63,1936

COURT OF APPEAL

09.9.16

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA
FROM THE JUDGMENT OF THE HONOURABLE MR.JUSTICE MURPHY
DATED THE 28th DAY OF MARCH, 1935.

IN THE MATTER OF THE "COMPANIES ACT"

AND

IN THE MATTER OF PIONEER GOLD MINES
LIMITED (IN LIQUIDATION)

VERNON LLOYD-OWEN (PETITIONER)
APPELLANT.

and

JOHN S. SALTER, Liquidator of
Pioneer Gold Mines Limited (In
Liquidation)
PETITIONER

and

ALFRED E.BULL, J.DUFF-STUART,
R.B.BOUCHER, F.J.NICHOLSON,
HELEN A.WALLBRIDGE and D.S.
WALLBRIDGE, EXECUTORS AND TRUSTEES
OF THE ESTATE OF ADAM H.WALLBRIDGE
DECEASED:
RESPONDENTS

A P P E A L B O O K

Mr.Ian A. Shaw,
Solicitor for the Appellant

Mr.J.A.MacInnes
Counsel for the Appellant

Mr.H.A.Beckwith
Victoria Agent,

Mr. T.Edgar Wilson,
Solicitor for the Respondents

Mr. J.W.DeB. Farris,Esq.,K.C.
Counsel for the Respondents

Messrs. Elliott,
MacLean & Shandley,
Victoria Agents.

Mr.Charles W. St.John
Counsel for the Liquidator

Solicitor for the Liquidator

Messrs.Jackson &
Baugh-Allen,
Victoria Agents.

No. 12 of 1936

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Solicitor for the Respondents

Mr.J.W.DeB.Farris,Esq.,K.C.
Counsel for the Respondents

Messrs.Elliott,
MacLean & Shandley,
Victoria Agents.

Mr.Charles W.St.John
Counsel for the Liquidator

Solicitor for the Liquidator

Messrs.Jackson &
Baugh-Allen,
Victoria Agents.

I N D E X

I N D E X cont'd

Petition

TO THE CHIEF JUSTICE OR ANY OTHER JUDGE
OF THE SUPREME COURT OF BRITISH COLUMBIA.

THE PETITION OF VERNON LLOYD-OWEN and JOHN S. SALTER, humbly showeth, that

1. Your Petitioner, Vernon Lloyd-Owen, is a Lumberman and resides at 1565 Harwood Street, in the City of Vancouver, Province of British Columbia.

2. Your Petitioner, John S. Salter, is an Accountant and resides at 601 West 22nd Avenue, in the City of Vancouver, Province of British Columbia, and is the Liquidator of Pioneer Gold Mines Limited (In Liquidation).

3. Your Petitioner, Vernon Lloyd-Owen is a member of Pioneer Gold Mines Limited (In Liquidation) and is the registered holder of 10,580 shares in the capital stock of the said Company, No.470,003 to 480,002 and 479,423 to 480,002 inclusive.

4. By order of this Honourable Court dated the 11th day of July, 1933, and made upon Petition presented to this Court through the Vancouver Registry as No.426/33 the dissolution of Pioneer Gold Mines Limited (In Liquidation) was declared to have been void and the time for final dissolution of the Company was extended until the 20th day of May, 1936, subject to the further order of the Court.

5. In an action in the Supreme Court of British Columbia, No. F 891/32, one Andrew Ferguson as Plaintiff sued Alfred E.Bull, J.Duff-Stuart, R.B.Boucher, Francis J. Nicholson and the Executors and Trustees of the Estate of Adam H.Wallbridge (all of whom are hereinafter referred

to for convenience as the "Wallbridge Syndicate")together with your Petitioner, John S.Salter as Liquidator of Pioneer Gold Mines Limited (In Liquidation).

6. The Judgment in the said action was appealed by the Plaintiff to the Court of Appeal and thence to the Judicial Committee of the Privy Council. The Petitioners will, on the hearing of this Petition crave leave to refer to the Reasons of the said Judicial Committee.

7. It appears from the said Reasons that in the opinion of Their Lordships the Plaintiff Ferguson was not nor was any other minority shareholder in Pioneer Gold Mines Limited (In Liquidation) competent to bring a minority shareholders action to recover from majority shareholders or directors assets allegedly belonging to the Company. Their Lordships indicated that such action after the commencement of voluntary liquidation, can be taken only in the name of the Company.

8. 51% of the issued share capital of Pioneer Gold Mines Limited (In Liquidation) is controlled by the Wallbridge Syndicate and your Petitioner, Vernon Lloyd-Owen, believes that an appeal to the Company in general meeting to authorize the Liquidator to commence an action in the name of the Company against the members of the said Syndicate to recover property of the Company wrongfully diverted by them to their own use, would be futile.

9. Your Petitioner, Vernon Lloyd-Owen, has requested his co-Petitioner to take action in the name of the Company against the members of the said Syndicate but the Co-Petitioner declines to take any action without the directions of the Court.

10. Your Petitioner, Vernon Lloyd-Owen, as a member of the said Company, is desirous that appropriate

proceedings be taken in the Company's name for the vindication of the Company's rights with respect to the matters complained of in the action aforesaid, which are set out in extenso in the Reasons of the Privy Council, and for such other relief against the said parties or others as Counsel may advise.

11. Your Petitioner, John S. Salter, as Liquidator of the Company in voluntary liquidation has, at the request of the said Lloyd-Owen, joined in this Petition for conformity with the provisions of the "Companies Act" and for the purpose of obtaining such directions as the Court may see fit to give and your Petitioner as such Liquidator, submits himself to the directions and orders of the Court.

WHEREFORE YOUR PETITIONERS PRAY:

For directions in relation to the course to be followed by the Liquidator in the premises.

YOUR PETITIONER, VERNON LLOYD-OWEN, PRAYS

(a) For an Order that the Liquidator of Pioneer Gold Mines Limited (In Liquidation) be directed to take action forthwith in the name of the Company against such persons as Counsel may advise and without limiting the generality of the foregoing, against Alfred E.Bull, J. Duff-Stuart, R.B.Boucher, F.J.Nicholson, Helen A. Wallbridge and the Executors and Trustees of the Estates of Adam H.Wallbridge and Lewis K.Wallbridge, or any of them, for the recovery of all property and assets of the Company which may be alleged to have been wrongfully acquired by the proposed Defendants, or any of them, and without limiting the generality of the foregoing, for the following relief;

1. For a Declaration that the profit on

an Agreement dated January 21st, 1925, and allegedly made between the Company and the members of the Wallbridge Syndicate, was and is the property of the Company.

2. For a Declaration that 800,000 shares in Pioneer Gold Mines of B.C. Limited and all dividends thereon acquired and/or received by the members of the Wallbridge Syndicate, were and are the property of the Company.

3. For all necessary and incidental orders to compel the proposed Defendants to restore to the Company all such monies and properties, together with interest, or

4. In the alternative, to compel the proposed Defendants to contribute such sum or sums to the assets of the Company by way of compensation in respect to the matters complained of as the Court may think just, and

5. For orders for the interim preservation of the subject matter of the litigation, and

6. For such further and **other relief as may be available to the Company.**

(b) In the alternative your Petitioner, Vernon Lloyd-Owen, prays that he be granted leave to bring action in the Company's name to obtain relief as aforesaid on the Company's account for vindication of the Company's rights.

AND YOUR PETITIONERS, as in duty bound, will ever pray, etc.

DATED at Vancouver, B.C., this 13th day of

Petition

March, 1935

VERNON LLOYD-OWEN

Per "Ian A. Shaw"
His Solicitor

JOHN S.SALTER,Liquidator
of Pioneer Gold Mines Limited
(IN LIQUIDATION)

Per "Chas W.St.John"
His Solicitor

This Petition was filed on behalf of the Petitioner,Vernon Lloyd-Owen, by Ian A.Shaw, whose place of business and address for service is Room 201, Inns of Court Building 678 Howe Street,Vancouver,B.C.,and on behalf of the Petitioner, John S.Salter, by his Solicitor, C.W.St. John, whose place of business and address for service is Suite 422, 744 Hastings Street West, Vancouver, B.C.

It is proposed to serve this Petition on such persons as the Court may direct.

Affidavit of
Vernon Lloyd-Owen

A F F I D A V I T

I, VERNON LLOYD-OWEN, of 1565 Harwood Street, in the City of Vancouver, Province of British Columbia, Lumberman, make oath and say as follows:

1. That I have read the Petition herein dated the 13th day of March, 1935, and say that such of the facts therein set forth as are within my own knowledge are true and such of the facts therein set forth as are not within my own knowledge are true to the best of my information and belief.

2. That now produced and shown to me and marked Exhibit "A" to this my Affidavit is a copy of the Reasons of the Judicial Committee of the Privy Council in the case of Ferguson vs Wallbridge et al referred to in the Petition.

3. That now produced and shown to me and marked Exhibit "B" to this my Affidavit is a copy of the Order of the Supreme Court of British Columbia dated the 11th day of July, 1933, and referred to in Paragraph 4 of the said Petition.

4. That I am fully familiar with the said case, having attended the trial of the action, having perused all the Exhibits and having read the Record filed by the Appellant Ferguson on his appeal to the Privy Council and I say that all material facts as alleged by the Appellant in that case and as set out in the Privy Council Judgment are true to the best of my knowledge, information and belief and were proven in the said action and in any new action can be fully substantiated by evidence.

5. That on or about the 28th day of February, 1935, I requested the Liquidator of Pioneer Gold Mines

Limited (In Liquidation) to take appropriate proceedings in the name of the Company against various parties for the vindication of the Company's rights and caused to be delivered to the said Salter a request in writing, a copy of which is now produced and shown to me and marked Exhibit "C" to this my Affidavit.

SWORN BEFORE ME at the City of Vancouver, Province of British Columbia, this 13th day of March, 1935

"Vernon Lloyd-Owen"

"F.R.Anderson"
A Commissioner for taking Affidavits within British Columbia.

Order

BEFORE THE HONOURABLE) THURSDAY, THE 14TH DAY
MR.JUSTICE MURPHY) OF MARCH, 1935.

THE PETITION of Vernon Lloyd-Owen and John S. Salter, having this day come on for hearing; upon reading the Petition herein dated the 13th day of March, 1935, and the Affidavit of Vernon Lloyd-Owen sworn herein the 13th day of March, 1935, and filed, and the Exhibits therein referred to: and upon hearing Mr.C.W. St.John of Counsel for the Liquidator of Pioneer Gold Mines Limited (In Liquidation) and Mr.J.A.MacInnes of Counsel for the Petitioner, Vernon Lloyd-Owen, and the Court, being of the opinion that the further hearing of the Petition should be deferred until notice thereof has been given to those persons who were Defendabts in the recently concluded litigation of Ferguson vs Wallbridge et al:

THIS COURT DOTH ORDER that the hearing of the Petition herein be adjourned until Thursday, the 28th day of March, 1935.

AND THIS COURT DOTH FURTHER ORDER that the Petition herein and Affidavit in support, together with Notice of Hearing, be served upon the following parties at least four days before the date of the adjourned hearing, namely: Alfred E.Bull. J.Duff-Stuart, R.B. Boucher, F.J.Nicholson, Helen A.Wallbridge and D.S. Wallbridge, Executors and Trustees of the Estate of Adam H. Wallbridge, deceased.

LIBERTY to the Petitioners to apply for further directions as to service in the event of there being any difficulty in effecting service upon any of the said parties within the time limited as aforesaid.

AND THIS COURT DOTH FURTHER ORDER that service be effected as soon as reasonably possible.

AND THIS COURT DOTH FURTHER ORDER that a copy of this Order be served upon each of the said parties at the time of service of the Petition herein

BY THE COURT

"H.Brown"
Dep.DISTRICT REGISTRAR

10 D.M.J.

Approved

Chas.W.St.John

Entered
Mar 15 1935
Order Book,Vol.93 Fol.100
Per A.L.R.

Affidavit of A.E.Bull

I, ALFRED EDWIN BULL of the City of Vancouver in the Province of British Columbia, Barrister-at-Law, MAKE OATH AND SAY as follows:

1. I have read the Petition of Vernon Lloyd-Owen, and John S. Salter, dated the 13th day of March 1935 and filed herein, and I am the Alfred E. Bull referred to therein. The said Petitioner Vernon Lloyd-Owen took an active interest in and assisted the Plaintiff Andrew Ferguson and his solicitor in prosecuting the said action of Andrew Ferguson against myself and the other Defendants referred to in paragraph 5 of the said Petition. The said Vernon Lloyd-Owen several times attended at my office and the office of Thomas Edgar Wilson, Solicitor for the Defendant Gen.J.Duff-Stuart, Dr R.B.Boucher, Francis J.Nicholson and myself and spent many hours in said office with Mr.Ian Shaw, solicitor for the said Plaintiff Andrew Ferguson, perusing and examining many of the papers and documents produced by and on behalf of the said Defendants in the said action.

2. THE said Vernon Lloyd-Owen attended the trial of the said Ferguson action and also attended at the hearing of the Appeal in the said action by the Judicial Committee of the Privy Council in London,England.

3. THAT now produced to me and marked exhibit "A" to this my affidavit is a true copy of extracts from the transcript of the proceedings made by public stenographers on the hearing of the said appeal by the Judicial Committee of the Privy Council from the time it commenced on the 16th day of July until the end of Appellant Counsel's argument on the 23rd day of July 1934.

4. THAT during the hearing of the argument of Counsel for the Appellant Ferguson as set out in the transcript produced as exhibit "A" the legal question, "that a minority shareholder in Pioneer Gold Mines Limited, in liquidation, was not competent to bring the said action, but that such action could only have been taken in the name of the said Company," had not been raised or mentioned and the said legal question was not mentioned or raised before the Judicial Committee of the Privy Council until the Counsel for the Appellant had completed his argument.

5. THAT the costs of the Defendants, other than Salter, in the said Ferguson action down to and including the trial were taxed on the 4th day of May 1933 and allowed at $3151.80 and the costs of the said Defendants in the Appeal to the Court of Appeal in June and July 1933 were taxed at $1353.10 and the costs of the Defendants in the said action and the said appeal to the Judicial Committee of the Privy Council were taxed and allowed at £1262 7s.10d.,equalling $6109.98 Canadian funds at the present rate of exchange of $4.84 to the Pound Sterling, making total taxed costs payable to the Defendants of $10,614.88, for which the Defendants have judgments against the plaintiff in the said Ferguson action and none of the said costs have been paid, except $200.00 received as the security deposited on account of the Defendants" costs of the Appeal to the Court of Appeal and £500 deposited as security for the costs of the Defendants in the Appeal to the Judicial Committee of the Privy Council.

6. I am informed by Mr.C.W. St.John, Solicitor for the Defendant Salter and verily believe that the said Salter's costs of the action and appeal to the Court of Appeal, although not yet taxed, will amount to over

$2200.00.

7. The solicitor and client costs paid by the Defendants in defending the said Ferguson action amounted to over $50,000.00.

8. NOW produced to me and marked exhibit "B" to this my affidavit is the Record in the said Ferguson action in the Appeal to the Judicial Committee of the Privy Council.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia this 27th day of March A.D. 1935.) "A.E.BULL"

"E.R.Young"

A COMMISSIONER FOR TAKING AFFIDAVITS WITHIN BRITISH COLUMBIA.

A F F I D A V I T

I, Charles William St.John, solicitor, of the City of Vancouver, Province of British Columbia, make oath and say as follows:-

1. That I am Solicitor for John Sutherland Salter, the liquidator of the said Pioneer Gold Mines Limited (In Liquidation).

2. Now produced and shown to me and marked Exhibit "A" to this my affidavit is a letter dated the 28th day of February, 1935, from Lawrence & Shaw to the said John S. Salter. The said Exhibit "A" was delivered to me by the said John Sutherland Salter as his solicitor in this matter.

3. Now produced and shown to me and marked Exhibit "B" to this my affidavit is a letter dated the 26th day of February, 1935, from one Vernon Lloyd-Owen. The said Exhibit "B" was delivered to me by the said John Sutherland Salter as his solicitor.

4. Now produced and shown to me and marked Exhibit "C" to this my affidavit is a letter dated the 12th day of March, 1935, addressed to and received by me from J.W. DeB. Farris, K.C.

5. I am informed by the said John Sutherland Salter and verily believe that he, as liquidator of the said Pioneer Gold Mines Limited (In Liquidation) has distributed all of the assets of the said Company, excepting the moneys, if any, recoverable by the Company in these proceedings, amongst the creditors and shareholders of the said Company as required by law and that therefore he has now, with the exception aforesaid, no assets of the said Company in

his hands.

SWORN BEFORE ME at the City of Vancouver, Province of British Columbia, this 28th day of March, 1935.

"Chas.W.St.John"

"John E.Baird"
A Commissioner for taking affidavits within British Columbia.

Exhibit "B" to the Affidavit
of Vernon Lloyd-Owen

426/33

In the Supreme Court of British Columbia

In the Matter of the "Companies Act"

and

In the Matter of Pioneer Gold Mines Limited (In Liquidation)

Before the Honourable Mr.Justice Murphy } Tuesday, the 11th day of July, 1933.

Upon Petition presented to this Honourable Court on behalf of Andrew Ferguson personally and as administrator of the Estate of Peter Ferguson deceased, for an order that the dissolution of Pioneer Gold Mines Limited (In Liquidation) be declared void and that the liquidation of the said Company be continued upon terms; and the said Petition having come on for hearing on the 20th day of March, 1933, and having been adjourned until the 21st day of March, 1933, and having on the said date come on for hearing before this Honourable Court presided over by the Honourable Mr. Justice Murphy, and having been referred by the Honourable Mr.Justice Murphy for disposition to the Judge of this Honourable Court presiding at the trial of a then pending action in this Honourable Court under number 891/32 wherein the Petitioner was Plaintiff and John S. Salter liquidator of Pioneer Gold Mines Limited (In Liquidation) and certain directors and shareholders of the said Company were Defendants; and the said Petition having been spoken to before the Honourable the Chief Justice, the Judge presiding at the trial of the said action, and having by him been directed to stand until the 21st day of April,

Exhibit "B" to Affidavit
of Vernon Lloyd-Owen.

1933, and having on the said date been adjourned generally to be brought on by notice or by arrangement of the parties; and by consent having this day come on for hearing. Upon hearing Mr.Ian A. Shaw of counsel for the Petitioner and Mr.C.W. St. John of counsel for the Liquidator of Pioneer Gold Mines Limited (In Liquidation):

Upon reading the Petition herein dated the 15th day of March, 1933, and the affidavit of Andrew Ferguson sworn herein the 15th day of March, 1933, and filed, and the exhibits therein referred to, and the affidavit of John S. Salter sworn herein the 17th day of March, 1933, and filed, and the exhibit therein referred to, and the affidavit of Ian Alastair Shaw sworn herein the 21st day of April, 1933, and filed:

And upon it appearing that on the 13th day of April, 1933, the claim of the Petitioner as Plaintiff in the aforesaid action had been dismissed by the trial Judge and that the said judgment has been appealed to the Court of Appeal:

THIS COURT DOTH ADJUDGE AND DECLARE the dissolution of Pioneer Gold Mines Limited (In Liquidation) to have been void.

AND THIS COURT DOTH FURTHER ORDER, ADJUDGE AND DECLARE that on the 20th day of May, 1936, the Company shall, unless otherwise ordered, be deemed to be finally dissolved.

AND THIS COURT DOTH FURTHER ORDER that if at any time before the said 20th day of May, 1936, the aforesaid action of the Petitioner shall have been dismissed by order of any Appellate Court or Tribunal

Exhibit "B" to Affidavit
of Vernon Lloyd-Owen.

and the time for appealling from such decision shall have expired and no appeal taken, the Liquidator of the said Company or any other person who appears to the Court to be interested, may apply to vary this Order and to have the Company finally dissolved.

AND THIS COURT DOTH FURTHER ORDER that a copy of this Order shall be filed with the Registrar of Companies within one month from the date hereof.

By the Court

"J.F.Mather"

District Registrar

Checked

S.V.L.

J.F.M. D.R.

Entered
Jul 13 1933
Order Book, Vol. 86, Fol.250. Per L.J.B.

Approved

(Seal)

"Chas W.St.John"

D.M.J.

Exhibit "B" of Affidavit
of A.E.Bull.

This Exhibit consists of the printed Record in the Privy Council in the action of Ferguson vs Wallbridge et al, and, being too voluminous to copy, is furnished to the Court in printed form.

This is Exhibit "A" to the
Affidavit of Alred Edwin Bull

FERGUSON et al vs WALLBRIDGE et al

Extracts from proceedings
before Privy Council

Page 66:

LORD BLANESBURGH: One sees exactly what your position is, right or wrong, with reference to the grant of the concession to Sloan that the directors or three of them who agreed to it, had, by virtue of the deed of trust, an interest in the transaction to Sloan; one understands that thoroughly. This is different, is it not? You have to look at this from a different point of view, this second transaction by which the liquidator, under the direction of the committee of creditors, or with the assent of the creditors, purported to, and did, sell the undertaking of the Company, subject to the agreement for a trust, which was then accepted by virtue of a resolution of the creditors. You are not entitled, are you, to make the same complaint, certainly not the same sort, with reference to the intervention of the Syndicate as creditors in relation to that transaction?

MR. MacINNES: No, my Lord.

LORD BLANESBURGH: They have no fiduciary position towards the Company in that respect, have they, or towards you as a minority shareholder?

MR. MacINNES: No, my Lord.

LORD BLANESBURGH: Therefore, if you are going to make any definite or original or independent complaint of this transaction, which was the sale by the liquidator of whatever there might be in the Compan

Exhibit "A" to the Affidavit
of Alfred E. Bull.

if Sloan's agreement had been fulfilled, you have to find some other ground?

MR. MacINNES: Yes, my Lord. The creditors, as creditors, would have a right; there was no

PAGE 67 fiduciary relation between them and the Company.

LORD BLANESBURGH: They have the right to get their money.

MR. MacINNES: Yes, as best they could get it.

LORD RUSSELL: I presume the Syndicate got hold of the property under this; they did not exercise their option for $100,000 dollars.

MR. MacINNES: We come to that; we will see how that works out Your Lordship has made a good guess.

LORD RUSSELL: If this was a plot, surely they would take it under the 45,000 dollars and not under the 100,000 dollars option?

MR. MacINNES: That was not carried through; there was another transaction by which they got it for 70,000 dollars.

LORD RUSSELL: They did not get it under either of these transactions. Sloan could have got it for them for 100,000 dollars.

Page 78:

LORD BLANESBURGH: Inasmuch as that offer is made conditional upon Mr. Sloan's agreement being approved by 95 per cent of the shareholders, that means this offer will come to nothing if your people object. That is right, is it not?

MR. MacINNES: Yes.

LORD BLANESBURGH: That would mean upon the terms of this letter that offer would come to nothing if

your people, Ferguson, objected, because there would not be 95 per cent of the shareholders in its favor?

MR. MacINNES: But Mr. Bull's idea all the time, as expressed in his testimony many times in the trial, was that----

LORD BLANESBURGH: Unless this was communicated to the Fergusons it was not much use?

MR. MAcINNES: Not much use.

LORD BLANESBURGH: It never went to the Fergusons?

MR. MacINNES: No. Then paragraph 41; "On the 5th December, 1924, the meeting of the shareholders was held. The record of attendance at the meeting was: W.W.Walsh, allegedly representing 184,592 shares, (These were the Ferguson shares, both the hypothecated shares and those not hypothecated)".

LORD BLANESBURGH: Had he authority to represent those?

MR. MacINNES: None whatever.

MR. FARRIS: He was the registered owner.

LORD BLANESBURGH: That may help it out. That is very important. So far as the Company was concerned, he was on the register?

MR. MacINNES: He was on the register, but there is a peculiar provision in our Companies Act.

LORD BLANESBURGH: We will have to look at that.

MR. MacINNES: It is totally different from the English Act in that respect.

LORD BLANESBURGH: He was the registered owner of those shares?

MR. MacINNES: Yes, English law would make him so, I think, but the British Columbia Companies Act will not. "A. H. Wallbridge representing 382,499 shares (These were the Syndicate 51 per cent);

H. C. Seaman, allegedly representing 30,000 shares (These were Ferguson's shares pledged to secure a debt).

LORD BLANESBURGH: To get it right, I think that possibly may be the reason why the letter of the 28th November was addressed to Mr. Walsh only, because he was the registered owner of all the shares. It may not have been adequate, but it would be some sort of justification.

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MR. MacINNES: That was the idea behind it. "W.J.Twiss representing 30,000 shares"- that is his own "J.Duff-Stuart 1 share; A.E.Bull 1 share; W.W. Walsh, Executor of the Williams Estate, representing 102,899 shares."

LORD BLANESBURGH: I do not see why the representation should be different there. If it is a registered owner who is a shareholder he ought to have come into the 184,000.

MR. MacINNES: "There were ten shareholders of the Company resident in England, none of whom were present or represented by proxy or otherwise. Vernon Lloyd-Owen, of Birken, British Columbia, was not present, nor were either of the Ferguson brothers, nor were Dr. Boucher, Dr. Nicholson, nor Mr. McKim".

LORD ALNESS: Was a notice sent to each of these gentlemen?

MR. MacINNES: No, there was no notice sent to Ferguson.

LORD ALNESS: Each of them had one share?

MR. MacINNES: Each of the Fergusons.

LORD ALNESS: You say neither of them got notice direct; you say that, rightly or wrongly?

Exhibit "A" to the Affidavit
of Alfred E. Bull

MR. MacINNES: Andrew Ferguson was definite he did not; Peter Ferguson had died.

LORD BLANESBURGH: Was Andrew Ferguson living at the time at his address?

MR. MacINNES: It is said a letter was sent to Seattle.

LORD BLANESBURGH: Was it with regard to notice to the two Fergusons, or either of them?

Second Day

Page 4

LORD BLANESBURGH: Your answer is that that is not subject matter for a majority vote?

MR. MacINNES: No subject matter for a majority vote.

LORD RUSSELL: You say it is no subject matter for a majority vote; it is a dealing by the Company, that is what it is, acting through its Liquidator approved by the shareholders at a meeting of shareholders.

