Privy Council Appeal No. 18 *of* 1934.

Andrew Ferguson - - - - - - - - *Appellant*

v.

Helen A. Wallbridge and others - - - - - *Respondents.*

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY, 1935.

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD ALNESS.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD BLANESBURGH.]

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 of the Supreme Court. Both Courts therefore are, in the result, in agreement. But the issue between the parties has been the occasion for great divergence in the reasons adduced by the learned Judges for the conclusions reached by them. Although the learned trial Judge and three of the learned Judges in the Court of Appeal were agreed in thinking that the appellant's action failed, the reasons of each for that conclusion differed from those of the others almost as definitely, as they did from the reasons of Mr. Justice McPhillips, the learned member of the Court of Appeal, who would have decreed the plaintiff's suit. And now, following upon an objection to the competency of the proceedings, taken before the Board by the respondents their Lordships find themselves compelled, without essaying to compose these judicial differences, to deal with and finally to dispose

of the appeal, on a ground not hitherto suggested as possible. The result is unfortunate, but, they fear, unavoidable.

The action was commenced on the 1st June, 1932, by the appellant as plaintiff "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." To the action so brought the present respondents (the last of them, John S. Salter, while named as an individual, being described as "liquidator of Pioneer Gold Mines, Limited)" were made defendants. The main purpose of the action broadly stated and so far as it still survives, was to have the respondents held accountable for certain property alleged to remain the property of the company mentioned, and unlawfully appropriated by them. And now it is objected, that the action is for that purpose improperly constituted, so that no such claim made in it can be entertained.

In that connection, two things may be said at once about the parties to the action as they are above described. The first is that Pioneer Gold Mines, Limited, neither sues nor is sued in the action. The second is that the company is being treated in the writ as in liquidation at its date. About the second of these propositions there is no doubt. Nor is there any about the first, although its justification is less obvious. The company, not before the Court in terms, is not present in the person of the defendant liquidator. Mr. Salter, and for a very good reason as will be later explained, is not sued as the company's representative. So much might perhaps be gathered from the mere fact that his own name is introduced into the title, (as to this, see Companies Act of British Columbia, s. 202 (9)) but, if that is not enough, then his status in the cause is in the same sense disclosed by the statement of claim, where his removal from office is asked for and damages against him personally are demanded.

Now the objection referred to was taken in this wise.

After the appellant's case had been fully opened on his behalf, Counsel for the respondents before condescending upon any reply on the merits took formally the preliminary objection that the action and the appeal were alike incompetent. The relief, he said, claimed on behalf of the appellant, however it might be disguised as relief for minority shareholders, was all of it when its true basis was appreciated, relief in respect of wrongs at the hands of the respondents really, if at all, inflicted upon or suffered by Pioneer Gold Mines Limited, and he objected that no such relief could be granted nor the right to it even be ventilated in an action like the present in which that company was not before the Court at all. But further he objected that where (as in this instance) that company was stated to be in liquidation,

then no such relief could be granted in an action in which it was not itself plaintiff. The proceedings here therefore had now become quite incompetent and ought no longer to continue. And he elaborated the point.

Now it is little less than a calamity that this obstacle to finality should for the first time have been interposed at so late a stage in a litigation already greatly protracted, and after an expenditure of judicial time and of money all wasted if it be well founded. But the full defect disclosed, if it exists, is, it must be agreed, fundamental; for, if it be true that the presence of Pioneer Gold Mines, Limited, as plaintiff in the action is essential to its competence, then the defect is one not now to be cured by amendment, for the reason that only under authority obtained from the Court in winding up could the appellant, not claiming to be more than a single contributory of the company, even ask that the company be substituted or added to the record in that character. And possibly because so prevented no such application was made. The duty of the Board therefore to deal with this objection was, their Lordships felt, one that could not be ignored. They take it up therefore now.

And the answer to the question whether the objection is well taken depends first of all upon the answer to another, viz., are the claims of the appellant at all events as now formulated properly described as claims competent only to the company? And that answer is neither short nor simple for two reasons—the first, that the appellant's case as presented to the Board has been much less comprehensive than that set forth in his writ and statement of claim; and the second, that quite clearly he has all through sought so to frame his claims that they need not properly, or at all events need not necessarily be so described. If they are necessarily only corporate claims the appellant has been at pains to avoid saying so. Indeed, his purpose throughout the litigation certainly in words has been not so much to vindicate as against the respondents any rights of the company as to voice the wrongs of its minority shareholders, "frozen out" by the respondents—a majority overbearing and abusing, as he alleges, their powers as such. Their Lordships must accordingly first inquire whether in this matter the view of the respondents is really the true one.

