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 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 STEVENSON 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.*

CASE FOR RESPONDENTS OTHER THAN R. B. BOUCHER, & F. J. NICHOLSON

Case for the Respondents.

Other than R. B. BOUCHER and FRANCIS J. NICHOLSON.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal for British Columbia dismissing the Appellant's appeal from the judgment of the trial judge, Chief Justice Morrison.

2. The Appellant's whole action at bar by his Statement of Claim and on Appeal by his Notice of Appeal was based on fraud and conspiracy.

He alleged :—

(A) that the Respondents had fraudulently conspired to obtain and had obtained shares of the Pioneer Gold Mines Limited

(B) that they had fraudulently conspired to place that Company in liquidation, fraudulently concealed material facts from the shareholders, and fraudulently and in pursuance of a deliberate conspiracy bought the Company's assets.

The first set of allegations was dismissed by the trial Judge in the strongest language and was abandoned on appeal to the Court of Appeal; the second set was similarly treated by the trial Judge and met no success in the Court of Appeal.

3. The Respondents humbly submit that with concurrent Judgments of fact against him in the Supreme Court of British Columbia and the Court of Appeal the Appellant, in a case based entirely on fraud should not be allowed further to pursue this matter.

4. The action was brought by Andrew Ferguson in his own right and as administrator of the Estate of his brother Peter Ferguson, deceased.

5. The Respondents are divided into three groups: Salter, the liquidator of the company; Helen A. Wallbridge and D. S. Wallbridge, as executors of Adam H. Wallbridge, deceased; and the other Respondents. The " other Respondents " and the late Adam H. Wallbridge were members of a syndicate so-called, and were all charged with fraudulent conspiracy in that capacity. The said Wallbridge, deceased and the other Respondents except Salter, will hereafter be referred to as " the Respondents."

6. The controversy in this action is about the dealings of the parties in connection with a mining property in the Lillooet Mining District in the Province of British Columbia, 158 miles from Vancouver and 50 miles
p. 449. p. 87. from railway, known as the " Pioneer Gold Mines." The property was acquired by the Pioneer Gold Mines Limited about 1911. The shareholders
p. 88. then were Adolphus Williams, a Solicitor of Vancouver, and the Appellant Ferguson and his deceased brother who were both experienced miners. Andrew Ferguson was the manager of the mine, and one C. L. Copp, was the superintendent.

7. The company operated the mine until 1919, taking out a quantity
p. 88. p. 123, l. 38. p. 392, l. 11. of ore but the mine did not pay. By 1919 the company was in debt to the extent of $35,000.00 and the Fergusons had reached the limit of their resources. Attempts were made to dispose of the property. As early
p. 89. p. 113, l. 30. p. 365. as November 1919 an option was given the Mining Corporation of Canada for $90,000.00 net which paid a cash payment of $5,000.00 and $3,900.00 for supplies, but in February 1920 discontinued its operations, abandoned
p. 91. the mine, and threw up the option. An option given in 1920 to one Lloyd-Owen on similar terms also fell through.

p. 90. p. 136, l. 36. 8. The sale of the mine was then intrusted to Copp—the former superintendent, who after other unsuccessful attempts in November 1920 interested the late Wallbridge, who was a broker in Vancouver. Wallbridge brought together the group who are the present Respondents (other than

Salter) and the late H. C. N. McKim. This group are termed "the syndicate." It is to be noted none of them had any mining experience. Bull and McKim are Solicitors. Boucher and Nicholson were physicians. General Duff-Stuart was a merchant.

9. In January 1921 Wallbridge took an option from Williams and Ferguson on behalf of the syndicate to purchase 382,500 or 51 per cent. of the shares in the company for $45,000.00 net ($50,000.00 less $5,000.00 commission) payable $15,000.00 cash and the balance on terms, the vendors to pay all existing debts of the company and give the purchasers a majority representation on the board of directors. The price was subsequently reduced by agreement of the 15th of February 1923, on account of misrepresentations made by Ferguson to the syndicate in January 1921 that there were from $50,000.00 to $60,000.00 worth of tailings on the property, which the syndicate relied upon to obtain working capital for the company. p. 366. p. 369. p. 31. p. 427. pp. 24, 25.

