In the Priuy Council

No. 70 of 1937

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

LESLIE COLBATCH CLARK, Trustee of the Estate of Vernon Wright Worsdale, a Bankrupt,

(*Plaintiff*) APPELLANT

AND

THE YUKON CONSOLIDATED GOLD CORPORATION LIMITED,

(*Defendant*) RESPONDENT.

CASE FOR THE RESPONDENT

THE YUKON CONSOLIDATED GOLD CORPORATION LIMITED

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CASE FOR THE RESPONDENT

1. This action was brought by the Appellant, as Trustee of the estate of one Vernon Wright Worsdale, a bankrupt resident in England, for a declaration that as such Trustee he is the owner of 1,663,900 shares of the capital stock of the Respondent of the par value of $1 per share, and for an order directing the Respondent to register a transfer of the said shares from one A. N. C. Treadgold to said Worsdale, or in the alternative to rectify its share register by inserting the name of the Appellant as the owner of these shares. The action was dismissed by the trial judge and his judgment was affirmed by the Court of Appeal for Ontario. The appeal is from the judgment of the latter. RECORD p. 2—l. 35 p. 396—l. 30 p. 408

2. There was a former action in which the title of the said Treadgold to these shares was in issue. In December, 1930, an action was brought by one Patton and others on behalf of shareholders of Respondent against Treadgold and the North Fork Power Company Limited wherein Respondent was joined as a defendant and by the judgment in that action dated 23rd June, 1933, it was determined that Treadgold was not entitled to these shares and other shares standing in his name and he was ordered to be stricken from the register as holder of the shares. The present action was not brought until 6th November, 1934. p. 568 p. 590

3. Respondent was incorporated in 1923 under Letters Patent issued under The Companies Act (Canada). Its broad purpose was to bring together in one holding numerous mining properties in the Yukon Territory and the p. 602

RECORD

p. 532, p. 535, p. 545, p. 650, p. 685, p. 693

securities, shares and miscellaneous interests therein outstanding in many hands and largely held in England. The process of consolidation was slow but early in 1925 Treadgold who had had experience in the Yukon but since 1920 was an undischarged bankrupt and had no property or securities to bring into the consolidation, was sent to Canada with powers of attorney and instructions to vest in Respondent certain properties, interests and securities on behalf of their several owners. Treadgold thereupon formally

p. 83—l. 16

organized a Board of Directors in Canada composed of persons whom he nominated and qualified with one share each which had been made available to him. Treadgold himself became a Director and President. He then proceeded with the business of transferring assets to Respondent but not in accordance with his instructions nor with the authorities given him. Treadgold was the holder of all but 4 or 5 of the 60,000 issued shares of a company incorporated in Canada named the North Fork Power Company Limited. This company had done no business for many years and had no assets. Before coming to Canada Treadgold had obtained the consent of at least some of the

p. 118—l. 20

p. 753—l. 25, p. 278—l. 30, pp. 746-747, p. 774—l. 25, p. 775, p. 277—ll. 2-15.

persons interested in the consolidation to the use of the North Fork Power Company Limited as a nominal vendor in making the necessary transfers of properties and securities from their various owners to Respondent and it was understood that all of Treadgold's shares in the North Fork Power Company Limited would be held by Mr. Smallman, a Solicitor, in trust for the persons interested in the consolidation so that they should be fully protected. Notwithstanding these arrangements Treadgold effectively intervened in Canada to prevent the North Fork Company's shares from passing out of his own control. In the formal agreements for the transfer of properties and securities the North Fork Company appears as vendor to Respondent and when matters between Treadgold and Respondent's other shareholders came to an issue in 1930 Treadgold repudiated the former arrangements and took the position that the North Fork Company was an independent vendor of the properties and securities vested through it in Respondent and was entitled as such to make and keep a profit which he in turn as its sole substantial shareholder was entitled to absorb in the face of the statement in lieu of prospectus declaring he had no interest. By this general means and by an almost bewildering series of manipulations Treadgold while assuring the interested persons in England of his loyalty to them besides diverting to his own purposes shares and money of Respondent, got into his own name over 2,000,000 of the common shares of Respondent which gave him substantial control of the Company. This was all attacked in the Patton action.

p. 285—ll. 30-40, p. 326—ll. 10-43.

p. 580 and p. 582

p. 120—l. 41 to p. 121—l. 12, p. 519

p. 797

4. There were two principal agreements purporting to vest properties and securities in Respondent. The first is dated 19th February, 1925, but Treadgold did not in that agreement include all that had then been entrusted to him to transfer. Part of it he withheld and included for a further consideration to the North Fork Power Company in a second agreement of transfer dated 12th July, 1929, but generally the properties and securities covered by the agreement of 12th July, 1929 were acquired by the use of shares of Respondent issued under the earlier agreement of February, 1925, in excess of the shares then actually required for its purposes. It was declared by the judgment in the Patton action that the properties,

p. 214—l. 16

p. 120—l. 36

p. 592—l. 37

securities and assets mentioned in the agreement of 12th July, 1929, had been acquired for and on behalf of and at the expense of Respondent and that neither Treadgold nor the North Fork Power Company Limited had any beneficial interest in them or in or under the agreement itself. The shares in question in the present action are part of the shares forming the consideration to the North Fork Power Company under this agreement of 12th July, 1929. They are included in the shares standing in Treadgold's name which were dealt with by the judgment in the Patton action.

RECORD

p. 120—l. 29
p. 134—ll. 22-30.