And on that inquiry they will assume that Pioneer Gold Mines, Limited, is still really in voluntary liquidation and that the respondent, Mr. Salter, is still its liquidator. The assumption is a large one, because in point of fact the company was dissolved in due form years ago. Power was however apparently delegated by the Court in winding-up to the Court in this action to make, if it thought fit, any order in relation to the dissolution that might be called for in the interests of justice. And, doubtless as a result of that arrangement, the continuance of the voluntary liquidation was—certainly so far as this objection is concerned—assumed in

argument by counsel on both sides. So their Lordships will make the same assumption and in order to ascertain whether the claims now made by the appellant are necessarily of the description asserted by the respondents will proceed without further preface to outline the case presented by the appellant before the Board.

The story, a long one, begins with the appellant and his deceased brother, Peter Ferguson, acquiring in 1911 for $26,000 the Pioneer gold mine, located in the Lillooet district of British Columbia. The Fergusons, both of them practical miners, although Peter apparently took no active part in the management of the mine, were soon joined in their venture by Mr. Adolphus Williams, their solicitor, senior partner in a Vancouver law firm. Mr. Williams acquired a one-quarter interest in the property, and by its three owners a substantial sum was spent in development. In 1915 a company was formed by them under the Companies Act of British Columbia to take over and work the mine. The company, the Pioneer Gold Mines Limited, of the writ of summons, had a nominal capital of $1,000,000 divided into 1,000,000 shares of $1 each, and the purchase consideration paid by it for the mine was 750,000 of these shares credited as fully paid. Of the shares so taken by the vendors 269,999 were allotted to each of the Fergusons; 195,000 to Mr. Williams; 15,000 to his wife, Mrs. Catherine Williams; and one share each to two of his law partners, Mr. Walter Walsh and Mr. Harold C. M. McKim, whose names will again appear in the narrative. No other shares were ever issued.

For some years the company operated the property: gold values substantial in amount were extracted from it, and $26,000 were distributed in dividends; the rest was expended on the mine. But in 1920 the company was in debt to the extent of $35,000. The Fergusons were not men of means, and Mr. Williams was apparently unwilling to embark further money on the undertaking. Accordingly, steps were taken to find a purchaser for the mine, or at least to find somebody who in consideration of the transfer to him of a controlling interest in the company would be ready, directly or indirectly, to provide the capital necessary for the further development of the property. And then it was that the appellant, probably through a Mr. Copp, who had at one time been superintendent of the mine, was brought into contact with Mr. Adam H. Wallbridge, a mine-broker of Vancouver. Mr. Wallbridge—who, it may here be stated, died in September, 1927, his executors being the first respondents—became sufficiently interested to set about, with Mr. Copp's assistance, the organisation of a syndicate to acquire a controlling interest in the company; and in the result a syndicate of six was brought into being, consisting of Mr. Wallbridge himself, the four respondents—Messrs. Bull, Boucher, Duff-Stuart and Nicholson—and Mr. McKim, Mr.

Williams's partner, already referred to and now, like Mr. Wallbridge, deceased.

The syndicate agreement is dated the 29th December, 1920. It recites that Mr. Wallbridge was negotiating with Mr. Williams and the Fergusons to acquire 51 per cent. of the capital stock of the company for $50,000—$5,000 cash, $10,000 in May, 1921, this to be used to install a cyanide plant and in developing and operating the mine. The balance was to be payable by instalments extending up to the 1st December, 1923. Mr. Wallbridge in the first instance retained for himself, as appears by the agreement, one-half interest in the syndicate; his five associates took at that time, apparently, one-tenth interest each. On the occasion of the bond granted by the company to Mr. David Sloan in 1924, later to be stated, and in which they participated, the six members became equally interested in the syndicate.

The syndicate agreement was followed on the 6th January, 1921, by the agreement for the sale of the shares made between Mr. Williams and the Fergusons as vendors and Mr. Wallbridge as purchaser. Thereby on the terms just stated 51 per cent. of the Pioneer Company's capital stock or 382,500 shares (provided as to 275,400 by the Fergusons in equal proportions and as to 107,100 by Mr. and Mrs. Williams) were acquired by Mr. Wallbridge. The shares were to be held *in medio* and not transferred to the purchaser until their price had been fully paid, but it was a term of the agreement that three nominees of the purchaser should at once be elected directors of the company. On the 23rd April, 1921, the respondents, Mr. Duff-Stuart and Mr. A. E. Bull, with Mr. Wallbridge, were accordingly so elected. Mr. Wallbridge forthwith became managing director and thenceforward full control of the management of the company was assumed by these three members of the syndicate, who were always a majority in number of the directorate, Mr. Walsh, indeed, being at the critical period, the only other member of the board.

