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UNIVERSITY OF LONDON  
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No. 37 of 1941.

INSTITUTE OF ADVANCED  
LEGAL STUDIES

*In the Privy Council.*

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

DAVID TAIT and TAIT AND MARCHANT  
(Defendants) - - - - - *Appellants*

and

HERBERT PREST WINSBY (Plaintiff) - - *Respondent.*

10

**Case for the Appellants.**

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 20th December 1940 which by a majority of three judges to two reversed the unanimous judgment in the Appellants' favour of the Court of Appeal for British Columbia dated the 19th October 1939 which had dismissed an appeal by the Respondent from part of a judgment of the Supreme Court of British Columbia dated the 17th January 1939 and had allowed a cross-appeal by the Appellants upon the other part.

RECORD.

p. 419.

p. 414.

p. 29, ll. 5-25.

20 2. The Appellant David Tait (hereinafter called "Tait") is a partner in the Appellants Tait and Marchant, a firm of barristers and solicitors in the City of Victoria. In all matters relevant to this appeal he acted and purported to act on behalf of the firm. The appeal has reference to the exploiting of mining interests in British Columbia. Persons desiring there to acquire any interest in mining property are required to take out Free Miner's Certificates and Section 12 of the Mineral Act (Revised Statutes of British Columbia 1936, Chapter 181) provides that, with immaterial exceptions, "no person or joint stock company shall be recognised as having any right or interest in or to any mining property unless he or it has a Free Miner's Certificate unexpired." A common method of developing mines is for those interested to be "grub-staked"

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by a partner. When the working partner makes a discovery the partnership commonly raises funds for the development by promotion of a syndicate which takes over the property or an option upon it in exchange for shares or units in the syndicate issued to the partners. The syndicate then raises funds for equipment and development by the sale of additional shares or units. It is common practice for one or more of the partners to form the syndicate and to acquire, on his or their own behalf, for cash or in payment for services, additional shares in the syndicate as he or they may see fit.

p. 196, l. 8-p. 198,  
l. 18; p. 199,  
ll. 20-33.

3. Prior to the 18th March 1935, the Appellants had acquired 10 comprehensive information concerning mining properties in the Valley of the Zeballos River, Vancouver Island, including information of certain very rich surface showings of gold-bearing ore which had been discovered on the Gold Peak Group of mineral claims in the area belonging to a party of prospectors.

p. 198, l. 33-p. 200,  
l. 37; p. 90,  
ll. 1-23; p. 101,  
ll. 28-41.  
p. 99, l. 23-p. 100,  
l. 23; p. 274, l. 5-  
p. 275, l. 29.  
p. 30, ll. 1-6;  
p. 89, ll. 22-25.  
p. 117, l. 30-p. 118,  
l. 15.

4. On the 18th March 1935 the Respondent, an experienced mining broker and real estate agent with a knowledge of conveyancing, interviewed Tait. The respondent was never a client of the Appellants but had known Tait in his boyhood. At this time and at all subsequent times up to the 4th January 1938 the Respondent did not have a Free 20 Miner's Certificate but the Appellants were unaware of this fact until after action was brought. At his interview with Tait the Respondent claimed to have acquired, through one Morrison purporting to represent the owners, an option for 20 days upon the Gold Peak group and the adjoining Privateer group belonging to the same owners. Tait being in touch with persons with or controlling capital who might be interested in mining properties agreed to join with the Respondent in exploiting this alleged option. The Respondent offered Tait an undivided half interest in all profits to be derived therefrom.

p. 288, l. 1.

p. 199, ll. 4-7.

p. 190, ll. 34-39;  
p. 101, ll. 28-44;  
p. 289, l. 1.

p. 90, ll. 28-39;  
p. 102, ll. 37-41;  
p. 200, l. 38-p. 201,  
l. 47.  
p. 289, l. 19.

5. On the 19th March 1935, the Respondent again interviewed 30 Tait bringing an option which it had been agreed he should obtain signed by one Pitre who, with three partners, owned the Van Isle and Rimy groups of mineral claims adjacent to the Gold Peak and Privateer groups. The Respondent had stated that these minor groups would complement the Gold Peak and Privateer groups to form a compact holding covering the proven rich area in the Zeballos Valley. It was agreed that this option should be included in the proposed undertaking.

p. 290.