LORD THANKERTON: With, I assume, a statutory majority.

LORD RUSSELL: What more do you want than a majority for that purpose?

LORD THANKERTON: Is it your case that the Liquidator was a party to the fraud, as you call it?

MR. MacINNES: Our case precisely is this, that the Liquidator did not pay any attention; he did what he was asked to do without any thought or care.

LORD THANKERTON: He was a tool in their hands?

MR. MacINNES: Exactly. The Minutes of that meeting of contributories your Lordships will find on page 483.

LORD ALNESS: You realise the seriousness of that charge?

MR. MacINNES: I do, my Lord.

LORD ALNESS: You make it deliberately?

Exhibit "A" to the Affidavit
of Alfred E. Bull

Page 9

LORD RUSSELL: There is a provision in the Articles with regard to accidental omission to give notice.

Page 14

LORD THANKERTON: It all seems to come back, does it not, to the two meetings of the shareholders and possibly the meeting of the creditors as well? If that was valid then there was nothing abnormal for them to make a profit out of the transaction; it may be a big profit. That is not evidence of fraud, or anything like it. You must get back earlier, must you not, as to how they got it into their hands, not the benefit they get out of it afterwards? People generally purchase a thing in the hope of making a profit. The real crux of the thing is, is it not, these two meetings, assuming for the moment you say there was not a valid quorum at the directors' meeting that this shareholders' meeting purported to validate, and the creditors' meeting? That is the centre point of your attack, is it not?

MR. MacINNES: Yes, my Lord, with this addition, that we contend that the evidence will show the whole thing was connected from the beginning once the Sloan deal was made.

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LORD THANKERTON: Assuming you are going to satisfy us that the condition in Sloan's offer was not made open to the minority shareholders, do you suggest, after having refused the two cents assessment per share, they were to come in under that? I should have thought it was pretty obvious. I do not say that they had done everything that

was right. You have to satisfy us there is something wrong. But looking at it from the legal point of view, it seems pretty obvious that if the syndicate had not raised the 8,000 dollars to comply with the condition of Sloan's offer, the Company would have been in liquidation the next day, would it not, with a debt of 40,000 dollars to the syndicate?

MR. MacINNES: It might have been put into liquidation at any time.

LORD BLANESBURGH: No, Lord Thankerton means that it would have been in real liquidation, because it could not go on. It would be a break up altogether

LORD THANKERTON: Having refused to provide means which would save it from going into liquidation, the minority shareholders are now trying to get the benefit of the people who tried to pull it out of the rut.

Page 30

LORD THANKERTON: You have yet to show me any justification for the suggestion of fraud against these gentlemen, which is a very serious charge.

Page 31

LORD THANKERTON: There is no suggestion, is there, that if Sloan had said: Yes, I will buy for the 100,000 dollars, that would not have come to the company?

MR. MacINNES: Quite right, my Lord, there is no suggestion of that kind. I think the suggestion there is that they tried to sell to Sloan.

LORD THANKERTON: It was because of Sloan's condition that it was necessary to get some further money

raised otherwise than through Sloan.

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LORD BLANESBURGH: That is perfectly right. You will forgive me putting it,but I think you have involved yourself in difficulties by trying to prove things that perhaps are not correct,and which really do not follow from the case, if you prove them. You have to bear in mind that at this particular moment when the Sloan option came along the financial affairs of the Company were desperate, and there was no source from which it appeared possible that money could be obtained to enable operations to continue and prevent the Company from stopping. If the Company had then stopped,there would have been nothing for anybody, majority or minority shareholders. The majority shareholders, being the syndicate, came forward and said: We will finance this Company to the extent of enabling it to go on, but it is only to be on the terms that we ourselves keep, so far as Sloan does not get it, the advantage that will accrue. Accordingly, we will make an arrangement under which the Company can do that. We will grant this option to Sloan on the terms that Sloan will for a consideration that we will give, namely 8,000 dollars, give us half of his interest. That was the arrangement. One has to consider it altogether, apart from the minority or the majority. One has to ask whether that arrangement,when carried through, had any validity at all. The answer is, at law it had none by reason of the fact that the only transaction by which the Company purported to be bound was a resolution passed at a meeting of Directors

which was no meeting. Accordingly, attached to that Sloan agreement that document was, as a binding document on the Company,worthless,and it is your case that that agreement was worthless at the date of the liquidation. Then you come to the liquidation,and you say that the thing itself did not exist, because it had not been properly sanctioned, and there was no authority by which it could exist. Accordingly, the liquidator would have said: This agreement is no agreement, and the whole of the property of this Company is still the Company's, as it always was; What is to be done with it by me; and he deals with it accordingly. It seems to me that talking about fraud and conspiracy is simply not facing the issue. You will forgive me saying it, but I think it beats the air to talk about conspiracy and fraud, when you have the point of the liquidation, and bear in mind, when they came to the liquidation, they divided the Company's assets in the way in which they did.

LORD ALNESS: I am very much impressed by the way My Lord Blanesburgh has put the case to you, Mr. MacInnes; but shall I find anything on those lines in your case from beginning to end?

MR.MacINNES: Yes, my Lord; I think so.

LORD BLANESBURGH: You get into confusion to my mind by talking about freezing out the minority shareholders at a time when the Company was in despair.

LORD BLANESBURGH: That is the title that Mr.Sloan got.

MR.MacINNES: Yes. Then as regards the transaction

that we were attacking, we say that the defendants took to themselves this right to the purchase price from Sloan which should have gone to the Company.

Page 35 There are three points in the transaction I wish to draw your Lordships' attention to. In the first place the whole thing was one transaction although expressed in two different documents. Secondly the whole transaction was based upon and founded upon the disposal of the Company's assets. If it were not for the undertaking of the Company which went to Sloan under the working bond,then Sloan would not have touched it so it was a consideration for the working bond given in connection with the property that Sloan undertook to carry half interest. Why should the consideration for dealing with the Company's property have gone to any particular portion of the Company to the exclusion of another portion, or should it have gone to the Company? Could these Directors by their control or this Syndicate working through the Directors ----

LORD BLANESBURGH: But you have to begin. They got it for themselves by payment.

MR.MacINNES: No, my Lord,they did not pay anything for it.

LORD BLANESBURGH: Did not they pay 8,000 dollars?

MR.MacINNES: No, they agreed to contribute to Sloan in a sum of 8,000 dollars.

LORD BLANESBURGH: They paid that for their half.

MR.MacINNES: It was to Sloan for the carrying on.

LORD BLANESBURGH: Sloan having agreed with the Company that they should provide 16,000 dollars,he says: I can only provide 8,000 dollars and they had to

provide 8,000 dollars. They paid 8,000 dollars for what they had got. It seems to me to have been good in law.

LORD RUSSELL: What is the position after the Declaration of Trust was executed, as if the agreement between

Page 36 Sloan and the Company had been an agreement between Sloan and the Syndicate on the one hand and the Company on the other? I do not understand your saying it was part of the consideration which ought to have gone to the Company.

MR.MacINNES: They dealt with the Company's property, my Lord, and they handled the Company's property and disposed of it in such a manner which would get for themselves a contract which they considered an advantage. That was exactly what was done in the case of Menier v.Hoopers Telegraph Works.

LORD THANKERTON: Do let us get clear about the contract Personally I have a very clear view of that. They wanted to get this mine developed. They could only get it developed by means of working according to the option to purchase, the personal undertaking or working bond. Sloan was the gentleman they got and Sloan said: Yes. He said in effect: I will pay you 15 per cent of any results I get - this is only the substance of it -- as soon as those results turn out favourable. Sloan said: I require some cash obviously to do the development and to get the returns. I cannot put it all up myself. He comes to the Syndicate and says: Will you put it up; they say that they will. On their becoming liable to find the half capital necessary for development purposes to

enable the Company to get 100,000 dollars as it turns out, their consideration,as between them and Sloan for the finance necessary for the development, was that they were not to get the return of the money plus interest, but they were to get a half share in what Sloan had got from
Page 37 the Company. Of course, it has turned out well, and very naturally your people, who did not agree to the 2 cent levy, and have not the good thing
10 for themselves, want to see if there is not some way to get hold of it. I cannot at the moment see how there is any possible question of fraud here. However, you say you will give some evidence of that. Secondly, they may say that there are invalidities in the methods by which the Company and the Directors at the time took to convey the title to Sloan, and they may attack that; they may also say that on some legal ground the Syndicate in advancing the 8,000
20 dollars or becoming bound to advance the 8,000 dollars in return for a certain consideration must be acting on behalf of the Company. It sounds a little startling to me at first sight, but that must be the case; not that they got benefit, but they had become liable to advance 8,000 dollars for a consideration which turned out a more than ample consideration, if you like, but they must be held to be acting on behalf of the Company. It may affect only those who are
30 Directors and, therefore, they must hand over the benefits received as if it had been the Company. It startles me at present, but I am quite willing to listen to that case if youhave

it. I have read the Statement of Claim, and a good deal of that seems to be absent from the Statement of Claim. It is not enough to have it from your Case even if it is in that.

MR.MacINNES: Your Lordship sees what the Syndicate was desirous of getting was enjoying the prospect of sharing in the future of the Company. The future and the prospects of the Company was Company

Page 38 property was it not?

LORD THANKERTON: I do not think it is quite fair to the Syndicate. They were willing to take the chance and to advance money in order to take the chance of the mine turning out to be a good one.

LORD HLANESBURGH: Will you be able to make more out of this concession by Sloan than the fact that for one reason or another it was absolutely void? Suppose in point of law the transaction had taken the form that Lord Russell indicated, which is the result of it, that this was an option granted to Sloan of the first part,to the Syndicate of the second part, by the Company under and by virtue of which the Syndicate and Sloan were shown on the face of the option to be equally interested in Sloan's part of the bargain. Supposing that had been put in plain language? Quite plainly that agreement could never have been voted by the Board of Directors who were themselves, or three of them, members of the Syndicate. There was no quorum to do it, and they could not do it at all. It would be absolutely void. It remains just as void because they took it in the form of a Declaration of

Trust from Sloan as if they had taken it by agreement with the Company. What more can you have when you come to liquidation than that.

MR.MacINNES: Is not that the case that I have been trying to make out, my Lord?

LORD ELANESBURGH: You have been talking about other thing-----minority shareholders and every conceivable thing. Probably the 100,000 dollars was to go to the Company for the benefit of everybody. It was only the benefit that Sloan got that they were

Page 38
39 dealing with.

MR.MacINNES: It was only the benefit of participating with Sloan.

LORD ELANESBURGH: That, so it is suggested, was the thing which made the whole transaction void having regard to the way in which it was carried out. If it had been sanctioned by a general meeting of the Company held as a general meeting, but it was not. It was done by the Directors, not by them only, but they were interested as Directors and, therefore, void. What better can you get for starting a liquidation than that?

MR.MacINNES: It is a good way.

LORD ELANESBURGH: Could you get a better beginning than that?

MR.MacINNES: In addition to that we say this was done by design.

LORD ELANESBURGH: Does that matter? If it was void at the time of the liquidation and the liquidator ought to have dealt with it as the entire property of the Company,then you must see whether in the liquidation it was so manipulated and dealt with as in fact it was to the detriment of the minority

shareholders. Is not that the real position you have to face?

MR.MacINNES: Now we have this, that as a result of that negotiation or the transactions in July this syndicate,without any authority,was participating with Sloan in the future of that Company,which we say was a right which the Company had.

LORD BLANESBURGH: Was participating with Sloan in that which had been the property of the Company?

MR.MacINNES: Yes,my Lord. When the Company takes that stand, I submit that is a fraudulent undertaking which the law will not permit.

LORD ALNESS: It is a very stale charge of fraud. You are challenging an agreement in 1924, and your Statement of Claim is 1932.

MR.MacINNES: Yes, my Lord. The fact is that Ferguson did not learn of this transaction in any shape or form, except that it was a sale to Sloan. He never knew there was any participation or any sharing by this syndicate with Sloan in the deal until a short time before he brought his action, and then he became active to begin his action to get his rights. There is no contradiction about that. So that, so far as he was concerned, it was not stale, although there had been a number of years passed over.

LORD THANKERTON: The case that my Lord Blanesburgh put to you in truth would be this, would it not, that if none of the accounts purporting to be valid accounts of the transactions on behalf of the Company were valid to convey any title to Sloan or the syndicate, the result would be that the mine and all its properties remained the property of the Company

and never ceased to be the property of the Company; and, so far as Sloan dealt with the Company, he would be bound to account to the Company for those properties? It is nothing to do with fraud or communicating benefits or anything else. Assuming that by initial or subsequent validation, Sloan got a perfectly good title and so did the syndicate, there, again, what is the ground for attack upon that, if the Company is held to have given it under a bond for working and then subsequently

Page 40 given it on payment of the purchase price; What ground of attack can there be? There is no case for fraud or communicating benefits or anything else that I can see left. I would like to be satisfied that it is in your Pleadings. The first case is whether the mining claims ever ceased to be the Company's property.

LORD BLANESBURGH: Just to make it plain,the theory that I have been putting to you is a case that you might be able to find that at the moment the liquidation comes -- that is the critical moment --Sloan had no title. You have,therefore, to see whether what was done in the liquidation operated to give him a title as against the minority shareholders,and for that purpose you have to do what up to now you have been ignoring, namely,to see when these meetings were called, whether a full statement was made as to the true position, so that everybody could be said to be bound by it, or whether a full disclosure was not made, so that the minority shareholders were not ousted from their rights. That is a part of the

case which has been, as it seems to me,forgotten,but it is the actual basis of your case. You have to succeed, if you can,by showing that that meeting in the liquidation was inoperative to do what it purported to do

MR.MacINNES: That I think I can show in the act.

LORD ELANESBURGH: That is a thing you have to do, but,as my Lord Thankerton was saying, have you pleaded any of these things? What is your Statement of Claim? Let us look at that now.

MR.MacINNES: The first twelve paragraphs are not material.

LORD RUSSELL: I think we had better look very carefully at your Statement of Claim.

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MR.FARRIS: I would ask my learned friend to be good enough to begin at paragraph 7.

LORD ALNESS: Speaking for myself, it is paragraph 7 where the charge of fraud is made.

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LORD THANKERTON: There is not a word there about the validity of the meetings except one point that is made in paragraph 20 and the question of non-disclosure of material facts.

LORD ALNESS: Do you anywhere suggest or say that the alleged ratification is bad because of the intervening liquidation?

MR.MacINNES: No, my Lord, that is not alleged directly.

LORD THANKERTON: Or indirectly?

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LORD ELANESBURGH: In fact there is no suggestion in the Statement of Claim as between Sloan and the Company that the option given to him was invalid?

LORD ELANESBURGH: You have very specific allegations

with regard to the meetings held in the liquidation,but you do not have much with regard to the Directors' meetings at which the option was given.

LORD THANKERTON: The two points as regards the meeting during the liquidation is (a) that there was concealment of material facts which the liquidator knew as regards the 100,000 dollars as an asset,and (b) the failure to send notice of the meeting?

MR.MacINNES: Yes. Will your Lordships refer to paragraph 18 of the Statement of Claim: "On December 5th, 1924"---

LORD THANKERTON: That is non-disclosure of material facts. That is summarised in paragraph 19. That summarises the two preceding paragraphs. I cannot find anywhere any suggestion apart from the two questions, the failure to send notice to one of the Fergusons and failure to disclose the then known value of the asset in regard to which they were asked to ratify the agreement. I do not find any suggestion of invalidity or attack on the meeting of the 5th December at all.

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MR.MacINNES: The meeting of July 16th is attacked in paragraph 13.

LORD BLANESBURGH: Not on the ground that they were interested Directors. You talk about notice and so forth. That is not the reason why this is invalid; there was no proper quorum.

MR.MacINNES: I think the allegation is there,my Lord, because "the said Sloan was not an independent contractor, but as to an undivided one half interest in the said option, was merely a trustee for the defendants". Is not that an allegation that it was not valid?

LORD BLANESBURGH: No: the defendants are not all Directors-----only three of them. It is not pointed to the thing you are now using it for. Nobody could discover this real

allegation in that form of words.

MR.MacINNES: What we say in the Statement of Claim is that these people agreed together to do these various things of which we are complaining, and by agreeing together they then conspired to do that. What they did we say was to take from the Company that which belonged to the Company,namely, the right to enjoy the fruits of its own property and get a consideration for any sale of its property which might be negotiated by the Board of Directors.

LORD THANKERTON: Your full case is based upon the assumption or statement that these defendants acquired the assets, not that they failed to acquire. You do not ask for a Declaration that these meetings were invalid. On the contrary the only Declaration you ask for is that they acquired the assets.

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MR.MacINNES: Yes. It was so patently put to him.

LORD THANKERTON: How could he possibly say what he said on page 325, line 30 - "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. "

That makes clear as daylight how these things were not dealt with; naturally enough they were not pled.

MR.MacINNES: The action went throughout on the validity and the ratification. The whole thing was tried on that basis. Then, my Lords, at line 21, on page 328, the Judgment goes on: "At the date one share each out of the 750,000 shares" etc. (Reading to the words,line 47)

"and the verbal statements made at the said meeting, disclosed fully the true situation."

LORD BLANESBURGH: The Chief Justice does not seem to explain why it was that the Sloan option required to be confirmed. He has not said anything which indicated invalidity.

MR.MacINNES: "There was no concealment by the defendant of any knowledge they had as to the developments or as to
Page 50
any results".

(Reading to the words, line 24, page 329) "The Fergusons were in no way deceived or kept in ignorance of the true situation at any time".
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That is the finding of fact,so there is not a particle of evidence in support; and the only evidence on the point is the very opposite. "The exigencies with which the defendants were confronted from time to time justified the various bona fide steps taken in acquiring the interests now held by them. The meetings necessary during all these periods were properly convened. The meeting held to ratify and confirm the option and sale to Sloan was properly convened, notice of which I am satisfied was duly served or conveyed to the plaintiff and to his brother. 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". In that Judgment the learned trial Judge did not deal with the question of invalidity of the July transaction and the results flowing therefrom. He did not deal with the proposition of validity or invalidity of the proceedings during winding up.

Exhibit "A" to the Affidavit
of Alfred E.Bull.

LORD THANKERTON: Nor did your notice of appeal, I think. If that was an omission of the Trial Judge you should have commented upon that in the notice of appeal.

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LORD THANKERTON: The one solitary point is in (f) and (g) of that head, the words about they did not give notice which had been dealt with and had been found against you, and probably the next one (h), failure to give due information; but that is really a different class of point.

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LORD ELANESBURGH: There you have the point dealt with by that Chief Justice.

MR.MacINNES: "Looking at the frame of the action one sees that Sloan is not a defendant. In fact counsel for the plaintiff stated in argument that the most sensible act of the Board was the giving of the option to Sloan". The Chief Justice was in error distinctly there is that respect because what he suggested to counsel on the argument was: Are you seeking to set aside the option to Sloan? No. Well,why? Two reasons; perhaps it may have been the best thing they could have done under the circumstances, or ----------

LORD THANKERTON: Is that your argument?

MR.MacINNES: I submit the Chief Justice was wrong in his facts there, and you see that from the reasons of the other judges when I come to them.

LORD ELANESBURGH: Sloan was no party to any breach of trust.

MR.MacINNES: No: the Chief Justice misapprehended the claim of the Plaintiff with regard to the 800,000 which these Defendants received.

LORD THANKERTON: Surely he is dealing with the difference

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between declaring the transaction bad and declaring that

the benefits of the transaction are held in trust. Accepting the transaction, he is saying the former could not be maintained because Sloan was implicated in it, but the latter may be maintained.

LORD BLANESBURGH: What does he mean by that?

MR.MacINNES: I do not know. "Nor can the defendants be declared trustees of this interest for him."

LORD BLANESBURGH: "When the Plaintiff acquiesced in and relied upon the option" -------

MR.MacINNES: I think what he means there is that, not having sought to set it aside, you must therefore treat them as having adopted it.

LORD THANKERTON: I think that is it.

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LORD BLANESBURGH: May I ask you this: Does this learned Judge, when he goes on, distinguish between the position of the directors while the Company was a going concern and their position after liquidation, or does he treat this criticism of their conduct as applicable all through?

MR.MacINNES: All through, my Lord.

LORD BLANESBURGH: That seems to be difficult.

MR.MacINNES: All through,my Lord,I think your Lordship will find that is right.

LORD BLANESBURGH: Because they cease to be directors on the liquidation.

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MR.MacINNES: This is the dissenting judgment. "This appeal has relation to what now would appear to be a regularly producing gold mine" etc.(reading to the words, line 31) "undertook to treat the property of the Company as their property" ------

LORD BLANESBURGH: The learned Judge has put that a little bit too high. Supposing in point of fact there had been no agreement between Sloan and the directors but simply the option given to Sloan without the back letter at all,there would have been no defrauding the Company. There would have been the same result, as far as the Company was concerned.

MR.MacINNES: That would appear to be right;,--"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; and the effort was made throughout a long course of procedure - which in my opinion was fraud by way of a breach of duty - and they endeavoured to bring about the unassailability of what was done - all profitless in my opinion as the initial fraud and breach of duty permeates the whole and renders all these proceedings - by way of putting up fences - absolutely nugatory. Why were these proceedings adopted in what way is it attempted to be justified?"

LORD BLANESBURGH: This would be quite justified if any such suggestion as this could be made, but it cannot be made,that the option which was granted Sloan was deliberately fixed at a low price because the directors were participating in half of his profits. That would be completely defrauding the Company; but that is not suggested. The mere fact that Sloan divides his profit with the directors may be quite improper for another point of view, but it does not defraud the Company; the Company's position would be precisely the same,assuming the option to be well drafted, if there had been no such back letter; you agree with that?

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LORD THANKERTON: That is the first time I have heard of it. I have heard of an offer that someone should come in

Exhibit "A" to the
affidavit of Alfred E.Bull.

and contribute half the capital necessary for development, which is not what you have just said

Page 67. MR.MacINNES: The last proposition was ultimately as Mr.Bull puts it in his evidence, that after ten days or so it was licked into the shape in which it appeared, the working bond from the Company and the declaration of trust back.

LORD THANKERTON: That is not the way you put it. You suggested just now that Sloan had said to the Company If you will stand in half with me I will take it on. That is not what he said, or anything like it. What he said was: I will take it it over and work it under a five years agreement. 15 per cent of the proceeds to be paid to the Company up to the tune of 100,000 dollars, when I can acquire it, and then he says to the people who are dealing with him on behalf of the Company: But I must have some assistance in providing the capital necessary to develop, and it is a condition of my offer that that should be provided. That was made a condition.

MR.MacINNES: That was a condition.

LORD THANKERTON: That is not an offer of a half interest.

MR.MacINNES: May we leave it just that way? There is the proposition that came before these men in their dual capacity.----

LORD THANKERTON: You have to remember that it is a proposition which ranged from 125,000 dollars to 90,000 dollars, all of which had fallen through - a very fair test of the market value of a proposition of that type.

MR.MacINNES: Even stronger against me than that is the fact that Ferguson,convinced that the property is being ruined through inefficiency -----

LORD THANKERTON: Some of these people who had options sent up their own people to inspect, and one of them spent 1,000 dollars in finding out the truth about it, and they were not going to be put aside by mismanagement, or anything of that kind.

MR.MacINNES: In regard to that option the fact is in evidence that the engineers who made the inspection and turned it down did not make any inspection satisfactorily for the property. However, the point is that when Sloan made that proposition or when that Sloan proposition came up for consideration, the directors of the Company, also members of the Syndicate at Wallbridge's house agreed to accept the terms,and they took to themselves the right to associate with Sloan in respect to the Company. There was a new asset and a very substantial asset.

LORD ELANESBURGH: No, that surely is not so.

MR.MacINNES: But, my Lord, it was so.

LORD ELANESBURGH: We are only on one point with regard to Mr.Justice McPhillips' judgment where he talks about the transaction as it went through being a transaction which robbed the Company of something. What I am wanting to point out to you is this, that so soon as you accept the option to Sloan as one which was properly granted, the Company lost nothing by reason of the fact that Sloan agreed to divide half his profit with the directors; it would have been precisely the same for the Company if that back letter had never been entered into, unless you are going to attack the transaction itself by saying: By reason of that interest in it under Sloan they took from him a smaller price than he would have paid. You cannot put it that way.

Exhibit "A" to the
affidavit of Alfred E.Bull.

MR.MacINNES: I put it the other way.

LORD ELANESBURGH: How do you get any loss to the Company by reason of that bargain with the directors, so long as you accept the option to Sloan as being one that you cannot question?

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LORD THANKERTON: That is the Company having its cake and eating it, selling this proposition to Sloan and then claiming to share in the profits that Sloan made out of it.

LORD ELANESBURGH: Let me ask you this in the form of a perfectly definite question, and you answer it. I will begin with a hypothesis. You are not attacking the option to Sloan at the moment?

MR.MacINNES: No.

LORD ELANESBURGH: I will assume the directors have no interest whatever in that. Do you follow me?

MR.MacINNES. Yes.

LORD ELANESBURGH: None at all. Now I want to ask you this: In what way would the Company as a Company have been better off if Sloan had kept the whole interest to himself than the Company was by virtue of the agreement he made with the directors?

MR.MacINNES: It would not have been any better off.

LORD ELANESBURGH: Therefore the Company has not been defrauded of its property by this arrangement if you once accept the option to Sloan.

MR.MacINNES: I say the option to Sloan was not 100,000 dollars, but was accompanied by the offer back,namely, the half interest in the venture which would result from the working of that option.

LORD ELANESBURGH: I do not think that is the evidence at all: Sloan would not give 100,000 unless he

received assistance with regard to the 16,000.

MR.MacINNES: That assistance could have come from the Company.

LORD RUSSELL: Could the Company have put up 8,000?

MR.MacINNES: Supposing it could not, then the question would come back to the directors.

LORD BLANESBURGH: It does not affect your case with regard to your right to take it; I am only taking this definite statement from the judgment that that agreement that they made in point of fact as an agreement resulted in loss to the Company and a taking of the Company's property; it did not. Whatever else it may have done it did not do that. If there had been no such agreement the Company would not have got a halfpenny more from Sloan under his option than it does now; absolutely the same sum.

