*Privy Council Appeal No.* 12 *of* 1936.

**Vernon Lloyd-Owen** - - - - - *Appellant*

*v.*

**Alfred E. Bull and others** - - - - - *Respondents*

FROM

## THE COURT OF APPEAL FOR BRITISH COLUMBIA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY 1936.

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*Present at the Hearing:*

LORD BLANESBURGH.

LORD THANKERTON.

LORD ROCHE.

[*Delivered by* LORD BLANESBURGH.]

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This is an appeal by special leave from a judgment of the Court of Appeal for British Columbia dated the 17th July, 1935, affirming an order of the Supreme Court dated the 28th March, 1935. The petition on which the order of the Supreme Court was made was presented on the 13th March, 1935, by the appellant and the respondent John S. Salter as liquidator in the voluntary liquidation of a British Columbian company, Pioneer Gold Mines, Limited—to be referred to throughout as " the Company." By the petition the liquidator submitted himself to the Court but took no active steps in the case. It was the appellant, a minority contributory of the Company, was the active party.

The petition prayed for an order that the liquidator be directed in the Company's name to take action against the respondents other than himself, for the recovery of property and assets alleged to be the property of the Company and for other relief. Alternatively the appellant asked for leave to bring an action in the Company's name for the same relief. The proposed defendants collectively hold a controlling interest in the Company—fifty-one per cent. of the issued shares. Two of them were directors: two others are representatives of a deceased director. As against all of these the claim or some part of it would be made in that character.

The petition was dismissed by the Supreme Court—Mr. Justice Murphy—and his order, as just stated, was affirmed on appeal. This bare statement suffices to disclose the unusual character of this appeal, one justified only by the importance of the issues involved, the exceptional circumstances in which the application was made, and the even more unusual course taken by the learned Judge in dealing with it.

The purpose of the petition was to obtain leave to have action taken in the Company's name in respect of matters which, so far as it was a representative suit by a minority shareholder, had been the subject of a former action brought by one Andrew Ferguson suing personally and on behalf of all other shareholders of the Company except the respondents against the respondents as defendants. The Company itself was not joined as a party.

The action had been dismissed by the Supreme Court of British Columbia and by the Court of Appeal. A further appeal to His Majesty in Council was also dismissed, but not, as in the Courts below, on the merits. It was dismissed on objection to the competency of the proceedings then taken for the first time. Learned Counsel for two of the respondents as a preliminary objection and before proceeding to deal on the merits with the arguments which had been addressed to this Board by learned Counsel for the appellant Ferguson, objected that the action and the appeal were then alike incompetent. The relief which had been claimed by the appellant before the Board 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 the Company. Such relief could only be claimed and the right to it could only be ventilated in an action to which the Company was at the least a party. But the objection went further. The Company it was said, was, and was even stated to be in liquidation, and when a company was in that position no corporate relief could be granted in an action in which it was not itself plaintiff. In short the whole proceedings had become incompetent and ineffective; amendment not being open to the Board they should now cease. And the Board by their judgment delivered on the 1st February, 1935, accepted that view. They examined the nature of the claims presented to them in argument on behalf of the appellant and concluded that they were, all of them, claims competent to the Company alone. They gave it as their opinion that after liquidation no such claims could be made in a representative contributories' action even if the Company were joined as defendant. The following is the passage from their Lordships judgment which deals with this aspect of the case :—

> " The permissibility of the form of proceeding thus assumed, where the Company concerned is a growing 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 will 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 growing 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 the 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."

And then their Lordships dealt with the costs. They had in an earlier part of their judgment commented severely upon charges of fraudulent conspiracy which counsel for the appellant had refused either to withdraw or at least to restrict. These charges recklessly made, had not, they said, in that action been established. Accordingly because of the refusal of the appellant to withdraw them he was ordered to pay the costs of the appeal while the adverse orders as to costs in the Courts below were left undisturbed notwithstanding the late stage at which the competence of the action was challenged by the respondents.

Their Lordships do not doubt that the appellant's petition now under review was suggested by the above statements in their judgment in the Ferguson action, and it may be added that before it was presented the liquidator had been

invited to institute proceedings in the Company's name and he had refused. It seems, however, to have been suggested in the Provincial Courts that the petition should be granted on the ground that it was at least encouraged by their Lordships. That is not so. The possibility of further proceedings was certainly not absent from their minds. They deplored the fact that the objection taken was " an obstacle to finality ". They did not forget section 243 of the Act. But they said and meant no more. The petition when presented was one to be dealt with by the Judge in liquidation upon the considerations relevant in such cases.

And the proper judicial attitude towards such an application is well understood. A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding-up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success: where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.

