendants, on the examination in chief of Mr. Bull, produced a statutory declaration made by Mr. Salter (another Defendant) purporting to prove mailing of the notices to shareholders convening the meeting of December 5, 1924. This declaration, *inter alia*, alleged the mailing of a copy of this notice to Andrew Ferguson (the Plaintiff), addressed Seattle, Washington. No comment was made by Counsel for Defendants on the fact that this declaration purported to go beyond or outside the particulars delivered to the Plaintiff, nor was there any order or rule made by the learned Trial Judge to allow proof by declaration. Counsel for the Plaintiff, having in mind the particulars, failed to notice that the document purported to prove mailing of notice to the Plaintiff at Seattle and it was filed, without objection, as Exhibit 92.

p. 253, l. 35

Ex. 92, p. 488

43. On the 21st January, 1925 ,the creditors of the Company, being the Syndicate, went through the form of validating the Syndicate scheme with minute particularity, and authorized the Liquidator to convey the property and assets of the Company to the Syndicate. This was done by an agreement of 21st January, 1925.

Ex. 161, p. 484

p. 60, l. 37

44. The Syndicate, in this agreement, makes express provision for their right to collect and receive all the Sloan payments, whether for purchase moneys or for Royalties, and out of the same, but only as and when they receive the same, they are to pay the $20,000 for the shareholders and the costs of liquidation. This is not a "sale" of the assets as contemplated in the notice of meeting, it is a gift to the Syndicate.

p. 196, l. 3-12

45. In due course and well within the period of five years contemplated in the working bond and option given by the Company, 16th July, 1924, Sloan completed his payments in full, amounting to $101,050.00, *all of which were made out of the property.* The Syndicate collected these moneys from Sloan under their purchase agreement, paid the $45,000 debts, with interest at 8%, due to themselves, paid the $20,000 for distribution amongst the shareholders (of which they themselves got $10,200) and paid the costs of the liquidation, in all about $70,000. The remainder of the Sloan purchase money, $31,050.00, they retained for themselves.

Ex. 75, p. 469

p. 252, l. 22
p. 216, l. 19-45

p. 283, l. 43

p. 212, l. 39 to p. 213, l. 13

46. In the early part of 1928 a new company, called The Pioneer Gold Mines of B.C. Limited, (Non-Personal Liability) had been incorporated and to this Company Sloan conveyed all his interest in the Pioneer Mine and equipment in consideration of the allotment and issue of 1,600,000 shares, of the par value of $1.00 each.

Ex. 76, p. 507

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Ex. 77, p. 509

47. By a further agreement dated 30th March, 1928, made between Sloan, of the one part, the new Company, of the second part, and Sloan's various associates, of the third part. Sloan divided the said 1,600,000 share consideration amongst his associates and in this division the Syndicate or the direct representatives of the Syndicate received 800,000 shares in this new company. Had the Defendants from the 16th July, 1924, acted in good faith with the old Company this consideration of 800,000 shares should have gone to the original Company for the benefit of the whole Company. The minority shareholders were thus deprived of 392,000 shares in this new company (49% of 800,000 shares). As a result of the expressed intention of the Syndicate to protect themselves and get free from the burden of carrying the minority, and by means of the control exercised by the Syndicate in the management of the old company, and throughout the liquidation proceedings, the Syndicate or its representatives not only got their original debts of $45,000 paid with 8% interest, got $10,200.00 for their old Company shares, with a $31,050.00 profit on the purchase of the assets, but retained an unencumbered 50% of the issued shares in the new Company stock; that is, they protected themselves by getting back every dollar ever spent in the property, retained a half-interest in the property and made a clear cash profit of upwards of $20,000. The minority shareholders, on the other hand, were completely "frozen out" without any regard to the fact that they had originally put $80,000 into the opening up, development and equipment of the property.