6. On the 21st March 1935, Tait and the Respondent entered into a written contract for a partnership limited to a venture described in the contract as "the business only of purchasing and taking over and 40 "forming a Syndicate upon, developing, managing or selling the groups

- “of claims situate in the Valley of the Zeballos River in the Nootka Sound area, Vancouver Island, British Columbia, comprising thirty six (36) mineral claims made up of the ‘Gold Peak’ and ‘Privateer’ group (17 claims) the ‘Lone Star’ claim, and ‘Van Isle’ and ‘Rimy’ groups (16 claims) and the ‘Charity’ No. 1 Mineral Claim and any and all other mineral claims, rights, interests etc. which the parties or either of them may acquire or become interested in in that area.” The contract as executed provided that the parties should share equally “in all the profits of whatsoever nature or kind arising or accruing from the entire transaction, whether by way of commissions or profits made at any stage of the transaction, or earnings of any kind whatsoever in connection therewith, save and except legal fees which shall belong to the firm of Tait and Marchant.” About the end of April 1935, the contract was altered to provide that the Respondent should have only a 35% interest and the Appellants should have a 65% interest. p. 203, ll. 16-32; p. 91, l. 40-p. 92, l. 26.
- No provision was made for the contribution of partnership capital by either partner nor was capital considered necessary, the partners’ intention being to make an immediate deal in the properties acquired under option. p. 204, ll. 2-8.
- 20 7. On the 23rd March 1935, at an interview with Tait and the Respondent, Morrison signed a memorandum setting forth the terms of the proposed option for 20 days on the Gold Peak and Privateer groups and undertook that the owners, for whom he purported to act, would execute a formal option on those terms. p. 206, l. 20-p. 207, l. 15; p. 106 l. 37-p. 107, l. 12. p. 295, l. 1.
- 30 8. About the 1st April 1935, Pitre agreed with Tait and the Respondent the terms of the option, embodied in an agreement dated the 1st April, 1935 and executed by Pitre and his partners and by Tait, on the Van Isle and Rimy groups. This option was to Tait in accordance with the terms of his agreement with the Respondent that all documents relating to the transactions should be in Tait’s sole name, it being thought desirable by both partners that this course should be adopted. p. 159, ll. 25-41; p. 174, ll. 16-35; p. 208, ll. 16-22; p. 266, l. 30-p. 267, l. 12. pp. 298-301. p. 290, l. 38.
- 40 9. Meanwhile, on the 28th March 1935, the owners of the Gold Peak and Privateer groups repudiated the terms to which Morrison had agreed. Until the 9th May 1935 continuous efforts were made to secure an option upon these properties but on that date Tait and the Respondent withdrew their proposals and, after referring to a report upon the properties which they had obtained, offered for the properties \$30,000 instead of the \$150,000 then demanded. Morrison thereupon, on the 15th May 1935, requested the return of maps and other documents and ore samples supplied by him. These were returned. The Appellants submit and the learned trial judge found that the option on the Gold Peak and Privateer groups was in this way abandoned. p. 210, ll. 4-19; p. 109, ll. 23-26. p. 212, l. 21-p. 218, l. 19. p. 218, ll. 20-40. p. 318. p. 329, l. 22. p. 402, ll. 20-30.

p. 223, l. 4-p. 225,  
l. 26; p. 135, l. 1,  
et seq.

pp. 322-329.

10. The Appellants and the Respondent then made vain attempts to obtain subscriptions to a syndicate on the terms of a prospectus issued by them, to develop the Van Isle and Rimy groups along with another property called Fair View Consolidated. As a result of their failure no money was available to comply with the conditions of the Van Isle and Rimy options under which the partners were bound to pay an instalment of purchase price on the 30th May 1935; to carry on continuous work on the claim; to have the work surveyed in 1935; and to obtain a Crown grant as soon as sufficient development work had been recorded. The partners had never acquired any interest in the Charity claim and an option acquired on the Lone Star claim had expired. The partners accordingly decided that it was impossible to go any further with their project. In the words of Tait to the Respondent "As far as I can see we are absolutely finished."

p. 225, l. 26.

p. 160, l. 13-p. 162,  
l. 33; p. 226, l. 40-  
p. 228, l. 22.