MR.MacINNES: It would be the same thing.

LORD BLANESBURGH: Absolutely the same sum. What the directors got was something under Sloan, something out of the profits.

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LORD RUSSELL: Under these Articles the director may make a profit at the expense of the Company, provided he discloses it. Disclosure is the whole thing.

LORD BLANESBURGH: Subject to correction from anybody. I feel at the moment that there is a good deal to be said for this point of view, that suppose you establish that in point of fact the agreement that was made between the Syndicate and Sloan was

Page 73 an agreement which, so far as the directors were concerned - because they were directors at the time they made it - make them accountable to the Company for any profit that they made in respect of that

agreement, and that that was the actual position, that they were accountable to the Company for the profits in their pockets at the date of the general meeting, at which it was said that this contract was to be approved, then I think one would want a great deal of argument to be satisfied that they were entitled to vote in support of that resolution even as shareholders, because that does look like using their vote to take the Company's property to themselves.

MR.MacINNES: That is exactly what our contention is.

LORD BLANESBURGH: But you have to prove a great deal before you get to it in this case.

LORD THANKERTON: I ask you not to take up the two things together. The question of oppression,as it is called and unconscionable conduct are quite different questions from the question whether a contract is invalid or the benefits of it must be communicated. Surely you would agree with that?

MR.MacINNES: Yes.

LORD THANKERTON: Quite a different question. The fact that such a contract was concluded and there was benefit to be got from the contract is a very relevant fact on a question of oppression; but the point we are on at the present moment has nothing to do with oppression at all. The point was whether this was a contract that could be justified by the directors in question, or whether they would be bound to communicate the benefit of the contract; in other words, be held to have contracted on behalf of the Company if the Company claimed communication of the benefit. Accepting the contract, they must get into the place of the directors in the contract.

LORD BLANESBURGH:

What I was thinking of was the sentence at line 39 on page 340: "The directors cannot,by using their voting power as shareholders, with the aid of these certain other shareholders in general meeting prevent the Company claiming the benefit of it".

MR.MacINNES: There are certain contracts which a Company cannot adopt. A contract ultra vires in the strict sense their powers they could not adopt,or anything of that kind. The Company could not ratify or adopt the actions of directors which are ultra vires; neither can they, in the same way, adopt actions of directors which are illegal in the sense of being subversive.

LORD BLANESBURGH: That is not the way to put it. It is whether the directors themselves are under a power to vote in support of a resolution which would give them the Company's property. The other shareholders can give it to them if they like. Can they take it for themselves? That is the point. Do you not see the difference?

MR.MacINNES: They can either take it for themselves---

LORD BLANESBURGH: The other shareholders can give it to them.

MR.MacINNES: Not by a majority. They would have to have, I submit, a hundred per cent, vote of all the shareholders.

LORD BLANESBURGH: I am assuming the other shareholders are all the other shareholders than themselves. You must agree that that would be quite permissible?

MR.MacINNES: I cannot agree to that because I think it is contrary to the law.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD BLANESBURGH: All other shareholders can agree that they should keep it. The point is this resolution was only carried by their own votes; are they entitled to vote in support of it?

MR.WILFRID GREENE: It was unanimous, my Lord.

LORD BLANESBURGH: Unanimous: I suppose they shouted. They were not all there.

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LORD RUSSELL: The majority of the other shareholders would be enough?

MR.MacINNES: I think not.

LORD RUSSELL: A Company can only act in one of two ways; it can act through its directors or it can act by the vote of its shareholders in general meeting and a majority vote is sufficient.

LORD THANKERTON: A disqualified vote is no vote.

MR.MacINNES: The judgment proceeds: "I do not propose to follow out the long and complicated procedure" etc. (Reading to the words, at line 17 on page 341) "being an executed contract".

LORD BLANESBURGH: "That a decree go for an account". In whose favour, in favour of the Plaintiff?

MR.MacINNES: In favour of the Company, the Plaintiff says it must be for the Company.

LORD BLANESBURGH: The Defendants get their share; they are shareholders.

MR.MacINNES: For the whole Company --"being an executed contract,and whatever form of consideration" etc. (Reading to the words, at line 2 on page 345) "must account for all profits received".

LORD BLANESBURGH: One rather feels if you have to bring your claim down to that date of the Company meeting, after liquidation, that there is no respect in which

the directors are in a worse position than the other two, they would all be the same: they would either all get off or all be caught. You are ignoring the original transaction as having done nothing and have to justify this as a voting.

LORD RUSSELL: If you are driven to that, what took place at the meeting in December, it is just as if the proposition before the meeting then was that the liquidator should be authorized to seal for the first time a contract between Sloan and the six members of the Syndicate on the one hand and the Company on the other; that is what it comes to, is it not?

MR.MacINNES: Can you ignore the fact that the situation existing in December and in respect of which this meeting was called in December, arose from the act of the directors on the 16th July, and it was a condition that had been created by these directors requiring, as they thought, confirmation or ratification by their shareholders, and they brought about this December meeting for the purpose of completing what they had improperly or unhappily done in July.

LORD BLANESBURGH: You say that you put them in a difficulty by reason of the fact that this meeting was asked to confirm something.

MR.MacINNES: Yes, and there was no suggestion to the shareholders -----

LORD RUSSELL: Does that make any difference in law, because the meeting is only asked to confirm it? I think the expression used is "validate", but it is only asked upon the footing that what has been done hitherto is not binding upon the Company. In truth and in substance it is asking the Company to enter into the agreement.

Exhibit "A" to the
affidavit of Alfred E.Bull.

MR.MacINNES: That would be a question to debate.

LORD RUSSELL: That is language which it is difficult to apply to the case of a Company in winding up; it is asking those interested to authorize the liquidator to exercise the power of the Company to enter into such an agreement.

LORD THANKERTON: You have to remember, surely, that this was subsequent to the increased offer for the assets of the Company.

LORD RUSSELL: It is a new offer.

LORD THANKERTON: And there is a liquidation, neither of which was present at the time the directors put through the original contract with Sloan.

LORD RUSSELL: That is why I think you will have to deal with the case as if it was a new proposition brought forward in December.

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LORD RUSSELL: As Lord Thankerton puts it, it must be a new transaction, because it contained a fresh element; it is not merely validating the old transaction, but it is entering into a new one.

LORD BLANESBURGH: There was no fresh element in relation to Sloan.

MR.MacINNES: There was no fresh element in relation to Sloan.

LORD BLANESBURGH: This has also to be remembered. I quite recognize that this is a nasty thing to say, but one judicially has to say nasty things which one would not say in private life. At the time when the transaction in July was entered into, there is no doubt that the position of the Company was desperate, or it appeared to be desperate,

and this 8,000 dollars which had to be found by the directors was probably absolutely essential. That I gather from you to be the position. After the Company had gone into liquidation and after they had passed the resolution in December, by that time everything had become rosy.

LORD RUSSELL: That is a question of evidence.

LORD BLANESBURGH: Except that there were reports, which were not disclosed, showing the position had changed. That I understand is your case on the facts. So if it was void in December, nothing at all, then to ask shareholders to ratify a transaction which gave so much of them under their contract it should be plainly stated.

LORD RUSSELL: If that was the true position you have an enormous case of under-value.

LORD BLANESBURGH: You are going to give us the evidence with regard to what the facts were known to the Defendants on the 5th December when the resolution was put before the meeting of shareholders. That you have to do by reference to the evidence.

MR.MacINNES: Yes.

LORD BLANESBURGH: Does he say anything about the shareholders as well as the directors.

MR.MacINNES: Yes, my Lord, "Further shareholders -- not directors -- parties to the fraud and breach of duty and members of the Syndicate carrying out the sale and profiting by the secret agreement also must account for all profits received."

LORD BLANESBURGH: Then he gives his reasons for that.

MR.MacINNES: No, my Lord, but there is good authority for that.

LORD BLANESBURGH: Are these cases he refers to on that point?

Exhibit "A" to the
affidavit of Alfred E.Bull.

MR.MacINNES: No, my Lord. The case that will cover that is the Imperial Mercantile Insurance case

LORD BLANESBURGH: Then he goes on: "It follows that, in my opinion, the directors must account to the Company for the profits achieved in respect of the sale to Sloan of the mining property of the Company and so must the shareholders who along with the directors obtained an advantage to themselves not shared by the other shareholders -- the profits derived were really assets of the Company." He does not say anything at all with regard to any advantage they got by the agreement to purchase the property subject to that. I mean by the agreement that was for the first time ratified in December. He does not say anything about that.

LORD THANKERTON: The agreement was not ratified, it was authorized.

MR.MacINNES: That was by itself.

LORD THANKERTON: That was the new offer calling for tenders.

LORD BLANESBURGH: You took no exception to that agreement.

MR.MacINNES: Which Mr.Justice McPhillips and Mr.Justice Macdonald said was only a matter in succession as part of the original scheme. That is the way it struck those learned judges, that it was merely a completion of the attempt made in July.

LORD THANKERTON: If you leave that standing, are not they the parties entitled to the proceeds of the assets?

MR.MacINNES: Your Lordship means leave the December meeting standing.

Exhibit "A" to the
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LORD THANKERTON: No, if you leave the sale of the asset by the Liquidator or the 70,000 dollars or whatever it is, standing. As I understood you to say a minute ago, you were not attacking it; then the party entitled to the profit on the asset on the transfer of the asset is, surely, the purchaser. That is the distinction between profit and damages.

MR.MacINNES: My answer there, my Lord, is a decision in the Imperial Mercantile v. Coleman &c.,

LORD THANKERTON: There is rather a singular misunderstanding of what I was putting to you. That does not answer in the slightest degree what I was suggesting. The transaction that you are attacking, as I understand, is the transaction with Sloan which gave the interest to the Syndicate via Sloan --their half interest in the Sloan transaction.

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: You are not attacking the Sloan transaction. That is not what I was referring to a moment ago. You are saying that any profits the Syndicate got by means of that transaction must be accounted for by the Company. But in the liquidation this asset was sold on a tender received in answer to an advertisement. I understood you to say in answer to Lord Blanesburgh a moment ago, that you are not attacking the conveyance of the asset to the purchaser for the 70,000 dollars.

MR.MacINNES: No, my Lord, that is not the point.

LORD THANKERTON: That is the point I want you to answer, please. Are you attacking that transaction or are you not?

MR.MacINNES: I am attacking that transaction. My answer to Lord Blanesburgh was not attacking the transaction

by which the new Company acquired the title. The other transaction we question very much. We say it is part of the scheme by means of which these various properties --

LORD ELANESBURGH: I do not find that the judge has said anything about that at all in your favour

MR.MacINNES: He apparently over-looked that 31,000 dollars.

LORD ELANESBURGH: I think Lord Thankerton, if I may be allowed to say so in his presence, is putting a very awkward point to you. You are endeavouring to obtain, as being the property of the Company, the interest of these directors under Sloan, and his option. You say that belongs to the Company and ought to be accounted for to the Company. Lord Thankerton says; Let that be so, but what has happened? The shareholders at this meeting on the 5th December, have sanctioned the sale of every asset that the Company had, subject only to the Sloan agreement, and they have that for the profit which has been paid by the Syndicate. What has it, in fact, got under that contract in relation to the property of the Company? Amongst other assets they get this interest under Sloan which they take for themselves, but which belonged to the Company and which will then come to the Company under this contract, as well as its assets, which have been recovered by your exertions in this suit.

MR.MacINNES: That is met in another part of our case in this way, that that was a transaction by which the Syndicate acquired from the liquidator the property of the Company subject to Sloan. That was something done on 5th December. Firstly:

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we say no notice of it was given, and secondly, it was done by an insufficient and incompetent meeting,and not in accordance with the Companies Act.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD BLANESBURGH: Then you do attack it.

MR.MacINNES: Yes, my Lord. One of my contentions which I am advancing is that the provision of the Winding-Up Act, the British Columbia Companies Act, Section 226, is that the Liquidator requires sanction for the disposal of the assets or matters affecting the future of the Company; he must have the sanction of an extraordinary resolution, and due notice for passing an extraordinary resolution has not been given, and the thing has been improper under Section 226B.

LORD BLANESBURGH: Now what is going to be the order of your argument?

MR.MacINNES: What I propose to do is to show first that the transaction in July was one by which the directors sought to acquire assets of value belonging to the Company, and take them to themselves in that when they had the opportunity in July arising out of this offer by Sloan to supply what the Company so badly needed theretofore, namely, the competent management, that they took that advantage for themselves and they did not allow the Company to have the advantage of that asset. They fixed a price of 100,000 dollars, which would go to the Company, and the participation with Sloan in that venture over and above that 100,000 dollars, would go to them ---

LORD THANKERTON: You say they fixed the price. They negotiated the price with Sloan.

MR.MacINNES: They negotiated a price with Sloan of 100,000 dollars which should go to the Company. The rest of the benefits of the Sloan transaction they took to themselves.

Exhibit "A" to the
affidavit of Alfred E. Bull.

LORD BLANESBURGH: No, half of them.

MR.MacINNES: Yes, my Lord, half of them.

LORD BLANESBURGH: There is no need for exaggeration.

LORD THANKERTON: It was not a certain matter; it was not a benefit in the least at that time. It was only because it turned out to be a benefit that you say that. There might have been a loss on that.

MR.MacINNES: My argument in support of that proposition is this: Menier v. Hoopers Telegraph Works, 9 Chancery Appeals, page 350, where the circumstances were very much the same ------

LORD ALNESS: Will you forgive me saying this before you go to the cases. Is it not possible to crystallise in the form of a proposition of law or of fact, the proposition which you rely upon for success. I have been groping after it and it is probably my fault that I have not got it.

MR.MacINNES: I put that, I think, my Lord, in paragraph 66 of the Appellant's case, page 25: "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 a 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 or 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 by the minority be permitted to accomplish the wrong, merely on a pretence that it falls within the internal management of the Company".

LORD ALLNESS: That is a proposition which at this time of day after all that has passed, you still rely upon?

MR.MacINNES: I think so, my Lord, because I think we come clearly under the authorities upon it. That is why I say my reliance has been placed on Menier v.Hoopers Telegraph Works,and Cook v. Beeks, 1916 Appeal Cases. They were both cases of contracts. In Menier v. Hoopers Telegraph Works, the Defendant Company was an operating Company manufacturing telegraph cables. They took part in promoting the European and South American Telegraph Company &c.

Page 84. MR.MacINNES: .....

Now, my Lords, applying that case here, what pressed itself upon me was that any bargain or agreement made by these Respondents with Sloan in July at Wallbridge's house was a bargain involving the disposal by them of the entire undertaking of this Company, the Pioneer Gold Mines, Limited. Out of the disposal of that undertaking they arranged that the consideration which was to be received from Sloan, the benefits which Sloan was to give by reason of their turning over the Company to him, would be divided in certain ways.

LORD THANKERTON: You cannot say that, unless you are going to say that the bargain offered by Sloan to the Company was an inadequate price. Then what has it to do with it? Sloan's arrangement with the Syndicate had nothing to do with the consideration to the Company. It may well be that the people having got some benefit out

of it, they have got to account for it, but that is another matter altogether. This suggestion that they diverted part of Sloan's consideration to themselves seems to me quite untrue in the present case, and you cannot make it.

MR.MacINNES: My answer is this. We do not agree that the Sloan transaction involved only the 100,000 dollars. The Sloan transaction involved more than that. The Sloan transaction involved the passing of the control of this Company to Sloan. It involved the opportunity and the chance of getting Sloan's co-operation in the management and control of that Company, and for the first time in the history of the Company it furnished to the Company the very vital thing that the Company needed, namely, competent and efficient management. These Directors or this Syndicate realized that, and they in their own way divided that transaction into two, and, instead of making it a contract whereby Sloan would undertake for a half interest in the Company to operate and control the Company provided that the Company supplied 8,000 dollars, they made it the other way round. They said: You take it for a nominal 100,000 dollars, the price that has been fixed in several of the options that have gone before; put it that way, and we will contribute with you; we will take one-half benefit ------

LORD THANKERTON: If you have any evidence to support that, I could understand such a case. The only tittle of evidence I know of already is directly contradictory of your being able to call it a nominal 100,000 dollars. All I know is that options were given ranging from 105,000 dollars to 95,000 dollars, which all fell through.

LORD BLANESBURGH: Supposing the option had been in this form, that Sloan on payment by him in the manner prescribed of 100,000 dollars to the Company, and on payment by the Company to him of 8,000 dollars, would hold the property which was comprised in those sales to him, so far as profit was concerned, as to one-half in trust for the Company and the other half to himself. That would be perfectly plain and easy. The 8,000 dollars could have been found by the Company in that case, and the 8,000 dollars would get a half. Suppose that having been done, and suppose the Company - not being able to find 8,000 dollars, the Directors found 8,000 dollars, but they found it on the terms that they kept half, and it did not go to the Company at all. Then would you say that was improper?

MR.MacINNES: I say that is improper, my Lord, as long as they are Directors of the Company and as long as they involved in the transaction of the disposal of an undertaking of the Company. The consideration that was given there that was passing from them to Sloan was entirely a Company undertaking -- the whole of it.

LORD THANKERTON: Is it not illegitimate to judge of it by what has happened years after? You talk of it as if the Syndicate just sat there and did nothing, but wait for profits to drop in their laps. They were risking 8,000 dollars.

MR.MacINNES: Did they not have to take the chance of putting up money for laying the cable under the contract in Menier v. Hoopers Telegraph Works?

LORD THANKERTON: I cannot see that the facts in that case have any similarity at all to the present case.

MR.MacINNES: It struck me, my Lord, that that was a covering case. That was the very essence of the thing. The Company's assets were used to obtain something in

the way of a contract which they took for themselves, not intended for the Company.

LORD THANKERTON: That is the whole distinction, as it seems to me -- something which was part of a contract which should have gone to the Company.

MR.MacINNES: Exactly, my Lord.

LORD THANKERTON: You cannot say that.

MR.MacINNES: Your Lordship asked me to give you the evidence. I think I have already read it, but may I give it to your Lordships again?

LORD THANKERTON: The evidence which you say justifies you in calling the 100,000 dollars a nominal price?

MR.MacINNES: No, my Lord. What I wish to say is that at that meeting at Wallbridge's house, when this thing first broke ----

LORD THANKERTON: Never mind the meeting at Wallbridge's house. I want to know the value of the subject - matter of the Sloan bond and sale deal. Do you say 100,000 dollars was the nominal price for it? Where is the evidence of that?

MR.MacINNES: I say the 100,000 dollars was made a nominal price when the matter was, as Mr.Bull says, licked into shape ten days or two weeks later. That was the method which they adopted of getting at this transaction as disclosed by Mr.Bull at page 247 of the Record.

LORD THANKERTON: It does not seem to me to be an answer at the moment, but we will look at it.

MR.MacINNES: I have read it before, I think. After referring to the assessment, he is asked: "Then you turned back to whom -- to Sloan? (A) Then we took another crack at Sloan. We put the proposition up to Sloan that he buy the property, and we offered it to him for 100,000 dollars" ------

LORD RUSSELL: That is to sell it outright?

MR.MacINNES: Yes, my Lord, outright -- " and we had quite a bit of negotiation, both myself and the late A.H.Wallbridge, trying to get him to take it over. So he afterwards came and put a proposition. He said, "if these people will come in with me, take half interest in it and put up half the money and take half the responsibility, I will take a working bond on it for five years at a purchase price of 100,000 dollars".

(Q) Was that discussed between you and your associates? (A) Yes. (Q) Was there any enthusiasm about putting up this new money? (A). No, I thought that was just the last chance of saving our money and getting the thing operated. We had to guarantee to raise 16,000 dollars. We were to raise 8,000 dollars and Mr.Sloan and his associates the other 8,000 dollars. (Q) And that was finally agreed upon by you? (A). Finally agreed upon. We had a meeting at Mr.Wallbridge's house, when Mr.Sloan definitely made that statement, proposition, and then we agreed. The point was then how we were going to divide." Then it goes on at line 9 on page 248: "(Q). The document with Mr.Sloan was drawn up by you, was it? (A). Yes. (Q) And submitted to this meeting of directors on the 16th July, 1924? (A) Well, it had been gone over by Walsh, McKim and Housser for themselves and the Fergusons, and by Mr.Sloan's Solicitor, Mr.Johannson, and finally all of them -- it took us a week or ten days to lick it into shape, and then we had a meeting on the 16th July, 1924, a directors' meeting".

LORD THANKERTON: It does not come near the point, if

I may say so. What I am asking you is why do you suggest 100,000 dollars, so far from being an adequate price, was a mere nominal price for this mine?

MR.MacINNES: Your Lordship is misunderstanding my use of the word "nominal", I think, By "nominal" I do not mean merely a small price. It was used as the figure at which in the written document with the Company it would be put. That figure was dictated by the fact that several options had been given round about that figure, two or three times. The Land option was 100,000 dollars and some other options were 100,000: Ferguson had spoken of selling for 125,000 dollars. When Sloan made the proposition it must have come in by the way; I will take a half interest in this property: I will not take it all. How could these people give him a half interest? The half interest in the property was something they could not give him because they did not control it. They did not want to give him their own half.

LORD THANKERTON: That was not Sloan's proposition. His proposition was that he himself would take over the whole thing for 100,000 dollars providing somebody would undertake to provide him with 8,000 dollars,and in return for that get from Sloan, not from the Company, a half interest.

MR.MacINNES: Yes, my Lord, and I say that started with the proposition to take a half interest. They could not give him a half interest in the Company, but they worked it out in this way: We will sell the property to you outright, and you give us back a Declaration for half interest. It was carried out on that basis.

LORD BLANESBURGH: I am putting it quite respectfully to you Mr.MacInnes, but how do you think you strengthen

your case by talking about what the transaction was in July if you have so far in your favour the proposition that the transaction in July was void?

MR.MacINNES: Of course, my Lord, if that is void ----

LORD BLANESBURGH: Are you going to transfer what you have been saying with regard to that transaction of July to the resolution of December?

MR.MacINNES: No, my Lord, I am going to say that the Resolution ----

LORD BLANESBURGH: If you are not going to do so, can you get anything more out of the transaction of July? So far as one can see it is not binding on the Company.

MR.MacINNES: The transaction in December is void for another reason.

LORD BLANESBURGH: You are on July at present, and you said that the whole thing is improper in July. I am asking you: Do you gain anything by the impropriety of July if in point of fact it was void?

MR.MacINNES: No, my Lord.

LORD BLANESBURGH: Then why elaborate this part of it?

MR.MacINNES: That was the angle from which the case presented itself to me all the time, and I am permeated with that idea. It may not be a good argument here, but that is the explanation of why it is so hard to discard.

LORD BLANESBURGH: There is one important branch of fact which you indicated and it might be very relevant on further consideration in this case. What was the change in circumstances with regard to this action in July as contrasted with December? You say there was some evidence which had been received in relation to the progress of the mine which shows it was a very different proposition in December from what it had been in July.

Exhibit "A" to the
affidavit of Alfred E.Bull.

SIR SIDNEY ROWLATT: I suppose in July it was still uncertain whether this option would ever work out to give Sloan the property? If he did not do certain things he would not get it.

LORD THANKERTON: They seemed to be uncertain as to the length of the vein.

THIRD DAY:

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MR.MacINNES: Yes. They had proved at that time at least this, that the then proposed shaft in the 500 feet level extended 140 feet in depth.The defendants say, with regard to this contention of ours as to the change in position by reason of the work at the mine, that they did not get reports from Sloan, and they were not conversant with the improvements that were made. Mr.Bull, on page 254, at line 40 and at page 255 gave his evidence upon that: "(Q) What was the state of your knowledge on the 5th December,1924, of the operations which Mr.Sloan had been conducting at the mine? (A). We just knew that he was operating the mine and was continuing the shaft down, and that he had brought out a little gold, two small bricks, one 2,700 dollars and one 6,300 dollars; 9,000 dollars altogether he had brought out, and 15 per cent of that had been handed over to the liquidator. (Q) Will you look at paragraph 17 of the Statement of Claim: "Between July 16th and December 5th,1924, the defendants, in their mining operations having developed upon the Pioneer Mine immediate ore in sight worth approximately 200,000 dollars". What have you got to say about that? (A) Well, that that was absolutely absurd. I know enough about mining now to know that

there was very little value to that find, and we did not know anything about that find until after that meeting, did not know that he had sunk the shaft until after that meeting, when he came down immediately before Christmas. (Q) - "and having tremendously increased the potential value of the mine". Had you? (A) No; all he had done was to find the vein,went down to the next level, expending some money in extending further. (Q) - "fraudulently concealed such facts from the shareholders and in particular from the Plaintiff". Did you conceal that fact fraudulently? (A) No, we did not know anything about the facts until after the meeting".

LORD ELANESBURGH: Do you accept that answer as the result of the evidence as a whole that this information you are referring to was only known to them after the meeting?

MR.MacINNES: That is what they say.

LORD ELANESBURGH: I am asking you if you accept it?

MR.MacINNES: I have to, my Lord, because there is nothing to show to the contrary."(Q) Now what did you discover from Sloan when he did come down? etc. (Reading to the words, line 45) "so that this wonderful discovery of ore that he talks about 200,000 dollars does not amount to much".

Then, my Lords, there is the evidence of Dr. Boucher, General Stuart, and Mr.Bebe,all going to the same effect, that is, that the defendants did not have information about what Sloan was doing at the mine. I will read their evidence together if I may.Mr.Bull's evidence continues at page 271, lines 22 to 32" (Q) When you drew this" -- that is talking about the working bond and option -- "came to this arrangement with

Exhibit "A" to the
affidavit of Alfred E.Bull.

Mr.Sloan, it was distinctly stipulated that the sinking of the shaft to the lower level should be undertaken as the preliminary work. (A) Yes. We had done the same with Land's option, and I think with Copp's option. (Q) So no matter what Copp or Ferguson or anybody else said, you agree with them when you say that the sinking of the shaft was the root of this problem as it stood then? (A) If there was to be any money spent on it we were going to see it was developed properly. (Q) And sinking the shaft was proper development? (A) Yes."