Although Mr. Wallbridge appeared in the sale agreement as sole purchaser, and although the company's shares when finally transferred were all of them registered in his name, it is an accepted fact that all through he held the shares in one block and voted in respect of them as trustee for the members of the syndicate, including himself.

As has been seen, the company at the time of this sale was indebted to the extent of $35,000, and it was a term of the agreement that that indebtedness should be discharged by the vendors, in its relief. Mr. Williams, as the man of means amongst them, would naturally be the first to bear this burden, and in order to secure him against ultimate liability for more than his proper proportion, as well as against other indebtedness of theirs, the Fergusons left all their free shares in Mr. Williams' name and assigned to him, as further security, their interest in the purchase

money receivable under the sale agreement. That neither the appellant not his brother was ever at any time the registered holder of more than one share in the company, and that the voting rights in respect of the shares in which each had a beneficial interest, complete or partial, were from time to time exercised by those in whose names they were in fact registered is a circumstance of some importance in the case.

In September, 1921, Mr. Williams died. His executors were his partner, Mr. Walsh, already mentioned, his widow, and Mr. Godfrey, local manager of the Bank of Montreal. Of these, Mr. Walsh appears to have been most active. As for the appellant, he on the accession of the syndicate to power gave up the management of the mine and returned to Vancouver. Until June, 1922, he remained a director of the company. He then left Vancouver and retired to Seattle. There he remained until 1924. Thence he went to California, not returning to Vancouver until 1931. For better or for worse, he was outside the Province during all the events now to be recorded.

Under the sale agreement, only the first $15,000 was ever paid, and of that sum $10,000 went as above stated in the installation of a cyanide plant. In December, 1922, the syndicate was in arrear with its payments to the extent of $20,000. In that state of things, on the 15th February, 1923, a very important agreement was made.

Their Lordships pass by as irrelevant to the purpose of this present narrative the charges and counter-charges bandied about between the parties during and in respect of the early period ending with that agreement. For the same reason they say nothing of the circumstances in which the agreement was required of, and ultimately entered into by, the appellant. They record, only, the fact of its execution. The effect was to place the syndicate completely in power. By it the Fergusons and the Williams estate agreed to a modification of the sale agreement of the 6th January, 1921, with the result that:—

(1) The syndicate was discharged from any obligation to pay the later instalments of purchase money thereunder, amounting to $35,000, and became entitled to immediate delivery of the 382,500 shares in consideration of the payments previously made by it, amounting to $15,000 only.

(2) The Fergusons and the Williams estate jointly agreed to make 183,750 of their shares and the Syndicate agreed to make 191,250 of its shares available to raise working capital for the company, if a sale of these shares could be effected.

On the same date the charge upon the Ferguson shares held by the Williams estate was adjusted so as, amongst other things, (*a*) to release 132,300 of these shares for the service of the agreement just stated; and (*b*) to confine that charge to 67,295 only of the remaining shares.

The history of the mine up to 1923 had not been propitious. There had, apparently never been much doubt as to its possibilities:

but lack of capital for adequate development was the bane. During these years money was not forthcoming. In the view of the appellant, right or wrong, the money which was advanced was not wisely applied. But the main preoccupation of the syndicate, apparently, was to find a purchaser for the entire undertaking, a consummation equally favoured then by the appellant, who, again rightly or wrongly, had no confidence in the syndicate's development operations and saw no prospect of success for the mine in its hands.

In the summer of 1923, the board instructed Mr. David Sloan, already referred to, a mining engineer of great experience and repute, to report upon the mine. On the 19th July, 1923, he made a very complete and highly favourable report on the property and its possibilities, naming a sum of $25,000 as an estimate of immediate expenditure. Efforts were made to induce Mr. Sloan to participate in the venture himself, but at first he declined. So in December, 1923, an option to Mr. Copp, already mentioned, to purchase the mine for a net sum of $112,500 was granted, and a further option, on the 2nd April, 1924, for $100,000 was granted to a Mr. Land. But these were neither of them exercised. A proposal was then made to the Williams Estate and other local shareholders to contribute with the syndicate 2 cents a share to continue operations. But they all refused. It is a complaint of the appellant that no such request was ever made to him. But their Lordships cannot doubt that taking the view of the syndicate which he did he too would have ignored it, if one had been made. By this time the syndicate had advanced $40,000 to the company, and was also liable on a guarantee to the bank. The mine was closed down and the company was without funds.