p. 187 to p. 196

48. Throughout the liquidation of the old Company the Defendant Salter apparently did what he was told to do by Wallbridge, McKim and Bull, and thus played into the hands of the Syndicate. He gave no explanation as to his action in permitting the Syndicate to make a $31,050.00 profit out of the purchase of the assets. He made no independent investigation of the property under his administration, nor of the progress of the Sloan operations.

p. 324

p. 324, l. 20

49. The learned trial Judge (Morrison, C. J.) delivered an oral judgment at the close of the trial, which was, later, supplemented by written reasons, dismissing the Plaintiff's action *in toto.* This judgment is based on the premises laid down by the learned Judge in these words, "Fraud is the gist of the action. The Plaintiff must prove the fraudulent mind and intent to deceive on the part of the Defendants. It is a term that should be reserved for something dishonest and morally wrong. These ingredients are, of course, in my opinion, wholly absent in this case" etc.

50. This definition of fraud is unduly restricted and excludes from consideration all idea of "constructive fraud," as defined and

explained in so many authorities. The Plaintiff submits that the definition given in "Snell's Principles of Equity," 20th Edition, at page 454, is a correct statement of the law:—

> "Constructive fraud is (or arises) where, although there may be no actual fraud in fact, yet the transaction is *deemed* fraudulent, either
>
> (1) Because it is contrary to the policy of the law; or
>
> (2) Because it is an abuse of some fiduciary relation; or
>
> (3) Because it operates as a fraud upon the rights and interests of third persons."

The learned trial Judge says, and says correctly, that the burden of establishing fraud rests on the Plaintiff. He then rejects the evidence of the Plaintiff's witnesses, and overlooking the fact it is submitted with deference, that the Plaintiff's case is wholly based, on every crucial point, on the records of the Company prepared and kept by the Defendants and on the admissions of the Defendants in their pleadings, correspondence, discovery and evidence at the trial, finds that the Plaintiff failed to establish that kind of fraud defined in the opening part of his reasons for judgment. The above findings of the learned trial Judge caused no embarrassment to the Court of Appeal, and, it is submitted with deference, should offer no difficulty on this appeal.

51. The other findings in the reasons for judgment of the learned trial Judge as to the actions of the Defendants in working out their scheme for self-protection are all inferences drawn from undisputed and uncontradicted facts, records and testimony, and are freely open to review on an appeal, and, in view of the learned Judge's definition of fraud, should be reviewed.

52. The Chief Justice of British Columbia, in the Court of Appeal, finds that the Defendants were guilty of a "deliberate breach of trust," and that "all the Defendants and Sloan were equally involved." This learned Judge, however, finds that because the Plaintiff did not seek to set aside the sale to Sloan he would not now hold the Defendants answerable for this breach of trust.

p. 335, l. 32
p. 336, l. 20
p. 335, l. 39

53. A sale to Sloan would have been a matter within the competence of the Company—if it had been a sale to Sloan. The Plaintiff knew of the reputed sale to Sloan as early as August, 1924, (see paragraphs 28 and 29 of this Case). He did not know, however, that the Syndicate had, in negotiating the Sloan deal, appropriated to themselves, to the exclusion of the Company, a half interest in the properties so sold, which is the "deliberate breach

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of trust" found by the learned Chief Justice. Had the Defendants, in negotiating with Sloan, preserved for the Company this half interest which they appropriated to themselves, there could and would have been no complaint. This was the very point in *Cook v. Deeks* (1916) 1 A.C. 554—the fraudulent use of the majority control in a Company for the purpose of diverting Company property to the use of one part of the Company, to the exclusion of another part. The contract with the Canadian Pacific Railway was not attacked nor set aside in *Cook v. Deeks,* but, on the contrary, the benefits of that contract, which in law and in equity belonged to the Company, had to be accounted for to the Company by the fraudulent Defendants. The learned Chief Justice has fallen into the error, it is submitted with deference, against which Lord Buckmaster, in *Cook vs. Deeks,* p. 563, so carefully warned, viz., confusing cases where, on the one hand, a director sells to a company something of which he is the owner and in which the company had no interest, and those cases, on the other hand, where the interest which the Company has in the property either at law or in equity, is being taken by a director. In the former class of case, if the Company were unable or unwilling to rescind the purchase it could not make the director account for his profits; in other words, it could not at one and the same time affirm and disaffirm the contract, nor ask the Court to make a new contract.