Then again at page 278, line 28 to page 279 line 7. "(Q) Now when Babe" -- Babe was an associate of Sloan's who was with him at the property in the early part of 1924 -- "came down on the 4th of December (The Court) What year? (Mr.MacInnes) 1924. (Q) He brought down with him that last brick? (A) The third brick. (Q) 6,300 dollars? 6,400 dollars. (Q) You saw him the day he came down or the next day? (A) No, I did not get in touch with him until the 6th, Saturday the 6th. I explained that he got down late at night: On Thursday the train came down. Friday morning" ---- that is the morning of the meeting -- "he took the brick to the assay office and he did not get the cheque for it until Saturday. (The Court) How much was the brick worth? (A) 6,400 dollars. But that would not be ascertained until they assayed it, measured it, and that was on the 6th of December. He got the cheque on the 6th of December and deposited it to the bank account of David Sloan in trust, and it was that afternoon I got in touch with him over the telephone. That was the first I knew he was down. (Mr.MacInnes) The first you knew he was down, eh? (A) Yes. (Q) Did not

you know he was down on the 4th December, or the morning of the 5th of December? (A) No. (Q) I understood Mr.Wallbridge told you that? (A) No, Wallbridge did not know. It was Saturday afternoon that Wallbridge told me that Babe was down, and he could not find out what progress had been made. (Mr.Mayers) That Babe was down? (A) Yes, And he could not get any information about the progress, and I said I would try and get it on the telephone".

Then at page 303, lines 31 to 36 there is another reference to that. "(Q) You were present at that meeting of the 5th December, 1924? (A) Yes. (Q) Was there any mention made at that meeting of the two bricks that had been brought down previously? (A) Yes, mentioned by somebody, Wallbridge or myself, or Salter, that Sloan was bringing down some - had brought down some gold: a couple of bricks had come down".

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LORD ELANESBURGH: Is there any evidence that the liquidato made any inquiry into this matter?

MR.MacINNES: No, my Lord.

LORD ELANESBURGH: So that he knew what the position was on the 5th December and took the responsibility upon himself of presenting it.

MR.MacINNES: He did not, my Lord.

LORD THANKERTON: Are you still maintaining that you have proved your allegation on page 6 of the Record, at line 30, about concealment at this meeting? I understood you to say you were accepting this evidence or had accepted it?

MR.MacINNES: I am simply showing your Lordships now apart from any suggestion against these defendants, that as a matter of fact there were certain conditions existing at the time the notice was sent for these meetings which were material for the shareholders to know, and that they were not known to the shareholders.

LORD THANKERTON: What are they? All the evidence you are reading is negativing concealment. What do you say was concealed? While the fact that the mine shaft had been sunk and that they had tapped the vein lower down was apparently not known at that date. That is what this evidence says, and you say you have to accept that evidence. What beyond that do you still say was concealed.

MR.MacINNES: I say the fact that the shaft was being sunk and that work was being carried on was known to everybody.

LORD THANKERTON: Sinking the shaft does not mean that the mine has become valuable.

MR.MacINNES: Not necessarily, my Lord. If your Lordships will allow me to develop this ----

LORD THANKERTON: All right. You still say you have something?

MR.MacINNES: General Stuart at page 297, lines 14 to 17 says practically the same thing. My submission is that the defendants knew that the shaft was being sunk and that it was part of the development operations being carried on, and that would be a very material thing for the shareholders to know when they came on the 5th December to determine whether or not they were going,to confirm the working bond and option. They did know as a matter of fact that the shaft was being sunk to an extent.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD ELANESBURGH: Who is "they"?

MR.MacINNES: The defendants, my Lord. The witnesses whose evidence I have just read did know that work was being done, but they were ignorant of the extent to which it had been carried out at the time of the meeting. There was this about it: if they did not know of the extent to which it was carried out they could have found out, because their manager to whom they had entrusted the work was in charge of the operations, and it was their knowledge through his knowledge of the facts.

LORD ELANESBURGH: Mr.MacInnes,may not this be by another part of the case on which you are embarrassed,namely that you are committing yourself to allegations in your Pleadings of moral turpitude which according to the evidence --which you accept -- you are unable to establish. Is not your difficulty this: Having framed your case on that basis, you are confronted with an embarrassment when you seek to put forward a case that might be a very strong case if it had not been preceded by those accusations of moral turpitude and fraud. As I gather, what you are going to try to say is this: In point of fact at this time on the 5th December -- and in point of law -- there was no agreement that Sloan was entitled to and their back letter was worthless. If they were going to get that thing restored in any way at all,it could only be, and ought only to have been, when the liquidator had properly inquired into the position, and seen what the actual state of the property was at that date, and if it was then ascertained that this was full of promises, Sloan being entitled, if you like, to keep his option, the back letter should have been secured by the liquidator for

the benefit of all the contributories on the terms of that being made by them and on their account, and the particular body, who are the Syndicate, ought not to have been allowed to keep it for themselves. That is a very intelligible case -- right or wrong: but unfortunately you are miles away from that case upon your allegations of moral turpitude and fraud and concealment, and so on, which apparently on the evidence completely failed.

MR.MacINNES: With regard to that,my Lord what I say is this: Supposing the plaintiff was wrong in his instructions with regard to the moral turpitude ---

LORD BLANESBURGH: That is to say, assume he could make any progress in this case without those allegations being made. They have been made and they have failed. I am taking it on your own statement that you have to accept this evidence.

MR.MacINNES: I accept more or less the definite ruling that your Lordships made on Tuesday, that I did not need to pursue that argument; that you were satisfied there was no fraud establishable. But I say,supposing the Plaintiff in his instructions made charges of conspiracy and fraud, what he says was that the acts which these people did resulted in their acquiring possession of this property by reason of the working bond and option and the back letter of July 16th. That was without authority, illegally and void by reason of the interest of the three Directors who carried it. The position at the time of the meeting was that these Directors and Sloan were then in charge of the property, operating under the terms of that working bond and option for themselves and Sloan. The Defence is: if that were wrong and with no authority in it, that it

was ratified and confirmed by a meeting of the 5th December. What I am trying to show your Lordships here is that at the meeting on the 5th December there was no ratification,first, because there was no proper disclosure of the real facts ----

LORD BLANESBURGH: There was no ratification,because there was no bargain.

MR.MacINNES: On various grounds. I say that the Pleadings show that the actual facts relied on by the Plaintiff were the taking of this property by these Defendants without right, and without title,and it was unjustified. If the Plaintiff was exuberant and over vehement in his allegation of fraud,it is only an over-statement of fact. It does not eliminate the fact that he says and charges in his Pleadings: You have this property, and you have it today when it should belong to the Company. If he makes charges of moral turpitude,and he fails in them and your Lordships find so,then it is a matter,not of dismissing his action on that score,because there is still left in the action the complaint that these Defendants have and had the Company's property without right or title. With regard to the charges made which are unfounded, if your Lordships so find, then the Plaintiff is in your Lordships' hands to deal with with regard to that.

LORD ALLNESS: Personally, I should like to know where we are. Is one to assume that the charges of fraud are now withdrawn by you?

MR.MacINNES: Do not put me into the position of withdrawing them,my Lord, I accept your Lordships' ruling.

Page 11. that they have not been proved on the evidence.

LORD BLANESBURGH: You must not say that. You have not read us the evidence. It is not a question of ruling,

because their lordships find the allegations of fraud have not been proved on the evidence; it is because of your statement that you have to accept that evidence, not by reason of our ruling. You must take the responsibility of these things yourself,and not put them upon us, without our having heard the evidence. We have not heard it. It is your own statement.

MR.MacINNES: I would have given your Lordships the evidence, and continued on Tuesday ----

LORD ELANESBURGH: Do it by all means, if you wish to maintain your charges.

MR.MacINNES: There was an intimation -----

LORD ELANESBURGH: There was no intimation.

MR.MacINNES: May I examine the thing, my Lord?

LORD ELANESBURGH: Certainly you may.

LORD ALNESS: Are you maintaining or are you with-drawing the charges of fraud?

MR.MacINNES: With regard to that,my Lord,my instructions are that these acts of the Defendants,working together in a combination throughout the whole of this piece, in which they, through the exercise of their majority power, on the 18th December acquired this property or this interest in this property with Sloan illegally, without right, continued to hold that, and when they sought ratification from the shareholders on the 5th December at this meeting they failed to disclose to the shareholders fairly the situation that existed at that time.

LORD RUSSELL: Let me see what you say in your Pleadings about that. That "the Defendants concealed and induced the Directors to conceal from the meeting the discoveries of ore which had been made". Do you say that now? That is the question.

Exhibit "A" to the
affidavit of Alfred E.Bull.

MR.MacINNES: I say that the evidence falls short of the instructions which are set out in these Pleadings.

LORD RUSSELL: That is no answer to the question. Do you allege it before us?

MR.MacINNES: No, my Lord, I cannot.

LORD RUSSELL: Then you do not?

MR.MacINNES: No, I do not.

LORD BLANESBURGH: Then you are not abandoning it by any ruling of ours. I want to keep quite clear of complexity in this matter. At the moment I have no knowledge of the evidence. I accept your statement that the evidence does not enable you to maintain that charge now.

LORD ALNESS: The next question which seems to me to arise is: In that event where shall we find a case presented by you in your Pleadings which is independent of a case of fraud?

MR.MacINNES: Your Lordships will find that at page 5, paragraph 13. Striking out the reference to conspiracy, it reads: "The Defendants, through their agents, the aforesaid Directors, Bull, Duff-Stuart and A.H.Wallbridge on the 16th day of July, 1924, gave an agreement to sell to one David Sloan all of the property of the Company without disclosing to the other members of the Board of Directors or to any of the other shareholders of the Company or to the Company, that the said Sloan was not an independent contractor, but as to an undivided one-half interest in the said option, was merely a trustee of the Defendants".

LORD BLANESBURGH: The first words are: "In pursuance of the said conspiracy"?

MR.MacINNES: Yes, my Lord, I said if you struck those words out. The allegation still remains that these

Directors, being a majority on the Board, carried the option to Sloan with the provision that they were to have a half-interest in it. Then would your Lordships look at paragraph 19 of the Pleadings?

LORD THANKERTON: Paragraph 19 depends on the alleged concealment of material facts and non-disclosure.

LORD BLANESBURGH: Will you read paragraph 18 before you read paragraph 19?

MR.MacINNES: If your Lordships please. "On December 5th. 1924, the Defendants for the first time disclosed to an alleged general meeting of shareholders called by the Defendant, Salter, at the request of the other Defendants, that they were interested in the Sloan option and fraudulently and in breach of faith to the minority shareholders and acting in an oppressive manner towards the minority shareholders, the Defendants concealed and induced the Directors to conceal from the meeting, the discoveries of ore which had been made by them and the value of the premises which they, the Defendants, were so acquiring".

LORD THANKERTON: I understand that you are not maintaining in consequence of the evidence, any longer those lines 30 to 34? That is what I understood you to say in answer to my Lord Russell?

MR.MacINNES: May I withdraw that admission,and put it that the evidence may be weak?

LORD THANKERTON: Are you going to maintain that you have proved that allegation of fraudulent non-disclosure? We must have it one way or the other.

MR.MacINNES: I maintain that there was non-disclosure, and this non-disclosure was a non-disclosure of facts which these Defendants should have disclosed and did not disclose, and they obtained and seek to retain the

property which they had wrongfully acquired in July under circumstances due to the non-disclosure at this meeting.

LORD THANKERTON: There are four facts with regard to non-disclosure in the pleadings so far. First of all, that the shaft had been sunk to a certain level with the result that they found a vein. The answer on the evidence is that they did not know that until after Christmas. I understand you accept that, and therefore, that disappears. Is not that right?

MR.MacINNES: No, my Lord. I think your Lordship is taking me wrongly there -- simply the fact that they did not know the extent to which that shaft had gone.

LORD THANKERTON: If they did not know the extent to which it had gone, they would not know he had reached the vein, would they? Is that involved in it,or not?

MR.MacINNES: No, my Lord, because they did not know that he was sinking a shaft for the purpose of getting to the vein.

LORD THANKERTON: Have you any evidence to show that they knew more than they say they knew about the sinking of the shaft?

MR.MacINNES: No, my Lord.

LORD THANKERTON: And about tapping the vein at the lower level?

MR.MacINNES: No, my Lord, I think the evidence which I have read covers that.

LORD THANKERTON: Secondly comes the question about the shaft, and that was a matter of development which would interest the shareholders. Mr.Bull at page 254 admits that he knew that the shaft was being

sunk. Did you ever ask him if that was stated to the meeting? I have not seen it anywhere. If so, I would like to see the question.

LORD BLANESBURGH: I thought there was a general statement that nothing was said at the meeting at all?

MR.MacINNES: Yes, my Lord; nothing was said at the meeting at all.

LORD THANKERTON: I know that on page 303 Mr.Mayers put the question, but not you, asking about whether the bricks had been mentioned, but there is no question about whether the sinking of the shaft had been mentioned or not. It was for you to put that question to Mr.Bull, or at least to some of the witnesses who were present at the meeting. Mr.Bull's evidence is that he had two bricks at that time.That proved he knew that the shaft was being sunk, but he did not know that the shaft had been sunk and the vein tapped.

MR.MacINNES: At page 207, lines 16 to 20, your Lordships will see this: "Was there any disclosure at that meeting made of Sloan's operation? (A) No, I do not know any. Did not have any". This evidence was taken before the trial, and on that evidence of Mr. Bull's in chief, which we put in in our case,there was no disclosure at the meeting of Sloan's operations. "So the shareholders were asked then to vote on the sale of the assets for 70,000 dollars, taking a definite loss of 32,500 dollars, without any disclosure of what was actually doing? (A). They knew about as much as we did".

LORD THANKERTON: He told you in chief what he knew, and it was for you to ask him whether the shareholders knew it or not.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD BLANESBURGH: Speaking only for myself, I am not so much impressed about non-disclosure at this meeting. It was a meeting of intimate friends, and there were no independent shareholders present. Apart from that question, I would like to know very much the attitude which the liquidator took up about this, because he was responsible for everybody, both creditors and contributories, about it.

LORD THANKERTON: I think there were independent shareholders at the meeting.

LORD RUSSELL: Mr.Twiss, Mr.Seaman, and Mr.Walsh were there.

MR.MacINNES: Yes, my Lord. Walsh was the Director at the meeting in July.

LORD THANKERTON: But they were not part of the Syndicate. If your allegations had been true that this mine was worth 200,000 dollars, and more to follow perhaps, I could understand that you might have a very strong case.

MR.MacINNES: My proposition on the non-disclosure had reference to the non-disclosure with regard to the notice calling the meeting. The non-disclosure at the meeting would be material as against non-attendance of shareholders and would invalidate that meeting if there was a non-disclosure of material facts. What I was trying to show to your Lordships was that this shaft was being sunk as part and parcel of the original agreement in July stipulated for precisely as being a very material part of the development and I submit that would be a very material thing for the shareholders to have notified to them before they were asked to decide.

LORD THANKERTON: Do you think that a notice convening a meeting has to contain the bones of the Chairman's speech that is he giving to the meeting -- that is quite a novel idea to me -- when the purpose is, you are told, to confirm a working agreement. I should have thought it was a matter for every shareholder who was properly interested in the mine to attend.

LORD BLANESBURGH: No. You have to consider whether in point of fact there was a disclosure to persons invited to come to the meeting. If a material fact has been ignored, it is very serious, because it may mean that you stay away from the meeting.

LORD THANKERTON: That depends on non-disclosure.

LORD BLANESBURGH: The whole point is whether there was any duty upon anybody to disclose.

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MR.MacINNES: The letter on page 481 says: "To the shareholders of Pioneer Gold Mines Limited. In view of the voluntary winding up of the Company" etc. (reading the words) "The voluntary winding up of the Company was then proceeded with". That is the only disclosure.

LORD THANKERTON: What more do you say could be said in the letter?

MR.MacINNES: In the first place, I submit that that was defective in several respects. In the first place David Sloan is given simply a name. So far as the shareholders receiving that notice is concerned, that is all they were told,whereas David Sloan was a very experienced mining engineer who had examined this Company's property in 1923 at the Company's expense and had made a special report on the Company's property and its prospects.

LORD THANKERTON: You say that that should be put into a notice of the meeting?

MR.MacINNES: If they had said this: David Sloan, mining engineer -----

LORD BLANESBURGH: I should have thought the real defect of this notice was quite different, but I do not impute to Mr.Wallbridge that he was conscious of it. The real difficulty is that it did not indicate in any way that the bargain into which they had entered was a worthless one.

MR.MacINNES: That is one of the things I have noted.

LORD BLANESBURGH: They must have suspected something, from the fact that they thought it necessary to have the agreement confirmed, but you never obtained any evidence what it was they did know which made it necessary for this meeting to be convened and for that resolution to be passed; you never got that out at all.

MR.MacINNES: The shareholders got nothing out?

LORD BLANESBURGH: You have not got it out at the trial: there is no evidence to show it. I do not see any question directed to any witness as to what it was that made it necessary for this meeting to be convened and for this resolution to be proposed. Have you anything in that at all? That is the whole gist of the thing, but I do not see any question directed to it.

LORD BLANESBURGH: You do not think that is an answer to my question, do you?

MR.MacINNES: I think so, my Lord.

LORD BLANESBURGH: It just exactly misses it. Do you not see that the offer which was made by the creditors was based upon the footing that Sloan's option was

good and that everything in relation to it was good and remained good? The 20,000 dollars for the shareholders was a surplus on the assumption and footing that the Sloan option, in every part of it, was perfectly good. What I asked you was: is there anything to show that at the time when this meeting was convened and this notice was sent out, the persons seeing that notice were aware of the fact that, if the option was not bad, there was a grave doubt about its validity? Have you any evidence of that at all?

MR.MacINNES: I think Mr.Bull says that very plainly in what he says at page 253?

LORD BLANESBURGH: I have waited for it, and I cannot see that you have anything on that point at all. It is not a point to answer by such a reference as that. Is there any substantive question directed to that?

MR.MacINNES: There was no such question directed to that.

LORD THANKERTON: I should say the passage which you have just read suggested the opposite. It is a very natural thing, the way they put it.

LORD BLANESBURGH: Just imagine the opposite, that the Sloan option with the back letter, if you choose to call it so, was a thing beyond question, and the offer by the creditors was a substructure on that foundation.

MR.MacINNES: May I submit this, that when Walsh objected to the offer of Boucher for 45,000 dollars for the sale of the assets -----

LORD BLANESBURGH: That was because the 20,000 dollars, or whatever the figure, for the contributories, was not enough; that is his objection to it, and when he got 20,000 he was content.

Exhibit "A" to the affidavit of Alfred E.Bull.

LORD THANKERTON: Mr.Wallbridge might have gone to the Court for compulsory liquidation. It was important to get all the creditors as far as possible to agree.

LORD BLANESBURGH: I do not think he would have gained anything from compulsory liquidation, because he controlled the liquidation with his liquidator; he could not have got more than he had.

LORD THANKERTON: It is my mistake: I meant Walsh. One knows in this type of Company how important it is that these things should run smoothly, and that these things should be got through. From that paragraph of Mr.Bull's evidence it all proceeded upon the footing that there was no suspicion that the directors meeting was invalid.

LORD BLANESBURGH: Except one does not understand what the purpose of that resolution was: but you never investigated it.

MR.MacINNES: I took it, Mr.Bull, being a lawyer and giving his evidence, that when he said: "We increased our offer to 20,000 dollars to get Walsh's adherence on the condition that at this ratification meeting he would vote on the shares under his control for a ratification of and confirmation of the Sloan option, notwithstanding the interest of the directors in it", it was a blank admission that they knew and realized on the 15th June ----

LORD BLANESBURGH: I did not hear anything about "notwithstanding the interest of the directors in it"

MR.MacINNES: You get that on page 481.

LORD BLANESBURGH: That is the crux of the thing. You must not interpolate it if it is not there. Where is there anything about "notwithstanding the interest of the directors in it"?

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD RUSSELL: I should have thought that notice meant this: Owing to there being three directors who are interested, we require it to be confirmed. That is at the top of page 481.

MR.MacINNES: That is in the notice.

LORD RUSSELL: Yes, in the notice convening the meeting. I asked you some time ago how many directors there were in this Company and it turned out there were only four.

MR.MacINNES: Four.

LORD RUSSELL: On the face of that, there could be no valid Board resolution.

LORD BLANESBURGH: If that was in the minds of those giving the notice, it ought to have been stated. It led to a conclusion that was drastic, and if it was in their minds they ought to have stated it.

LORD THANKERTON: Any shareholder reading that paragraph on page 480 would assume it meant this: To confirm the action of the Board of Directors,of whom three out of four are interested as parties under the working agreement.

LORD RUSSELL: That is the way it would suggest itself to me. There is no point in asking for confirmation unless confirmation is necessary. You do not ask for confirmation for the fun of the thing.

MR.MacINNES: On page 42 is Mr.Bull's letter of the 28th November, and that was subsequently converted into the offer of the 5th December.

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MR.MacINNES: In paragraph 20: "The Plaintiff says that the alleged meeting was not properly convened".

LORD RUSSELL: As to the irregularity of the meeting, that is a separate point.

MR.MacINNES: At line 32, on page 6, it says the directors

concealed "from the meeting the discoveries of ore which had been made by them and the value of the premises which they, the Defendants were so acquiring".

LORD THANKERTON: That is a concealment from the meeting: that is different from not stating it in the notice. Surely you need not put in to the notice everything you are going to tell a meeting?

LORD RUSSELL: You must not read those words in isolation: you must refer this back to paragraph 17. It says that the ore in sight was 200,000 dollars' worth and that that had tremendously increased the potential value of the mine, and that is the discovery of ore and the value of the premises which are referred to in paragraph 18.

LORD THANKERTON: Where are the omissions from the notice of the meeting? 17 and 18, as I read them, are nothing to do with the circular.

LORD BLANESBURGH: Mr.Greene, which was the paragraph to which you referred? I do not find any complaint made against this letter.

MR.WILFRID GREEN: The letter is not even mentioned.

LORD BLANESBURGH: I thought you said the allegation made with reference to the letter was confined to this one thing?

MR.WILFRID GREEN: No, my Lord; the allegation made about non-disclosure was confined to non-disclosure of the discovery of ore.

LORD RUSSELL: Mr.Greene said there was no complaint either as to the notice or as to the circular.

MR.MacINNES: If there was proper disclosure in the notice and the circular -----

LORD RUSSELL: There is no allegation of want of disclosure.

Exhibit "A" to the
affidavit of Alfred E. Bull.

MR.MacINNES: Is not that covered by the failure properly to convene the meeting, because the meeting requires fair disclosure to be made?

LORD RUSSELL: It only requires fair intimation of the business to be transacted. The notice would be complete if the resolutions which were to be proposed were set forth, as they were set forth in extenso: that is the notice you want. That is the business they are called upon to transact. With regard to this other thing we are talking of, there may be a duty imposed on those convening the meeting to let the shareholders know what is involved in the resolution they are asked to propose by reason of some interest being reserved for people who have no right to it unless they get it expressly authorized.

MR.MacINNES: I submit that a failure to give a proper notice and make proper disclosure in the calling of a meeting is a failure -----

LORD BLANESBURGH: You have not particularised this matter as one in respect of which there was a failure; that is the trouble.

MR.MacINNES: I am making that submission.

LORD RUSSELL: Are you seriously telling their Lordships that this point is covered by line 40 of the statement of claim, that the alleged meeting was not properly convened?

LORD THANKERTON: There was a demand for particulars which is on page 11,and demand 27,at line 14, is a demand for particulars of the impropriety of the convention of the meeting alleged in paragraph 20; that is the one we have been looking at. If you turn to page 15, at line 80, it says: "In answer to paragraph 27 of the demand, the Plaintiff can give no further

Exhibit "A" to the
affidavit of Alfred E.Bull.

particulars save as set forth in the statement of claim": It makes it quite clear that it is only failure to serve notice on the Plaintiff, and failure to serve notice on the Plaintiff is the only defect in convening the meeting.

MR.MacINNES: There is one further submission I will make upon it: the allegation in the last part of that paragraph is: "That the alleged meeting and all proceedings thereat were and are wholly invalid".

LORD THANKERTON: That does not stand by itself:you cannot bisect it: that is the consequence.

MR.MacINNES: You are putting a difficulty and I am meeting it as best I can.

LORD RUSSELL: It would be much simpler for you to admit at once that it is not pleaded.

LORD BLANESBURGH: It is very hard on a plaintiff to expect him to be ready with the whole of his statement of claim. If he finds later it is not complete, it is for him to apply for leave to amend.

MR.MacINNES: The case was fought both at the trial and in the Court of Appeal, and these questions were all canvassed in the Courts below and were brought up here on the case we have submitted to your Lordships.

LORD BLANESBURGH: I doubt very much whether this particular case has ever been submitted, that is to say a case which is based upon the footing that the proceedings of the meeting in July were, so far as the Company were concerned, inoperative and invalid, and you have to look at the position of the meeting of the 5th December on that footing and from that point of view, and the duty of the

Page 30: liquidator, if he found, as he ought to have found, that the whole property of the company was still there

to be dealt with afresh on the 5th December for the benefit of everybody concerned. That is the aspect of the case upon which attention has never been focussed.

MR.MacINNES: Perhaps not in the way your Lordship puts it, but it was focussed before the trial judge and before the Court of Appeal on the basis that the 16th July proceedings were invalid and had never been cured by any ratification on the 5th December, and that therefore, in consequence of that, the Respondents here were in possession of property which belonged to the company. We get that from the statement of fact in the judgment of the Court of Appeal.

LORD BLANESBURGH: You say the Respondents here were in possession of the property of the company.
By that time the property had been sold to the new company.

MR.MacINNES: We say the proceeds which they got.

LORD BLANESBURGH: That they held the proceeds which they got out of their bargain for the company.

MR.MacINNES: Yes, they having got the company's property have converted it into a new company and taken stock, that stock being 800,000 shares, and that is what we are asking for. We say no notice of this meeting was sent to Ferguson.

LORD RUSSELL: That is a separate point.

SIR SIDNEY ROWLATT: What is all this leading to? What relief emerges from it, supposing you make good this proposition as to the invalidity of the meeting of the 5th December? What happened then?
You cannot rescind.