5. At the trial of the present action it was admitted by Counsel for Appellant, for the purposes of this action, that Treadgold was not at any time entitled to the shares in question. Appellant was therefore forced to rely upon a claim of estoppel, preventing Respondent from denying as against Worsdale and him the certificate No. 0369 which Worsdale alleges he received from Treadgold. It was only by an amendment made to his Reply that this was set up. The finding of the trial judge upon the facts was that there had been no real transaction between Worsdale and Treadgold and that what is set up as an agreement between them was a mere sham for the sole purpose of protecting Treadgold. The Court of Appeal took the same view.

p. 10
p. 72—ll. 27-30.
p. 397—l. 16
p. 5—l. 14
p. 406—ll. 6-18
p. 407

6. The evidence adduced by the Appellant to establish title in Worsdale to the shares consisted substantially of three documents (Exhibits 1, 2 and 3) and of the viva voce testimony of Worsdale and Treadgold. Exhibit 1 purports to be a certificate of Respondent (No. 0369) that A. N. C. Treadgold is the owner of 1,663,900 ordinary shares of the capital stock of Respondent transferrable by the holder on the books of the Company upon surrender of the certificate. It does not certify that the shares are fully paid nor that anything has been paid upon them. The certificate is dated 8th May, 1930, and is signed by the Vice-President and by a Director and bears the seal of Respondent. The certificate is endorsed with a printed form to be used for transfer of any or all of the shares. The blanks in this form are not filled in with the name of any transferee or with the number of shares to be transferred or with the name of any attorney to make the transfer on the Company's books, but the form is signed by Treadgold and bears the date 19th July, 1930. Exhibit 2 is a deed of transfer of 1,750,000 ordinary shares of Respondent by Treadgold to Worsdale in consideration of one dollar and of "other good and valuable consideration". It is dated 10th July, 1930. The evidence is that it was drawn and executed in New York. This document does not in any way identify the shares it purports to transfer. Exhibit 3 is a letter addressed by Treadgold to Worsdale whereby Treadgold, in consideration of Worsdale not registering the transfer of shares made to him on that day, undertakes to hand to Worsdale any dividends and to send to him all notices from the Company respecting the shares. This letter is dated 10th July, 1930, and is upon the letter-paper of The Commodore Hotel, New York. Worsdale says that these three documents were handed to him by Treadgold in London on 27th August, 1930.

p. 409
p. 410
p. 411
p. 411—l. 11
p. 75—l. 41
p. 15—l. 22 and l. 36

7. Worsdale has given varying accounts of the transaction with Treadgold under which he claims to have received the foregoing documents, and

p. 13—l. 5
p. 412

RECORD

reference was made by the trial judge and will be made hereinafter to his differing statements. Worsdale represents himself as having, with unnamed associates, been largely interested in mining in the Yukon and later in the consolidation of mining interests there for which Respondent was organized, and he alleges that in this way he and his friends became entitled to a large block of shares of Respondent. This, even if true, would not serve to create a title by estoppel in Worsdale and after undergoing some cross-examination as to particulars of his alleged interests and rights arising therefrom, he aban-
p. 47—l. 25 doned any claim in respect thereof as a consideration for the transfer to him of the shares in question. At the trial Worsdale for the first time put forward 10 a new consideration. He said that at the time Treadgold gave him the doc-
p. 14—l. 5 to p. 15—l. 18 uments (Exhibits 1, 2 and 3) Treadgold wanted to raise £30,000 for the Company and that he, Worsdale, undertook to provide whatever part of this sum Treadgold should fail to raise elsewhere, and that he did, in fact, pay Treadgold £300 in several sums thereafter. No memorandum or voucher of any kind is produced to support this story and the trial judge did not believe it.

8. In considering Worsdale's vague and uncorroborated statements as to his large and important interests and associations, as well as his alleged financial relations with Treadgold and payments to him, certain facts admitted 20
p. 25—l. 26 by him are important. Worsdale was employed as a solicitor's clerk and
p. 30—l. 29 managing clerk from 1895 until his enlistment in 1915 or 1916. He was
p. 22—l. 18 demobilized in 1919 and speaks of large enterprises in which he then engaged. Whatever may be the truth as to these matters, the result was that by 1926
p. 23—l. 11 he was insolvent. From that time forward there is substantial concurrent
p. 416—l. 20 to p. 439 documentary evidence that his financial position was a desperate one. His
p. 31—l. 27 to p. 39 house and furniture were sold. He was repeatedly threatened with bank-
p. 239—l. 20 p. 662 ruptcy proceedings. Finally on 25th May, 1934 he was adjudicated a bankrupt on the petition of Barclay's Bank.

9. If the account of their dealings put forward by Worsdale and Tread- 30 gold is true it could have been supported readily by documents and by the evidence of other witnesses. The total absence of anything of the kind from the Record is striking. There are moreover many facts and circumstances that support the finding of the trial judge, concurred in by the Court of Appeal,
p. 405—l. 46 to p. 406 that the evidence of neither Worsdale nor Treadgold should be accepted. The following are some of the matters that support this finding:

(a) In his examination-in-chief at the trial Worsdale told of calling Tread-
p. 13—l. 40 to p. 14—l. 33 gold for shares for himself and his friends and of the negotiation of an agreement that was implemented by the documents Exhibits 1, 2 and 3. Worsdale said that this was verbal and not in writing. On cross-examination 40
p. 26—l. 39 his attention was called to the fact that Treadgold was in New York when these documents were signed and had not been in England for some months.
p. 89—ll. 8-13 The fact is that Treadgold had been in Canada and the United States con-
p. 24—l. 14 stantly since June of the preceding year. Worsdale had never been anywhere
p. 27—l. 11 in North America. Worsdale then said that he had letters from Treadgold and
p. 49—ll. 37-44 that the bargain was forced out of Treadgold by correspondence that he had
p. 27—l. 15 with Treadgold. On being pressed for the letters he said they were in England.