10. The company as newly organized proceeded in 1921 with operations. Andrew Ferguson remained on the Board of Directors and with his approval Copp, his former superintendent, was made manager of the Mine. Difficulties beset the path of the company from the first. The Mine had been "gutted" by the Fergusons. "The Mine suffered from lack of proper equipment as well as foresight in mine development. The equipment was so poor that by 1924 there was none fit for use. The shaft was only a "prospect shaft." p. 123, l. 38. p. 392, l. 11. p. 441, l. 15. p. 315, l. 30. p. 309, l. 40.

The Fergusons had transferred all their shares, except one share each, to the Williams Estate and the Royal Bank, as security for money they owed, and the shares were registered in the name of the executors of the Williams Estate and H. C. Seaman for the Royal Bank.

Andrew Ferguson left for the United States in 1922 and did not return until 1931. p. 97, ll. 23-35.

11. As early as August 1922 the Appellant suggested the sale of the mine and during 1922, 1923 and 1924 many unsuccessful attempts were made to sell the property to mining companies, to mining operators and mining engineers, who were then seeking suitable mining properties for purchase. Some of these were the following :— p. 396, ex. 31.

Tonapagh Belmont Mining Company, operating Surf Inlet Mine ; pp. 244-245.
Premier Gold Mines Limited ; pp. 386-389.
Woods Trites and Wilson, Mining Operators ; pp. 393, 396.
Col. Leckie, O. B. Smith, A. E. Davis } Mining Engineers ; p. 397. p. 413. pp. 429-435. p. 442. p. 443. pp. 453-458.
Errington, Mining Engineer, representing English capital ; pp. 461-469.
Nicholl and Hammill, representing English capital ;
New York and California Mining Operators.

p. 245, l. 10. p. 435. 12. In June 1923 the directors tried to get David Sloan, a Mining Engineer, to take an interest in the Company. Sloan made an examination of the property and prepared a written report, in which he stated that at least $25,000.00 should be spent before any attempt was made at milling, and recommended the expenditure of $50,000.00 on the property.

p. 245. 13. The directors then asked Sloan to take an interest in the company. He said that if $30,000.00 could be raised he would purchase a block of shares for $10,000.00 and take charge and operate the mine. pp. 445-447. Mr. Wallbridge as secretary issued a prospectus and tried to sell 250,000 shares in the company, which the syndicate and the Fergusons and the Williams Estate had placed at the disposal of the company under agreement of the 15th of February 1923 to raise capital, but Wallbridge was unable to sell a single share or raise a dollar.

p. 458, ex. 141. p. 246. 14. In October 1923 the Respondents again approached David Sloan and asked him to form a syndicate to purchase the property for $100,000.00. Wallbridge offered to help him and the Respondents offered to contribute $25,000.00 of the money that the company owed them. This attempt resulted in failure.

p. 461, ex. 55. 15. In December 1923 an option to purchase was given to Copp for $112,500.00 ($125,000 less $12,500 commission) who was buying on behalf of E. L. Hagen, Mining Engineer; nothing was done under this.

p. 230, l. 15. 16. By the end of 1923 the Respondents had advanced over $40,000.00 to the company and the Respondents were liable on a guarantee to the bank which had advanced money to the Company. The mine was closed down and was filled with water and the Company was without funds.

p. 246, l. 26. p. 466. 17. The final blow seemed to have fallen when an option taken by some New York capitalists was rejected. This option or "working bond" was dated 2nd April, 1924, to R. R. Land for $100,000.00 (less $10,000.00 commission payable to David Sloan). It required completion of payment by 1st December, 1925, and permitted the purchaser to operate and develop the mine and apply a percentage of the proceeds on account of the purchase price. Land, his engineer and associates came 3,000 miles from New York and visited the mine. They spent $1,000.00 in pumping out the mine and after investigation on the ground, refused on 1st June 1924, to go on with the option. The result was that affairs were in a p. 482. desperate condition. If the mine was allowed to be flooded again the situation would be hopeless. A proposal was made by Wallbridge that p. 247. the shareholders contribute an assessment of 2 cents a share to continue p. 472. operations. The syndicate agreed, but the Williams Estate refused both p. 247, l. 12. as to the Williams Estate's shares and the Ferguson shares. Another local p. 277, l. 30. minority shareholder, Twiss, also refused. p. 269.