MR.MacINNES: The position we are in then, if this meeting of the 5th December is illegal and there was no

ratification and confirmation, is this. We have the fact that, on the 16th July, by reason of an invalid and improper document and under an agreement that was invalid and void, Sloan was put in possession of this property on behalf of himself and these Respondents. The defence to that is that that was ratified in the December meeting. If it was not ratified at the December meeting it still remains invalid and void, as it was in July. As a result of that, on the assumption that it was invalid and void, then these Defendants by reason of the invalidity had no title or right to the property, and nor had Sloan, and they were using and enjoying the property of this company until 1928, when they ultimately converted it into the new company. So far as these Respondents were concerned, the shares which they got by reason of those wrongful acts consisted of 800,000 shares in the new company which should have been the property of the old company for distribution amongst all the shareholders of the old company.

SIR SIDNEY ROWLATT: Is it damages or rescision?

MR.MacINNES: No, it is really an account against this syndicate, three of whom were trustees and directors.

LORD THANKERTON: I always apprehended the law was, if a company called on directors to account for money or property as being held on trust for them, they must accept the contract of the third party and ask for the benefit or make the directors account for the benefit on the footing that the contract is good,otherwise they must sue for rescision or damages, whichever is appropriate. Therefore, surely, if they are asking these directors to account for their interest in the Sloan working contract, they must accept the contract

and bond as good must they not, and say the directors hold their interest in trust for the company?

MR.MacINNES: We have not attacked the Sloan transaction for two reasons.

LORD THANKERTON: You said a minute ago it was invalid and void.

MR.MacINNES: That is what I say, that the invalidity of that Sloan transaction affects these Defendants, because they participated in the invalidity in taking their share. We say: You have your share through invalid proceedings: there was an invalid use of the property, but we cannot get the property; it has gone away.

LORD BLANESBURGH: You need not go further, because you are in a preliminary difficulty. If in any way you are going to establish here affirmatively that the Sloan transaction was invalid and that the resolution of the 5th December was invalid, so that no title was conferred under that resolution upon the creditors; and if you are going to endeavour to obtain from these creditors the shares that they have received from the new company, still alleging the invalidity of the whole thing,you cannot say it in an action to which neither Sloan nor the new company are defendants. Do you not see they are not here? How can you say the Sloan contract is invalid when Sloan is not here to protect it? I want, by saying what you cannot do, to see what you can do: it can be nothing but this. Out of these transactions these directors have made a certain advantage at the expense of the company as a whole, for which we say they are accountable; we are willing the bargain should go through,providing we get that from them, but it is personal to them.

MR.MacINNES: Certainly, as I have said ---------

LORD BLANESBURGH: No.

MR.MacINNES: Then I am mis-stating myself, because that is what I am trying to say.

LORD BLANESBURGH: But you say the resolution of the 5th December was invalid?

MR.MacINNES: It did not ratify and did not confirm.

LORD BLANESBURGH: You are recognising its existence, because you are not seeking to set aside what happened in consequence of it,namely, the sale to the new company.

MR.MacINNES: Then I have been misunderstood. Taking the transactions as they stand, the July and December ones, neither one justified these directors in taking an interest in the property of this company. There is no authority for that.

LORD THANKERTON: Did they justify Sloan in taking an interest?

MR.MacINNES: We are not considering Sloan.

LORD THANKERTON: You must consider Sloan.

MR.MacINNES: We are not attacking that.

LORD THANKERTON: You cannot make half an attack.

MR.MacINNES: We are attacking the possession of these Defendants, who, by reason of these acts,good or bad, get into their possession property which belonged to the company. Can they justify it? The fact is this, that 800,000 shares in the new company came into the hands of these Respondents as part of the sale price of the property of this company, of which they were directors and shareholders. Had they any right to get that? What is their justification? They say that, by an agreement in July made with Sloan and ratified by the Company in December, the proceedings by which we got those 800,000 shares are justified and are legal and they are ours, and you cannot attack them.

Exhibit "A" to the
affidavit of Alfred E.Bull.

SIR SIDNEY ROWLATT: You say they have wrongfully effectively conveyed away property of the company and got something to themselves in doing it, and you want it.

MR.MacINNES: Precisely.

LORD THANKERTON: Then you accept the conveyance but you demand an account. You keep repeating you will not accept the conveyance as valid but partly valid,which I do not understand.

MR.MacINNES: We have accepted, as far as the effects of this action goes, that the property has gone to Sloan, and through Sloan, to the new Company. That we are not attacking, for various reasons, but we say that by reason of this state of circumstances the profit which the directors made of 800,000 shares in the new company has been made as the proceeds of the sale of assets belonging to the old Company. If directors, or shareholders, sell or dispose of property of the old Company,then they have to show, in order to keep the profits, that the course of conduct by which they acquired that property was valid and regular.

LORD RUSSELL: That there was really an asset of the Company.

MR.MacINNES: An asset of the Company.

LORD RUSSELL: Why is it not effectively sold to the syndicate under the agreement of the 21st January, 1925? That, of course, is a sale by the liquidator?

MR.MacINNES: That is a sale by the liquidator.

LORD RUSSELL: Can you upset that? Have you a case on it?

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: In respect of this so-called property?

MR.MacINNES: Yes.

LORD RUSSELL: That is not a document that depends for its validity upon any act of the directors: that is a sale by the liquidator in the winding up.

LORD THANKERTON: Which he is entitled to do by his own hand.

LORD BLANESBURGH: Dictated by the Syndicate.

MR.MacINNES: I say with regard to that sale, or so-called sale, by the liquidator on the 5th December of the assets to the syndicate, in the first place it was not a sale at all, it was a gift.

LORD RUSSELL: I said, on purpose, the agreement of the 21st January, 1925. That is one which is entered into, the seal of the Company being affixed by the liquidator, not the directors.

MR.MacINNES: The validity of that depends upon the resolution of the 5th December.

SIR SIDNEY ROWLATT: Do you mean the validity or the rightfulness?

MR.MacINNES: I say the liquidator, in the absence of authority from the shareholders,could have no power to execute a document so as to pass any title.

LORD THANKERTON: Under section 225 he has absolute power.

MR.MacINNES: 226 was the one to which I referred.

LORD THANKERTON: It is 225 (1): "The liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding up by the Court".

MR.WILFRID GREEN: Then there is section 205, subsection 2

MR.MacINNES: "The liquidator in a winding up by the Court shall have power (a) to sell the real and personal property and things" -------

LORD THANKERTON: That gives power to the liquidator:

MR.MacINNES: This is not a sale, it is a gift.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD THANKERTON: I cannot understand that.

MR.MacINNES: Because that document of the 21st January, 1925, simply appoints the so-called purchasers a conduit pipe for the collection of moneys that come in from Sloan, without consideration: they are to collect the money from Sloan and as and when it comes they are to pay it over to the liquidator.

LORD THANKERTON: Where is your pleading against that? Where do you attack that sale?

MR.MacINNES: That document is not attacked; that particular document is not attacked in that way, my Lord.

SIR SIDNEY ROWLATT: I thought the position was that you cannot say in this action that the property has not passed to these people. You cannot say that, but you say it has been wrongfully made to pass, and that leads to damages, does it not? You cannot make a man account for what he has: it is what you have lost, not what he has got.

MR.MacINNES: They admit that they have got, as the proceeds of this, 800,000 shares.

SIR SIDNEY ROWLATT: If you take my horse and wrongfully sell it to somebody else in market overt, the amount of damage is the value to me of the horse, not what you get for it; it is not accounting.

MR.MacINNES: If there was a position of agency or trusteeship ---

LORD RUSSELL: That is the whole point; the point of trusteeship does not arise under the 21st January, 1925, because that is an act of the liquidator. I follow your point; if the meeting was invalid then there was no ratification by the Company of the act of the directors in the previously July,

and therefore the only title would depend upon the act of the directors, and that being an invalid act the directors must account, because they made a gift to themselves, but those considerations do not apply to the 21st January 1925.

MR.MacINNES: Section 226 of the winding up provisions, the voluntary winding up particularly, would apply. There is section 225 and then section 226. Section 226 says: "The liquidator may with the sanction of an extraordinary resolution of the company" - then leave out (a) and leave out (b) and go to (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 the 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".

LORD THANKERTON: The extraordinary thing is that it does not mention sale of the assets there.

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MR.MacINNES: My Lords, I was dealing with this question of the document of the 21st January, 1925, I would ask your Lordships first to look at the Resolution at page 483. "Moved by Mr.Walsh, seconded by Mr.Seaman that the offer of A.E.Bull" contained in a "letter dated December 5th, 1924, addressed to the Liquidator of the Company for the purchase of all the assets of the Company subject to but with the benefit of the working Bond and Option given to David Sloan and the

royalties and purchase moneys payable thereunder for the price and on the terms set forth, which letter has been read to this meeting, be and is hereby accepted" -------

LORD BLANESBURGH: The important words so far are "all the assets of the Company"

MR.MacINNES: Yes, my Lord - all the assets of the Company subject to the Sloan bond -- "subject to the title to the mineral claims" -- I do not know why they call them assets in one place and mineral claims in the other.

LORD BLANESBURGH: That is by way of security for the final payment. They are not to have a conveyance until payment is made.

LORD RUSSELL: There were no other assets besides the mineral claims, were there?

MR.MacINNES: Yes, there were a lot of things, equipment and so on.

LORD RUSSELL: Yes, certainly.

MR.MacINNES: "remaining in the Liquidator until payment of the debts, interest, cost of liquidation and the sum of 20,000 dollars mentioned therein to the liquidator, and the liquidator is hereby authorized to sign, seal and deliver on behalf of the Company, all necessary documents for the purpose of accepting and carrying the said offer into effect". That is the authority. Then the document is at page 60. Your Lordships will notice the Company is described as the vendor and these parties are described as purchasers.

LORD RUSSELL: What is the meaning of the phrase "Hereinafter called the vendor of the first part, identified by J.Duff-Stuart, Chairman"?

Exhibit "A" to the
affidavit of Alfred E.Bull.

MR.MacINNES: That is the memorandum endorsed. There was a meeting of the creditors called and they authorised this.

LORD RUSSELL: It is nothing to do with the document?

MR.MacINNES: No: it was identifying that document as being one that the creditors authorised. At page 61 it recites that the vendor is the owner of the properties. Then line 30: "And whereas the purchasers have offered to purchase the entire assets of the vendor on the terms hereinafter set forth. And whereas a meeting of the shareholders of the vendor representing 729,996 shares of the issued capital stock of the vendor held the 5th day of December, 1924, unanimously approved of the sale of the said assets on the terms hereinafter set forth. And whereas a meeting of the creditors of the vendor held the 21st day of January, 1925, unanimously approved of the sale of the said assets on the terms hereinafter set forth and authorised the said liquidator to sign, seal and deliver these presents on behalf of the vendor".

LORD ELANESBURGH: So far as the recitals are concerned you have the authority for the sale attributed to the meeting of the shareholders?

MR.MacINNES: Yes: that is where he gets his authority. Then it goes on:"(1) The Vendor hereby agrees to sell to the purchasers and the purchasers hereby agree to purchase from the vendor all the mineral claims, assets and property of the

Page 40 vendor subject to but with the benefit of that certain working bond containing an option to purchase all mineral claims, buildings, plant, machinery,equipment, materials and supplies belonging to the vendor, dated July 16th,1924,given by the vendor to one David Sloan".

Exhibit "A" to the
affidavit of Alfred E.Bull.

So that it is tied up together to that matter.

LORD BLANESBURGH: That assumes that to be valid and binding. They had nothing else to sell.

MR.MacINNES: (2) The consideration for the said sale shall be the payment to the vendor by the purchasers out of the royalties and purchase money received by them under the said bond as and when the same shall have been so received" --- there is the consideration.

LORD RUSSELL: I think you had better finish it.

MR.MacINNES: If your Lordship pleases - "of a sum sufficient to pay the liabilities of the vendor as now proved with the said liquidator together with interest thereon as provided by the various notes evidencing such indebtedness or resolutions of the Directors of the vendor until payment, the purchasers agreeing in any event to pay to the vendor sufficient moneys to enable the liquidator to pay the said claims filed with him other than the purchasers' claims within the period of two years from the date hereof".

LORD BLANESBURGH: That means whether they received money or not?

MR.MacINNES: Yes, my Lord. "As further consideration the purchasers agree to pay over to the vendor the next 20,000 dollars received by them from said royalties or purchase money under said bond after satisfaction of above mentioned liabilities and interest as and when the same shall have been so received for distribution pro rata among the shareholders of the vendor and sufficient moneys to pay the costs and expenses of the liquidation as and when the same shall have been received by the purchasers. The purchasers covenant with the vendor that they will pay to the vendor the sums of money in this paragraph mentioned as and when received

by them at the times and in manner above mentioned".

LORD BLANESBURGH: The words are "and in manner above mentioned".

MR.MacINNES: Yes. Does not that refer to the receipt?

LORD BLANESBURGH: Surely not.

LORD RUSSELL: You cannot strike out the words "in any event".

LORD BLANESBURGH: You cannot strike out that positive obligation within two years to pay?

MR.MacINNES: No, my Lord, I think not.

LORD RUSSELL: That is a liability of some 3,000 odd dollars according to the recital.

MR.MacINNES: Yes,according to the recital,but your Lordships remember of that liability of 3,300 dollars a large part of it was a liability to the Union Bank of Canada.

LORD BLANESBURGH: I think you get the further point that a very substantial portion of that would by of apportionment have been in respect of early payments, and they would all get their share pro rata. You follow what I mean, as and when they made payments when received from the mine, to the liquidator on account of the creditors, he would be bound to pay those rateable amongst all the creditors and, therefore,these outstanding people would get their proportion whatever it was of the distribution: therefore, the total sum left for them might be very small.

MR.MacINNES: Yes, my Lord, and the prospects were that if this bond were carried out, the money as and when received ----

LORD BLANESBURGH: In point of fact you say no payment was called for?

MR.MacINNES: No payment was made. I want to make this further point, my Lords. The list of creditors your Lordships will find at page 474 of the Record, the list of liquidation claims filed.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD RUSSELL: Where is the 3,300 dollars out of that?

MR.MacINNES: Will your Lordships go down that list with me. Boucher was a Syndicate member. Bull was a Syndicate member. Then the Union Bank of Canada. It was reduced between the time the claim was filed from the time of this document. Wallbridge was a Syndicate member and so on. Then Harris, Bull & Mason were not: A.Williams Estate was not, and Walsh, McKim & Housser were not.

LORD BLANESBURGH: Mr.McKim is a partner in Walsh & McKim, I suppose, but it is a firm debt.

MR.MacINNES: Yes, it is a firm debt. The Union Bank of Canada had been reduced to a matter of 2,000 dollars. That union Bank of Canada liability was a liability of these Syndicators in any event, because they had personally endorsed that liability to the Bank.

LORD BLANESBURGH: But still it would be a payment they would have to provide.

MR.MacINNES: They were not assuming any further obligation here than was already upon them.

LORD THANKERTON: you mean they had guaranteed the debt?

MR.MacINNES: Yes.

LORD THANKERTON: It makes them liable to the Bank, but ultimately it is a liability to the Company?

MR.MacINNES: Primarily a liability of the Company.

LORD BLANESBURGH: Do you think their position could be different if they had advanced the money to the Bank and then paid the Bank off?

MR.MacINNES: I was going to show your Lordships that the consideration, when it is reduced down to its actual facts is so small ----

LORD RUSSELL: It is really 3,300 dollars, is it not, because they are buying for themselves the 15 per

cent, as I read it, and they are guaranteeing that in any event they will provide the 3,300 dollars to pay off the creditors? Then if this is paid off out of the 15 per cent, they are losing that as assignees of the 15 per cent?

MR.MacINNES: There is no question about this in my mind, and we make no claim with regard to it. The three small amounts to Harris, Bull & Mason, to Walsh,McKim & Housser and the Williams Estate, amounting to 1,027 dollars, were separate debts, and the undertaking would have covered those. With regard to leaving a bank balance, whatever it was, their assumption of this liability in this document was not the creation of any liability upon them at all. They were still liable in any event.

LORD BLANESBURGH: They would have been liable, even if they had not entered into this agreement?

MR.MacINNES: Yes, my Lord; that is the point I am trying to make clear.

LORD THANKERTON: With a right of relief? It was not their debt. What I want to get clear in my mind is this. Assuming for the moment - because there was the other possibility perhaps -- that eventually Sloan was going to buy the thing for 100,000 dollars, at this time the Company was entitled, was it not, to the 15 per cent of the 100,000 dollars added up at the end?

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: They bought that 15 per cent, or the chance of it, under this document?

MR.MacINNES: A little more than that, my Lord.

LORD THANKERTON: That may be, but they did buy that?

MR.MacINNES: Yes, my Lord.

Exhibit "A" to the
affidavit of Alfred E.Bull.

LORD THANKERTON: The purchasers by that time had the right to one-half of the remaining 85 per cent, during those years, and 50 per cent of the produce of the mine after that date?

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: They undertook to pay for what they purported to buy from the Company out of their share -- out of one-half of the 85 per cent, did they not?

MR.MacINNES: If and when.

LORD THANKERTON: Yes, I quite agree: but that is merely formal, it may be risky.

MR.MacINNES: Yes, my Lord, but it is using money twice over, once to buy the property, and once ----

LORD THANKERTON: That is what I want to see. It was a different interest.

MR.MacINNES: Does your Lordship mean as creditors and syndicators?

LORD THANKERTON: They were not buying the 85 per cent. interest, they were only buying the 15 per cent.

MR.MacINNES: There is more in it than that,again, my Lord. They were buying the right of the property and the right to receive, subject to the Sloan right to take it from them, they paying 15 per cent, as and when he went along, in which event that 15 per cent, was proceeds of the Company's property.

LORD BLANESBURGH: Are you not getting a little involved, Mr.MacInnes? Was not the meaning of this contract that they bought the whole assets of the Company, subject to the benefit of this Sloan option: they, therefore, got everything that the Company had under that option and was entitled to receive, I gather the Company was entitled to receive under that option 15 per cent of the total sum of 100,000 dollars, and

that was the sum that the Company was to receive. That passed under this agreement with all the assets of the Company to the purchasers, as and when that money was received: The 85 per cent, which represented Sloan's interest after the 15 per cent, had been accounted for by him to the Company, was not the subject matter of this agreement at all. Therefore, out of the 85 per cent, or out of the 42½ per cent, there was no payment to be made back to the Liquidator at all. That was kept as their own, and under another title altogether. But what they get under this is, what you are now trying to point out, and what is all subject to the thing being a good bargain or not, for a payment that might be fixed at such a sum as 100,000 dollars or 200,000 dollars or 300,000 dollars, they got all debts. First, they got everything that was coming to the Company under the Sloan option,with an obligation to repay so much as they received until those debts were satisfied, but they got everything else that the Company had.

LORD THANKERTON: One has to remember,the agreement being for 15 per cent, these people got 42½ per cent,out of which they were bound to make payments under this agreement.

MR.MacINNES: Apart from that, in any event they were not bound to make any payment out of the 15 per cent.

LORD THANKERTON: They were bound, as and when they received 42½ per cent,to make payment out of that. Surely that is what this means?

MR.MacINNES: No, my Lord, I submit not. I submit it means as and when Sloan paid his 15 per cent.

LORD BLANESBURGH: They are not dealing with the Company's 42½ per cent, any more, they are dealing with Sloan's 42½ per cent.

LORD THANKERTON: Pardon me, I think they are. Just look at it. "The consideration for the said sale shall be the payment to the Vendor by the Purchasers" -- that is the Company --"out of the royalties and purchase money received by them" -- that is the syndicate--" under the said Bond as and when the same shall have been so received of a sum sufficient to pay the liabilities of the Vendor as now proved with the said Liquidator" -- that is 15 per cent?

MR.MacINNES: No, my Lord, that is what Sloan paid --the 15 per cent.

LORD RUSSELL: They only get 42½ per cent, under the Declaration of Trust, not under the Bond.

MR.MacINNES: Yes, my Lord, Apart from that, "in any event, in Clause 2, page 62, there is no obligation to do anything at all, but to collect the money, and when they collect it from Sloan to pay it over to the Company.

LORD BLANESBURGH: But they are under an obligation as to 3,300 dollars out of their own moneys.

LORD RUSSELL: The point is this, as it seems to me: Assuming the whole thing came to nothing, no further ore was produced from the mine, the 15 per cent, produced nothing, and, therefore, the 100,000 dollars option was never exercised, then Sloan would thereafter be out of it, and they would be the owners and they would pay the Liquidator 15 per cent.

MR.MacINNES: Yes, my Lord.

LORD RUSSELL: Then they would be saddled with their own debts?

MR.MacINNES: Yes, my Lord, they would have an additional 3,300 dollars to pay, in which event they would have the property.

Exhibit "A" to the affidavit
of Alfred E. Bull.

LORD BLANESBURGH: The real business value or otherwise of this offer proposed by themselves,and apparently accepted, was what was the prospect and condition of the mine at the time, and what was their knowledge with regard to that. You have not explored that very fully in your evidence.

MR.MacINNES: I tried to do that this morning, my Lord, in the sense that they knew that Sloan was operating and sinking a shaft, and that he was an experienced man.

LORD BLANESBURGH: And another thing, that they were not called upon at that time to pay their 8,000 dollars.

MR.MacINNES: Not only was he doing well, but he was producing sufficient money to put this on a producing basis in September, 1924.

LORD THANKERTON: What was their interest in the shareholding of the syndicate -- about 51 per cent?

MR.THANKERTON: Did not this in effect mean that the other shareholders as a result were getting 49 per cent of 20,000 dollars?

MR.MacINNES: That was the suggestion.

MR.BLANESBURGH: That surely seems to be some evidence to the contrary of your proposition?

MR.MacINNES: If this meeting had been proper and properly called in such a way to bind absentee members ----

LORD THANKERTON: I am trying to construe the meaning of this document by itself at the moment, apart altogether from the external considerations.

LORD BLANESBURGH: It is right with regard to 20,000 dollars, that that only comes out of the proceeds?

MR.MacINNES: It is only if and when it is going in that they pay that. So that the increase to the share-

holders was contingent upon the Sloan deal going through and being paid, otherwise they would have got nothing. The other covenants and agreements are all to the same effect.

LORD THANKERTON: It is an obvious gamble -- or most of this.

MR.MacINNES: Now,my Lords, when one goes back to the Resolution and goes back to the meeting, which deal with this proposition, that was not a sale of the assets of the property in the sense meant under Section 205, referred to by my Lord Thankerton this morning. A sale, I submit, is where there is a straight agreement for a definite price, a covenant to buy and a covenant to sell. Then you have a sale. Where you have a contingent arrangement,such as this is,dealing with future possibilities, with only one firm thing in it, namely, the in any event payment of 3,300 dollars, then you have not a sale at all, but you have a compromise or arrangement which comes within the provision of Section 226 (1) (c). It is a compromise or an arrangement made between a Company and the debtor "or person apprehending liability to the company", and it is a question in some way relating to or affecting the assets or the winding up of the Company.

LORD BLANESBURGH: What is the resolution required to satisfy such an arrangement? Is it an extraordinary resolution?

MR.MacINNES: Yes, my Lord: an extraordinary resolution.

LORD RUSSELL: I do not see how you bring it under Section 226 at all. I wish you would make that clear. Is it under sub-section (1) (c)?

MR.MacINNES: Yes, my Lord.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD RUSSELL: What words do you say cover it-- "any compromise or arrangement in respect of calls"---?

MR.MacINNES: Leave out "calls and liabilities to calls": "in respect of 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" ---strike out the words "and a contributory, or alleged contributory" -- "or other debtor or person apprehending liability to the Company" -------

LORD THANKERTON: They were creditors.

LORD RUSSELL: They were not comprising any claim?

MR.MacINNES: No, my Lord, but they were selling on the contingency of the Sloan option.

LORD BLANESBURGH: No, it was their property subject to it.

MR.MacINNES: Yes, my Lord. Then you come down into the next lines: "and all questions in any way relating to or affecting the assets or the winding-up of the company".

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: What is the question?.

MR.MacINNES: The question is whether or not this transaction could be accepted by the shareholders at this meeting; was it a proper transaction for them to enter into, or would they direct the Liquidator to sell by tender or auction, or some way of selling directly or completely, or would they permit this Sloan option to stand and take the chances of getting the money, 15 per cent.,if and when Sloan paid it?

LORD BLANESBURGH: I believe if you cannot get it under those words, you cannot get it at all. It is possible

you may get it under these. May I read it in my way: "Make any compromise or arrangement in respect of" -- then go right down to "all questions in any way relating to or affecting the assets or the winding up of the company". You might say, might you not, that the disposition of the assets of the Company under such an arrangement as you have described is not properly described as a sale, but it may be described, might it not, as a compromise or arrangement in respect of "all questions in any way relating to or affecting the assets or the winding-up of the Company": that is to say, an authority to dispose of them on those special terms?

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: That is reading it really as if it were really simply any compromise or arrangement relating to or affecting the assets, but you have the words "compromise" and "all questions". What was the question that was compromised -- that means the question between the Company and somebody else?

LORD BLANESBURGH: It was not a compromise, I quite agree.

MR.MacINNES: No, my Lord, I think the word "compromise" there relates to the contributories who are already in relation, it means arrangement.

LORD THANKERTON: Arrangement relating to a question surely means a compromise of some kind or other?

LORD RUSSELL: I share Lord Thankerton's difficulty in seeing what the question was in respect of which the arrangement was made.

MR.MacINNES: Cannot that be solved more readily in this way: Is the transaction in question a sale under Section 205? I submit it is not, because there are so many contingencies involved in that, and it is only an

agreement to do certain things in the future which results in a sale, if and when certain moneys are paid by Sloan. The sale will not be completed until that contingency and that payment by Sloan has been arrived at. The fact that they undertook in any event to pay 3,300 dollars of debts does not make it a purchase. So that you have your complication there which prevents the matter being a sale, and, therefore, takes it out of the provisions of Section 205. If it is not under Section 205, then where does the Liquidator get his authority? The only other place is under Section 226 (1) (c). It does fit in Section 226. (1) (c), very much more readily and easily and completely than it does in any other place.