RECORD

Appellant was examined for discovery in London on 28th May, 1935, and was particularly questioned as to documents passing between Worsdale and Treadgold leading up to the documents in question. He said that he knew of none. Further Worsdale was asked for any letters on the first day of the trial, 28th October, 1935. The taking of evidence was not completed until 5th December, 1935, yet no offer to produce any letters was made, nor was any request made for an opportunity to produce them. The conclusion is unavoidable, not only that Worsdale's evidence-in-chief is contradicted by his own evidence in cross-examination, but that either there is no such correspondence with Treadgold as Worsdale states or if there is any it does not support his account of it.

p. 235

p. 393

(b) Worsdale said on cross-examination that Exhibit 3 was drawn by his own solicitors and was sent to Treadgold to be signed. He also said that his solicitor was present on the occasion when Treadgold handed him this Exhibit in London. The solicitor was not called as a witness nor was any draft document or letter in any way relating to this Exhibit produced. Appellant procured the issue of a commission to take the evidence of witnesses on his behalf in England. No explanation has been made why this solicitor was not examined and the conclusion must be that his evidence would not support the Appellant's case.

p. 51—ll.1-10

p. 28—l. 16

p. 177—l. 12

(c) A vital part of Worsdale's account in evidence of his arrangements with Treadgold for the transfer of shares is that which relates to the raising of £30,000 and Worsdale's alleged undertaking in respect to it and the alleged payment to Treadgold of £300. Yet in none of his several accounts of the transaction prior to the trial is there any mention of these matters. There were first two interviews in London on 16th February and 20th February 1934 with Mr. Patton, the President and Mr. Troop, the Secretary of Respondent. They were anxious to have from him full information of his claim. There was no mention of the alleged arrangement for financing or the payment of money in either interview with them. On the occasion of the second interview Worsdale handed them a letter he had prepared and brought with him setting forth his position. This letter makes no reference to the alleged arrangement or payment. Again on 19th March 1934 Worsdale made an affidavit in the Patton action in support of his application to be allowed to intervene in the appeal then pending in that action in the Court of Appeal. This affidavit is silent as to the existence of any such arrangement for financial assistance as is now set up and says nothing about payment of £300. Neither the statement of Claim in the present action nor the Reply contains any mention of the alleged arrangement for financial assistance or to the payment of any money and, notwithstanding that the Reply was amended as late as 4th June 1935 by setting up a claim of estoppel, no allegation was made of the alleged arrangement or of the payment of any money under it or otherwise. Worsdale had no explanation except that these things were not considered worth mentioning by him.

p.163—l. 34
p. 168—l. 20
p. 216—l. 4

p. 412

p. 435

p. 1
p. 5

p. 6—l. 8

p. 63—l. 4

(d) In his account given to Mr. Patton and Mr. Troop of the arrangement for the transfer of shares Worsdale said that the arrangement had been carried out in New York by his agent one Weinheim. Worsdale denies that

p. 169—l. 10
p. 221—l. 28

RECORD

p. 61—l. 38 p. 403—l. 27 he made this statement but the trial judge has accepted the evidence of the others.

(e) If Worsdale's story is true his meeting with Treadgold on 27th August 1930 when he says the documents Exhibits 1, 2 and 3 were delivered to him p. 14—l. 12 was an important business occasion. It was then that he says he undertook to assist Treadgold in raising £30,000. He also says that he undertook to p. 14—l. 45 transfer 500,000 of the shares in question to various persons who had claims against Treadgold for properties he had received or for services. These are important matters which one would expect to find reduced to writing with the terms and persons and particulars defined. This is more particularly so p. 28—l. 16 if, as Worsdale says, his own solicitor and possibly Treadgold's solicitor were p. 89—l. 38 present. But nothing was put in writing. Treadgold did not even remember any conversation on the occasion. Worsdale himself was so uncertain as to p. 435 the time of delivery of the documents that in his affidavit of 19th March 1934 made in the Patton action he swore that delivery was made to him on or about the 10th day of July 1930.

p. 29—ll. 21-38 (f) Worsdale says that with respect to his undertaking to take care of claims against Treadgold, while nothing was put in writing as between himself and Treadgold he gave letters to the persons who were to receive shares undertaking to deliver them and had their acknowledgments. No such documents were produced.

(g) A similar condition exists with respect to raising the £30,000. There is no substance to the story, in any particular. Treadgold did not in fact p. 75 raise any money for the Company at this time. He gives as an explanation the troubles that arose within the Company. Worsdale speaks in a characterpp. 56—57 istic way of arrangements with his associates to provide the money, but again there are no documents, and the Company got no money. It is inp. 427—l. 23 p. 424—l. 20 structive to compare Worsdale's large way of talking of raising £30,000 with his letters to his own creditors of about that date.

p. 15—ll. 10-18 (h) Worsdale says that under advice he made the "valuable consideration" mentioned in Exhibit 2 for the transfer of 1,750,000 shares £300, p. 427—l. 32 which amount he paid Treadgold in four or five sums in cash. Worsdale p. 66—l. 19 had no bank account at this time and he says the money was obtained from his wife's bank account by cheques payable to himself. He says he drew the cash and paid it to Treadgold. There is no cheque, receipt or other voucher to show any payment whatever to Treadgold. Worsdale produced his wife's bank-book and it was filed as Exhibit 14A. He pointed out certain debit p. 449 to p. 451 entries in the account as the items paid over by him to Treadgold but the book indicates only payment to Worsdale as it does in respect of many other similar items. The trial judge did not believe that any money was paid by Worsdale to Treadgold. It is not without significance, when considering the omission to produce documents of importance, that Worsdale was sufficiently alive to the need for corroborative evidence to bring with him even his wife's bank-book. It is not probable that he would have overlooked such important evidence as his correspondence with Treadgold if there had been any that supported his story.