18. As a last resort a further appeal was made in July 1924 to David Sloan to buy the property for $100,000.00. He refused but made a counter proposal to take an option or working bond on the property for $100,000.00 net, on the condition that the Respondents would join him for a 50 per cent. interest, put up half the money required and assume half the responsibility, Sloan was to have bond in his own name and he was to have sole charge of operation of the property. The Respondents reluctantly agreed to this ; for three years the directors had unsuccessfully tried to sell to outsiders, Sloan's offer seemed to be the last chance and the only way to try to get something out of the property. The directors met 16th July 1924 and gave the option to Sloan. This option was for $100,000.00. It required that $16,000.00 should be put up during the balance of the year for development work. The payment of purchase price was to be completed by 1st August, 1929. The purchaser was to take over at a valuation all supplies and materials at the mine and was to keep the mine insured for $20,000.00. The purchaser had to do a specified amount of development work each year and 15 per cent. of the proceeds of the ore sold was to be paid the vendors as rent, or, if the option was exercised, to be applied towards the purchase price. Attempts were made to get the other local shareholders to join in the new option but they refused. It will be noted that the terms were more favourable to the Company than the " Land " option referred to above.

p. 247. p. 469. p. 248, ll. 1-8. p. 270, l. 20. p. 247, l. 34. p. 248. p. 250, l. 23. p. 468. pp. 55, l. 13 to 59, l. 24.

19. The directors present at the Directors' Meeting when the option was given on 16th July 1924 were General Duff-Stuart, A. E. Bull, W. W. Walsh and A. H. Wallbridge. All but Walsh were members of the syndicate. Walsh represented, as Executor, the Williams Estate and in that capacity all the shares of the Fergusons (except one) and shares held by the Royal Bank standing in his name on the company's register. Full disclosure of the directors' interests as members of the syndicate was made at the meeting. Walsh, who held over three-fourths of the shares of the minority was particularly well pleased to get the sale through and moved its adoption which was unanimous. The meeting was irregular, however, as there was not a quorum of disinterested directors. Under the Articles of the company a director could contract with the company but could not vote, or, if he did vote, his vote should not be counted.

p. 468. p. 204, l. 10. p. 468, ll. 38-44. p. 204, l. 8, l. 25. Article 102, pp. 361-2.

20. By extraordinary general meeting 22nd August, 1924, it was resolved that the company be wound up voluntarily and John S. Salter be appointed liquidator. This resolution was confirmed by second extraordinary general meeting 9th September, 1924. The Fergusons received notice of these meetings but ignored them.

p. 475. p. 471.

21. On 5th December, 1924, all the powers of the directors having then ceased by virtue of the Companies Act, R.S.B.C., 1924, Ch. 38, s. 219,

at a general meeting of the shareholders called by the Liquidator the option to Sloan was ratified and confirmed.

The interests of the syndicate, including the three directors were—

p. 480. ex. 7. (A) set out in the notice convening the meeting

p. 481, ex. 73. (B) further explained in a letter sent to shareholders by Mr. Wallbridge, deceased

p. 483, ll. 21-35. (C) recited in the resolution ratifying the option.

p. 483, l. 20. The resolution was moved and seconded by minority shareholders and was carried unanimously, 97 per cent. on the issued shares of the Company being represented. A notice of this meeting was posted to both Fergusons at their registered address as required by the Articles, paragraph 143.

p. 363.

22. On 21st January, 1925, the creditors of the company met and resolved (after reciting the interests of the aforementioned directors) that the Sloan option " be and is hereby ratified and confirmed and the said bond be declared to be valid upon the company and upon the creditors and the liquidator is hereby authorised to carry out the terms thereof."

23. The option was exercised in due course and conveyances in accordance were executed by the liquidator. The property was conveyed to a new company : The Pioneer Gold Mines of B.C. Limited, and the old company was wound up. After some vicissitudes the mine proved a success and is now a valuable producing property.

p. 97, ll. 23 to 35. 24. Andrew Ferguson, who had left Canada for the United States in 1922 did not return until 1931. Although he was the registered owner of only one share he was sent notices of the meetings, none of which he attended. All of his other shares were represented at the meetings and voted by Walsh and Seaman, Manager of the Royal Bank.

25. This action was commenced in the Supreme Court of British Columbia by Writ issued 1st June 1932. The action is one for fraudulent conspiracy charged against the Respondents as members of the syndicate. At the trial two main allegations were charged and pressed.

p. 4, ll. 15-18. 26. First, that from January 1921 " the defendants fraudulently conspired together so to mismanage the company as to acquire its property without payment and eventually to defraud the minority shareholders of their interests " . . . " From January 1921 to July 1924, the defendants, being in full control of the company, fraudulently conspired together to refrain from mining and producing gold so as to bankrupt the company."