54. In the latter class of case, however, the company can either disavow the contract, or it can affirm the contract and call upon the wrongdoer to account for profits so coming into his hands, they being company profits and not personal profits. This latter was the course adopted in *Cook vs. Deeks* and is the redress sought by the Plaintiff in this action and which was refused by the learned Chief Justice in the Court of Appeal.

55. The learned Chief Justice is in error when he says that
p. 334, l. 14 the Plaintiff in the case at bar "comes forward to claim the advantages attained by Sloan and his *cestuis que trustent.*" This error in defining Plaintiff's claim may account for the learned Judge's finding that Sloan was a necessary party. The Plaintiff's claim, however, is not to participate in advantages attained by Sloan. It is based on and arises from the fact that the Defendants manipulated the affairs of the Company in such a manner as to divert to themselves the advantages of participation in the Sloan contract, which advantages were, in law and in equity, the property of the Company and should have been shared by the Company as a whole and not by the Defendants to the exclusion of the Company.

Jacobus Marler Estates Ltd. v. Marler, (1913) 85 L. J. P. C. 167.

Cook v. Deeks (1916) 1 A. C. 554.

Lumber v. Fretz (1928) 62 O. L. R. 635, affirmed on appeal, 63 O. L. R. 190.

56. The Honourable Mr. Justice Martin finds that the Plaintiff has established a case of constructive fraud on the part of the Defendants which would entitle him to the relief prayed, were it not for the provisions of Article 102 of the Company Articles. This Article, in the opinion of the learned Judge, effects a change in the law which would enable the Directors of this Company to enter into the transaction for participation with Sloan, notwithstanding that they would thereby benefit themselves at the expense of and to the exclusion of their co-shareholders, and this, the learned Judge says, distinguishes the case at bar from *Cook v. Deeks* and the other cases cited. p. 337, l. 15

With all deference, it is submitted that the learned Judge is in error in drawing this distinction. In none of the cases cited by the learned Judge—*Daniel v. Gold Hill Mining Co., Lassell v. Hannah, Madden v. Dimond, Kendall v. Webster, Cook v. Deeks* and *re Jacobus Marler Estates*—does it appear that the decision turned upon or was in any way affected by the constitution or articles of any of the companies. In *Cook v. Deeks* the company in question, The Toronto Contracting Co. Ltd., was one incorporated in 1905, under the Ontario Companies Act. Since 1902 the Ontario Companies Act has contained provisions regarding contracts between Directors and their companies practically identical with Article 102. These provisions, including two minor amendments immaterial to this discussion were, at the time of *Cook v. Deeks,* to be found in R. S. O. (1914) Cap. 178, Sec. 93, and read as follows:—

"(1) No director shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the Company in which he is interested as vendor, purchaser or otherwise.

"(2) A director who may be in any way interested in any contract or arrangement proposed to be made with the company shall disclose the nature of his interest at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and if he discloses the nature of his interest, and refrains from voting, he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realized by such contract or arrangement; but no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting or be held liable to account to the company by reason of his holding

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shares in any other company with which a contract or arrangement is made or contemplated.

"(3) This section shall not apply to any contract by or on behalf of a company to give the directors or any of them security by way of indemnity."

57. It is evident, therefore, that any extension or enlargement of the powers of Directors to enter into contracts with their companies resulting from such statutory provisions or the adoption of Articles such as the one in question here does not extend to cover transactions wherein majority control is exercised by the majority to acquire Company property for their own benefit, to the detriment or the exclusion of the minority.