11. About the 8th July 1935, Tait informed Pitre of this decision and Pitre pointed out that as he and his partners had to do assessment work to retain their rights in the Van Isle and Rimy groups, the decision placed them in difficulty. He proposed that Tait should join him in a syndicate to provide money to enable Pitre and one of his partners to do the necessary work, but he refused "to go into anything if Mr. Winsby was to be associated with it." Accordingly, there was an interview between Tait, the Respondent and Pitre on the 11th July 1935. Tait explained to the respondent in detail the proposal that he and Pitre should form this new syndicate which would take over the option and give to the partnership of the Appellants and the Respondent 15 units of the new syndicate's capital and Winsby agreed. Of these 15 units the Respondent agreed with Tait that 5 were to go to the Appellants in satisfaction of moneys advanced by them (about \$650) and that the remaining 10 units were to be divided in the proportion laid down by the partnership agreement. Thus the sole remaining asset of the partnership was disposed of. A draft of the proposed memorandum was discussed with the Respondent and approved by him, and he was informed that the Appellants were to be members of the syndicate with an initial subscription of 4 shares. They had an option with other members under the draft agreement to take further shares. The Appellants respectfully submit that the evidence about this interview of the 11th July 1935 establishes that the partnership between the Appellants and the Respondent was then dissolved. This evidence stands uncontradicted although the Respondent was recalled to give evidence in rebuttal. This submission is supported by the fact that after the interview the Respondent had no further dealings or business association with the Appellants, although previously they had been in constant consultation; and for nearly two and a half years until the 11th November 1937 the Respondent did not claim to be and gave no indication that he considered himself to be a partner with the Appellants in any way whatsoever.

p. 97, l. 29-p. 98,  
l. 36; p. 142,  
ll. 26-32; p. 162,  
l. 39-p. 163, l. 43;  
p. 191, l. 40-p. 192,  
l. 18; p. 229,  
l. 28-p. 231, l. 45.  
p. 231, ll. 40-45.

pp. 335-336.

p. 232, l. 2-p. 233,  
l. 9.

p. 105, ll. 26-29.

p. 142, l. 34-p. 143,  
l. 18.

12. The new syndicate as "The Nootka Gold Mining Syndicate" was accordingly formed with an initial capital of \$6,000 in units of \$100; 15 units were allotted to the partners for the assignment of the option; \$3,000 in cash, including \$400 originally subscribed by the Appellants was paid by members. Pitre arranged with one of his partners and two other men to work on the property and to receive their wages in syndicate units. Work proceeded and as more capital was required the syndicate capital was increased and the Appellants in order to keep the work going made advances out of their own funds and eventually these advances together with a sum of \$600 due to them for services rendered to the syndicate as managers and secretaries came to \$6,000. This sum was satisfied by the allocation to them from time to time of 60 syndicate shares, the syndicate being unable to pay otherwise.

pp. 335-336.  
p. 335, l. 14.  
p. 366; p. 66,  
ll. 6-16.  
p. 189, ll. 22-29;  
p. 232, ll. 38-41.  
p. 237, l. 14-p. 238,  
l. 25.  
p. 61, ll. 8-11;  
p. 237, l. 16; p. 341  
l. 28.  
p. 238, ll. 18-25;  
p. 341, l. 21; p. 351,  
l. 9; p. 373, l. 7.

13. In the summer and autumn of 1936 Tait and Pitre who had meantime become partners in another mining venture had a chance to acquire several conflicting and overlapping groups of claims including the Privateer group. By an agreement dated 1st August 1936, but made in November 1936, they acquired an interest in the Pilgrim group which had been staked over the top of the Privateer group, and on the 10th December 1936 they acquired an option on the Privateer group. A cash payment of \$1,000 had immediately to be made and money was also required for development. The Nootka Gold Mining Syndicate had no money and was heavily in debt. Tait borrowed moneys on his own account to finance the adventure. The entire property was held developed and worked by Tait and Pitre for themselves and their associates in this new venture until the 21st May 1937, when the options and property were assigned to a company formed for the purpose in consideration of shares in the capital of the company. The company was at first named "Nootka Zeballos Gold Mines Ltd." but later the name was changed to "Privateer Mine Limited."

p. 338; p. 243,  
ll. 19-43.  
p. 164, ll. 18-20.  
pp. 346-350.  
p. 346, l. 29.  
p. 245, ll. 27-34.  
pp. 367-371.