Then, and it is said, as a last resort, the property was in July, 1924, offered to Mr. Sloan for $100,000. The position had then so far altered that in a revised estimate Mr. Sloan had calculated that no more than $16,000 would be required for immediate expenditure, the expectation being that as a result of development work of that value the mine would become self-supporting and itself produce all that was needed in the way of further expenditure—an expectation which was in the event more than realised. In the result Mr. Sloan agreed to accept a working bond upon the property for $100,000.

It is said by the respondents, who in the Courts below made a great point of the fact, that Mr. Sloan actually made it a condition of his acceptance that the syndicate would join him for half an interest in the venture and would put up half of the $16,000 required. It was in response that its members participated as they did. Now, that Mr. Sloan desired to limit his risk, and even by a half, may well have been the case. There is evidence, indeed, that he sought for and secured other participants in his remaining half. But that he made the request in the terms of a

condition directed specifically to the syndicate or its members as such, while it may have been so (their Lordships make no pronouncement upon it one way or the other, for they have not heard the respondents), is made somewhat doubtful by the fact that in his evidence—he was called as a witness by the respondents—Mr. Sloan said nothing specifically about this, while at another part of his evidence, to show his ignorance of everything relating to the internal affairs of the company, he said he thought "Mr. Wallbridge,"—with whom doubtless all his actual negotiation took place—" had the whole thing in his hands."

But, however this may be, one thing is clear. The working bond was to be in Mr. Sloan's name alone. That he had participants other than the syndicate is evident. But he was to remain and did remain in unfettered control. As to the syndicate participants, their interests (which there is some slight suggestion were not to be published) were to be and were evidenced by a declaration of trust under his hand.

The proposal to grant the Sloan working bond already informally agreed to with Mr. Wallbridge of the syndicate was brought before the board of the company on the 16th July, 1924. The directors present were the three syndicate members: Messrs. Duff-Stuart, Bull and Wallbridge and Mr. Walsh.

The proposed bond was on the face of it as already stated one with Mr. Sloan alone and there is no statement in the minute of the meeting that the directors present or any of them were interested in any way in it. Presumably however the interest therein of the other directors was at least generally and possibly fully known to Mr. Walsh.

While therefore it is more than probable that the provisions of article 102—the regulation in a well recognised form dealing with contracts with the company in which a director is interested—were far from the minds of any of the directors present, its provisions in this regard were probably substantially, if unconsciously, observed.

But under the article no director may vote in respect of any contract in which he is interested, while a quorum for a directors' meeting is by article 92 fixed at 2. The resolution therefore of the four directors—three of them being interested—that the working bond be granted to Mr. Sloan was of no force or effect to bind the company. See *In re Greymouth Point Elizabeth Railway, etc., Company* [1904], 1 Ch. 32. Such a bond was invalid until ratified. As already indicated all this was doubtless unsuspected at the time by the directors. It was quite unknown to Mr. Sloan. He had no knowledge of any meeting. It does not appear, indeed, that he was ever made aware of any initial defect in his bond, even after its discovery.

Following upon the resolution, the company on the same day purported to grant Mr. Sloan his working bond—a formal document imposing upon him very far-reaching obligations.

On the same day—in the form of an instrument depending upon but quite distinct from the bond, the company being no party to it—Mr. Sloan made a formal declaration of trust in favour of the six members of the syndicate by name. Thereby on a recital that they had agreed to contribute one-half of the moneys required in equal shares payable as set out in the bond, Mr. Sloan declared that in consideration he held the bond and option and all benefit to be derived thereunder in trust as to one-half thereof for the six in equal shares.

With the working bond accepted by Mr. Sloan, himself a distinguished engineer with an instructed and convinced belief in the possibilities of the mine, and containing an obligation on his part to provide $16,000 for development under his own supervision, the prospects of the mine were in fact transformed.

The appellant, however, as their Lordships understand his case, does not suggest that a larger sum than $100,000 for the bond ought to have been asked for or could have been obtained from Mr. Sloan. His grievance is that the benefits resulting from the accompanying declaration, instead of being held for all the shareholders of the company, including the respondents, have been wrongfully diverted by the syndicate to themselves. In the view of the appellant, one of the difficulties in the case has been due to the blending or confusion, as if they were one, of two things which he suggests are essentially distinct. The grant of the working bond to Mr. Sloan: the participation in that bond by the syndicate.