The learned Judge however on this occasion went far beyond this. Instead of treating himself only as a custodian of the Company's proprietary interests, taking counsel perhaps with representative non-partisan contributories he directed the petition to be served upon the actual defendants to the proposed action and they, not content with the Board's judgment in the Ferguson appeal, which had been referred to in the petition, brought into evidence the whole voluminous record in that action and even the shorthand notes of the proceedings before their Lordships, and all of these are entered in the order of the learned Judge as having been read by him. His action in this matter, without precedent in their Lordships' experience, had the effect that not only before him, but in the Court of Appeal and before this Board there has been at the instance of the respondents, the proposed defendants, what approached as near to a preliminary trial of the proposed action as they could make it. As a result not only have the proceedings become inexcusably elaborate; but judicial attention from the primary issue has, their Lordships cannot doubt, been to some extent diverted. The learned Judge gave no reasons for the order he made dismissing the petition. But, having regard to the fact that all the proceedings in the Ferguson action are read in the judgment, and to the terms of the notice of appeal therefrom, their Lordships feel satisfied that his reasons were substantially the same as those given by the majority of the Court of Appeal embodied in the following passage from the judgment of Mr. Justice Macdonald :—

> " We should only allow this appeal, if, in our opinion with fraud in all its phases eliminated a new plaintiff on legal grounds apart from fraud would have a reasonable chance of success. In view of all that occurred : my own opinion as expressed at the time ; and the further study of the case in the light of the argument presented to us, the proposed new action could not in my judgment possibly succeed, and that being so it is not just that the respondents should be subjected to the cost and inconvenience involved in contesting it."

Their Lordships with reference to this pronouncement note first that it is based on the assumption that " fraud in all its phases will be eliminated " from the proposed action. It may be, but it will not necessarily be so. Doubtless no more will be heard of the fraudulent conspiracy so adversely commented upon in their Lordships' judgment in the Ferguson appeal—and of this their Lordships were assured by Mr. Radcliffe—but if the facts as proved in the proposed action justify personal reflection on any defendant the Company cannot in advance be precluded from making it, and no assurance to that extent has been given nor can it be asked for. It must be remembered that as relied on by the respondents themselves in obtaining the dismissal of the Ferguson appeal, the Company was a stranger to the proceedings then. So far as the Company was concerned these proceedings were all *coram non judice* : it cannot be affected by anything that took place in its absence. The unfortunate experience of the plaintiff in the Ferguson action however will be the best protection the respondents can have against any further reckless charges of fraud being made against them.

The next ground of Mr. Justice Macdonald's judgment is that in his opinion with fraud in all its phases eliminated, the proposed action cannot possibly succeed. In answer to this their Lordships will only say that it would be unjudicial for any Judge who heard the arguments on this appeal to express a conclusion so absolute. Their Lordships purposely refrain from expressing even a provisional opinion on the question. They have formed none. The time for that is not yet. All they need now say is that the proposed action will not be in any sense a frivolous or vexatious one, and if the respondents feel aggrieved at having to face it, they must remember that it is the price they pay for their successful objection to the competence of the Ferguson proceedings.

In this connection, however, their Lordships would add that in their judgment the fact that Mr. David Sloan so much referred to in the argument, has died since the Ferguson action was tried should not prevent his evidence given in that action from being read *quantum valeat* at the trial of the proposed action if the presiding Judge expresses the view with all the evidence before him, that justice to either party so requires : and their Lordships will humbly advise that the order presently to be stated should

be made on the understanding that all necessary consents to that end, so soon as they are asked for by the Judge will be forthcoming.

Surveying now the whole case in the light of the arguments addressed to them their Lordships are of opinion that the discretions below have been exercised on a wrong principle and on a basis which their Lordships cannot accept. It is, they think in all the circumstances and upon the understanding that if so required by the Judge at the trial all necessary consents will be forthcoming to the evidence of David Sloan deceased given in the action *Ferguson* v. *Wallbridge et alios* being then read *quantum valeat*, it is just that leave be given to the appellant to institute the proposed action in the Company's name against the respondents other than the liquidator on a proper indemnity to be settled in case of difference by the Judge in winding up.

The appeal should be allowed, the orders below discharged, and an order on the above terms substituted, and their Lordships will humbly advise His Majesty accordingly.

There will be no costs to either side in either Court below. The respondents, other than the liquidator, must pay to the appellant his costs of this appeal.

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In the Privy Council.

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VERNON LLOYD-OWEN

*v.*

ALFRED E. BULL AND OTHERS.

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DELIVERED BY LORD BLANESBURGH.

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