Dominion Cotton Mills v. Amyot (1912) A. C. 546 at 554;

Cook v. Deeks (1916) 1 A. C. 554;

British American Nickel Corporation v. O'Brien & Co. Ltd. (1927) A. C. 369.

p. 338, l. 21

58. Mr. Justice Martin then concludes that the transaction impeached in this action was voidable only, and that by reason only of the fact that it was carried out by the vote of interested directors and that any "irregularity" resulting therefrom was cured by ratification at the shareholders' meeting of the 5th December, 1924. This conclusion the learned Judge finds upon the authorities collected in *Transvaal Land Co. v. New Belgium (etc.) Co.* (1914) 2 Chy. 488. This case was one arising out of the purchase of certain shares by the plaintiff company. So far as the report goes the transaction was one apparently within the scope of the company's powers, but was open to attack by reason only of the personal interest of the controlling directors in the plaintiff company in the transaction, due to their direct connection with the defendant company. The transaction thus became voidable at the instance of the plaintiff company, just as the transaction in question in *Northwest Transportation v. Beatty* was voidable. It is submitted, however, with all due deference, that Mr. Justice Martin overlooked the distinction drawn by Lord Buckmaster in *Cook v. Deeks* between purchases by a company, in the company's name and, ostensibly at least, for the benefit of the company as a whole, from or through interested directors and cases where a majority in control of a company, whether directors or shareholders, attempts to acquire company property for their own benefit and to the exclusion of minority shareholders.

p. 338, l. 22

59. The learned Judge then finds that there was a valid ratification by the shareholders of a mere irregularity and refuses to

interfere with that "domestic decision." In *Cook v. Deeks* the Courts below took the same view of the circumstances in that case, holding that it was a matter to be settled by the domestic forum, but Lord Buckmaster (p. 562) expressly declined to regard a transaction of that nature as a question of policy, or a discretionary matter to be determined by a mere majority.

60. Mr. Justice Martin's reasoning, carried to its legitimate conclusion, would justify any majority action so long as the majority made complete disclosure of its interests in the transaction. This is contrary, it is submitted with due deference, to the law as laid down in all the cases wherein a majority has taken to itself property or rights legally or equitably belonging to the whole Company.

61. Mr. Justice M. A. Macdonald (in the Court of Appeal) gives a very complete summary of the facts and a frank statement of their impression made upon him. The salient points in this summary are as follows:— p. 345

(a) The Sloan deal gave every promise of being a very profitable deal before the 5th December, 1924. p. 347, l. 15

(b) All the successive steps leading to the extinction of of the old company were planned and were taken as part of a predetermined course, including the winding up of the company and the purchase by defendants of the assets. p. 347, l. 23 p. 348, l. 2

(c) The purchase money for the acquisition of the assets, in the final analysis, was to come from the net proceeds of ore milled and sold. p. 348, l. 27

(d) As a result of this predetermined plan so carried out the minority shareholders of the original company ceased to have any further interest in the property. p. 349, l. 45

(e) There was animus against the Plaintiff and bad feelings arising from past difficulties. Defendants wished to get rid of the Plaintiff. p. 353, l. 23

(f) The Syndicate permitted Syndicate interests to predominate, rather than the interests of the Company as a whole. p. 353, l. 31

62. The learned Judge finds that the transactions so characterized by him were matters of policy and internal management and were at the most voidable only and therefore capable of ratification at a general meeting, and that there was no fraud, active or constructive, or harsh, oppressive or unconscionable conduct revealed. This finding, it is submitted with deference, is errone- p. 350, l. 40

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ous, and is the same error as that into which the trial and Appellate Courts fell in the case of *Cook v. Deeks* (supra at pp. 562-563).

p. 351, l. 1

63. The learned Judge then finds that the Defendants, having technically complied with the forms and regulations in the Company's Articles, are now entitled to rely on the ratification alleged to have been procured at the shareholders' meeting of the 5th of December, 1924.