(i) It is highly improbable that Treadgold would part with almost one third of the issued capital of Respondent, which meant so much to him, for so small a sum as £300 which meant little to him. There are two circulars purporting to be signed by him and which he approved if he did not actually sign. They are both dated 26th August, 1930, the day before the alleged transaction with Worsdale. These circulars were prepared to be sent out with the annual statement of Respondent for 1929. They purport to explain in some detail the progress of the consolidation and the nature and result of the mining operations. The second circular concludes with the statement "The business is not only safe, it is highly profitable". Treadgold confirmed that as his opinion at the trial. No one has ever accused Treadgold of want of optimism or of lack of faith in the enterprise or in his own conduct of it. He would have scorned a proposal to part with so many shares in it for so paltry a price.

RECORD

Ex. 25 pp. 500-502

p. 91—l. 40 to p. 97—l. 17

p. 97—l. 15

(j) Even if Worsdale were believed as to the payment of several sums amounting in all to £300 it is not possible to connect these payments with the alleged undertaking to finance in respect of £30,000 required for the Company and Worsdale does not in fact so connect them. Any such small loans or payments, if any, as were made were purely personal matters and were not made in fulfilment of any contract or promise arising from the transfer of shares. They do not serve to support any title by estoppel.

p. 65—l. 20

(k) Possession of the Certificate (Exhibit 1) after the alleged transfer is important. There is no evidence except that of Worsdale and Treadgold that it was ever delivered to Worsdale. On the other hand there is abundant evidence that after the time of the alleged delivery to Worsdale the certificate was in Treadgold's possession and control, and that he dealt with it as his own. In August, 1931, while the Patton action was pending, in arranging for a loan of $2,500 from one Gordon Taylor, a Toronto broker, he proposed as security certificate No. 0370 for 116,100 shares and added, "If for any reason you should wish further shares as security for your 2,500 I will sign and send a transfer for same, which would, if you need them, be on account of my big lump (1,788,900) which are really under attack." As before stated the shares now in question form the major part of the 1,788,900 block coming from the North Fork Company's Agreement of 12th July, 1929, which was attacked in the Patton action. In November, 1931, E. J. Weinheim, who was a close associate of Treadgold's and is described by him as "an old timer" and who was often a messenger between Treadgold and one Williamson, a New York broker, deposited the certificate (Exhibit 1) with Williamson in New York and Williamson gave his receipt that it was received for the account of A. N. C. Treadgold. With this certificate there was a covering letter from Treadgold asking Williamson to take care for him of the certificate and two other certificates for 50,000 shares and 100,000 shares respectively which were in Williamson's name, but as Treadgold's nominee. These certificates all remained in Williamson's custody until 22nd March, 1932, when they were returned to Treadgold. Williamson says in his evidence that he had never heard of Worsdale. Treadgold is very uncertain as to what he did with the certificate after he got it back. Anticipating at the trial the

p. 130—l. 18

p. 556—l. 41

p. 109—l. 42

p. 111—l. 7

p. 660—l. 25

p. 661

p. 106—l. 38

p. 232—l. 43

p. 661—l. 15

p. 234—l. 3

p. 81—l. 19 to p. 82—l. 6

RECORD

p. 22—l. 7
p. 55—l. 11

evidence of Williamson which Respondent had previously taken under commission, Worsdale offered the explanation in his evidence-in-chief that he had placed the certificate in Treadgold's hands for a time in order that Treadgold might find a buyer for the shares. As in the case of all his other alleged dealings there is no letter or receipt or communication whatsoever produced by Worsdale to support this explanation nor to show that Treadgold had possession in any right other than his own or that he was trying to sell the shares for anybody.

p. 428
p. 434—l. 15
p. 40—l. 19
p. 677—l. 13
p. 53—l. 16

(l) In a letter of 28th March, 1931, to solicitors from whom Worsdale had had a bankruptcy notice he said he had no assets. In January, 1933, Worsdale made an affidavit to resist a certain bankruptcy proceeding taken against him and by his affidavit he exhibited a statement of his assets and liabilities. The statement does not include any of the 1,663,900 shares of Respondent. His only explanation at the trial was that these shares were not an asset but a liability. In May of 1934, however, after he had announced his claim to the shares, he valued them at £75,000 in the bankruptcy proceedings taken by Barclay's Bank. In his evidence at the trial he says he was always of the opinion the company would come out all right.

p. 498
p. 79—l. 1
p. 497—l. 32

(m) While the Patton action was pending the shareholders of Respondent were disturbed and apparently a shareholders' committee was formed. On 7th October, 1931, Treadgold addressed a letter to that Committee to assure them that the 2,069,000 shares then standing in his name did not belong entirely to him and he gave particulars of the persons for whom he held them. In this way he accounted for 1,390,000 shares and, as he proceeded to point out, he had not even 1,000,000 shares for himself. Worsdale is not among the persons entitled to shares according to this letter, and even, if the 500,000 shares of his 1,750,000, for which he says he was to account to others, is deducted, there is no room for the balance in the shares left to Treadgold according to his letter. Treadgold made substantially the same statement without details in an affidavit of 8th March, 1933, in the Patton action.

p. 101—l. 29 to p. 102
p. 54—l. 16

(n) Early in 1932 negotiations were carried on in London in an effort to settle the Patton action and in these negotiations the Shareholders' Committee and Treadgold both actively participated. Draft minutes of settlement were prepared and submitted to Treadgold who revised them and later Treadgold by letter accepted the proposed terms. Worsdale was not communicated with in connection with the matter. In fact Worsdale says he knew nothing of the Patton action.

p. 503—l. 20
p. 522

(o) Treadgold was hard pressed for funds with which to defend the Patton action. He had to get money from his friends. Two of his letters to his friend Weinheim written in December, 1933, reveal a good deal in this regard. If Worsdale was the real owner of the shares now in question, one would expect that Treadgold when hard pressed would have applied to him, the more especially if it was Worsdale's habit to make advances of money to Treadgold, as he suggests.