On receiving his bond Mr. Sloan at once started vigorous operations at the mine. His progress was, in fact, both rapid and immediate. The syndicate's moiety of the $16,000 was to be provided in equal instalments of $2,000 on or before the first day of August, September, October and November, 1924. The instalments for August and September were called for. Thereafter no further payments were required by Mr. Sloan. The mine had so soon become self-supporting, and the gold obtained more than enough to pay for all the development work which under his bond Mr. Sloan was required to carry out. By the 5th December, 1924, there had been deposited in the Government Assay Office bullion in bricks from the mine of the total value of $15,532·36. The brick, deposited, as it happened, on the 5th December, was alone of the value of $6,412. The syndicate's participation has in the result cost them nothing, their $4,000 having been long ago reimbursed. This the appellant points out.

In the meantime, at general meetings of the company held on the 22nd August and 9th September, 1924, a special resolution was passed for its voluntary winding up and the appointment of Mr. Salter as liquidator. No reference at either meeting or in any notice was made to the Sloan work bond or to the syndicate directors' interest therein, nor was any explanation offered of the reason or necessity for winding up at that time. Mr. Bull's

reason for then putting the company into voluntary liquidation, given in evidence, was that the syndicate had become anxious as to the company's debt to them and resorted to liquidation in order that it might be more speedily discharged as the result of a liquidator's sale of assets to an outside purchaser. The appellant asks the Board to draw a different conclusion from the syndicate's action in this matter. His contention is that the sole purpose of the syndicate in putting the company into liquidation before the Sloan bond was worked out was by their preponderant voting power both as creditors and contributories to secure for themselves exclusively as purchasers on their own terms the assets of the company in every event. This was one of the contested issues in the action.

At the commencement of the liquidation the company's indebtedness amounted to about $45,000, $40,000 of which approximately were owing to the syndicate and about $4,200 to the Union Bank on overdraft guaranteed by the syndicate. The remaining debts of the company—to the Williams estate and to the different solicitors—were trifling. In substance the syndicate was the company's only creditor.

It was not, apparently, until about November, 1924, that its members, or any of them, became conscious of any irregularity in the directors' meeting of the 16th July, 1924, or of the questionable validity of the resolution then passed, granting the Sloan working bond. It was, at any rate, only in November that any overt steps were taken to validate that resolution and otherwise regularise the arrangement then come to. The great question raised by the appellant is whether these steps were effective for their purpose.

On the 13th November, 1924, the liquidator gave notice of a meeting of shareholders of the company—contributories were always in his notices still called shareholders—to be held on the 5th December for the following purposes. (Their Lordships think it well to set forth the terms of the proposed resolutions textually, because great importance is attached to these by the appellant)—

> "1. Of confirming the action of the Board of Directors of the company in granting a working bond containing an option to purchase all the mineral claims buildings . . . and supplies belonging to the company dated the 16th July, 1924, to one David Sloan, representing himself for one half interest and the following shareholders of the company for one half interest: R. B. Boucher, F. J. Nicholson, H. C. N. McKim, A. E. Bull, A. H. Wallbridge and I. Duff-Stuart, of whom the three last mentioned are directors of the company.
>
> 2. Of considering and if thought fit confirming or sanctioning the action of the meeting of the creditors of the company held the 22nd October, 1924, in accepting a tender of $45,000 for all the mineral claims, assets and property of the above company subject to, but with the benefit of, the said working bond, said tender being made by R. B. Boucher on behalf of the before-mentioned six shareholders, who are also creditors of the company to the extent of $39,590·18."

The notice of meeting was accompanied by a letter signed by Mr. Wallbridge, who described himself as " manager and secretary "—the letter being stated by the liquidator to be enclosed " at his request." The liquidator himself was, as always, quite silent.

The statement summarises the recent history of the mine substantially as their Lordships have stated it, but dwelling only on the past and making no allusion to any actual results already achieved or to any improvement in prospects to be expected from Mr. Sloan's participation. With reference to Mr. Sloan's condition that the syndicate should participate in his bond—a prominent point in the statement—it concludes with the words " the syndicate to endeavour to save their advances and investments agreed to the proposal. The other local shareholders of the company were asked to join with the syndicate in the new undertaking but refused. The voluntary winding up of the company was then proceeded with."

From the evidence of Mr. Duff-Stuart, chairman of the meeting, it appears that he read out Mr. Sloan's bond at length. He did not, apparently, either read or refer to his declaration of trust. The proceedings were formal and brief. The first resolution proposed was passed unanimously in terms of the notice convening the meeting. In place of the second resolution, one was passed accepting a fresh tender by the syndicate for the assets of the company, made by a letter of that day—the 5th December, 1924. The tender was made subject to the condition stated in the letter that :

> " The bond to David Sloan shall be confirmed and this offer accepted and approved of by a vote of the holders of not less than 95 per cent. of all the shares in the company at the meeting of shareholders called for the 5th December, 1924."