The learned Judge, in checking over the formalities (or "tackle") observed or used by the Defendants in carrying out their predetermined plan, comes to the following conclusions:— 10

p. 351, l. 3

(a) That the shareholders received proper notices of the necessary meetings convened *in the manner specified by the Company's Articles* and that these notices were in such form as to enable them to determine their conduct;

p. 351, l. 11

(b) That notwithstanding the clear admission on the pleadings and particulars (detailed in paragraph 42 of this Case) the Defendants, by Exhibit 92, did prove mailing of a notice of the 5th December meeting to the Plaintiff, Andrew Ferguson;

p. 351, l. 18

(c) That what was done at the 5th December meeting was the expressed will of a majority in respect to internal matters within the corporate powers of the Company. 20

p. 353, l. 5

64. Mr. Justice Macdonald then concludes with the finding that fraud by abuse of majority power, being a question of fact in each case, he would follow the learned trial Judge even though contrary to his own views. These views being the result of inferences drawn from uncontradicted testimony and from defence records and admissions and not depending in any way upon credibility of witnesses or weight of evidence, should, it is submitted with deference, have been given effect to by the learned Judge. 30 This is more apparent when one considers that the learned trial Judge's finding of no fraud was based upon an unduly restricted definition of fraud—(see paragraph 49 of this case).

p. 339

65. The dissenting judgment of the Honourable Mr. Justice McPhillips is a very strong judgment for the Plaintiff. The outstanding findings in this judgment are:—

p. 339, l. 30

(a) Defendants are guilty of fraud by way of breach of duty and vainly endeavored to cover up this fraud by fruitless attempts to make use of Company Articles and formalities in procedure. 40

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(b) The Defendants planned the scheme to protect their own interests, irrespective of its effect on the Company or the minority. p. 339, l. 44 p. 340, l. 42

(c) The profits accruing to the defendants from the participation with Sloan belong in law and equity to the Company, as a whole. p. 340, l. 30

(d) There was no fair disclosure of the real facts; on the contrary, there was fraudulent concealment. p. 340, l. 47

(e) There can be in law no valid ratification permitting the Defendants to take to themselves the property and assets of the Company. p. 344, l. 25

PLAINTIFF'S CONTENTIONS IN SUPPORT OF THIS APPEAL

I.

66. The Defendants, by exercise of their control of the Company, pursuant to a predetermined plan, have dealt with the entire assets of the Company and have manipulated the affairs of the Company in such manner that they have protected their own interests in the Company at the expense of and to the exclusion of the minority by acquiring for themselves, instead of for the Company, the right of participation in the Sloan enterprise. Such use of majority power, it is submitted, is illegal and therefore void; it involves inequality of treatment of shareholders and is fraudulent, oppressive, unfair and harsh to the minority and cannot be undertaken in the first instance nor be subsequently ratified or confirmed by a majority vote of shareholders, nor can such a majority, in attempting to maintain for themselves an advantage not shared in by the minority, be permitted to accomplish the wrong, merely on a pretence that it falls within the internal management of the Company.

Menier v. Hoopers Telegraph Works (1874) 9 Chy. App 350;

Cook v. Deeks (1916) 1 A. C. 554;

Hoole v. Great Western Ry. Co. (1867) 3 Chy. App. 262, at p. 268 and at p. 272;

Foss v. Harbottle (1843) 2 Hare 461 at p. 492 and p. 504;

Burland v. Earle (1902) A. C. 83 at p. 93;

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Dominion Cotton Mills v. Amyot (1912) A. C. 546 at p. 554;

Allen v. Gold Reefs of West Africa (1900) 1 Chy. 656, at p. 671;

British American Nickel Corp'n v. M. J. O'Brien Ltd. (1927) A. C. 369 at p. 378.