(p) It is incredible that Worsdale was entitled as between himself and Treadgold to the shares now in question and that Treadgold did not tell him about the attack made upon them in the Patton action. Not only was he under obligation to do so by the terms of Exhibit 3, but all the circumstances called upon him to do so. Worsdale acted his assumed part in true character when he said to Mr. Patton and Mr. Troop on 20th February, 1934, that he and his friends might have to consider whether or not they would take criminal action against Treadgold. Plainly this was all assumed for the occasion of that interview as his later conduct shows and he and Treadgold continued on terms of friendly co-operation. Two weeks later on 6th March, 1934, Treadgold was in consultation with Worsdale's solicitors in Toronto. When the present action was brought and security for costs was required from the Appellant, Treadgold helped to provide it. Litigation within the Company began in November, 1930, only three months after Worsdale says he received Exhibit 3. This first litigation had relation to the annual meeting of shareholders which had been called for December, 1930, and an injunction was obtained against holding the meeting. Treadgold makes no explanation of his failure to inform Worsdale of this and of the Patton action which more directly affected the shares now in question.

RECORD
p. 411
p. 169—l. 27
p. 58—l. 23
p. 91—l. 14
p. 664
p. 238—l. 25
p. 100—l. 11
p. 101—ll. 10-28

(q) It is likewise incredible, if Worsdale as he claims was largely interested in Respondent's shares and had many friends likewise interested who had contributed property and money to the consolidation, that no word of the litigation within the Company reached him for three years. Worsdale is characteristically vague as to the inquiries he made from time to time as to the company's progress. He says that he made inquiries from Treadgold but when asked "Q.—Did you make them verbally or by writing?" his answer was "A.—I should imagine both. I should imagine verbally. Q.—You have no letters from him? A.—No." It is to be remembered that Worsdale claims that he was entitled to about one-third of Respondent's issued capital and that some 500,000 shares of this were a trust for friends who had contributed largely he says to the consolidation. The circumstances were such that anyone entitled to shares in the Company and particularly a trustee would have been diligent to keep himself informed.

p. 52—l. 31

It is submitted that each of the matters set forth in the several clauses of this paragraph taken singly would raise doubt as to the truth of the evidence tendered in support of Appellant's claim and that the sum of them makes it impossible to accept this evidence. Appellant's claim is not only unsupported by documents and independent witnesses, where they ought to be produced, it is unsupported by the things that were done, by the conduct of Worsdale and Treadgold and by the events that happened. Everything occurred and was done as it would naturally be expected to occur and be done if there were no agreement between Worsdale and Treadgold. All the inconsistencies are in Appellant's case.

10. The learned trial judge concluded that he could not accept the evidence of Worsdale as to his mining interests in the Yukon. He was unable to tell of any property in the Yukon that ever stood in his name. He never

p. 406—l. 23
p. 24—ll. 11-26

RECORD

had any shares registered in his name in any company operating in the Yukon. He was never in the Yukon Territory nor in Alaska. He claimed to have had some vague interest in property held by one Lawrence Harrison which he turned in to the consolidation. When pressed for any definite statement upon it, his mind was blank. Mr. McLeod a Solicitor practising for many years at Dawson, who had acted as solicitor for all the subsidiary companies that came into the consolidation and was familiar with their stock books and share registers and through whose hands had passed the titles to their properties had never seen Worsdale's name. He had a wide acquaintance among mining men and had never heard of Worsdale prior to 1934. Mr. Troop the Secretary since 1930 can find no mention of Worsdale. Mr. Patton who had gone to the Klondike in 1898 and who was active in the consolidation and residing in London while it was proceeding never heard of Worsdale until 1934. Throughout the proceedings in the Patton action, wherein title to these shares was in question, Worsdale was not mentioned. That action was twice tried: first before Mr. Justice Raney in March, 1932, when he directed Treadgold's name to be stricken from the register and an appeal having been taken by Treadgold a new trial was ordered because owing to the death of the Court Reporter a copy of the evidence taken was not available. The second trial was that before Mr. Justice Davis in May, 1933. Worsdale's letter of 30th January, 1934, to Price Waterhouse & Co. and his letter of 20th February, 1934, to Mr. Troop and the inquiries and statements therein about other companies and his interests in them and their relation to the consolidation, are most obvious pretence, if there is any truth in his statements in evidence as to his own activities in the consolidation and as to obtaining the shares in question from Treadgold in 1930 as an interest in the consolidation. There was, in truth, no background to the alleged transaction of August, 1930, that will show good faith and bona fides in it as Worsdale suggests. He is throughout a mere pretender.

p. 13—ll. 7-14
p. 29—ll. 1-12
p. 46—l. 4 to p. 47—l. 9
pp. 226-227
p. 170—l. 30
p. 213
p. 215—l. 19
p. 76—l. 3
p. 76—l. 32
p. 170—l. 40 to p. 171—l. 14
p. 599
p. 412
p. 13—ll. 7-40
p. 49—l. 33