If the shares held in equity for the appellant and his brother, free from all incumbrance and numbering, it is said, 117,297, are included in the computation, 95 per cent. of the shares in the company were represented at the meeting. Mr. Wallbridge, as the holder of the syndicate's shares, on a poll was in a position to carry any resolution he pleased. Like the first, however, this resolution also was carried unanimously.

The resolutions so passed were, as was natural, strongly relied on by the respondents in the Courts below as one answer to the claim made against them. It is convenient, therefore, at this point, to summarize the contentions of the appellant with reference to this meeting. It is with his contentions that, at the moment, their Lordships are alone concerned. His view, as their Lordships understand it, is that the true position at the time of the meeting was as follows :

(1) If the Sloan working bond was to become binding on the company it had to be ratified.

(2) If the syndicate, including the directors, sought to retain for themselves the benefit of the Sloan declaration of trust which, on ratification of the bond, they held as trustees for the company,

or the contributories generally, they could, if at all, only do so on the fullest disclosure of the position and of all then material facts in relation to the mine which were calculated to influence the minds of the contributories.

None of these last conditions were, it is said, complied with. There was no reference to the declaration of trust at all. The statement that under the bond Mr. Sloan "represented himself for one half interest and the members of the syndicate for another half," not in fact true, suggested, if it did not say, that the interests of Mr. Sloan and the syndicate stood or fell together, and that the company could not have the benefit of the one without renouncing all interest in the other. The actual situation, again, was, so it is said, travestied in Mr. Wallbridge's statement, giving as it did no hint of the mine's progress under Mr. Sloan; of the gold extracted since he began work; or of the fact that since September it had been self-supporting. It was incredible that Mr. Wallbridge, in constant touch with the mine, was not fully informed on all these matters. Such are the appellant's views.

So far as regarded himself, the appellant's evidence as to the meeting was that no notice of it ever reached him. It remains in doubt whether any notice was, in fact, sent to his registered address. Two notices sent to other addresses were returned by the Post Office. The notice of the meeting for winding up had been sent to Mr. Noble, the appellant's Vancouver solicitor, and that notice reached the appellant. The same course was not adopted on this occasion. The appellant's evidence was that not until 1931 had he any knowledge or suspicion that the syndicate or any member of it, whether director or not, had any interest in the Sloan bond, of the existence of which he had heard casually from a friend in a letter of the 20th September, 1924, which he produced. (Exhibit 11.)

At a meeting of creditors held on the 21st January, 1925, at which the only creditors present were five members of the syndicate—Messrs. Duff-Stuart, Nicholson, Wallbridge, Bull and McKim, the liquidator being "in attendance" and characteristically acting as "secretary of the meeting," the syndicate's tender of the 5th December was unanimously accepted —the solemn resolutions at this meeting are not without their glimpse of humour—and an agreement to give it effect (which, as was stated by the liquidator in his evidence on discovery, had been drafted by Mr. McKim) was approved, and on the same day was executed on behalf of the company by the liquidator.

The appellant sees in this agreement, executed so late as the 21st January, 1925, the completion of the syndicate's scheme already indicated to "freeze out" the minority shareholders and to secure for themselves every asset of the company not included in the Sloan bond. By this date, it is suggested, it had become a certainty that the Sloan bond would be taken up, and the

price—that is, $100,000—paid. Yet by this deed under no circumstances was more than $70,000 payable by the purchasers, and that, except as to $3,600, only out of payments received from Mr. Sloan and not otherwise. Of the $70,000 so paid over $40,000 was returnable to the syndicate in respect of their claim as creditors and $10,200 in respect of their majority interest in the company. And, well within the time limited by his bond, Mr. Sloan completed his payments thereunder, amounting to $101,050. The whole sum was made out of the produce of the mine. The sums paid by the syndicate under the agreement of the 21st of January, 1925, amounted, as has been seen, to about $70,000 only. The remainder of the Sloan purchase money, all of which the syndicate received under the same agreement, and amounting to $30,000, they retained as their own.

In 1928 a new company—the Pioneer Gold Mines of British Columbia Limited—was incorporated, and to that company the mine was transferred by Mr. Sloan and his associates in consideration of 1,600,000 shares of $1 each credited as fully paid: 800,000 of these shares fell to the syndicate as their share. This was a clear profit. It was stated in evidence that these shares were at the time of the trial being dealt in on a rising market at $6·50 a share.