27. Second, that from February 1923 until July 16th, 1924, the Respondents, being then the majority shareholders and controlling the board of directors, fraudulently conspired to acquire the company's property and to deprive the minority shareholders of their holdings. p. 5, ll. 25-31.

In support of this it was alleged :—

(A) That the agreement of 16th July, 1924, to Sloan was made without disclosure of the interests of the syndicate directors ;

(B) That they put the company into liquidation and improperly and insufficiently advertised the sale of the company's assets ;

(C) That having got the option they forthwith proceeded for the first time to operate in an efficient manner ;

(D) That they fraudulently concealed from the shareholders the fact that they now had $200,000.00 of ore in sight ;

(E) That the discoveries of ore were fraudulently concealed from the meeting of 5th December, 1924 ;

(F) That no notice was sent to the plaintiff of the said meeting, which accordingly was void ;

(G) That the defendants purchased the assets of the company for $65,000.00 without disclosing that the mine was of value and that the option would likely be paid in full.

28. The learned trial judge found very strongly against the plaintiff on both these issues of fraudulent conspiracy. He delivered oral reasons at the conclusion of the trial, which at request of Counsel, were supplemented by a reasoned judgment. At the trial he stated :— p. 324.

" The two main witnesses on whose evidence I take it counsel rely are Ferguson and Copp. They impressed me in the course of their evidence as having a desire to refrain from committing themselves when faced with the necessity of answering a direct question. They were both most disingenuous ; their evidence was halting and dubious. The Plaintiff Ferguson failed signally to prove even the semblance of fraud." p. 324, l. 35, to p. 325, l. 4.

" As to the evidence material to the issue, I accept unreservedly the evidence of the defendants and that adduced on their behalf. I shall not dilate upon or deal in detail with the evidence. I simply now disclose the conclusion to which I have come, and if counsel desire, I shall, of course, deal in a more lengthy judgment with my reasons for coming to those conclusions."

p. 325, ll. 22 to 42.

"He (Ferguson) withdrew from the jurisdiction when he thought, in my opinion, he had disposed of this property very satisfactorily, to a group, and he left them there to deal with it as best they might. They started in, and all the incidents connected with it turned upon how they would ultimately, and without loss, dispose of this property or retain it, and not lose by retaining it. Mr. Ferguson was indifferent to all that, and after the matter turned out successfully, and perhaps he himself not meeting with success in his new home, he turns up after this long period of time and, instead of attacking the problem, the method by which these properties changed and were acquired, and attacking the legality of the proceedings, he launches the action, the statement of claim in which from almost the first paragraph to the end is a reiteration and repetition of expressions of fraud and conspiracy and breach of trust connected with it.

"May I express a pious hope that our courts in the future will not be made the medium of putting on record aspersions on the character of reputable citizens on occasions that may be appropriately termed privileged. This pleading seems to be nothing more than that."

29. In his reasoned judgment and as to the second allegation of conspiracy his Lordship says :—

p. 328, last line, to p. 329, l. 5.

"There was no concealment by the defendants of any knowledge they had as to the developments or as to any results accomplished by Sloan during the Autumn of 1924. I accept the evidence of Sloan and Yuill that there was nothing to conceal. The meeting at which 97 per cent. of the stock was represented duly confirmed all this."

p. 329, ll. 15 to 24.

"Wallbridge died in September, 1927, in consequence of which the plaintiff doubtless felt the more secure at the trial in his evidence relating to the events, particularly with which he and Wallbridge and Copp had to do. Parenthetically I am satisfied that the way the plaintiff and Copp answered questions they are not reliable witnesses. At no period throughout the events sketchily referred to above were the Fergusons unaware of what the defendants and Mr. Wallbridge were doing. The Fergusons were in no way deceived or kept in ignorance of the true situation at any time."

p. 329, ll. 31-36.

"I am satisfied by the evidence and find as a fact that the defendants and the late Mr. Wallbridge were never actuated by any fraudulent design or dishonest intent nor sought to gain or

abuse any advantage in connection with the matters set out in this claim and were not guilty of conspiracy or oppression in any way."

His Lordship's comments were justified by the Appellant's abandonment of his more serious charges of conspiracy and fraud, namely, those in the first charge, in his appeal to the Court of Appeal.

30. The issue now is only as to the second charge of conspiracy : See Notice of Appeal paragraphs two and three. p. 331.

There is only one issue :

Was there a conspiracy June to December 1924 *by which the plaintiff and other minority shareholders were defrauded of their property ?*

31. It is proposed to discuss this question under three headings.

A. The findings against the major charges of conspiracy, together with the accompanying implications against the good faith and truthfulness of Ferguson, have been accepted by the Appellant.