11. It was a common device of Treadgold's to carry shares in other names than his own and to conceal his holdings. There were shares in the name of Lawrence Harrison, which he used as his own. Harrison's interests were turned into the consolidation by Treadgold, under the agreement of February, 1925, at a much greater price than Harrison had agreed to accept but he did not receive any of the shares then appropriated to pay him. Later Harrison sued and recovered judgment for the shares he had agreed to accept which was taken care of by the judgment in the Patton action. There were 350,000 shares carried in the name of Treadgold's nominee E. M. Williamson and used as his own. Treadgold made so free with these shares that he signed Williamson's name to the transfer endorsed on a share certificate and then signed his own name as witness to the signature. The name of The North Fork Power Company Limited was used throughout by Treadgold as really an alias for himself and share certificates in the name of that Company were dealt with by him as his own and exchanged by him for certificates in his own name or the names of his nominees. It is further of significance that the share certificate now in question which was in Williamson's custody in New York at the time of the first trial of the Patton action in March, 1932, and for some

p. 545—l. 20
p. 546—l. 25 to p. 555 p. 545—l. 20
p. 125—l. 28
p. 591—l. 15
p. 108—l. 33
p. 109—l. 25
See original exhibit 40

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months prior thereto, was removed by Treadgold from that custody immediately upon judgment being given by Mr. Justice Raney ordering him to deliver up to Respondent the certificates for all shares in his name. Treadgold also carried shares in his own name "in trust". p. 80—l. 16-to p. 81 p. 82—l. 3

12. There has not been any real explanation why Worsdale, who had been so long silent, suddenly announced himself in January, 1934. It is submitted that the true explanation is that the Deed of Transfer (Exhibit 2) dated 10th July, 1930, had never been given to Worsdale but had remained with Treadgold to be used if and when it suited his purposes, and that he had mislaid it. On 28th December, 1933, in a letter to his friend E. J. Weinheim, he says, "I have found the deeds I signed with Miss Kahn as witness in July, 1930 (you will remember), they will be useful to you and me." There were close relations between Treadgold and Weinheim in the affairs of Respondent Company although their actual basis or purpose is not revealed. Treadgold refers to him as "an old-timer" and "a very old friend of this business". It was Weinheim who in Ottawa procured for Treadgold the certificate No. 0369 for 1,663,900 shares dated 8th May, 1930, at a time when the ordinarily complacent Directors of Respondent had become a little difficult with Treadgold. Weinheim went with Treadgold on his first visit to the office of Miss Sally Kahn, the public stenographer in New York who typed and witnessed the deed of transfer dated 10th July, 1930 (Exhibit 2). On 13th August, 1930, Treadgold wrote Weinheim in New York with a promise of assistance with 200,000 shares of Respondent. Weinheim was Treadgold's messenger in November, 1931, to deposit the share certificate, No. 0369, and two other certificates with E. M. Williamson. Treadgold's letter to Weinheim of 28th December, 1933, and another of 30th December, 1933, disclose an intimate and confidential relationship in regard to Treadgold's contest with the other shareholders of Respondent, which contrasts strangely with his reticence towards Worsdale, if Worsdale was the person really interested. In both of these letters of December, 1933, Treadgold deals with and is confident of procuring the registration of transfers of shares and there can be no doubt that the deeds in question "with Miss Kahn as witness" were deeds of this character and important for that purpose. Treadgold does not agree that his letter of 28th December, 1933, referred to Exhibit 2 but he is most indefinite in his explanations of other possible references. It is submitted that the date of finding the deeds so closely coincides with Worsdale's first appearance on the scene and the description of the documents then found so closely fits the deed of transfer (Exhibit 2), that nothing but the clearest evidence to the contrary will displace the inference that Exhibit 2 had been held in reserve by Treadgold and had been misplaced but was now found and available for use, it having been held in the Patton action that he himself could not hold the shares.

p. 505—l. 23

p. 109—l. 40

p. 84

p. 89—ll. 1-5

p. 229—ll. 5-8

p. 503

p. 105—ll. 3-26

p. 660—l. 28

p. 503—l. 20

p. 522

p. 112—l. 4 to p. 113—l. 23

p. 151—l. 20 to p. 152—l. 10

13. It is plain from an inspection of the original Exhibit that the Deed of Transfer, Exhibit 2 was not all typed at one time. Certain words were typed in after the first operation of typing. The typist, Miss Sally Kahn, (now Mrs. Silk), gave some evidence as to this. A closer inspection of the document with special regard to the alignment discloses that several lines

p. 229—l. 15

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in the middle of the page are not in alignment with the lines above and below them, indicating that they were written in subsequently. Worsdale's name and address are in the part that appears to have been so inserted.

14. The unforeseen declaration of Worsdale's bankruptcy, following upon the announcement of the claim that the shares in question were his and while he was in Canada pursuing it, has no doubt somewhat disturbed Treadgold's plans and arrangements. Worsdale's creditors have now something to say about the disposition of the shares should they be recovered. Settlements with creditors are however always a possibility and the opportunity was not overlooked in this case and a scheme of arrangement was prepared having special reference to the shares in question.

p. 40—ll. 35-43

p. 682

p. 683—l. 3

15. The trial judge disposed of the action upon the facts alone. It is submitted that upon Appellant's own case, even if his witnesses were believed no title by estoppel has been made out. Worsdale did not alter his position in any way or pay anything on the faith of the certificate in Treadgold's name. All that he really claims is that he paid Treadgold £300 and for reasons hereinbefore stated it cannot be found, even if it were found that he actually paid the money, that he did so because of the certificate. The character that Worsdale himself gives the payments he alleges, is that of accommodation as between friends and not the carrying out of a bargain. He says that, he, Worsdale, "made" the "valuable consideration" mentioned in Exhibit 2, £300 cash. He does not say that that was the bargain with Treadgold. Again he says he would never let Treadgold have more than £100 at once. These expressions, together with the absence of any receipt or other written evidence of payment or other satisfaction of the good and valuable consideration, such as ordinary prudence would suggest, in the carrying out of an important transaction, serve to demonstrate that the several alleged payments amounting to £300 were not part of any business arrangement.