14. In October 1937 the Nootka Gold Mining Syndicate formed a company under the name of "Man-O-War Mines Limited" to which, on the 20th November 1937, the syndicate transferred the Van Isle and Riny groups and five adjacent claims which had been staked by the syndicate, together with the other assets of the syndicate. The consideration was 300,000 shares of the company's capital. Consequently the Respondent became entitled by reason of his holding of  $3\frac{1}{2}$  units in the syndicate to 7,000 shares of the capital of the company and these shares were eventually allotted to him. The Appellants Tait and Marchant received 114,000 shares of which 23,000 shares represented their share of the original 15 units allotted to the partners and 91,000 shares represented units in the syndicate which they had purchased for cash or received as repayment of advances.

pp. 382-385.  
p. 383, l. 33.  
p. 387, l. 31.  
p. 387, l. 26.

p. 144, l. 40-p. 146,  
l. 23.

p. 93, l. 35-p. 95,  
l. 4; p. 234, l. 8-  
p. 235, l. 14.

p. 385.

15. In October 1937 it became generally known in Victoria that the Privateer mine was producing a particularly rich gold ore. On the 2nd November 1937 the Respondent sought an interview with Tait and had interviews with him on the 2nd and 9th November when the only matter discussed was the issue to the Respondent of his shares in Man-O-War Mines Limited. By letter dated the 22nd November 1937 the Respondent for the first time indicated to Tait, in vague terms, that he claimed a partnership interest in the Privateer shares, and he informed Tait that he had consulted solicitors.

p. 386, l. 21.

p. 118, ll. 8-15.

p. 388, l. 25.

16. On the 4th January 1938 the Respondent, who until then had not at any material time a Free Miner's Certificate, took out a Free Miner's Certificate valid until the 31st May 1938 and on the 27th May 1938 he took out a further certificate valid until the 31st May 1939. 10

p. 1.

pp. 2-6.

p. 5, l. 35-p. 6, l. 5.

17. On the 5th January 1938 the Respondent issued his writ against the Appellants. His action was framed as an ordinary action of account based on the partnership agreement of the 21st March 1935 as varied. The claim was for an account to include all dealings and transactions by Tait within the terms of the agreement and by the firm of Tait and Marchant under and pursuant to and falling within the terms of the agreement. The Respondent also asked for a receiver and for an order adjudging the carrying out of the trust under the agreement and the execution by the Appellants of all documents and transfers necessary to vest in the Respondent the interests which he claimed. No facts were alleged, however, to establish a claim to any specific assets or to bring into the partnership any assets acquired by the Appellants in dealing on their own account and not on behalf of the partnership. 20

pp. 6-9.

18. In their Amended Statement of Defence the Appellants alleged the termination of the partnership adventure when the option on the Gold Peak and Privateer claims had been repudiated by the owners and when the sole remaining asset of the partnership was in July 1935 turned over to the Nootka Gold Mining Syndicate. They further pleaded that the Respondent had received his agreed share and that the Appellants had no partnership assets in respect of which to render an account. The Appellants further relied on Section 12 of the Mineral Act (Revised Statutes of British Columbia 1936 Chapter 181). 30

pp. 9-12.

19. By his Reply the Respondent alleged inter alia a fiduciary relationship between the Appellants and the Respondent which made the transactions in respect of the Nootka Gold Mining Syndicate illegal and void and which precluded the Appellants from setting up the absence of a Free Miner's Certificate. The Respondent also alleged that the partnership assets in which he claimed an interest were not an interest in a mineral claim so as to make such a certificate necessary. 40

20. The law of partnership of British Columbia is, in its essence, the same as that of England. The British Columbia Partnership Act R.S. B.C. Ch. 213 provides as to dissolution, section 35 :—

“ Subject to any agreement between the partners, a partnership is dissolved :—

(A) If entered into for a fixed term, by the expiration of that term :

(B) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking :

10 (C) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.”

21. The action was tried in the Supreme Court of British Columbia by Fisher J. The opening of Counsel for the Respondent indicated that he was seeking to obtain a judgment involving the shares in Privateer Mine Limited which the Appellants had acquired with their own moneys and on their own account. Counsel for the Appellants objected that such a case was outside the pleadings and could not be presented without amendment. He stated that if it were set up the Appellants had defences to it particularly the defence of laches which had not been pleaded and which could not be pleaded in answer to the claim as framed. Fisher J. stated that he would rule on objections to evidence as it came along and without amendment and in spite of continued objection evidence was admitted which showed that the Appellants had acquired the specific assets in respect of which the Respondent was seeking to make a claim.