It is submitted that this weakens the Appellant's case as to the remaining charge of fraud.

B. The remaining charges of fraudulent conspiracy now before the Court have been passed on by both Courts below and it has been found as a fact that there was no fraudulent conspiracy. These concurrent judgments negativing a charge of fraud should, in the Respondents' submission, not now be open to review.

32. In the Court of Appeal their Lordships found against any fraudulent conspiracy. The Chief Justice thought that when the three directors voted at the directors' meeting of 16th June there was a breach of p. 335. trust. He points out, however, that the Appellant is not seeking to repudiate the Sloan agreement. Sloan is not a defendant and he recalls that Appellant's Counsel at the argument stated " that the most sensible act of the board was the giving of the option to Sloan."

"I am satisfied that there was here a breach of trust in which all p. 336, l. 20. the defendants and Sloan were equally involved, but after reading the history of the case as disclosed in the evidence I am of the opinion that there was no conscious fraud."

His Lordship was of the opinion that when the Appellant acquiesced in and relied upon the option he confirmed and ratified the whole agreement, p. 336, top. and cannot therefore succeed in his claim.

p. 204, ll. 1 to 10. It is submitted that in finding even a technical breach of trust without fraud his Lordship overlooked Article 102, p. 361–2. But in any event the judgment is a finding against fraudulent conspiracy.

33. Mr. Justice Martin thought that for the directors to share in a contract of this nature would constitute " constructive fraud " under pp. 337-338. different circumstances, but not here, because—

(A) of the special provisions of the Articles of Association of the Company ;

(B) because full disclosure was made ;

(C) and although the directors' actions were voidable there was due ratification and confirmation by the company.

As to any other grounds set up by the Appellant his Lordship thought they were " lacking in real substance."

This Judgment clearly refutes any charge of conspiracy.

34. Mr. Justice M. A. Macdonald expresses the view that while the trial judge finds a complete absence of any fraudulent design and does so in emphatic language, yet he confesses if he were the trial judge he would not be free from concern. He observes that there was animus against the Appellant—" possibly deserved " ; and that the Respondents wanted to get rid of the Appellant. There is some ground too for inferring that it was the interests of the syndicate that the directors always had in mind rather than the interests of the company. " However these facts, while causing concern, do not outweigh the broader aspects I have referred p. 353, ll. 35-36. to."

His Lordship had already pointed out :—

p. 352, l. 32, to p. 353, l. 4. " The truth is that the minority shareholders, if the company could not effect a sale to third parties—and its efforts in that direction failed—were willing to retire and to permit the respondents to join in a deal with Sloan, acquire the property ; pay the debts of the old company and $20,000.00 additional. It seemed to them desirable to affirm at that stage ; they cannot now repudiate because future events disclosed that it would have been more profitable to dissent. It would be regarded as a fair arrangement had not later developments revealed values rich enough to excite cupidity. The viewpoint, as entertained by all shareholders when the bond was given and continuing up to the time it was known that a rich mine had been developed, is important in deciding whether or not the steps taken by respondents were fraudulent, unjust or oppressive. It may be observed too

that the resolution of December 5th, 1924, ratifying the bond and declaration of trust was moved and seconded by minority shareholders and supported by 95 per cent. of the shares represented. Mr. Twiss and other minority shareholders present were capable of appreciating the situation."

His Lordship concludes :—

" The trial judge found in the acts complained of no conduct of a fraudulent character and he was in the best position to decide the point. He had the Respondents, whose actions were attacked before him, as witnesses, and we should accept his conclusion unless satisfied that it is clearly erroneous. I would therefore not disturb the judgment." p. 353, l. 38, to end.

35. Mr. Justice McPhillips wrote a dissenting judgment. It is somewhat difficult to extract from his Lordship's reasons just what the real matter of complaint is. Not that his Lordship is lacking in emphasis. He says :— p. 339.

" In truth the directors *unmindful of the law* undertook to treat the property of the company as *their* property—considering that as they had 51 per cent. of the stock they owned the property of the company to the denial of any right in the minority shareholders to participate in the profits of the sale." p. 339, l. 29.

What law were the directors unmindful of ? Not the law against directors contracting with the company, for the Articles clearly provided for this being done. Not the law against concealment, for full disclosure was made. Not the law about improvident bargains, for it has been conceded that the Sloan option was a good bargain for the company.