p. 406—l. 42

p. 15—l. 10

p. 65—l. 20

16. Section 77 of The Companies Act (Revised Statutes of Canada (1927) Ch. 27) is as follows:

> "77. Except for the purpose of exhibiting the rights of parties to any transfer of shares towards each other and of rendering any transferee jointly and severally liable with the transferor to the company, and its creditors, no transfer of shares unless made by sale under execution or under the decree, order or judgment of a court of competent jurisdiction, shall be valid for any purpose whatever until entry of such transfer is duly made in the register of transfers.
>
> "2. As to the stock of any company listed and dealt with on any recognized stock exchange by means of scrip, commonly in use endorsed in blank and transferable by delivery, such endorsation and delivery shall, excepting for the purpose of voting at meetings of the company, constitute a valid transfer."

The shares of Respondent had not been listed upon any exchange. The statute, having in sub-section 2 of Section 77 made provision for the cases in which a certificate endorsed in blank shall constitute a valid transfer,

p. 177—ll. 9-11

any consideration of other cases, depending upon practice or custom of brokers, is by implication excluded and sub-section one applies in terms to this case. The share certificate, Exhibit 1, also expressly prescribes the mode of transfer

RECORD p. 409—l. 14

17. In any event the express bargain, if there was ever any bargain between Treadgold and Worsdale, prevents Worsdale and the Appellant as Trustee in Bankruptcy of his estate, from claiming that anyone other than Treadgold was the shareholder. It was an express term of such bargain that the transfer should not be registered and that Treadgold should continue to be the shareholder except as between himself and Worsdale, and that exception was limited to particular purposes. According to Worsdale, Treadgold could in his own name sell the shares. The second certificate No. 0370 for 116,100 shares Treadgold did in fact pledge as his own to secure the $2,500 borrowed from Gordon Taylor. Further, according to Worsdale, the purpose in having Treadgold continue to appear as the holder of the shares in question was for the advantage of Worsdale as well as of Treadgold. Under these circumstances the judgment in the Patton action had full effect according to its terms. Worsdale cannot have as against Respondent other rights than his contract with Treadgold was intended to give him. His contract was that Treadgold should continue to be the shareholder so far as Respondent was concerned and he is bound by whatever was lawfully and properly done as between Respondent and Treadgold in that capacity.

p. 51—ll. 1-30
p. 55—l. 11
p. 59—l. 20
p. 69—l. 26
p. 50—l. 38

18. The share certificate, Exhibit 1, does not certify that the shares mentioned in it are paid up shares nor that any sum has been paid on them and Appellant relies upon nothing else as a representation by Respondent. In fact nothing was paid on them. The certificate was held by Treadgold without right or title. There is nothing therefore to prevent Respondent from asserting as against Appellant that the shares are wholly unpaid.

p. 409

19. Section 78 of The Companies Act (R.S.C. 1927 Ch. 27) provides as follows:

> "78. No transfer of shares whereof the whole amount has not been paid in shall be made without the consent of the directors."

This section prevented any transfer of the shares in question, the consent of Respondent's directors not having been obtained.

20. A new Companies Act enacted by Ch. 33 of the Statutes of Canada of the year 1934 came into force on 1st October, 1934, a few weeks before the issue of the Writ of Summons in this action, but after formal demand was made for registration. Sections 77 and 78 of the earlier Act as hereinbefore quoted were respectively replaced by Sections 36 and 37 of the Act of 1934 which are as follows:

p. 20—l. 17 and p. 70—l. 23

> "36. (1) No transfer of shares, unless made by sale under execution or under the decree, order or judgment of a court of competent jurisdiction, shall, until entry thereof has been duly made in the register of transfers or in a branch register of transfers of the company, be valid

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for any purpose whatsoever, save only as exhibiting the rights of the parties thereto towards each other, and if absolute of rendering any transferee jointly and severally liable with the transferor to the company and to its creditors.

"(2) Notwithstanding the provisions of subsection one of this section, the delivery of any certificate for fully paid shares, with a duly executed transfer endorsed thereon or delivered therewith, shall constitute a valid transfer of the shares comprised therein, if such shares are listed on any recognized stock exchange at the time of such delivery, provided that, until entry of such transfer is duly made in the register of transfers or in a branch register of transfers of the company, the company may treat the person in whose name the shares comprised in the said certificate stand on the books of the company as being solely entitled to receive notice of and vote at meetings of shareholders and to receive any payments in respect of such shares whether by way of dividends or otherwise.

"37. (1) No transfer of shares whereof the whole amount has not been paid in shall be made without the consent of the directors.

"(2) Where any such transfer is made, with the consent of the directors, to a person who is not apparently of sufficient means to fully pay up such shares, subject to subsection three of this section, the directors shall be jointly and severally liable to the company and its creditors in the same manner and to the same extent as the transferring shareholder, but for such transfer, would have been liable.

"(3) If any director, present when any such transfer is allowed, forthwith, or if any director then absent, within one week after he becomes aware of such transfer, and is able to do so, delivers to the secretary or other officer of the company his written protest against the same, and, within eight days thereafter, causes such protest to be notified by registered letter to the Secretary of State, such director shall thereby and not otherwise exonerate himself from such liability.

"(4) Where a share upon which a call is unpaid is transferred with the consent of the directors, the transferee shall be liable for the call to the same extent and with the same liability to forfeiture of the share, as if he had been the holder when the call was made, and the transferor shall also remain liable for the call until it has been paid."