In the end, as put by the appellant, the syndicate, out of the property of the company in which at the commencement of the liquidation they held 51 per cent. of the issued capital, secured, as a result of their dealings with the company's property made valid, if at all, only in the liquidation:—

(1) As creditors, the amount of the company's debt to them with interest at the rate of 8 per cent. per annum;
(2) $10,200 in respect of their shares in the company;
(3) $30,000 profit on the agreement of the 21st January, 1925;
(4) 800,000 shares in the new company with, at the time of the trial, a quoted market price, already stated.

The minority shareholders, on the other hand—holding 49 per cent. of the company's capital—were "frozen out." They received in respect of their entire interest $9,800 only.

That is the way in which the appellant states the position.

Now the real character of the appellant's claim in respect of these matters can best be judged by the contentions of fact and of law by which he seeks to justify it. Their Lordships, of course, in stating these contentions as they understand them, express no opinion whatever of their own upon them. They have no opinion: they have not heard the respondents.

The appellant's contentions, then, take their colour from a passage in a letter of the 6th June, 1924, addressed by Mr. Wallbridge to Mr. Copp, on which great reliance is placed. "We are not going to carry the rest of the stockholders any longer," writes Mr. Wallbridge. "We intend to have a show down right

away." Founding upon that statement, the appellant sees in every subsequent act of the syndicate, as already detailed, a step towards the attainment of that end.

Their Lordships in tracing these steps have indicated from time to time the interpretation placed by the appellant upon them. They need not recapitulate nor elaborate the principles of law which the appellant invokes in alleged support of his case. It is perhaps enough to say that his main reliance is placed on *Cook* v. *Deeks* [1916], 1 A.C. 554 before this Board, and on such cases as *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350 and *Kaye* v. *Croydon Tramways Company* [1898] 1 Ch. 358. On the distinction in these questions between the powers of majorities of shareholders in a going company, and of contributories in a winding up, reference is made to such authorities as *Hampson* v. *Price's Candle Company*, 24 W.R. 754 on the one hand, and *Hutton* v. *West Cork Railway Co.*, 23 Ch. D., 654, on the other.

But everything converges on this result, that the claim really made upon the respondents, is a claim upon them as trustees to account for the 800,000 shares in the new company referred to and the $30,000 retained by them under the agreement of the 21st January, 1925; and that claim is, their Lordships are satisfied, one which is competent to the company, and, as sought in this action to be established, is competent to the company alone. The claim extends to the entirety of the two funds. There is no claim either made or proved establishing the right either of all minority shareholders, or of any individual amongst them, to receive any aliquot portion of either fund. Has any claim, for example, been either made or established for Mr. Walsh or Mr. Twiss or Mr. Seeman, manager of the Union Bank, each of whom, it may be suggested, individually assented to the retention by the syndicate of everything included in the claim against it? Again, has any individual right of the appellant been established in an action in which the mortgagees or trustees of his shares—the Williams' executors—are not even parties? These questions answer themselves. It is true that in the pleadings the real claim is camouflaged as one by the minority shareholders enuring for their benefit as such. The declarations asked by the writ are in that sense: those asked by the statement of claim are still tainted with the same virus; but the name of the company is there and then somewhat shyly also introduced. In truth, it is very apparent that the appellant's advisers were at that stage embarrassed by the fact that the company had been dissolved long before the day for the service of any writ had arrived. There was no company to be so served: there was no longer any liquidator of the company: his office had ended with the company. The chosen method of escape from the difficulty was a legitimate enough ruse. Mr. Salter was sued by name. He could at least be served: and a personal claim against him for damages (their Lordships say nothing upon

the question whether there was any ground for that claim) made his description as the holder of a non-existing office less noticeable, and perhaps innocuous, at least until the trial. It is surprising perhaps that this blot in the proceedings did not, in Canada, strike either the defence or the Court. But when exposed by learned counsel for the respondents it became obvious. The fact is that the only relief possible in this action is corporate relief. Any order made would necessarily have to be an order for payment to the company if, and when rescuscitated, so as to receive it, or, at least, for payment into Court to a separate account if such a course is permissible by provincial practice. But an order for payment to any contributory of any part of any sum for which the respondents might be found liable is out of the question. No such individual right to receive payment exists. Any sum recovered becomes *eo instanti* part of the assets of the company ultimately available for distribution, the company presumably having no longer any creditors, amongst the contributories, whether of the minority or the majority according to their respective rights and interests therein in a due course of liquidation and irrespective of the source from which the divisible fund originally emerged.