(A) Two directors were a quorum. Walsh was free to vote.

(B) There was subsequent ratification by the company.

(C) The liquidator, who had power to exercise all the powers of the company with full knowledge also ratified and adopted the bargain made. Companies Act, Statutes B.C., 1921, Ch. 10, Section 225.

In what way did they undertake to treat the property as their own ? On the contrary they participated, not as owners, but as part purchasers. How did they deny the minority shareholders' participation in the profit of the sale ? As the sale was provident they would share in the benefits to the company as shareholders.

36. The learned judge apparently thought they were entitled as shareholders to participate in the profits as purchasers as well—on what theory it is hard to understand. The minority shareholders on the ground would not join as purchasers. Walsh, Ferguson's representative and the registered owner of his shares, would not join, neither would Twiss. Ferguson was away ; his whereabouts was not known ; and he says he had no money. He had refused every other proposal. Must the deal be held up until he has an opportunity to participate ? Then too what obligation was there to offer him a chance to come in as purchaser ? The directors' only obligation is to the company, not to the individual members of the company.

p. 247, l. 7.
pp. 268, 269.
p. 277, l. 42.

37. His Lordship continues by charging that the " scheme was hatched up to recoup themselves and gain great profits and advantages to the injury of the minority shareholders." What scheme was hatched up which injured the minority ? The option to Sloan was not only conceded to be in the company's interest, but it was quite in accord with Ferguson's wishes. The only complaint is that the syndicate joined with him. That did not injure the company. It might have given a ground for repudiation under certain conditions ; but, if ratified rather than repudiated, where is the injury ?

p. 339, l. 44.
p. 340, l. 1.

38. All through his Lordship's judgment there seem to run two ideas—one, that the minority shareholders should have participated in the purchase ; the other, that the Sloan contract was improvident and was induced by concealment of the real facts. It is respectfully submitted that in law his Lordship's position cannot be supported and that on the facts the majority view must prevail.

39. C. Reviewing the facts, it is submitted that there is no evidence to support a finding of fraudulent conspiracy, much less to justify overruling the findings which have been made by the Courts below.

40. The first question which must be asked is—what did the Respondents do which was dishonest or wrong ?

(1) Was it wrong or dishonest to give the option to Sloan—was it an improvident agreement ? At the trial it was contended that the Respondents had purposely mismanaged the mine so as to make a sale necessary. The learned trial Judge's finding to the contrary has not been appealed from, so this finding must now be accepted. The assembled and established facts, together with the cognate fact that the mine was in difficulties from no fault of the Respondents, are conclusive that the Sloan option was not only beneficial, but the only possible solution.

p. 482.

(2) These facts may be recapitulated briefly as follows :—

(A) The Fergusons operated the mine from 1911 to 1919 at a loss, ending up in debt ;

(B) They gave two options for $100,000 less commissions in 1919 and 1920, both of which were dropped.

(C) They had come to the end of their resources when the Respondents were induced to take a half interest at the end of 1920.

(D) From 1921 to 1924 the mine was operated under the direction of Copp, who was Ferguson's former superintendent, at a loss.

(E) During this period the Respondents in attempts to make the mine pay loaned to the company over $40,000.00 without security, and the Respondents also were liable as guarantors to the bank. p. 250, ll. 18-20.

(F) A proposal to surrender a portion of their shares to be re-sold for development purposes was refused by Ferguson in August 1922, who stated in his letter that the only thing to do was to sell the mine, and that he would agree to a sale for $125,000.00. p. 397.

(G) In the same month Ferguson offered to sell his shares at fifteen cents per share, which set the price of the mine at $112,500.00.

(H) In 1922 Ferguson sold to Twiss 30,000 shares at 5 cents a share, which set price of mine at $37,500.00. p. 256.

(I) Wallbridge was continually endeavouring to find a purchaser, but with no success.

See letters pages 289, l. 30, 393, 398, 431, 442, 443, 454-5, 456-7, 458.

(J) In December 1923 an option was given to Copp not dissimilar to the Sloan option. This was not taken up. p. 461.

(K) A proposal to tax the shares 2 cents a share to develop the mine was turned down by the other shareholders. This fact was communicated to Ferguson through his Solicitor. p. 247. p. 472.

(L) The Land option was dropped in 1924, after the New York capitalists had personally inspected the mine at considerable expense in addition to spending $1,000.00 in de-watering.

pp. 246-7.