LORD BLANESBURGH: Would it not be a question relating to or affecting the assets of the Company, if the question was: How are these to be disposed of in any way other than by a sale? Supposing nothing else was possible, except this was sanctioned and approved -- I am assuming for the purpose of this question that you are right and that it was not authorised --

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might it not properly be described as an arrangement or question relating to or affecting the assets or the winding-up of the company by reason of the fact that only under and by virtue of an arrangement of this kind could they be disposed of at all?

MR.MacINNES: That, I think, is right, my Lord.

SIR SIDNEY ROWLATT: Compromise or arrangement relating to any question,does not that rather indicate the settlement of some question of right, not a decision on some question of policy?

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD BLANESBURGH: Of course, Sir Sidney knows well that there are a great many cases where "arrangement" has been held to be a much wider word than "compromise".

SIR SIDNEY ROWLATT: Yes, but is it a question of making up your mind what is the best thing to do? Is it not a question as to what the position is? A question of right when you get "arrangement" in double harness with "compromise".

MR.MacINNES: It was an arrangement with these creditors by which their proposition, which was not a sale, was accepted, and which would result -----

LORD BLANESBURGH: And the assets of the Company disposed of by means of that arrangement?

MR.MacINNES: Yes, my Lord: the assets to be held by the Liquidator until the matter was determined.

LORD RUSSELL: Are you relying on the fact that the other people to the arrangement were creditors?

MR.MacINNES: No, my Lord, it does not make any difference who they were.

LORD BLANESBURGH: Did you not have what was the equivalent of an Extraordinary Resolution here when you had unanimity on the part of those presents? Is an Extraordinary Resolution required at meetings always?

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MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: What about a special resolution, a resolution of the three-fourths majority?

MR.MacINNES: Yes, my Lord, that is so, if the meeting has been specially convened.

LORD THANKERTON: Had you not better read sub-section (2) of Section 226, before you go any further?

MR.MacINNES: If your Lordship pleases. "Subject to section 235, a compromise or arrangement under

clause (b) of subsection (1) affecting all the creditors or a class of creditors shall be binding on all the creditors or the class of creditors if acceded by three-fourths in number and value of all the creditors or the class of creditors". It does not apply to (c). Unless Section 227 has some bearing, I do not think your Lordships will find anything else in the Act which affects it.

LORD RUSSELL: Where is the definition of "Extraordinary Resolution" in the Act?

MR.FARRIS: I think, by your Lordships' leave, that section 235 is important.

MR.MacINNES: "Any creditor or contributory may, within two weeks from the date when a compromise or arrangement is entered into under section 226, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary, or confirm the compromise or arrangement". Your Lordships will find the definition of "Extraordinary Resolution" in Section 2: "Extraordinary Resolution" means a resolution which 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 the 1924 Act, and the Articles of the Company come under the 1911 Act. The definition of "Extraordinary Resolution" is exactly the same.

LORD THANKERTON:

The notice of the second meeting was in those terms.

MR.MacINNES: There was no notice at all referring to the

Extraordinary Resolution, my Lord. The winding-up resolution was passed as an Extraordinary Resolution.

LORD THANKERTON: Will you refer me to the notice of the second meeting.

MR.MacINNES: At page 480 of the Record in the notice of the meeting in question.

LORD RUSSELL: It does not purport to be for the passing of an Extraordinary Resolution.

MR.MacINNES: There is no Extraordinary Resolution at all. If my contention is right, it requires an Extraordinary Resolution to do either of the things.

LORD BLANESBURGH: You say, first of all, it is within Section 226, and if you are right in that, then you say there was no Extraordinary Resolution, because this meeting was not convened to pass one.

MR.MacINNES: Yes, my Lord. There is this further point that a shareholder on receiving that notice which is on page 480, and looking at it, would say: This Company cannot do anything effective or binding in any way whatever in the way of sale or disposal, or settlement or compromise of these matters, because they do not intend to act by Extraordinary Resolution: therefore, I need not attend.

LORD BLANESBURGH: You say that the Liquidator has never purported to do anything otherwise than by authority of this so-called resolution.

MR.MacINNES: Yes, my Lord.

LORD RUSSELL: It is quite clear, if you are within Page 55; section 226, there has never been an Extraordinary Resolution.

MR.MacINNES: Yes, my Lord.

Exhibit "A" to the affidavit
of Alfred E. Bull.

LORD BLANESBURGH: Supposing this could be said to be a sale which was within the competency of the Liquidator acting on his own authority, how far can you take advantage of the fact that the actual conveyance executed in the name of the Company by the Liquidator purports to have been affixed there by him on the authority of the resolutions that are cited.

MR.MacINNES: I do not think I could urge anything because if the Liquidator has the power to sell independent of a resolution altogether and there was a defective resolution authorising him to do something which he had authority to do, it would not deprive him of his authority.

LORD BLANESBURGH: Can you make anything of the fact that he does not appear to have acted except in pursuance of his authority?

MR.MacINNES: I read to your Lordship from the Examination on discovery. He left the carrying-out and the calling of the meeting to the solicitor, Mr.McKim.

LORD RUSSELL: What do you say to the point that we can pay no attention to that; that there is no evidence that is admissible against the other defendants. This is only his examination on discovery. He was never called at the trial.

MR.MacINNES: The Examination for discovery, when put into the trial in that way, under the Rules of British Columbia, becomes evidence as if the witness were called into the box.

LORD RUSSELL: Against other parties.

MR.MacINNES: The question is with regard to his authority, or whether this was a valid transfer of the property or a valid proceeding to pass this property or to effect a ratification or a dealing with that which would bind the Company.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD RUSSELL: What I mean rather is this:Lord Blanesburgh was putting to you that if this was a sale and the Liquidator had power to sell without any Extraordinary Resolution, could you say that this sale was invalid simply because there was evidence,which was not admissible against other defendants, that the Liquidator had not himself exercised his own judgment?

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MR.MacINNES: That is quite true, my Lord,and I am back to the other proposition that we have attacked the actual resolution; whether we have overstated our case, whether the instructions were too strong in regard to fraud or not, the complaint is made that the Company's property passed out of its hands by means of transactions clearly indicated,namely, on the 16th July, 1924, at this meeting, and we show that as regards the legality of the proceedings,as Mr.Justice McPhillips says, the defences put up are no protection because they are invalid and bad.

SIR SIDNEY ROWLATT: Does it invalidate the option too?

MR.MacINNES: No, my Lord. The invalidity of 5th December extends only to the proceedings taken on that date. The invalidity of the option depends upon the fact that that option, apart from anything on 5th December,

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SIR SIDNEY ROWLATT: Does your present argument attack the validity of what was done in the so-called affirmation of the option of 5th December, because they gave an option again on 5th December.

MR.MacINNES: Your Lordship means they confirmed it.

SIR SIDNEY ROWLATT: If that stands, what do you gain by

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setting aside the sale of assets of the Company subject to the option?

MR.MacINNES: The resolution purporting to confirm, or as your Lordship suggests, making a new sale, is again not a sale, because an option is never a sale. An option is expressed to be no sale unless and until the optionee declares at some future time that he is going to make it a sale.

LORD BLANESBURGH: Is your present argument reduced to this point of extreme simplicity: That the transaction which followed the resolutions of the meeting of 5th December were binding upon nobody because they were neither of them within the powers of the Liquidator, and they were not within section 226, because they were not ratified by an Extraordinary Resolution?

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: that is at the moment your simple contention?

MR.MacINNES: Yes, my Lord, and it applies to both transactions alike, both to the ratification of the alleged option and to the alleged sale.

LORD BLANESBURGH: I must say I did not get it into my head until this very moment that that was the substantive point here. Where do I find a reference to an Extraordinary Resolution as being the one thing that was lacking?

MR.MacINNES: No, my Lord, not particularly ------

LORD BLANESBURGH: Was it ever referred to at all, never mind about particularly? Have you used the words "Extraordinary Resolution" in relation to this matter until this very moment of time?

Exhibit "A" to the affidavit of Alfred E. Bull.

MR.MacINNES: Yes, my Lord, in the Court of Appeal argument.

LORD BLANESBURGH: Have you reproduced it in your case.

MR.MacINNES: Yes, my Lord, in detail.

MR.FARRIS: My Lord, an objection was taken in the Court of Appeal that it was not in the pleadings or in the notice of appeal.

MR.MacINNES: That objection was disposed of adversely to us. Will your Lordships look at paragraph 70 on page 27 of the Appellants' case: "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".

LORD THANKERTON: Does not the whole of this paragraph relate only to the question of ratification. It does not relate to the question of the coming sale.

MR.MacINNES: It says: "The business proposed to be transacted at the meeting".

LORD THANKERTON: It seems to me only to deal with the question of ratification of the working bond and sale to Sloan, not the sale to the Syndicate in general.

MR.MacINNES: I intend it to cover the whole point, and I submit, it does cover both.

LORD BLANESBURGH: Anyhow, you have it with regard to Sloan's business.

MR.WILFRID GREENE: I do not know whether your Lordships have noticed paragraph 21 of the Statement of Claim which is at page 6 of the Record.

LORD BLANESBURGH: Mr.Greene, you seem to have very carefully studied the Statement of Claim.

Exhibit "A" to the affidavit of Alfred E. Bull.

MR.WILFRID GREENE: In an action where fraud is alleged it is impossible to watch too closely. It is pleaded that this transaction was a transaction of purchase.

LORD THANKERTON: I do not think in any of the judgments that there is any suggestion that it needed an Extraordinary Resolution and it certainly is not in your Case.

LORD BLANESBURGH: Are you quite satisfied,Mr.MacInnes, that it is not in your Case? You thought it was. Have you satisfied yourself that it is not? Does not it relate also to the purchase?

MR.MacINNES: I submit it does. "The business proposed to be transacted at the meeting", (reading to the words at line 7) "do not afford the sanction claimed therefor". The reference to the singular in the first two lines is simply quoting the definition under Section 77 of the "Extraordinary Resolution".

LORD BLANESBURGH: Then you go on: "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" That seems again to relate only to the option.

LORD BLANESBURGH: When you were writing that you were thinking only of the option: "Even if capable of ratification there was no ratification binding on the minority for the following reasons".

LORD THANKERTON: I do not think there is any doubt that you talk only about ratification. There is no suggestion of dealing with this subsequent sale.

LORD BLANESBURGH: This is not pleading; but it is only to see whether you did take the point. Did you take the point in the High Court with regard to the question of the Extraordinary Resolution in relation to the question of the sale, the so-called sale?

LORD THANKERTON: It is not in your Notice of Appeal. Is it mentioned in any of the Judgments, even in Mr.Justice McPhillips Judgment?

MR.MacINNES: Mr.Justice McPhillips said that the fraud prevented the subsequent steps being any effectual support.

LORD THANKERTON: Was he there referring to the transaction of the disposal of the Company's property?

MR.MacINNES: Frankly, my Lords, I think Mr.Justice McPhillips was dealing with the sale of the property, the option of Sloans. He stopped there. He said the whole thing was a series of successive steps. Mr. Justice Macdonald said it was a series of successive steps including the sale of assets. Mr. Justice Martin at page 338 of the Record says: "Several other grounds of appeal were raised questioning various subsequent proceedings". --------

LORD THANKERTON: Mr.Green's reference to your Statement of Claim seems to put in this position with regard to this point, that you refer to this transaction as a purchase in your Statement of Claim: that there is not any reference apparently in any judgment, and there is not any reference even in your case, to this Board of a complaint with reference to the validity of this transaction by reason of the fact that it was not confirmed by an Extraordinary Resolution. Is it not rather too late for you to bring that forward as a substantive cause of complaint, not being a sale

that was confirmed by Extraordinary Resolution?

MR.MacINNES: The point I take there, my Lords, is this. When we attack the validity of the title and their right to this property and these assets, they stepped in with their defence; we got them in this way. We joined issue with them. There is no issue filed, but when they say that they by this Resolution and by this meeting acquired these properties, all of which they set out in their Pleadings, we say: No, you did not; that does not give you title.

LORD BLANESBURGH: What was the discussion that took place in the High Court in connection with your raising this point? Mr.Farris has pointed out that an objection was taken that that point was not open to you.

MR.MacINNES: Your Lordship is referring to the trial.

LORD BLANESBURGH: No, in the Court of Appeal.

MR.MacINNES: My learned friend Mr.Shaw raised this question and objection was taken. The objection was not ruled upon and argument was heard and was replied to by my learned friend Mr.Farris.

Now, my Lords, in conclusion, I submit that on the case as laid no right has accrued to these defendants to the 800,000 shares which they received as their proportion of the sale of this property. If your Lordships say that the question of fraud has not been substantiated, I still say that there is a complaint made in the Pleadings -----

LORD BLANESBURGH: I think you must begin by saying, not having supplied evidence to their Lordships to justify their saying it has been substantiated.

MR.MacINNES: Then, my Lords, I say there is still in the Pleadings the complaint made that these defendants by --

LORD RUSSELL: I am not content with leaving it there.

I still want a plain answer to a plain question: Are you still charging fraud -- Aye nor no?

MR.MacINNES: I have no instructions to abandon fraud, and I am afraid to abandon it definitely; so that your Lordships can say if I agreed with you ------

LORD RUSSELL: Then the answer to that question is: I am charging fraud.

MR.MacINNES: Yes: Put it that way and leave it to stand in that way.

LORD ELANESBURGH: Just consider that that means. Are you entitled to say that without reading to us evidence showing it means what you say, because fraud is a terribly serious thing to charge. It means a certain restriction even on the liberty of Counsel in relation to a charge of fraud.

LORD RUSSELL: It is entirely in Counsel's hands. If Counsel thinks the materials are sufficient to enable him to charge fraud he will charge it. If he thinks they are not, he will withdraw it.

MR.MacINNES: We have the direct findings of Mr.Justice Macdonald right straight through on the facts, a pre-determined scheme and plan from the beginning which brought about the elimination of these minority share-holders. We have Mr.Justice Martin's statement, and we have the Chief Justice saying it is a deliberate breach of trust, and Mr.Justice McPhillips, stronger than I put it, on the question of fraud and breach of duty. With those findings in my favour I cannot abandon that question of fraud.

LORD ELANESBURGH: There are specific allegations of fraud in your Statement of Claim, with regard to withholding information as to the 200,000 dollars. You do not suggest there is any evidence to support that?

Exhibit "A" to the affidavit of Alfred E. Bull.

MR.MacINNES: We say that these defendants in charge of this operation through their Manager and chief of operations, Sloan, knew that this sinking of this shaft by mid-November had proved a three feet or four feet vein of ore extending to a depth of 142 feet, wider and heavier at the bottom of the 142 feet than it was at the top where he started. That, calculated on a tonnage basis, will give over 200,000 dollars worth of ore.

LORD THANKERTON: Let me put it in this way to you. It is not enough for you as the Judgment has gone against you in the Court below to say that you are going to rest on this for fraud. That will never do here. May I take it that you have read to their Lordships all the evidence on which you rely for the charge of fraud, which I understand you still maintain?

MR.MacINNES: I have not: but I will do it now.

LORD THANKERTON: Do you still maintain all the charges of fraud you made originally?

MR.MacINNES: There are some of them in which possibly the evidence falls short.

LORD THANKERTON: Which are those? I want to get that definitely.

LORD RUSSELL: I have a note that when Mr.MacInnes was opening that paragraphs 7,8,9,10 and 11 of the Statement of Claim were abandoned. Then the next charge of fraud is in paragraph 12.

MR.MacINNES: The allegations contained in paragraph 12 have to do with a separate matter altogether which was never brought up on appeal. That is disposed of by an adverse judgment which we have not appealed. The complaint which we do not appeal starts at paragraph 12.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD BLANESBURGH: We do not want to go back or to have your clients embarrassed in any way, but it is well to make the position quite clear.

MR.MacINNES: In paragraph 12 we say that they conspired together to acquire the Company's property and to deprive the plaintiff and all other minority shareholders of their holdings. With regard to that may I outline my argument? I started on Tuesday to give your Lordships references to show where this Syndicate acted as a unit throughout, from beginning to end: in every step they were a unit working together in the Company. As a result of that, while they were so operating, they in July, 1924, came to the declared intention to protect themselves and to abandon the minority. The decision to abandon was a statement made definitely by Wallbridge in a letter.

LORD THANKERTON: That is not fraud or anything like it. You have to show that they took fraudulent means to obtain their ends.

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LORD THANKERTON: That does not prove that they knew of that at the time of the meeting?

MR.MacINNES: No.

LORD THANKERTON: How on earth can that support your allegation of fraud by non-disclosure at the meeting? The real point of this examination is on the tailings question.

MR.MacINNES: I say that in the contract with Sloan in July the first stipulation was that a shaft should be sunk. The evidence, and I have given it to your Lordships, is that that was the essential thing to prove up this property. Now having got the essential thing by a contract with Sloan and that contract

having been carried out by Sloan to the effect, as a matter of fact of sinking that shaft and cutting the vein at 142 feet below the upper level, there was then existing in connection with this property proof of high value. Now these Defendants were in charge of this operation through their manager Sloan, and if they did not know they should have known.

LORD THANKERTON: You have had them in the box and you have put it to them, and you have got their answer; they told you they did not know.

LORD BLANESBURGH: You must not say the Defendants were there through their manager Sloan.

MR.MacINNES: Was not that the relation?

LORD BLANESBURGH: I should not have thought so: he was the owner, and he gave them a declaration of trust whereby they became interested in the property.

LORD THANKERTON: You cannot impute fraud by saying a man ought to have known. How can you call it fraud?

MR.MacINNES: I say they knew the value of this shaft to the property and the value that it brought, and they did not disclose that in the statement to the shareholders whom they were calling together to ratify: it was a failure to make a material disclosure necessary for the shareholders to determine. The fraud consisted of the working together all the way through.

LORD THANKERTON: It is no use making a general statement. I am asking you about what you are maintaining in your Pleadings. That, I suppose, is the answer you give to my question about line 21 on page 6. Now will you go to paragraph 18?

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LORD BLANESBURGH: What I am going to ask you is relevent

both to paragraph 17 and paragraph 18. What do you say is the evidence you can ask us to accept as to the knowledge of any of these Respondents with reference to the actual condition of the mine on the 5th December 1924?

MR.MacINNES: That it was producing gold.

LORD BLANESBURGH: What is the evidence upon which you can rely for that purpose.

MR.MacINNES: The admission of Mr.Bull, that he knew they were producing gold, because they got 9,000 dollars of gold before the meeting of December 5th, the knowledge that Mr.Sloan, an excellent and capable mining engineer, who had been in the employ of the company to report on this property,had joined with them, or they with him, in the enterprise by which they were to divide the property.

LORD BLANESBURGH: Did you ever get from Mr.Sloan himself when you had him in the box what was his state of knowledge, or if you like, expectation with reference to this mine on the 5th December 1924. Did you bring it home to him? What was his state of mind on the 5th December, 1924?

MR.MacINNES: It is page 311, line 33: "(Q) Now at page 2 of your report, under the heading of "veins" -- that is the report made to the company.

LORD RUSSELL: What date was that?

MR.MacINNES: July, 1923.

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MR.MacINNES: "(Q) Now when the proposition was discussed with you of joining in with the syndicate which were in control, which resulted in the option to you of the 16th July, 1924, how long was that being discussed with you before it came to a conslusion?

(A). From the time when I made my report, probably I had been doing my best to do something along with Mr.Wallbridge on the property. (Q) Now I understand that you took an option on the property, or at least procured the option on the property called the land option? (A) Yes."

LORD BLANESBURGH: So far you have not any evidence directed to the point of what was the condition and prospects of the company in or about July, 1924, or December 1924.

MR.MacINNES: Does not this show you that an experienced mining engineer, after having examined the property, found conditions there which justified him in saying it was a good property and would pay for the working, and in his report said that it would take 25,000 or 30,000 dollars capital to do that work? Now when he came, in July, 1924 ---------

LORD BLANESBURGH: I am sorry: when you make that statement just see how that contrasts with your paragraph 17 of the statement of claim: "Between July 15th and December 5th, 1924, the Defendants, in their mining operations, having developed upon the Pioneer Mine immediate ore in sight worth approximately 200,000 dollars and having tremendously increased the potential value of the mine, fraudulently concealed such facts from the shareholders".

LORD RUSSELL: Those facts are put to him on page 309, and he is asked if there is any truth in that at all, and his answer is: No.

MR.MacINNES: What I am trying to show is this, that the fraud is the continuous action of this syndicate: first they decide to drop the minority and protect themselves, then they get this offer from Sloan which

they accept for themselves, and then, immediately, they wind up the company.

LORD THANKERTON: But fraud? Surely there must be some fraudulent act in the course of the concerted and joint action? Concerted and joint action is not necessarily fraudulent. You have put in specific charges of fraud. What you were asked just now was whether you had any evidence beyond what was cited to us to support the charges of fraud which I under stand you still maintain in paragraphs 17 and 18, which both relate to charges of non-disclosure in December of 1924. The passage you read from Sloan does not anywhere touch December, 1924.

LORD THANKERTON: The whole difficulty is you have stated in your pleadings what those conditions were, and you never put them to the witnesses. On page 309, at line 17, Mr.Mayers in chief puts your charge to Mr. Sloan, and he is answered: It is far-fetched. The next question is: "Is there any truth in it at all? (A). No."When Mr.Sloan came into your hands,I should have thought if you were going to substantiate that charge you were bound to cross-examine him on that point, according to the ordinary rules of cross-examination, and there is not a word in the cross-examination that touches the condition of things at that date. The only thing you get out of him is, first of all, on page 316, which is inconsistent with your making any such case:

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(Q) Now then, in the actual working out of that property between the 300-feet level and the 142 feet further down, how did the working out prove up? (A). We worked it all out the next year" --- that is

1925. "(Q) And there were no faults? (A). That is for the length of 250 feet on the vein, and between the third and fourth levels, as you call them". That all relates to a subsequent period as being proof of its being a valuable thing, and then the passage you refer to, on page 318, is just consistent with that, line 10, where referring to sinking the shaft, it does say: "The ore has been found to continue at this level" -- I should read that "by the subsequent working out in 1925" -- "and to maintain a grade at least as high as that of the average value". That was all matter, in the first place, of speculation when they had sunk, as Mr.Sloan undoubtedly says. Where was the cross-examination which one would have expected, you having made that charge against Mr.Sloan, amongst others, in paragraphs 17 and 18?

MR.MacINNES: As far as Sloan was concerned, we did not figure that he had anything ------

Lord Thankerton: You are making a charge of fraud against a man. He denies it in the box in chief, and it was your duty to cross-examine him about it.

MR.MacINNES: Sloan was not in this action and was not a party. So far as Sloan was concerned, we were not making any claim against him.

LORD THANKERTON: If you were going to try to use his evidence for the purpose for which you showed it to us, as being some evidence upon which you rely for the purpose of proving charge of fraud against the Defendants, you must be content with that denial in chief or else show you effectively cross-examined.

MR.MacINNES: When these Defendants sent out that letter, as they did, on page 481, in November 1923, setting out not one commendatory statement but setting out

difficulties they had experienced before, they were in this ----

LORD THANKERTON: That is not what I am suggesting to you. You made a charge, and you have to prove it. You have to establish the premises before talking about what should be in the letter. The premise is that there was a state of facts given to them which they had not disclosed. You have alleged what that state of facts was, and I cannot find a trace of attemption to prove it on your part, and yet you are still maintaining that charge of fraud. It does not make me very sympathetic to it. If you can answer my question, please do, I am giving you every opportunity.

LORD ALNESS: In order to clear my own mind, may I ask you if I state the situation accurately thus: that in the end of the

Page 77 day, though at first I was inclined to draw a different inference from the answer you gave me this morning, you stand by every charge of fraud which you have made from paragraph 12 onwards in the Statement of Claim, and that you have fully referred us to all the evidence which relates to those charges? Is that right?

MR.MacINNES: I cannot abandon the charges of fraud.

LORD ALNESS: The answer is "Yes". I understood you to say that you maintain you have an alternative case which is open to you?

MR.MacINNES: Yes.

LORD ALNESS: Assuming that all your charges of fraud have failed, for myself I am not able to appreciate what that separate case which you maintain can stand independently of your case on fraud is,and personally

I should be very grateful to you if you could state that alternative case.

MR.MacINNES: By eliminating from the various paragraphs, paragraph 12 onwards, the references to fraud, and taking them as being a statement of the successive steps taken from the 16th July in paragraph 12, the agreement with Sloan in 13, and so on through 14 down through the successive paragraphs, you have this; a statement that the directors in control of that Company authorised the Sloan bond and option in which they were jointly interested, that the directors brought about the winding up of the Company, and in the winding up of the Company brought about a sale of the assets and in order to confirm and ratidy that they brought about the meeting of the 5th December. I say that those facts in law apart from the question of fraud, for the reason I have given, namely, that the 16th December meeting was invalid ----

LORD ELANESBURGH: I suppose you would say not disclosing the nature of their interest?

MR.MacINNES: Not disclosing the nature of their interest and voting upon it themselves; the 16th July matter was wholly inoperative; by the resolution of the 5th December, they relied upon a ratification and making good, that being invalid and bad, because it was not passed by an extraordinary resolution, and notice of that meeting being defective -----

LORD ELANESBURGH: Defective in what respect?

MR.MacINNES: By reason of non-disclosure of reasonable facts and fair facts the shareholders were entitled to get, and defective by reason of the fact that it was not an extraordinary resolution, which it had to be.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD RUSSELL: On that point, at the moment there is not a word in your Pleadings complaining either of the notice convening the meeting or of the circular: your only complaint in your Pleading is as regards the fraudulent concealment of the fact of the 200,000 dollars worth of ore being immediately in sight. Speaking for myself I can see no evidence in support of that view.

MR.MacINNES: I can only submit that it is so.

LORD RUSSELL: I do not think you are entitled to bring in the notice convening the meeting and the circular, because you have not pleaded them. The only ground upon which you say you were misled is what took place at the meeting, namely, at the holding of the meeting these people fraudulently concealed facts, which upon the evidence were then unknown to them.