30 22. Fisher J. granted to the Respondent relief appropriate to his findings which may be summarised as follows :—

(A) The Respondent did not consult the Appellants in their professional capacity or retain them as his solicitors.

(B) The partnership under the agreement of the 21st March 1935 was for the single adventure or undertaking of turning the options to profitable account, and was therefore dissolved upon the termination of the venture.

(C) The option upon the Gold Peak and Privateer groups was repudiated by the owners and all claim to the option was

abandoned by the partners and it had lapsed to the Respondent's knowledge so that the partnership had no interest in the option or the mineral claims at the end of May 1935.

p. 404, ll. 12-28.

(D) After the abandonment of the option and the formation of a syndicate to take over the other groups, either party was at liberty to carry on other ventures or enter into other partnerships in respect of the Privateer group, and the partnership had no interest in the later adventure by which Tait and others acquired the Privateer group and shares in Nootka Zeballos Gold Mines Limited (later Privateer Mine Limited).

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p. 404, l. 43-p. 408, l. 25.

(E) The partnership in respect of the Van Isle and Rimy groups did not terminate on or before the 11th July 1935 and was in existence in November 1937 when the Nootka Gold Mining Syndicate transferred the option to Man-O-War Mines Limited; and accordingly the Respondent was entitled to an account with respect to the 114,000 shares in that company issued to the Appellants.

p. 408, l. 27-p. 412, l. 43.

(F) The action was not barred by the fact that the Respondent held no Free Miner's Certificate.

p. 417.

p. 419, l. 32.

p. 419.

p. 420; p. 421, l. 16; p. 421, ll. 42-45.

p. 421, ll. 17-41.

pp. 422-437.

23. The Respondent appealed to the Court of Appeal for British Columbia and the Appellants cross-appealed against that part of the judgment which declared their shares in Man-O-War Mines Limited to be partnership assets. The Court of Appeal dismissed the Respondent's appeal and allowed the Appellants' cross-appeal. Martin C.J. Macdonald, J.A. and Sloan J.A. based their decision on the fact that the Respondent did not at the material times have a Free Miner's Certificate. McQuarrie J.A. did not base his judgment on that ground but held that the partnership came to an end on the 11th July 1935, and that the Respondent's only interest was in the 7,000 Man-O-War shares representing the  $3\frac{1}{2}$  units in the syndicate which the Respondent had received in full satisfaction. O'Halloran J.A. took the same view, and supported his views by a detailed examination of the evidence. The Appellants respectfully submit that McQuarrie and O'Halloran J.A. correctly interpreted the evidence and rightly applied the law to the facts thereby established.

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p. 438.

p. 459, l. 38-p. 461, l. 19.

p. 461, ll. 13-18.  
p. 461, ll. 5-11.

p. 444.

24. The respondent appealed to the Supreme Court of Canada. Kerwin and Hudson J. J. would have dismissed the appeal but not on the ground that the Respondent had no Free Miner's Certificate. They held that on the transfer of the options to the syndicate the purpose of the partnership had been finally fulfilled and nothing remained but to divide the proceeds of sale as was done. The majority of the Court thought that the appeal should be allowed. The Chief Justice of Canada as regards

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the Van Isle and Rimy groups agreed with the learned trial judge. As regards the Privateer and Gold Peak groups he held the partnership to be still subsisting when the option was transferred in May 1937, to Nootka Zeballos Gold Mines Limited and to the extent to which the shares received by Tait and Pitre are profits within the scope of the agreement of the 21st March 1935 the Appellants were accountable to the Respondent. The Mineral Act did not in his view apply to an agreement by which one person agrees to account to another for a specified share of profits from dealings in mining properties, and in effect it was such an obligation which the Respondent sought to enforce. Davis J. (in whose reasons for judgment Crocker J. concurred) held that the Respondent's partnership rights were personal, and the interests in mining property involved in the action were now represented by company shares; accordingly the Mineral Act did not affect them and it could not be used by a partner to defeat a claim to profits in his hands. Davis J. further held that the partnership was not for a single adventure or undertaking and in his view it had not been dissolved up to the time of action. As he pointed out, the Respondent did not allege or seek a dissolution and without a dissolution the Court would not order a partnership account; nevertheless he thought the issue of the writ constituted a dissolution, enabling an account to be ordered. Although the original Privateer option had lapsed he held that Tait was not entitled to obtain another option on the property to the exclusion of the respondent or to take Pitre as his partner in place of the Respondent unless he had first terminated the existing partnership. Accordingly he thought the Appellants were accountable to the Respondent in respect of the Privateer as well as the Van Isle and Rimy groups.

p. 447, l. 36-p. 448,  
l. 4.  
p. 448, ll. 5-25.

p. 448, ll. 26-31.

p. 449, l. 1.

p. 451, ll. 7-38.

p. 458, l. 4-p. 459,  
l. 11.

p. 451, l. 39-p. 452,  
l. 6.

p. 459, ll. 12-16.

p. 459, ll. 19-36.