67. The question in every case, it is submitted, comes down to whether the transaction which is impeached is open to objection on its merits. If it is, then neither the rule in *Foss v. Harbottle,* (viz., the Courts will not, at the instance of a minority, interfere with a transaction which the majority have it in their power to carry out), nor that in *Mozeley v. Alston,* (viz., the Court will not allow an action to be brought by a minority on behalf of the Company to set aside a transaction which is competent for the Company to enter into), will stand in the way of a remedy.

Per Wigram, V.C., in Foss v. Harbottle, (1843) 2 Hare 461, at p. 492.

68. The complaint pressed in this action is that the Defendants used their position and power to take from the Company the benefit of the Sloan contract, an asset belonging to the Company, and this in their own names, for their own benefit and not in any way in the name of or intended for the Company. Defendants contend that the Company, on the 5th December, 1924, ratified this taking. It is submitted, with due deference, that the act complained of, neither purporting to be done in the name of the Company nor intended to be done for or on behalf of the Company, is not capable of ratification by the Company.

Vere v. Ashley Rowland et al (1829) 10 B. & C. 288;

Eastern Counties Ry. Co. v. Broom (1851) 6 Exch. 314;

Keighley Maxted & Co. v. Durant (1901) A. C. 240;

Re Rowe, Ex. P. Derenburg (1904) 2 K. B. 483.

69. From and after the taking by the Defendants of the Company's assets there was vested in the Plaintiff as well as in each and every other non-participating shareholder a cause of action against the Defendants. That cause of action could not be satisfied or discharged without a formal release or accord and satisfaction. Alleged ratification by a mere majority vote could not be a satisfaction or discharge.

De Bussche v. Alt (1878) 8 Ch. D. 286, at p. 314.

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70. The business proposed to be transacted at the meeting of the 5th December, 1924, held during the voluntary winding up of the Company, was a question relating to or affecting the assets or the winding up of the Company, and any proposal considered could have secured the sanction of the members only by an *extraordinary* resolution. The proceedings in the voluntary winding up of this Company were governed by the provisions of Sections 216 to 237 of the Companies Act, R. S. B. C., 1924, Cap. 38, and the particular section relied on is Section 226, which reads as follows: Ex. 72, p. 480,

> "226. (1) The liquidator may, *with the sanction of an extraordinary resolution* of the Company, do the following things or any of them:—
>
> "(a) Pay any class of creditors in full.
>
> "(b) Make any compromise or arrangement with any creditors or class of creditors, or having or alleging themselves to have, any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the Company, or whereby the Company may be rendered liable;
>
> "(c) Make any compromise or arrangement in respect of calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the Company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the Company, *and all questions in any way relating to or affecting the assets or the winding up of the Company on such terms as may be agreed,* and take any security for the discharge of any such call, debt, liability, or claim and give a complete discharge thereof."

The Company by its articles expressly adopts the definition of "extraordinary resolution" assigned thereto in Sec. 77 of the Companies Act, R.S.B.C., 1911, Cap. 39, which reads as follows:— Ex. 147, p. 359, l. 30

> "77. A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting *of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.*"

(This is an exact copy of Sec. 69 of the English Act—1908)

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Ex. 72, p. 480

The notice convening the meeting of December 5th, 1924, failed to specify the intention to propose the resolution as an extraordinary resolution and failed to set out the precise resolution proposed and therefore did not comply with the statutory requirement above set out. The resolutions allegedly passed at the meeting were, therefore, not extraordinary resolutions and consequently do not afford the sanction claimed therefor.

MacConnell v. E. Prill Ltd. (1916) 2 Chy. 57.

Pacific Coast Coal v. Arbuthnot (1917) A. C. 607, at 616.

p. 338, l. 18-37
p. 351, l. 1

Mr. Justice Martin and Mr. Justice M. A. Macdonald base their judgments wholly on the regularity of the proceedings adopted to secure the alleged ratification. They have, it is submitted with deference, overlooked this failure to comply with the statutory requirements and the consequent incapacity of the meeting, the sanction of which is relied upon by the Defendants.