MR.MacINNES: There are no further particulars given there. The Plaintiff says that the alleged meeting was not properly convened, that no notice was sent.

LORD RUSSELL: You have some technical point upon that, I understand, which would make the meeting invalid no matter what disclosure had been given.

MR.MacINNES: Yes, apart altogether from disclosure: that no notice thereof was sent or delivered to Plaintiffs, and that the proceedings were, and are, wholly invalid and void. There is an allegation your Lordships may reject if you do reject the question of fraud; the other allegation remains, the invalidity and voidability of these proceedings, remembering that they are relied upon and pleaded by the Defendants as validating their opposition. They have failed, whatever the validity of their opposition, by reason of the fact that the evidence

shows the proceedings were invalid, and they have not bettered themselves by it, so they have not made the defence they set up. I do not think I can add any more.

LORD BLANESBURGH: Are you making anything of the fact that no notice of the meeting was received by your own individual clients?

LORD RUSSELL: Surely there are some relevant articles of association?

LORD BLANESBURGH: I do not want you to forget it, or leave it out.

MR.MacINNES: The notice was not given to Ferguson.

LORD BLANESBURGH: Your evidence is that such notice was sent to an address not his own and was returned?

MR.MacINNES: Will your Lordship take the Pleadings first and look at the Statement of Claim, page 6, line 40.

LORD BLANESBURGH: I will remind you that you also stated that according to your company law, although shares were in the name of the registered owner, the beneficial owner might have a sort of interest in them.

MR.MacINNES: "No notice thereof was sent, mailed or delivered to him or to his registered address within the Province".

LORD BLANESBURGH: Which is that paragraph?

MR.MacINNIS: That is paragraph 20, line 41. Then paragraph 16, page 17, line 31: there you get the defence of the Defendants: "These Defendants specifically deny each and every allegation of fact contained in paragraph 20 of the Statement of Claim".

Page 86:

MR.MacINNIS: .....

Exhibit 92 is the declaration of Mr.Salter proving posting of notice of intention, calling meeting of

the 5th December 1924, the notice being dated the 13th November, 1924, and contains also a list of the names and addresses of the persons to whom it was sent." That document was put it; it was filed as an exhibit without objection and without notice that it purported to have any reference to Seattle because of the pleadings I have just read.

LORD ALNESS: That document purports that a notice was sent to Ferguson at three different places. Was there any cross-examination?

MR.MacINNES: Nothing whatever, because that was never noticed. There was no suggestion made that it was contrary to the admissions on the pleadings and it was a statutory declaration.

LORD THANKERTON: Was it contrary to the admission on the pleadings?

MR.MacINNES: Yes, my Lord, the pleadings were definite.

LORD THANKERTON: They ought to have disclosed it, perhaps, but in fact it adds two.

MR.MacINNES: It covers two of those that are mentioned in the notice, but then they leave out the one for Seattle.

LORD RUSSELL: When they put that in, your defence had only been that your registered address was in British Columbia, so, so far as they knew, what they were putting in was quite right and was not departing from what you had alleged and what they had said in their particulars. The initial mistake comes from you.

MR.MacINNES: No, my Lord.

LORD RUSSELL: Yes, your pleading was -- when I say "you" I mean your clients -- that his registered address was in British Columbia, and you were complaining that the meeting was invalid because they never sent

Exhibit "A" to the affidavit of Alfred E. Bull.

any notice to you at your registered address in British Columbia. They put this in at the trial, which shows it was sent to your client's registered address in British Columbia, and also it shows it was sent to his registered address in Seattle.

MR.MacINNES: That is done by statutory declaration, which is never proof.

LORD RUSSELL: That irregularity, if it be one, was waived by you, you ought to have objected to it being put in at all.

FOURTH DAY:
Page 6:

LORD BLANESBURGH: In one aspect of this case a particular transaction, which apparently had not been regarded as of any great importance, has become, from your point of view, of vital importance. That transaction of vital importance is the purchase by the Syndicate of the assets of the Company subject to the option which had been granted, because it becomes of vital importance in this, that unless you set that aside or show that can not be carried out, they get under that very contract all that you are seeking to get back from them now. You want to make that an asset of the Company. Under that contract you buy it. You have,therefore, to show that this contract is not binding, and I do not see myself that there has been any attention directed to that point of the case.

MR.MacINNES: That point of view is the one which has been presented as a straight legal answer to the claim of the defendants with regard to the ratification.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD BLANESBURGH: Was it ever realised in point of fact that if you succeeded in making the defendants accountable for the profit that they had made under the option, that their profit which you succeeded in recovering would be included in the assets of the Company, if it were sold to the Syndicate.

MR.MacINNES: In answer to that, my Lords, may I point out something that did not come up before in the previous part of the argument. That meeting of the 5th December dealt with two things. It dealt first with the Sloan option and bond. The option and bond, not being a sale had to have the ratification of an Extraordinary General Resolution.

It did not have the ratification of an Extraordinary Resolution, and therefore, the transaction with Sloan was never ratified or confirmed. If it had not been ratified or confirmed, then what did the liquidator have to sell under the second arrangement to the Syndicate?

LORD BLANESBURGH: There is nothing in the Act to show that ratification required an Extraordinary Resolution, is there? That is not brought within the Section of the Act to which you referred, but which referred to the words "compromise or arrangement". Where do you find anything in the Act that shows that ratification of anything that was done by the Company requires an Extraordinary Resolution in the winding up?

Exhibit "A" to the affidavit of Alfred E. Bull.

MR.MacINNES: I say this, my Lord: The one thing the liquidator can do is to sell under Section 205 if he has to deal with a proposition such as he had there, namely, a questionable transaction arranged in July for which ratification was sought by reason of the fact that it was put through by the consent of three interested Directors, then you have a question which does not deal with the sale of the property at all; you have a question which is a compromise or arrangement affecting the assets of the Company in the winding up.

LORD BLANESBURGH: I have not realised on Friday that the ratification of the Sloan option was a thing which you suggested had to be done under that special Section of the Act involving an Extraordinary Resolution? I thought on Friday that you confined your statement to the fact that an Extraordinary Resolution was required to the sanction of the agreement for sale to the Syndicate as creditors of the assets of the Company subject to the Sloan agreement and only to that.

MR.MacINNES: No, my Lord, I submitted both.

LORD RUSSELL: That is the first I have heard of it.

LORD THANKERTON: Your Pleadings do not cover the sale to the Syndicate.

MR.MacINNES: My Lords, as I stated in answer on Friday to that point ------

LORD BLANESBURGH: I am very sorry ----- I do not for a moment say that I may not be perfectly wrong ----

but I cannot remember your referring to that special Section of the Act with regard to an Extraordinary Resolution for any purpose than to say that the sale of the assets of the Company, which you said were for nothing, that it was a mere gift, was not a sale except for the purpose of saying that if you were going to ratify, it must be done under that Section. The words never, as far as I remember that section, in any way applied to the ratification of the Sloan option.

MR.MacINNES: With respect, my Lords, I feel confident that I had advanced the first proposition.

LORD BLANESBURGH: If you say that it is good enough. But can you find it?

Page 11.

LORD BLANESBURGH: Was this point with regard to the extraordinary resolution, both in relation to the option and in relation to the contract of the 5th December for the purchase of the assets, taken in British Columbia?

MR.MacINNES: Yes, my Lord, my Friend, Mr.Shaw, argued it, and my friend, Mr.Farris, said he objected to it, and there was no ruling on it.

LORD BLANESBURGH: It was raised and argued?

MR. MacINNES: Yes, my Lord.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD BLANESBURGH: What do you represent is the result of the evidence with reference to the notice served upon Ferguson apart from the Article altogether?

MR. MacINNES: That there is no proof whatever before your Lordships of any notice being sent to Ferguson at his Seattle address.

LORD THANKERTON: That depends on what you have objected to as not being evidence?

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: If that is evidence, then your point is bad, is it not?

MR.MacINNES: Then there is nothing in my point. Then a statutory declaration can never be evidence.

LORD BLANESBURGH: You also said at an earlier date, under the Companies' Act under which you are placed, that there was some provision with reference to the position of shareholders not persons not on the Register, who were equitably interested in shares which were on the Register. You are not forgetting that, are you?

MR.MacINNES: No, my Lord. The Article with regard to notice is at page 360 of the Record. They are Articles 68 and 70.

LORD RUSSELL: How can you take the point that the statutory declaration is not evidence when you did not object to it below? It went in with your consent.

MR.MacINNES: The particulars showed that the notices sent to Ferguson were sent not to his address, but to other addresses.

LORD RUSSELL: I remember all that, but how can you ask us now to reject it, when you allowed it to go in and did not object at the trial?

Exhibit "A" to the affidavit of Alfred E. Bull.

MR.MacINNES: For this reason, my Lord, where the Pleadings set up, as they did here, that a certain set of facts existed with regard to the sending of those notices, the mere introduction of a document which was not proof at all in itself, a statutory declaration, which is not proof, could not,without some direction of the learned Judge, be accepted as evidence, or, at least, when that document was produced, upon some application by the party producing it asking for leave to produce that evidence notwithstanding the state in which the Pleadings were with regard to those notices -----

LORD RUSSELL: You keep introducing that further qualification. My question to you was: How can you object to it here, when you did not object to it at the trial? You will not answer me.

LORD THANKERTON: Your own statement in your Case before their Lordships on page 17,line 11, seems rather to give this point away, as far as you are concerned. It gives an excuse for allowing it in fact as evidence. "Counsel for the Plaintiff,having in mind 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." How can you object to it now?

MR.MacINNES: If I cannot object to it, my Lords, then it is gone.

LORD THANKERTON: You can give a reason why you failed to notice something,but the fact is that it is admitted.

LORD ELANESBURGH: Do you remember when the first reference to this particular statement was made in the statutory declaration?

Exhibit "A" to the affidavit of Alfred E. Bull.

MR.MacINNES: In the argument in the Court of Appeal.

LORD BLANESBURGH: Not till then?

MR.MacINNES: Not till then,my Lord. It came as a surprise then.

LORD BLANESBURGH: Was it brought forward by the Respondents?

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: As being evidence on this point?

MR.MacINNES: Yes, my Lord. As a matter of fact, it took me by surprise there and then. I said it was not there. I had not noticed it was there.

LORD BLANESBURGH: Your view is that if the procedure with reference to the statutory declaration for the purpose of proving this thing had been followed, that would not have been put in by the other side without reference to the fact that it was being put in for that purpose, and the leave of the Court to its being put in would have been obtained?

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: What other purpose was it put in for than to prove the mailing of the notices for the meeting? The one notice in dispute between you was the notice to Ferguson.

LORD BLANESBURGH: What was the purpose this could be used for other than that purpose?

MR.MacINNES: To prove the mailing of the notice to everybody but Ferguson.

MR.FARRIS: Would your Lordships kindly look at the bottom of page 253 and the top of page 254 of the Record, where it shows what it was used for? Mr.Mayers describes what it was for.

MR.MacINNES: (Mr.Mayers): I was just going to describe this exhibit 91 as the declaration of Mr.Wallbridge

proving the posting of the notice -- calling two meetings for winding-up. And the same exhibit 91 contains a list of the names and addresses of the shareholders to whom the notice was sent.
Exhibit 92 is the declaration of Mr.Salter proving posting of notice of intention, calling meeting of the 5th December 1924, the notice being dated the 13th November, 1924, and contains also a list of the names and addresses of the persons to whom it was sent."

LORD BLANESBURGH: That is very express.

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: What did you suppose was happening when that was put in?

MR.MacINNES: I thought that was putting in what they had stated in their particulars and Pleadings, and nothing more.

LORD BLANESBURGH: Had the point with regard to Ferguson been definitely raised prior to this document being put in?

MR.MacINNES: Yes, the evidence was he did not get any notice.

LORD RUSSELL: You pleaded that no notice was sent to his registered address in British Columbia, not in Seattle. That is your Statement of Claim, paragraph 20.

LORD THANKERTON: One cannot blame Counsel, of course, in the middle of a heavy trial, but apart from that one would have thought: I wonder if Ferguson's name is in it? That is the only point which could have interested anybody in the document. If his registered address was not there, then it ought to have been.

Page 17:

MR.MacINNES: In my submission, that was not an accidental

omission. There is this fact that Ferguson did not receive any notice, and was not aware at all, as a matter of fact, of this meeting. That is a matter which is dependent on Ferguson's testimony.

LORD BLANESBURGH: And there is some evidence that the notice was returned.

MR.MacINNES: Evidence that two of the notices were returned. At page 84, line 37, is Ferguson's evidence in chief.

LORD THANKERTON: I think it was said that he was not a very reliable witness, was it not?

MR.MacINNES: The learned Trial Judge said he was not a reliable witness.

LORD BLANESBURGH: You have not read any of his evidence, have you?

LORD BLANESBURGH: Is it not right that, if you have to agree and have to submit to the view that no objection to the statutory declaration having been taken at the time it was tendered by Mr.Mayers, the statutory declaration must be deemed to be evidence in the case?

LORD RUSSELL: That knocks this point out, does it not? Page 18.

MR.MacINNES: Assuming your Lordships hold there was constructive notice given in that way to Ferguson; but I am now trying to establish as a matter of fact that he did not get any notice at all.

LORD RUSSELL: How does that matter? The meeting is a valid meeting, if he is served in accordance with the requirements of the Article, even although it never reached him.

MR.MacINNES: It matters in this way, My Lord, that it is an explanation of the delay in bringing his action.

LORD THANKERTON: That is the very point on which the

views of the trial Judge as to Ferguson in the witness box are important. He obviously does not believe a word he said, and finds that he knew all about it all the time.

MR.MacINNES: I want to show your Lordships there is no ground for that finding.

LORD THANKERTON: That is a matter of the way in which he gives his evidence. It would not be recorded, but for the learned Judge. Of course, you do not find Ferguson saying that he is not to be relied upon. It is a vital thing. This is clearly the learned Judge's view at page 329. He thinks he knew all about, and thinks what he says is not at all true about it in the box -- not what he said, but the way he said it. That is one thing the learned Trial Judge can judge of, and none of us can possibly judge, In face of that, it is very difficult to ask us to accept Ferguson's evidence, or anybody else's evidence that Ferguson did not know until 1931, or whenever the date was.

MR.MacINNES: My intention in tendering this evidence was not only that Ferguson says he does not get it, but there is affirmative testimony to show that Ferguson's statement is correct.

LORD RUSSELL: I interrupted you, because I thought the only point you were on was as to whether this was a valid meeting or not. If we accept the evidence of the statutory declaration, this point goes. The meeting was a valid meeting?

MR.MacINNES: Yes, my Lord. I was going further in citing this testimony.

LORD THANKERTON: That is what made me interpose, because you wanted to go further.

LORD BLANESBURGH: May we take it that you recognise, by reason of the difficulties in your way as regards the speeches and evidence, that we must regard this meeting as valid, so far as notice to the shareholders was concerned?

MR.MacINNES: Yes, my Lord, except for the next point, namely, the English shareholders. There is a different point there. Your Lordships having indicated your view on that question of the notice, then it would be a legal meeting as far as Ferguson was concerned.

LORD BLANESBURGH: Because there appears to have been a notice sent to him at his registered address?

MR.MacINNES: That would appear to be right. With regard to the English shareholders, the notices were mailed on the 14th November.

LORD BLANESBURGH: That is seven days' clear notice?

MR.MacINNES: More than seven days, my Lord. The meeting was called for 5th December -- twenty-one days later. Your Lordships will find Mr.Bull's testimony at page 262.

LORD THANKERTON: This is a different class of point to the last one. This is a question of reasonable notice?

MR.MacINNES: Yes, my Lord: not reasonable notice.

LORD THANKERTON: And, therefore, is as bad as no notice?

MR.MacINNES: Yes, my Lord. At page 262, line 23, Mr.Bull is asked: "You said this morning you had been a Solicitor for thirty-six years in practice in Vancouver? (A) Yes. (Q). And during that period of time you have had occasion to mail documents to the Old Country for ex juris service,

notices in probate, in the ordinary run of office work? (A). Yes.

(Q). I would suggest this, that twelve days is about the shortest time to expect mail communication in the ordinary way between here and England? (A). I think that is the average time. (Q). And making allowances for boats sailings, the mail boats sailing, you would have to really allow about fifteen days, to come and go? (A). Oh, I would not say that. Usually you get your mail in about twelve days,I think?

LORD RUSSELL: I am looking to see whether this point was pleaded that the meeting was bad, because the English shareholders did not get proper notice. Your only plea is in paragraph 20, that the meeting was not properly convened, and that no notice was sent, mailed or delivered to him -- that is the Plaintiff -- or to his registered address?

MR.MacINNES: We did not have the particulars at that time, and they did not admit or ask for any further. There the matter stands.

LORD THANKERTON: You confined yourself by the demand for particulars to the one notice to Ferguson. It was not for them to ask if you had any other complaints, was it?

LORD BLANESBURGH: Is not that a difficulty in your way, Mr.MacInnes? If you did refer specifically to notice to one person, that indicates that you are not making a complaint with regard to notice to anybody else.

MR.MacINNES: That is another difficulty, my Lord. Very well, I will not press that.

Now I wish to take up with your Lordships the point about the contention made throughout this whole case about Walsh representing Ferguson.

LORD BLANESBURGH: That is undoubtedly a point of substance if there is anything in it. It is quite clear, is it not, that all Ferguson's shares, whether they were pledged or not, were in the name of Walsh: so that, so far as the Company was concerned, Walsh was the registered shareholders.

MR.MacINNES: In the Register on the 6th June.

LORD BLANESBURGH: Showing that they were all in Walsh's name:

MR.MacINNES: Yes.

LORD THANKERTON: Can you conveniently tell me, looking at page 15 of your Case, because that shows it very conveniently I think, are those Ferguson's shares? Those are the people who voted on 5th December.

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: The 148,000 are the Ferguson shares?

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: And then his own shares are in the last line.

MR.MacINNES: Yes, my Lord.

LORD THANKERTON: Those are all independent shareholders. They are not in the Syndicate. Walsh was not in the Syndicate.

MR.MacINNES: No, my Lord.

LORD THANKERTON: He was the person who got the price increased from 48,000 dollars to 70,000 dollars.

MR.MacINNES: From nothing to 20,000.

LORD THANKERTON: Over and above payment of debts.

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: I gather you are going to suggest that there is some difference between the Company and Walsh in the shares which he held as executor

of the Williams Estate and shares which had been transferred to him by way of security.

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: That is strange to an English lawyer I just want to know how you get that.

MR.MacINNES: There is a difference in the Acts.

LORD RUSSELL: Does the same apply as regards Seamans?

MR.MacINNES: Yes, my Lord: They were security shares as well. That makes the whole 216,000 Ferguson's shares.

LORD BLANESBURGH: Before you go to your Act I want to know what the practical result is. Is the practical result that if due notice with regard to these 184,592 shares in the name of Walsh and due notice with regard to the 30,000 shares in the name of Seaman had been given that as to each of these cases a notice would have been served on Ferguson.

MR.MacINNES: No, my Lord.

LORD BLANESBURGH: What do you say ought to have happened.

MR.MacINNES: My contention is that they should never have recorded these shares as having been voted at that meeting, because there was no authority to vote them.

LORD BLANESBURGH: You say Walsh ought not to have been allowed to vote in reference to these shares and Seaman ought not to have been allowed in respect of the others also?

MR.MacINNES: Yes, my Lord.

LORD RUSSELL: I want to see what use that is to you. That would be very useful to you if there had been a poll or division of opinion at the meeting and that these votes had turned the scale, but this meeting was unanimous.

MR.MacINNES: That is true my Lord.

LORD RUSSELL: How does that help you?

MR.MacINNES: My friends in their case and in their arguments all the way through took the position that Walsh represented the Ferguson shares and the respondents were entitled thereby to accept any transaction Walsh made as binding on Ferguson by reason of holding these shares.

LORD BLANESBURGH: They did insist on 95 per cent of the shareholders.

MR.MacINNES: Yes, my Lord, but they did not get a 95 per cent vote.

LORD BLANESBURGH: I think we had better get to the section and see if that helps you.

MR.MacINNES: The section is section 78. Sections 77 and 78 are not in the English Act. In this Company Act, British Columbia adopted the English Act almost in toto. These two sections were new and were inserted in the British Columbia Act.

(Learned Counsel read section 78)

LORD BLANESBURGH: What is the way in which Walsh is entered in the Register, as mortgagee of Ferguson?

MR.MacINNES: Simply as if they were his own personal shares.

LORD BLANESBURGH: Therefore section 77 does not seem to apply to him at all.

MR.MacINNES: Will your Lordship just read on: "This provision" etc. (reads to the words) "the Register".

LORD BLANESBURGH: Is it neglect or omission by the Company never to have known anything about it?

MR.MacINNES: The entries in the Register were made by Wallbridge.

LORD RUSSELL: I do not see how this helps you.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD THANKERTON: Who has the right to vote?

MR.MacINNES: Ferguson I would say, under this Act.

LORD RUSSELL: Not under this section.

MR.MacINNES: He is the member in respect of these shares.

LORD RUSSELL: If they were part paid shares he would be liable to pay calls on them. That is all.

MR.MacINNES: That is a special provision in the British Columbia Act by which you can register your security against shares without becoming a member or without becoming liable in any way.

Now, if your Lordships will turn to section 66 you will see who were members: "Every company shall keep" etc., (reads to the words) "representative capacity". So that you have your Register consisting of a register of members and in addition to that a register of those who are registered merely because of trusteeship and so on, and also a register of mortgagee or security holders.

LORD BLANESBURGH: Have you a section in this Act which corresponds to the English Act that the Company shall not be bound to take notice of any trust?

MR.MacINNES: That is in the Articles, my Lord.

MR.WILFRID GREENE: No, my Lord, Section 71 of the Act.

MR.MacINNES: Section 71 is subject to section 77: "Notice of any trust expressed employed or constructed", etc., (reads to the words) "shall be a valid discharge to the company".

LORD BLANESBURGH: There is no reference to section 78 there at all.

MR.MacINNES: No, my Lord, there is not an ownership. The right of voting is expressly provided for in the case of trusteeship, but it is not provided for in the case of mortgagees.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD RUSSELL: What is the liability in respect of a share except payment of calls.

MR.MacINNES: He might be liable for any debts owing by the shareholders to the Company under special articles.

LORD RUSSELL: Only by lien on the shares.

MR.MacINNES: Yes, my Lord, only by lien on the shares.

LORD RUSSELL: Is section 78 more than this: Notwithstanding the man who is on the Register is a mortgagee, the Company can still look upon the mortgagor to discharge liability on the shares.

MR.MacINNES: Yes, my Lord.

LORD RUSSELL: How does that prevent a mortgagee being the proper person to vote in respect of the shares? Is voting a liability.

MR.MacINNES: Votes are confined to members.

LORD RUSSELL: Ex hypothesi he is in the Register as a member.

MR.MacINNES: If you look at section 66 he is not a member.

LORD RUSSELL: Section 78 deals with the case of a mortgagee who is entered as a member.

LORD BLANESBURGH: You would want to get a provision to the effect that notwithstanding a mortgagee is a shareholder registered, the mortgagee were not a shareholder registered. But it does not say that nor would it say that because it dare not say that. If it did, that would mean a mortgagee would have, say, protection for his security. He must be the person left to vote in order to protect his security; therefore it does not say that. It would be very difficult to assume that the Act did mean that when a mortgagor had pledged his

shares and they were out in the name of the mortgagee that the mortgagor was still to be entitled to vote in respect of them. It would deprive the mortgagee of his security or substitute the wisdom of the mortgagor for his own. You could not think of that. Is it not plain so far as notice is concerned and voting is concerned, although he is the mortgagee registered he is in exactly the same position as if he were not the mortgagee at all. Is not that your difficulty there?

LORD THANKERTON: "Member" is defined, is it not?

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: It is contrary to reason to suppose a mortgagor is entitled to vote in respect of shares he has pledged to somebody else. He remains liable because according to the mortgagee, the mortgagor ought to be liable, but he cannot vote in respect of them. It would be contrary to reason to say that that was the meaning of the section.

MR.MacINNES: I would think not my Lord.

LORD BLANESBURGH: Just think of it. Think of somebody pledging his shares to you and you taking them as good security, and you feel you are pretty safe, but then you find that by the terms of the Articles he is entitled to do anything he likes by way of diminishing or destroying your security. It is altogether unthinkable.

MR.MacINNES: I think you would have to protect yourself in your security agreement.

LORD THANKERTON: You would not suggest, would you, that there can be two people entered as owners of shares on the Register in British Columbia? Just look at Section 78: "No mortgagee who is entered as a member"--

that must mean in respect of shares he holds himself: and that must mean the ceasing of the mortgagor to be a member or his remaining a member.

MR.MacINNES: Now, my Lords,may I reconstruct my argument shortly. Our attack in this action centres on the transaction of the 16th July, 1924, by which these Directors, acting as I have described as a unit for and on behalf of the Syndicate, voted the Sloan bond and option, taking back the Declaration of Trust. That transaction is one transaction although it is expressed in two documents. They cannot be severed;

LORD BLANESBURGH: On the other hand, what has to be said on that point --it may be rather an important distinction -- is this: Your case has been rather framed on the footing that Sloan on that occasion was unwilling to allow the Directors to participate but they insisted that they should come in for half with him.

MR.MacINNES: Yes, my Lord.

LORD BLANESBURGH: The evidence seems to be exactly the contrary. The evidence seems to be that Sloan was himself unwilling to undertake the whole liability, and would not entertain it at all unless he obtained the assistance of the Directors coming in to the extent of 8,000 dollars. That puts a totally different complexion upon the transaction in point of morals. It may make no difference in point of law, but it certainly does eliminate the element of fraud which you introduced into that transaction. The evidence seems all one way on that point. It was the 8,000 dollars which they had contributed which was the vital thing. Sloan would not have touched it unless that had been provided; and that 8,000 dollars was provided by agreement with the Directors, and, according to the evidence, reluctantly.

In other words, they would seem to have been content that Sloan should have had the whole rather than that he should have kept a half.

LORD THANKERTON: Is not it in evidence that even after that Sloan tried to push another quarter of his interest on to Mr.Twiss?