(M) The situation then was that there was no money to keep the mine from flooding again. With its past record if allowed to flood again, under then existing conditions, it would

p. 482.

have become an abandoned mine.

p. 335, l. 40.

(3) As already stated, Counsel on the appeal conceded that the sale to Sloan was a wise and proper one. It is not now open to controversy that Sloan only agreed to the option on the condition that the Respondents would join with him and share in the further liabilities to be incurred.

(4) If the Sloan option was a provident agreement standing by itself, it is submitted that the fact of the syndicate, including three directors, sharing in the agreement, cannot affect the transaction in relation to a charge of fraudulent conspiracy. Particularly is this true where there was full disclosure, and when Sloan insisted on their participating as a condition of his undertaking the option. Without this option the property would have been lost.

(5) The contention is made (Statement of Claim paragraphs 17 and 18) that between the 16th of July and the general meeting, December 5th, the Respondents in their mining operations had developed ore in sight worth approximately $200,000.00 and had fraudulently concealed this from the shareholders and from the meeting of December 5th.

(A) As has already been said, there is an express finding of fact against this charge.

(B) An examination of the evidence discloses how completely this charge was refuted at the trial.

See the following witnesses :

A. E. Bull, pages 254, 255, 259, 260, 261.
Dr. Boucher, pages 290 and 292.
General Duff-Stuart, pages 297, 298.
John I. Babe, pages 304, 306.
David Sloan, pages 308, 309.
Col. H. G. Yuill, page 322.

(6) In December 1924 there were no directors as the company was in liquidation—See Companies Act, R.S.B.C. 1924, Ch. 38, Section 219 (*b*). All the defendants were then mere shareholders purchasing an interest from the company and as such the parties were at arm's length.

North West Transportation Co. *vs.* Beatty 1887 12 A.C. 589.
Chatham National Bank *vs.* McKeen 24 S.C.R. 348.

(7) That there was no conspiracy to exclude the minority shareholders is further evidenced by the following facts :—

(A) The two members of the syndicate who were most active in the company's affairs were Bull and Wallbridge. In the original syndicate Bull had 2/10 and Wallbridge 4/10. When they decided to share in the Sloan option the chances of success looked so black that both these gentlemen insisted that they should assume only the same proportions as each of the members of the syndicate, one-twelfth interest. pp. 247-8.

(B) McKim sold his one-twelfth interest in November 1925 for $7,500.00, which would be at the rate of $90,000.00 for the whole mine. He did this after consultation with Bull. Sloan had then been operating the property for 16 months so it did not look very promising at that time. p. 261.

(C) As late as 1926 Sloan wanted to sell out. He " got cold feet." The property didn't look good at the 5th level. The vein was barren where shaft was sunk. p. 271, ll. 10 to 20. p. 280.

41. It is further alleged by the Appellant that the liquidation of the company was improper and was evidence of the conspiracy charged.

42. The facts are that after the Sloan option was given on July 16th, 1924, steps were taken in the regular way to put the company into liquidation. The bank was pressing for payment of its note, which could be renewed for only 60 days. If the Sloan option was exercised the company was functus and if the option was thrown back, as so many had been before, there were no prospects to justify operating it further. p. 249, l. 24.

43. The liquidator, Mr. Salter, was joined as a defendant as he is accused of being an accessory to the alleged wrongful acts of the other Respondents. p. 333.

44. Mr. Salter is a reputable Accountant in Vancouver. He had been the auditor of the company for years. In 1921 Andrew Ferguson seconded the motion at the directors' meeting for his appointment. In 1922 his appointment was moved and seconded by Twiss and Seaman, both minority shareholders, and Seaman representing Ferguson's shares. p. 382. p. 426.

45. The two extraordinary meetings were held 22nd August and 9th September 1924 respectively. p. 475.

pp. 471-2. 46. On the 11th of August 1924 Walsh, McKim & Housser, Solicitors for the Williams Estate wrote Ferguson's Solicitor pointing out what was being done. They stated they could see no object in opposing the liquidation, but if Ferguson wished to do so, he would be given a proxy by the Williams Estate. Ferguson ignored the offer. To pass a special resolution required to wind up 75 per cent. vote is required, B.C. Companies Act 1921 Cap. 10 s. 2. Ferguson could therefore have prevented winding up if he had wished. The Respondents had only 51 per cent. of the total issued shares.

47. Then there was a complaint that the assets of the Company were sold for less than they were worth and under circumstances not conducive to the company's interests.