21. It is to be noted that under subsection 2 of the new section 37 the directors will become personally liable to the company and its creditors if they consent to a transfer of shares not fully paid to a person who is not apparently of sufficient means to fully pay up such shares. Worsdale is
p. 473—l. 36 certainly such a person and Appellant did not see fit to tender the certificate with a request for transfer to himself. No one has offered to pay up the shares and Respondent's directors were doing no more than their duty in refusing to register a transfer.

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22. In any event the blank form of transfer endorsed on Exhibit 1 is not sufficient authority for the registration of anyone as transferee of the shares. This is more especially the case in view of the fact that at the time of the trial of the present action steps were being taken towards a further appeal in the Patton action on behalf of Treadgold and the North Fork Power Company, Limited, and if such an appeal were to succeed, Treadgold would be likely to claim that it is he and not Worsdale who is to appear on the register and that he had given no authority to effect a transfer on the register, the form endorsed being in blank. p. 410 p. 167—l. 31

23. Section 80 of The Companies Act as it appeared in Ch. 27 of the Revised Statutes of Canada (1927) provided as follows:

> "80. The directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company."

By the Companies Act of 1934 Section 80 is replaced by Section 38, which is as follows:

> "38. (1) Subject to subsection two of this section and to the power of the company by by-law to prescribe the form of transfer and to regulate the mode of transferring and registering transfers of its shares, the right of a holder of fully paid shares of a public company to transfer the same may not be restricted.
>
> "(2) Where the letters patent, supplementary letters patent or by-laws of a company confer that power on the directors, they may decline to permit the registration of a transfer of fully paid shares belonging to a shareholder who is indebted to the company except in the case of shares listed on a recognized stock exchange."

24. Pursuant to section 38 of the 1934 Statute the Company on 1st October, 1934, passed a by-law conferring power on its directors to decline to permit the registration of a transfer of fully paid shares belonging to a shareholder who is indebted to the Company. p. 623—l. 16

25. Treadgold is indebted to Respondent in a large amount. By arrangement the trial judge did not go further into the matter of Treadgold's indebtedness than to take the evidence of its existence tendered by Respondent. The evidence in this regard was given by Mr. Troop. He said in the first place that there were 50,570 preference shares and 699,963 ordinary shares of the par value of $1.00 each issued to nominees of Treadgold and therefore not standing in his name on the register and not cancelled by the judgment in the Patton action. Treadgold was ordered to account to Respondent in respect of these shares and had failed to account. Treadgold is liable under the judgment in the Patton action to pay to the Respondent the costs of the Plaintiff in that action which the Company was in the first instance directed to pay. These costs were taxed at $17,189.31 and were paid by Respondent but have not been paid by Treadgold to Respondent. Further indebtedness was shown in the sums of £2,000 and £5,000 in respect of certain other transactions had by Treadgold. p. 9—l. 24 p. 181 p. 592—l. 3 p. 181—l. 20 pp. 186-187

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26. A further obstacle to Appellant obtaining a direction for the registration of either Worsdale or himself as holder of the 1,663,900 shares is that as to 500,000 of them Worsdale was to hold them in trust for others. Appellant
p. 238—l. 14 has conceded that title to the shares held in trust never vested in him as trustee in bankruptcy. He cannot therefore have any right of action respecting these 500,000 shares.

27. Further difficulty in the way of Appellant obtaining the relief claimed herein has arisen since the commencement of this action as pleaded
p. 6—l. 24 by Respondent by way of amendment to its Statement of Defence made
p. 176 under the Rules in that behalf. There has been a re-organization of Respon-
p. 628 dent's capital structure. To procure an indulgence Appellant withdrew all
p. 631 objection to the scheme. Supplementary Letters Patent have been granted to confirm the new capitalization. The effect of this was to reduce to a num-
p. 648 ber less than Appellant's demand the unissued shares of Respondent which
p. 195—l. 31 would be available to answer Appellant's claim in the event of his success.

28. Respondent submits that the judgments of the trial judge and of the Court of Appeal for Ontario were right and should be upheld for the following amongst other

REASONS

(1) Because there is no basis in fact for the Appellant's claim that Worsdale had title by estoppel to the shares in question.

(2) Because there was no real transaction between Treadgold and Worsdale.

(3) Because the sole purpose of Exhibits 1 and 2 and of all that occurred with respect thereto between Treadgold and Worsdale was to protect the shares in question for Treadgold.

(4) Because the evidence of Worsdale and Treadgold is not credible evidence and should not be believed.

(5) Because neither the incomplete transfer endorsed on Exhibit 1 nor Exhibit 2 is in form sufficient to effectively transfer the shares in question.

(6) Because upon Worsdale's own story and according to the terms of the agreement set up by Appellant, Treadgold was to continue as the holder of the shares and no notice of Worsdale's claim thereto was given to Respondent until Treadgold's name was stricken from the register of shareholders.

(7) Because in the circumstances of this case Worsdale and Appellant as his Trustee in bankruptcy are themselves estopped from alleging that a judgment against Treadgold as the registered holder of the shares in question is not effective against them.

(8) Because an unregistered transfer of shares is ineffective as against Respondent.

(9) Because the shares are wholly unpaid and Respondent's directors have not consented to their transfer.

(10) Because Treadgold is indebted to Respondent and Respondent's directors have refused to permit the registration of a transfer.

(11) Because Appellant has no title to or interest in the 500,000 shares which Worsdale says he held in trust for others.

(12) Because by reason of the re-organization of Respondent's capital to which Appellant withdrew all objection there are not sufficient shares unissued to answer Appellant's demand.

10 (13) Because the judgment dismissing Appellant's action is right.

R. S. ROBERTSON

C. C. CALVIN