MR.MacINNES: Unquestionably Sloan divided his interest into several parts.

LORD THANKERTON: Sloan was anxious about it as the man who had found the El Dorado.

LORD BLANESBURGH: Is not that the result of the evidence: I am not saying that is true, but is not that the result of the evidence?

MR.MacINNES: Yes, my Lord, that is the result of the evidence.

LORD BLANESBURGH: Does not that put you in a difficulty there? Do you admit according to the evidence as to the transaction that Sloan himself would not have been willing to entertain the transaction at all but for the Directors coming forward with their arrangement to provide 8,000 dollars in consideration of which he reassigned to them half of his interest under the option?

MR.MacINNES: That was a condition of the agreement. Who proposed and who accepted it I submit makes no difference in the effect of the transaction at all,because a wrong proposal accepted is not cured by placing the responsibility for the proposal over to the other side.

LORD BLANESBURGH: It takes away a great deal of the sting in the original charge.

MR.MacINNES: It might in regard to fraud, but it does not if it is constructive fraud.

LORD RUSSELL: It is not a wrong in them making the proposal. The only wrong comes in their not disclosing it to the Company.

MR.MacINNES: In the first place, my Lord, it is a proposal made to people who are in a position of trust, Directors of the Company, who must act for the Company, and who were bound to act for the Company.

LORD THANKERTON: Three of them.

MR.MacINNES: Yes, my Lord, three of them. The proposal had been made to them, it then on its face was a proposition which they could not entertain, and it, therefore, introduced that element of self interest into the disposal and affairs of the Company.

LORD THANKERTON: What ought they to have done -- let the Company go into liquidation?

MR.MacINNES: They could have done what Lord Buckmaster laid down in Cook v. Deeks.

SIR SIDNEY ROWLATT: By complying with Article 102 they could have put it all right.

MR.MacINNES: Yes.

LORD BLANESBURGH: They could have held a General Meeting and given full information to the shareholders as to what they intended to do,and have had opportunity of restriction being put on their activities.

MR.MacINNES: Yes, they could have done that, and they did not. While they were in control of the Company and where Article 102, as suggested by Sir Sidney Rowlatt, might have helped them, it would have been no help to them at all in the circumstances here. They could not get a quorum and without a quorum there could not be disclosure.

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD BLANESBURGH: But a quorum in General Meeting: that is the way to do it. Their disclosure would have been to a General Meeting if convened for the purpose of obtaining authority of the General meeting with their own votes added, and they could carry out this transaction free from the restriction of Article 102.

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SIR SIDNEY ROWLATT: Do you agree upon the construction of the Resolution of December, that it did confirm the retention by the Directors of this profit.

MR.MacINNES: Purported to do that, my Lord.

LORD BLANESBURGH: Do you agree it did so in a sufficient degree?

MR.MacINNES: The notice says distinctly "power" to confirm". The Resolution says it does confirm.

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LORD THANKERTON: Mr.Walsh, who was interested, was delighted to get out of it on those terms.

MR.MacINNES: Walsh and Godfrey were the only Williams Estate executors who were stated to be delighted.

LORD THANKERTON: They voted for it.

MR.MacINNES: They voted for it.

LORD THANKERTON: Walsh is alive, and did not give evidence.

MR.MacINNES: He is alive and he did not give not give evidence. The suggestion has been made that the Respondents were free to accept Sloan's -------

LORD BLANESBURGH: Were you not rather in a difficulty is not calling Walsh?

MR.MacINNES: No more difficulty than my friend was, my Lord.

LORD THANKERTON: You made no suggestion that he did

not carry out his duty in voting on behalf of your shares?

LORD BLANESBURGH: You might have suggested, even though you could not have proved it,that he, as a mortgagee, had acted wrongly.

MR.MacINNES: That may come up when he tries to collect the balance of his money

LORD THANKERTON: If you have the fact that outside the Syndicate you have Walsh and you have Twiss and other independent shareholders, whereas Ferguson is the only one interested and the English shareholders to the extent of 10,000 shares -- 11,000 shares --after seven years. It is rather a tall order to ask the Court to upset that, is it not, when you are making no criticism in respect of Walsh's conduct, in respect of your big block of shares, and making no attack on the price paid by Sloan as being an outrageously low price?

MR.MacINNES: The real attack on the Sloan transaction was the Defendants taking advantage of the situation to take a half-interest with Sloan, instead of giving that to the Company.

LORD BLANESBURGH: There would have been great sting in that if you had made good your allegation with regard to it; whereas the evidence is that Sloan would not have taken the thing at all, unless he had induced them to come into it.

LORD THANKERTON: And also that they knew that it was an Eldorado at the time.

MR.MacINNES: When one comes to deal with the cause of breach of trust such as this, can you canvass the nature of the transaction, that there was something else before -----?

Exhibit "A" to the affidavit of Alfred E. Bull.

LORD BLANESBURGH: When in a case like this the Plaintiff condescends upon allegations of deliberate fraud, and it is held by the Court before which these accusations are being brought that he has failed to establish them, then a Court is not very astute to construct a case for the Plaintiff which would entitle him to recover. That is where your trouble comes in

MR.MacINNES: The Chief Justice in the Court of Appeal considered it a deliberate breach of trust: Mr. Justice Martin considered it a constructive fraud; Mr.Justice McPhillips was outspoken in his condemnation, and Mr.Justice Macdonald called it a predetermined scheme and plan. We are supported to that extent by those findings.

LORD THANKERTON: The trouble is that you have not shown us any evidence to support it.

MR.MacINNES: I submit we have shown evidence where these people, while they were in charge of the Company before the liquidation, so arranged things by reason of this Sloan transaction that they got the interest which we now complain of: they did not have any right to get that: there is no justification in law, and they have not shown any justification for holding it.

My submission to your Lordships is that they have not done so, and we are entitled to get this back on the grounds we are asking for in this appeal, and I submit we are entitled to it.

Exhibit "A" of Affidavit
of Vernon Lloyd-Owen

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.

Exhibit "A" of Affidavit
of Vernon Lloyd-Owen.

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 assaying to compose their 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 administrater 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 submitted 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 Lord-

ships 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 syanide 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 thence-forward 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 nor 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 realized. 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 interest (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 statememt 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 recognized 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.

Exhibit "A" of Affidavit
of Vernon Lloyd-Owen.

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 $4,800 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 oversteps 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".

Exhibit "A" of Affidavit
of Vernon Lloyd-Owen.

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 to 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 or 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.Seaman, 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 organized. There was no suggestion that any minority shareholders, as,for instance, the Williams estate,were being separately favoured as 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 respondent's 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.

Exhibit "A" of Affidavit
of Vernon Lloyd-Owen.

They will accordingly humbly advise His Majesty that this appeal be dismissed and with costs.

Exhibit "C" of Affidavit
of Vernon Lloyd-Owen.
Exhibit "A" to Affidavit
of Chas.W.St.John

1565 Harwood Street,

Vancouver,B.C., February 26, 1935.

John S.Salter, Esq.,

Liquidator Pioneer Gold Mines Limited,

(In Liquidation)

808 Hastings St. W.,

Vancouver, B. C.

Dear Sir:

The undersigned is a member of Pioneer Gold Mines Limited, being the registered holder of 10,560 shares numbered 347,705 to 357,704 and 479,423 to 480,002 respectively.

In the action of Ferguson et al v.Wallbridge et al in which you were a party defendant, the reasons for judgment of the Privy Council are now to hand,and you have been furnished with a copy. From the facts in that case as established in evidence and with which you are perfectly familiar,it would appear that the company has been deprived of very substantial assets by the illegal and unauthorized action of certain members and directors known throughout as the Wallbridge Syndicate.

Unfortunately,owing to the lack of competence in the plaintiff in the Ferguson action,all steps taken in that action to recover Company assets so diverted were abortive, not by reason of any weakness in the claim but by reason only of the absence of any right in Ferguson to propound the claim, and the only result of that protracted litigation is to establish the validity and propriety of the claim therein made,had it only been presented and made in the proper manner and in the Company's name.

I am firmly convinced,and feel that a perusal of the Privy Council reasons will convince you,that this claim

Exhibit "C" of Affidavit
of Vernon Lloyd-Owen.
Exhibit "A" to Affidavit
of Chas.W.St. John.

for restoration to the Company of assets illegally and without authority taken by the Syndicate should be pressed at once,as plainly intimated in the Privy Council reasons by commencement of actions in the Company's name. Under Sec. 209 (1) of the Companies' Act (1929) you have full power and authority to bring such action. Under Sec.212 (1) it is your duty to get into your custody all properties and choses in action of the Company, and by s.s.2 of same section you are to use your own discretion in the management of the Company Estate.

You are fully aware of the fact that the proposed defendants in such an action control 51% of the voting power of the membership and under such circumstances it would be futile to submit the matter to the members at large, as the Syndicate would naturally vote down any such action.

Before moving on my own initiative I am, therefore, requesting you by this letter to take energetic steps, as I consider it is your duty to do,for the commencement of such process as will bring about a restoration to the Company of the assets so abstracted and diverted from it by the said Syndicate.

A prompt reply to this letter, with an answer to my request, will be appreciated.

Yours truly,

"Vernon Lloyd-Owen"

Exhibit "A" of Affidavit of
Charles W. St. John.

Letterhead of Lawrence & Shaw

Barristers, etc.

Vancouver,B.C.

February 28th,1935.

John S.Salter,Esq.,
Liquidator of Pioneer Gold
Mines Ltd.(In Liquidation)
c/o London & Western Trusts Co.Ltd.
808 Hastings St.W.
Vancouver, B.C.

Dear Sir:

RE: THE WALLBRIDGE SYNDICATE

We have been instructed by Mr. V. Lloyd-Owen, a member of Pioneer Gold Mines Ltd. (In Liquidation).,to take all necessary proceedings for the enforcement of the rights of the minority shareholders of the said Company arising out of the acquisition of the Company's property by members of the Wallbridge Syndicate.

You are,of course, fully familiar with the recently concluded litigation between Andrew Ferguson and the Syndicate members and you have doubtless perused the Judgment of the Privy Council which we left with you some days ago.

In view of the said Judgment and of the undisputed facts in that case, it is clear that any action for the benefit of the Company or the minority must be taken in the name of the Company and we have advised our client to call upon you to take appropriate action in the name of the company against A. E. Bull., J.Duff-Stuart, R. B. Boucher, F.J. Nicholson and the Executors of the Estate of A.H.Wallbridge and on his instructions we enclose herewith a formal demand upon you to take such action.

Our client will possibly have in this matter the assistance of other minority shareholders. It is, of course, understood that you will not be expected to

Exhibit "A" of Affidavit of
Charles W. St.John.

take any personal risk in this litigation but naturally the parties undertaking the expense will insist upon selecting the Solicitors and Counsel who will represent the Company in such litigation.

It is our client's desire that proceedings be taken without delay. We would appreciate a prompt reply.

Yours truly,

LAWRENCE & SHAW

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Per "Ian A.Shaw"

IAS/DP.

Exhibit "C" to Affidavit of
Charles W. St.John

Letterhead of Farris,Farris Stultz & Bull.

March 12, 1935.

Charles W.St.John, Esq.,
Pacific Building,
744 Hastings St.W.,
Vancouver,B.C.

Dear Sir:

Mr.A.E. Bull has handed to me copies of letters which your client Mr.Salter received from Messrs.Lawrence & Shaw and their client Mr.Vernon Lloyd-Owen, and with which you were kind enough to supply Mr.Bull.

These letters call upon Mr.Salter,as Liquidator, to bring an action on behalf of the Pioneer Gold Mines Ltd. (in liquidation) against Messrs.Bull,Duff-Stuart, Boucher and the estate of the late Wallbridge for the recovery of assets lost to the company by the alleged illegal and unauthorized action of these gentlemen as members of the Wallbridge Syndicate so-called, and by some of them as directors of the above named Company.

If my understanding is correct,you have thoroughly gone into the whole question and advised Mr.Salter as to his duties as liquidator in this connection,and,on your advise, he has refused the request made on him. Mr.Shaw, I understand, now wishes you to apply to the court for directions on behalf of the liquidator. Although I quite realize that Mr.Salter in his duties as liquidator is quite mindful, and correctly so,of the fact that in such position he is at all times subject to the direction of the court and will of course comply with any direction given,I do not think he should himself apply to the court, either alone or in consort with any other person or persons,as,if Mr.Lloyd-Owen is serious in his allegations, he can himself apply to the court for an order. From my very complete knowledge of

Exhibit "C" to Affidavit of
Charles W. St.John.

this whole matter,which has already gone through three courts,I wish to point out my clients position, in the event that you have not already advised Mr.Salter as to his duty in connection with Mr.Shaw's latter request.

In Mr.Shaw's letter he states that as a result of the Judgment in the Privy Council it is clear that any action for the benefit of the Company or the minority must be brought in the name of the company. This statement is quite correct, but it does not follow that because such an action,if brought,must be brought in this form, that therefore there is any justification for such an action being brought. His letter offers no opinion that there is any such justification. His client, Mr.Lloyd-Owen, however, does venture some opinions on the questions. He states:-

> First: the facts in the Ferguson action establish that "the company has been deprived of very substantial assets by the illegal and unauthorized action of certain members and directors known throughout as the Wallbridge Syndicate."
>
> Second: "Unfortunately, owing to the lack of competence in the plaintiff in the Ferguson action, all steps taken in that action to recover company assets so diverted were abortive, not by reason of any weakness in the claim but by reason only of the absence of any right in Ferguson to propound the claim, and the only result of that protracted litigation is to establish the validity and propriety of the claim therein made, had it only been presented and made in the proper manner and in the company's name."
>
> Third: I am firmly convinced, and feel that a

perusal of the Privy Council reasons will convince you,that this claim for restoration to the company of assets illegally and without authority taken by the Syndicate should be pressed at once, as plainly intimated by the Privy Council reasons by commencement of actions in the company's name."

My knowledge of the facts offered in evidence and of the Judgments given in the Courts of this Province and my reading of Mr.MacInnes' argument before the Privy Council, the observations of the Lordships during this argument, and their Lordships' Judgment as pronounced by Lord Blanesburgh convince me that Mr.Lloyd-Owen is wrong in each of his three assertions.

First: In the Courts of this Province no question arose as to the competency of the Plaintiff to bring the action. As a consequence all the issues of fact and law were fully considered and passed upon.

His Lordshief Chief Justice Morrison found the facts against the plaintiff so decidedly that he termed the proceedings "A wild mares nest". In law he dismissed the action.

In the Court of Appeal:

The Chief Justice found as follows:

1. As to <u>fraud</u> he held there was no actual fraud; but that there was a breach of trust.

2. Notwithstanding the breach of trust he found for the defendants:

(1) That the plaintiff could not accept the option and sale to Sloan and attach the rights of the defendants: "In my opinion when the plaintiff acquiesced in and relied upon the option he confirmed

and ratified the whole agreement."

(2) In any event in view of the dissolution of the company and the change in position of the parties the action can not be maintained.

Mr.Justice Martin found that a case of constructive fraud had been made out as to the first meeting of the directors, but in view of Section 102 of the company's articles and, in view of the ratification of the directors' actions by the general meeting of the company,at which over 95% of the shares were represented and voted unanimously for ratification, his Lordship held there was no right of action.

Mr.Justice M.A.Macdonald, to quote from Mr. MacInnes' Case in the Privy Council, decided as follows:

"The matters complained of '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."

"That what was done at the 5th December meeting was the expressed will of a majority in respect of the internal matters within the corporate powers of the company."

Mr.Justice McPhillips alone of all the Judges of the Courts here and in England decided for the plaintiff. His Judgment finds "A secret agreement": actions "unmindful of the law": "fraud by way of breach of duty"; and "initial fraud", which permeates the whole"; "it was all conceived and based on initial fraud"; "there was fraudulent concealment here."

"Further shareholders-not directors-parties to the fraud and breach of duty and members of the Syndicate carrying out the sale and profiting by the secret

Exhibit "C" to Affidavit of
Charles W. St.John.

agreement also must account for all the profits received."

The answer to this Judgment is that not only was it not supported by any other Judge in British Columbia, but in the Privy Council their Lordships declared:-

"The existence of such a conspiracy as alleged was in its universality of range on both sides almost unthinkable."

"It is however fair to the respondents that their Lordships having heard the appellants case should here say that in their judgment these allegations (of fraud) so recklessly made have not in this action been established."

"Their Lordships feel it their duty to mark their sense of the appellants refusal to withdraw those charges of conspiracy and fraud that in their Lordships' opinion had not been supported in evidence."

Second. So far as it is suggested that the Privy Council has in any way intimated that the plaintiff would have had any cause of action if the case had been properly brought I must definitely challenge the suggestion.

As already pointed out, they have repudiated the idea fraud. Yet fraud was, in the opinion of Mr.MacInnes, the essence of the whole case. See his Case, paragraphs 2 and 66. Note also his persistence in not withdrawing the charge.

The suggestion that the Privy Council has in any sense intimated that the Plaintiffs would have had a case, apart from fraud, if it had been properly brought, is without the slightest foundation and is based, if on anything, on a misunderstanding of their Lordships' Judgment.

Exhibit "C" to Affidavit of
Charles W. St. John.

His Lordship Lord Blanesburgh was most careful throughout to state that they were making no pronouncement on the merits apart from fraud,because the respondents had not been heard. All that he did was to recite what the contentions of the appellant were so as to decide whether or not these claims when stripped of camouflage were really claims which should have been made on behalf of the company and so in a different form of action. It is true that towards the end of the Judgment His Lordship points out the correct procedure for bringing an action when a company is in liquidation. It may be excusable for Mr. Shaw's client, a layman, to think that because the learned Judge is pointing out how such an action should be brought that, therefore, he is suggesting also that in fact it should be brought. This latter is the one thing His Lordship is guardedly careful not to do. More than once he points out that as the respondents have not been heard, they are offering no opinion. It follows, therefore, that so far as there is any semblance of a case left out of the wreck and, apart from fraud, the decisions of the Courts in British Columbia are still effective.

Not only is it true that their Lordships, by the Judgment, have guarded themselves as I have stated, but a perusal of their comments during the course of Mr. MacInnes' argument will show that, even without hearing the respondents, they were emphatically of the opinion that the appellant had no case <u>on any ground</u>.

Having in mind therefore that the decision of the Privy Council is that the charges of fraud were ill-founded; that Mr.MacInnes had expressly stated that this was the main aspect of his case;that the Courts in British Columbia have expressly found against him, not only on fraud, but

Exhibit "C" to Affidavit of
Charles W. St.John.

on all other grounds,and that these decisions still remain unchallenged;and in view of my own knowledge of the facts and belief that there is no justifying any action, I am strongly of the opinion, and have so advised my clients that the Pioneer Gold Mines Limited (In liquidation) have no case against them,and that the liquidator would be ill-advised to take any action or steps in that direction.

I, of course,have no objection to your giving a copy of this letter to Messrs.Lawrence & Shaw.

Yours truly,

J. W. deB. Farris.

Order.

BEFORE THE HONOURABLE)
)THURSDAY THE 28th DAY OF MARCH.A.D.193
MR.JUSTICE MURPHY)

THE PETITION of Vernon Lloyd-Owen and John S.Salter having come on for hearing on the 14th day of March 1935, and having been adjourned, and directions having been given for service of the said Petition, and it having come on for hearing this day in the presence of Mr.C.W. St.John of Counsel for the said John S. Salter, Liquidator of Pioneer Gold Mines Limited (In liquidation) Mr.J.A.MacInnes of Counsel for the Petitioner Vernon Lloyd-Owen, and Mr.J.W. deB.Farris, K.C., of Counsel for Alfred E. Bull, J.Duff-Stuart, R.B.Boucher, F.J. Nicholson and Helen A.Wallbridge and D.S.Wallbridge Executors and Trustees of the Estate of Adam H.Wallbridge, deceased: AND UPON READING the Petition herein dated the 13th day of March 1935; the affidavit of Vernon Lloyd-Owen sworn herein the 13th day of March 1935 and the exhibits therein referred to; the Order for directions made herein the 14th day of March 1935; the Notice of Hearing of said Petition dated the 14th day of March 1935; the affidavit of Alfred Edwin Bull sworn herein the 27th day of March 1935 and the exhibits therein referred to and the affidavit of Charles William St.John sworn herein the 28th day of March 1935 and the exhibits therein referred to

THIS COURT DOTH ORDER AND DIRECT that no action be taken by the Liquidator of Pioneer Gold Mines Limited (in liquidation) in the name of the Company or otherwise by said Liquidator against Alfred E. Bull, J.Duff-Stuart, R.B. Boucher, F.J.Nicholson and Helen A. Wallbridge and D.S.Wallbridge, Executors and Trustees of the Estate of Adam H.Wallbridge, deceased,or any of them,for the recovery of or otherwise

in respect of any property or assets of the Company which may be alleged to have been wrongfully acquired by them, or for any other relief as set out in the said Petition.

AND THIS COURT DOTH FURTHER ORDER AND DIRECT that leave be and it is hereby refused to the Petitioner Vernon Lloyd-Owen to bring action in the Company's name against the said Alfred E.Bull, J.Duff-Stuart,R.B.Boucher, F.J.Nicholson and Helen A.Wallbridge and D.S.Wallbridge, Executors and Trustees of the Estate of Adam H.Wallbridge, deceased,or any of them, to obtain relief as prayed for in the said Petition, or otherwise on the Company's account for vindication of the Company's rights.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Petition herein be dismissed.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said Alfred E.Bull, J.Duff-Stuart, R.B.Boucher, F.J.Nicholson and Helen A.Wallbridge and D.S.Wallbridge, Executors and Trustees of the Estate of Adam H.Wallbridge deceased, recover their costs of and incidental to this Petition from the said Petitioner Vernon Lloyd-Owen.

"J.F.M"
D.R.

BY THE COURT

"D.M" J.

"J.F.Mather"
District Registrar

Entered
Apr.30 1935
Order Book,Vol. 93 Fol.237
Per A.L.R.

"J.A.M".
"C.W.St.J"
Checked
E.P.O'C.

Notice of Appeal

NOTICE is hereby given that the Petitioner, Vernon Lloyd-Owen intends to appeal and doth hereby appeal to the Court of Appeal from the Order of the Supreme Court of British Columbia made on the Petition of Vernon Lloyd-Owen and John S.Salter by the Honourable Mr.Justice Murphy on Thursday, the 28th day of March, 1935, whereby and wherein the Petition insofar as the prayer of Vernon Lloyd-Owen was concerned,was dismissed and whereby no directions or orders were given to the co-Petitioner, John S.Salter, Liquidator of Pioneer Gold Mines Limited (In Liquidation).

NOTICE is further given that the said appeal will be set down to come on for hearing at the sittings of the Court of Appeal to be holden on the 4th day of June, 1935, at the Court House in the City of Victoria at the hour of 11:00 o'clock in the forenoon or so soon thereafter as Counsel may be heard or for such earlier special sitting of the Court of Appeal and either in the City of Victoria or the City of Vancouver as the Court of Appeal on the application of the Appellant may by order permit.

The grounds of appeal are the following:

1. The said Order is against the law and the evidence and the weight of the evidence.

2. The learned Judge should have directed the Liquidator of Pioneer Gold Mines Limited (In Liquidation) to take action forthwith in the name of the Company against such persons as Counsel might advise for the recovery of all the property and assets of the Company which might be alleged to have been wrongfully acquired by any person and more specifically for the relief prayed for in clause (a) of the Petition herein.

3. In the alternative, the learned Judge

erred in not granting to the Petitioner, Vernon Lloyd-Owen, leave to bring action in the Company's name to obtain relief as aforesaid on the Company's account for vindication of the Company's rights in the manner referred to in the said Petition.

4. The learned Judge erred in his interpretation and construction of the Reasons for Judgment of the Judicial Committee of the Privy Council in the case of Ferguson vs Wallbridge et al, which said Reasons were part of the material before him upon the hearing of the Petition in the following particulars:

(a) The learned Judge erred in deciding that Pioneer Gold Mines Limited (In Liquidation) by reason of the said Judgment should not be allowed to plead fraud, actual or constructive.

(b) The learned Judge erred in holding that the Company had no maintainable cause of action in respect to the facts set out in the aforesaid Reasons of the Judicial Committee.

5. The learned Judge erred in admitting in evidence the contents of the Record filed in the Privy Council in an action of Ferguson vs Wallbridge.

6. The learned Judge erred in assuming that the Record in the action of Ferguson vs Wallbridge contained any evidence or the only evidence available to the Company in the action proposed to be brought.

7. The learned Judge erred in admitting in evidence a document purporting to be extracts from a transcript of the argument of Counsel for one Andrew Ferguson on his appeal to the Privy Counsel in the action of Ferguson vs Wallbridge.

8. The learned Judge erred in purporting to determine before trial and without any evidence issues

of law and fact which could only properly be determined in an action instituted for that purpose.

9. The learned trial Judge found as a fact and erred in so finding in the absence of evidence that the Liquidator of Pioneer Gold Mines Limited sold all of the assets of the Company to certain persons under Agreement dated the 21st day of January, 1925.

10. The learned Judge found and erred in so finding that all of the Company's rights against the alleged purchasers, including therein the right of action herein sought to be maintained,were barred by reason of the said Agreement of the 21st day of January, 1935.

11. All findings of fact by the learned Judge were and are pre-mature.

12. The learned Judge erred in purporting to decide the Company's rights without considering all of the evidence which might be adduced in a new action.

13. The learned Judge erred in refusing to allow any charges of fraud to be made by the Company in the absence of specific evidence of such fraud being presented to him at the hearing of the Petition herein.

14. The Appellant will rely upon such further and other grounds of appeal as Counsel may advise.

DATED at Vancouver, B.C., this 11th day of April, 1935.

"Ian A. Shaw"
SOLICITOR FOR THE PETITIONER:

To: Alfred E.Bull,
J.Duff-Stuart
R.B.Boucher,
F.J.Nicholson, and
the Executors and Trustees
of the Estate of Adam H.
Wallbridge
And to John S.Salter,
Liquidator of Pioneer
Gold Mines Limited (In
Liquidation)