48. It is to be noted that neither the winding up nor the sale of the assets, subject to the Sloan option had anything to do with that
p. 253, l. 1. option. The assets sold for over $70,000.00. The only effect in the eventuality was that the company got over $70,000.00 instead of a chance of $100,000.00 but the purchasers had to wait 4½ years before getting payment. The resolution accepting this proposal was moved and seconded by Walsh, and Seaman, Manager of the Royal Bank. At that time, under the Companies Act, the directors had ceased to function. They were under no duty, their interest was disclosed and the bargain was approved by shareholders and creditors in no way connected with the Syndicate.

49. Considering the case in its legal aspects it is respectfully submitted that short of fraudulent conspiracy proved as a fact against the Respondents there is no case claimed or maintainable against the
p. 325, l. 32. Respondents. As Chief Justice Morrison stated in his Judgment :—

> " Instead of attacking the problem the method by which these properties changed hands and were acquired and attacking the legality of the proceedings he (Appellant) launches the action, the Statement of Claim in which from almost the first paragraph to the end is a reiteration and repetition of expressions of fraud and conspiracy and breach of trust connected with it."

50. Short of fraudulent conspiracy culminating in an oppressive contract to sell to Sloan at an improvident price it is submitted that not only is no case alleged in the pleadings, but none not maintainable in law.

To say that the contract was a good contract for the company, but was oppressive, because some shareholders did not share in the purchasing end, is a confusion of ideas. To say that because some of the directors have participated in the contract entitles the company to share in their profits is a legal misconception. If the directors have invalidly

contracted the company has its choice—it may repudiate, or it may ratify. It cannot approbate and reprobate. It cannot enjoy the position of vendor, and share in the profits of the purchasers :—

Jacob Marler's Estates *v.* Marler 1913, 85 L.J. P.C 167.
Cook *v.* Deeks 1916—1 A.C. 554.

51. There are other defences open to the Respondents :—

First : As to the Wallbridge Estate : The Estate has been fully administered and consequently no claim can be made against the executors.

Second : As to the Respondents, other than the directors, unless an actual conspiracy can be shown they cannot be held liable for the actions of the directors.

Third : So far as the action is one of tort it cannot be maintained by the representatives of Peter Ferguson or against the Wallbridge Estate as the right of action dies with the person.

Fourth : The Statute of Limitations.

Fifth : Misjoinder of parties.

Sixth : Estoppel.

52. The Respondents therefore humbly submit that this appeal should be dismissed and the Judgments below affirmed for the following amongst other

REASONS.

(1) BECAUSE the charge of fraudulent conspiracy was not proved.

(2) BECAUSE the findings of fact in both the Courts below are in favour of the Respondents and are supported by the evidence.

(3) BECAUSE the Sloan option was a provident agreement in which the Appellant participated as shareholder in the vendor company.

(4) BECAUSE the Sloan option was duly ratified by the company at a general meeting by unanimous vote of 97 per cent. of the shareholders, and by the creditors of the Company, with full knowledge of the Respondents' interest therein.

(5) BECAUSE the said option was ratified and confirmed by the liquidator exercising as such all the powers of the company.

(6) BECAUSE full disclosure of all the facts was made at the directors' meeting and at the general meeting 5th December, 1924.

(7) BECAUSE the provisions of s. 102 of the Articles of Association of the Company were suspended or relaxed by the General Meeting of 5th December, 1924.

(8) BECAUSE the directors had ceased to function as such prior to the general meeting of 5th December and all the Respondents were free to contract with the company and to vote at the said meeting.

(9) BECAUSE the company has had the benefit of the said contract.

(10) BECAUSE the Respondent Salter acted *bona fide* in the exercise of his powers as liquidator.

(11) FOR the reasons set forth in paragraph 51.

(12) FOR the reasons given by the learned Judges in the Courts below.

J. W. DE B. FARRIS.

WILFRID BARTON.

No. 18 of 1934.

In the Privy Council.

ON APPEAL

From the Court of Appeal for British Columbia.

BETWEEN

ANDREW FERGUSON - *Appellant*

AND

HELEN A. WALLBRIDGE and Others - - - *Respondents.*

Case

FOR THE RESPONDENTS.

Other than R. B. BOUCHER and FRANCIS J. NICHOLSON.

GARD, LYELL & CO.,
47 Gresham Street, E.C.2,
Respondents' Solicitors.

The Solicitors' Law Stationery Society, Ltd., Law and Parliamentary Printers,
29 Walbrook, E.C.4. CL6567B-31348A