And if the appellant's case is made to rest upon proof of the allegations of fraudulent conspiracy inserted in the statement of claim, the result for this purpose is the same. It is, however, fair to the respondents that their Lordships, having heard the appellant's case, should here say that, in their judgment, these allegations so recklessly made have not, in this action, been established. Their Lordships, indeed, during the course of the argument, invited the appellant's counsel to withdraw them. They pointed out that the charges were made without discrimination against each individual member of the syndicate, and that the fraudulent conspiracy alleged was directed, not only against the appellant—that might have been intelligible—but against every other minority shareholder, that is to say, for example, against Mr. Williams, and, after his death, against his estate; and that one of the alleged conspirators against Mr. Williams and his estate was Mr. McKim, a partner of Mr. Williams, and of Mr. Walsh, and that at a time when he was actually acting as solicitor for the Williams estate. There was discrimination neither in the alleged conspirators nor in the persons against whom the conspiracy was alleged to be organised. There was no suggestion that any minority shareholders, as, for instance, the Williams estate, were being separately favoured by being allowed by the syndicate to participate in their profits or otherwise. In the absence of any such suggestion, the existence of such a conspiracy as alleged was, in its universality of range on both sides, almost unthinkable. But counsel, on instructions, refused to make any withdrawal and this refusal will have to be borne in mind when the question of costs comes up for consideration, as it will presently.

The claims of the appellant being, therefore, in their Lordships' opinion, claims competent only to the company itself, the respondents are so far well warranted in their objection to competence now under consideration.

The question next arises whether they are also right in their further contention that this claim cannot be maintained or prosecuted in an action constituted as the appellant's action is. And, as the company is no party to that action, the answer must, their Lordships think, clearly be in the negative. But assuming that by amendment the company were to be added as respondent, the Board, let it also be assumed, having power to direct such an amendment to be made, could the appeal then be maintained? This is the real question, and quite clearly, in their Lordships' judgment, it could have been so maintained if the company were not in liquidation. *Cook* v. *Deeks ubi cit.*, is clear authority for this. But could it be so maintained now that the company is assumed to be in liquidation? And the answer must again, as their Lordships think, be in the negative.

The permissibility of the form of proceeding thus assumed, where the company concerned is a going concern, is an excellent illustration of the golden principle that procedure with its rules is the handmaid and not the mistress of justice. The form of action so authorised is necessitated by the fact that in the case of such a claim as was successfully made by the plaintiff in *Cook* v. *Deeks*—and there is at least a family likeness between that case and this—justice would be denied to him if the mere possession of the company's seal in the hands of his opponents were to prevent the assertion at his instance of the corporate rights of the company as against them. But even in the case of a going company a minority shareholder is not entitled to proceed in a representative action if he is unable to show when challenged that he has exhausted every effort to secure the joinder of the company as plaintiff and has failed. But *cessante ratione legis, cessat lex ipsa.* So soon as the company goes into liquidation the necessity for any such expedient in procedure disappears. Passing over the superficial difficulty that a company in compulsory liquidation cannot be proceeded against without the leave of the Court, the real complainants, the minority shareholders, are now no longer at the mercy of the majority, wrongly retaining the property of the company by the strength of their votes. If the liquidator, acting at the behest of the majority, refuses when requested to take action in the name of the company against them, it is open to any contributory to apply to the Court, and under section 234 of the Provincial Companies Act, which corresponds to section 252 of the Imperial statute, it is open to the Court, on cause shown, either to direct the liquidator to proceed in the company's name or on proper terms as to indemnity, and otherwise to give to the applicant leave to use the company's name as plaintiff in any action necessary to be brought for the vindication of the company's

rights. Nor is the contributory confined to that form of procedure. It would be open to him, so far at least as the respondent directors are concerned, under section 243 of the Act, without leave from anyone and by motion or summons on the winding up jurisdiction, himself to bring the respondents before the Court and obtain relief on the company's account, against a respondent whose liability to the company is in that proceeding established. See and contrast *Cape Breton* v. *Fenn*, 17 Ch.D. 198. And it is the policy of the Act that all claims competent to the company should be brought within the scope and control of the winding up, and that not only in a compulsory liquidation. Therefore, such procedure is not to be discouraged.

In the result, in their Lordships' judgment, the objection taken to the competency of the present proceedings in relation to the relief now alone asked for is well founded: and the only possible order to be made is one dismissing the appeal.

The objection, fatal to the appeal, fatal indeed to the cause, was taken, as has been seen at a very late stage. In ordinary circumstances, it would be right to make some special order as to the appellant's costs, thrown away as the result of the respondents' delay. But their Lordships feel it their duty to mark their sense of the appellant's refusal to withdraw those charges of conspiracy and fraud that, in their Lordships' opinion, had not been supported in evidence. They will accordingly humbly advise His Majesty that this appeal be dismissed and with costs.

In the Privy Council.

ANDREW FERGUSON

v.

HELEN A. WALLBRIDGE AND OTHERS.

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