71. Even if capable of ratification (which the Plaintiff does not admit) there was no ratification binding on the minority, for the following reasons:—

(a) No notice of the ratification meeting was ever mailed or sent to the Plaintiff, Andrew Ferguson. The relevant facts are set out in paragraph 42 of the Case. Article 68 of the Company provides that "*non-receipt* of the notice by any member shall not invalidate the proceedings or any resolution passed at any general meeting." This covers "non-receipt" of the notice, but does not excuse a failure to send a proper notice. "Non-receipt" having been established without any contradiction, and "non-sending" admitted in the pleadings, the burden was then cast upon the defence to shew strict compliance with Article 144. No sufficient proof of sending was tendered by Defendants. The Plaintiff did not in any way waive strict proof and never admitted the sending of such notice. Ignorance of Plaintiff or his counsel that Exhibit 92 was tendered as proof of the mailing of such notice to the Plaintiff cannot, it is submitted, be construed as any waiver of necessary or proper proof or acquiescence in the sufficiency of the alleged proof so tendered.

Ex. 147, p. 360, l. 29

Ex. 147, p. 363, l. 30

The Supreme Court Act, R.S.B.C. (1924), Cap. 51, Sec. 62, reads as follows:—

"62. All witnesses in suits or matters either before the Court or any Judge or any District Registrar or Special Examiner, shall give their testimony *viva voce* upon oath, and be subject to examination by Counsel in the presence of the Court, or one or more of the Judges, or of the District Regis-

trar or Special Examiner, unless it is otherwise ordered by the Court or a Judge upon special grounds, or with the consent of the parties in the suit or matter to which the testimony relates."

* * * * *

"64. Nothing in this Act or in any rules of Court made under this Act, save as far as relates to the powers of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by Jury or before a Judge without a Jury, or the rules of evidence, or the law relating to Jurymen or Juries."

The Defendants' admission on the pleadings, that no notice of this ratification meeting on the 5th December, 1924, was ever mailed or sent to the Plaintiff at his registered address therefore stands undisturbed and unquestioned, and the alleged meeting is void for this reason. p. 52, l. 23 p. 60, l. 28

Re London & Staffordshire Ins. Co. (1883) 24 Chy. D. 149;

Kynaston v. Shrewsbury Corp'n (1736) 2 Str. 1051;

R. v. Langhorn (1836) 4 Ad. & El. 538;

Smyth v. Darley (1849) 2 H. of L. Cas. 789;

Alexander v. Simpson (1889) 43 Chy. D. 139.

(b) It was never intended by the Defendants that the English shareholders should or would have any part in the ratification meeting. The facts upon which this contention is based are set out in paragraph 42 of this Case. It is strongly urged, on behalf of the Plaintiff, that the Defendants, having intentionally and deliberately ignored the English shareholders in this manner, cannot in equity take refuge under any technical compliance with the Articles of Association or be heard to claim a valid ratification of their scheme by any meeting so held.

Re London v. Staffordshire Fire Ins. Co. (1883) 24 Chy. D. 149;

Cannon v. Trask (1875) L. R. 20 Eq. 669;

Madden v. Dimond (1905) 12 B. C. R. 80;
Per Martin, J., at p. 90; and
Per Duff, J., p. 91;

Rose v. B. C. Refinery Co. (1911) 16 B. C. R. 215;
Per Martin, J.A., bottom p. 227;

RECORD

Reese River Silver Mining Co. v. Smith (1869) L. R. 4 H. L. 64, at 80.

(c) The actual notices sent out, including the secretary's letter, did not, as detailed in paragraph 39 of this Case, put the shareholders in a position in which each could have judged for himself whether he would or would not consent to the proposal of the Defendants and to release any possible claims against the Defendants. The purported disclosures in the notice were intended, as part of the Defendants' general scheme, to further that scheme, and not to enable the shareholders to form a fair judgment as to the reasonableness or otherwise thereof. The failure to give any intimation or notice of the Syndicate's participation in the Sloan purchase when sending out the notices, in August, for the winding up of the Company accentuates the Plaintiff's contention that the notices were "tricky."