25. The Appellants respectfully submit that the reasoning of the majority of the judges in the Supreme Court of Canada cannot be supported. Apart from the Mineral Act the law to be applied is in substance identical with the English law of partnership. The Appellants submit that the agreement of the 21st March 1935 was for a partnership for a single adventure or undertaking which had come to an end on or before the 11th July 1935. The Supreme Court of Canada has required the Appellants to account to the Respondent for 35% of the net profits accruing to them from any and all dealings in mineral claims and interests acquired by them before action brought in the Nootka Sound area including the Privateer Van Isle and Rimy groups. The Appellants are thus required to account in respect of units in the Nootka Gold Mining Syndicate which the Appellants had from time to time purchased for cash or received in satisfaction of personal advances after the syndicate had taken over the partnership assets and the partnership had apparently terminated and in respect of shares in Privateer Mine Limited acquired by the Appellants on their own account, with their own money, and at their own risk in a transaction 17 months after the partnership had disposed of all its assets

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and had apparently terminated. The Appellants respectfully submit that this result is quite inconsistent with the evidence, and that the agreement of the 21st March 1935 cannot operate to debar the Appellants from at any time subsequent to 11th July 1935 acquiring mining interests in the Nootka Sound area in their own right without being accountable to the Respondent. They further submit that no good cause was shown for making them accountable for such purchases, even had the partnership subsisted.

26. The effect of the decision is to make the Appellants accountable for :— 10

(1) Four syndicate shares (8,000 Man-O-War shares) bought by them with the knowledge and consent of the Respondent.

(2) Five such shares (10,000 Man-O-War shares) allocated to them on 11th July 1935 in respect of advances to the partnership.

(3) Six and a half such shares (13,000 Man-O-War shares) allocated to them on 11th July 1935.

(4) Forty-one syndicate shares subsequently allotted to them in repayment of advances.

27. The Appellants accordingly submit that the judgment of the Supreme Court of Canada is wrong and should be reversed, and that the judgment of the Court of Appeal of British Columbia should be restored for the following amongst other 20

## REASONS

- (1) BECAUSE the partnership between the Appellants and the Respondent came to an end on or before the 11th July 1935.
- (2) BECAUSE the Respondent has received his full share of all the partnership assets.
- (3) BECAUSE the partnership was for a single adventure or undertaking which came to an end when the partnership assets were sold to a syndicate. 30
- (4) BECAUSE the Appellants were entitled to acquire with their own money an interest in the purchasing syndicate because such acquisition was with the knowledge and consent of the Respondent and such interest did not become partnership property and because no case was made out for the ordering of an account in respect thereof or of syndicate shares allotted to

them for services rendered, or of syndicate shares acquired by them upon the division of the partnership assets hereinbefore set out.

- (5) BECAUSE the Respondent's action was in the common form for an account and relief was granted to the Respondent which could not properly be granted in such an action and upon grounds not raised on the pleadings and was not justified by the evidence.
- (6) BECAUSE the Privateer option and shares were acquired by the Appellants with their own moneys and on their own behalf and because no facts were pleaded or proved justifying the ordering of an account in respect thereof.
- (7) BECAUSE at material times the Respondent did not have a Free Miner's Certificate and was therefore debarred from having any right or interest in mining property.
- (8) BECAUSE of the other reasons given by O'Halloran J.A. and, in respect of the Privateer claims, by Fisher J.

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WILFRID BARTON.

FRANK GAHAN.

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No. 37 of 1941.

In the Privy Council.

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ON APPEAL

*From the Supreme Court of Canada.*

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BETWEEN

DAVID TAIT and TAIT  
AND MARCHANT  
(Defendants) - - - *Appellants*

AND

HERBERT PREST WINSBY  
(Plaintiff) - - - *Respondent.*

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**Case for the Appellants.**

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