Ex. 29, p. 472

Baillie v. Oriental Telephone Co. (1915) 1 Chy. 503;

Jackson v. Munster Bank (1884) 13 L. R. Ir. 118.

Gluckstein v. Barnes (1900) A. C. 240 at p. 250-251.

No opportunity was allowed any shareholder to see or peruse the terms of the written agreements entered into so as to determine for himself his course of action in respect thereto. It is submitted, therefore, that the insufficiency of the notices even if received in due time by each and every shareholder would render invalid any alleged ratification at any meeting held pursuant thereto.

Kaye v. Croyden Tramways Co. (1898) 1 Chy. 358;

Tiessin v. Henderson (1899) 1 Chy. 861;

Pacific Coast Coal v. Arbuthnot (1917) A. C. 607, at 617.

72. The special arrangement, (detailed in paragraph 41 of this case), negotiated by the Syndicate with Mr. Walsh to secure Walsh's support and vote for ratification was not an arrangement for the benefit of the shareholders as a class, but was primarily one to secure the protection of the Syndicate interest. It is true the arrangement contemplated payment of $20,000.00 to the shareholders as a class (of which the Syndicate would receive 51%, or $10,200.00), but it secured for the Syndicate, to the exclusion of the minority, not only their interest in the assets of the Company but of the balance of the Sloan purchase price, amounting to $31,050.00. It is submitted that the alleged ratification procured in this manner cannot stand.

British American Nickel Corp'n v. O'Brien & Co. Ltd. (1927) A. C. 369, at p. 378.

APPELLANT'S SUBMISSION

73. The Appellant, in conclusion, submits, with deference, that the Courts below are in error herein, and prays that the judgments thereof be reversed and set aside and that it be declared:

(1) That the $31,050.00 profit made by the Defendants on the purchase of the assets of the original Company (in liquidation) was and is, in equity, the property of the Company, and that the Defendants should account therefor and pay same over to the Liquidator for use of the Company;

(2) That the 800,000 shares of stock in the Pioneer Gold Mines of B. C., Limited, (N.P.L.), received by the Defendants as proceeds of the transactions with Sloan, together with all dividends paid thereon, were and are, in equity and at law, the property of the Pioneer Gold Mines, Limited; judgment ordering delivery up to the Liquidator of the Company of these shares and dividends, within a time to be specified, and, upon Defendants' failure or omission to make such delivery, that a reference be had before the Registrar of the Supreme Court, at Vancouver, B. C., to assess the value of the said shares and the dividends thereon at the highest market price attained by the shares since their wrongful acquisition by the Defendants, and that judgment be entered against the Defendants for the amount found due on the reference.

Eden v. Ridsdales Ry., Lamp, Etc. Co. (1889) 23 Q. B. D. 368.

See also disposition of a similar matter, made in
Lumbers v. Fretz (1928) 62, O. L. R. 635, at 652.

74. The Appellant therefore submits that this appeal should be allowed for the following, amongst other,

REASONS

1. The Defendants in exercise of their control over the Company obtained for themselves the proceeds and benefit of the Sloan contract which in equity and in law was the property and right of the Company.

2. The acts of the Defendants were not capable of ratification.

RECORD

3. Even if the acts of the Defendants were capable of ratification, the ratification contended for was improper, defective and of no effect in the following respects:

(a) The said acts were not sanctioned or ratified by extraordinary resolution as required by the Companies Act.

(b) No notice of the alleged ratification meeting was given the Plaintiff.

(c) The English shareholders were not given any reasonable time by the alleged notice of said meeting.

(d) The notices actually sent were "tricky" notices and there was no proper disclosure.

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J. A. MacINNES,
of Counsel for Plaintiff.