IN THE HIGH COURT OF AUSTRALIA

SCOTT & OTHERS (TRADING AS NORTHERN MINERAL SYNDICATE)

V.

GRAYDEN & OTHERS (TRADING AS UNION MINERALS SYNDICATE)

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 2ND MARCH, 1959.

(13)

W. M. Houston, Govt. Print., Melb.

SCOTT AND OTHERS
TRADING AS NORTHERN MINERAL SYNDICATE

v.

GRAYDEN AND OTHERS
TRADING AS UNION MINERALS SYNDICATE

ORDER

Appeal allowed with costs. Judgment of the Supreme Court of Western Australia set aside. In lieu thereof order that judgment be entered for the plaintiffs, forming the Northern Mineral Syndicate, in the action for £2125.0.9 on the claim with costs and that the counterclaim of the defendants forming the Union Minerals Syndicate be dismissed with costs.

Costs in the Supreme Court to be taxed on the scale applicable to an action in which the sum of £2125 is recovered with a certificate for three additional days of hearing and for two counsel

Order to follow

SCOTT AND OTHERS TRADING AS THE
NORTHERN MINERAL SYNDICATE

v.

GRAYDEN AND OTHERS TRADING AS THE
UNION MINERALS SYNDICATE

JUDGMENT DIXON C.J.

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SCOTT AND OTHERS TRADING AS THE NORTHERN MINERAL SYNDICATE

v.

GRAYDEN AND OTHERS TRADING AS THE UNION MINERALS SYNDICATE

This appeal from the Supreme Court of Western Australia (Virtue J.) relates to the amount due from one mineral syndicate to another as a result of the one, for a stipulated reward, raising treating and marketing in the form of concentrates the minerals of the other. The appellants who constitute the Northern Mineral Syndicate were the plaintiffs in the action and the respondents who constitute the Union Minerals Syndicate were the defendants. The former contracted to treat the mineral deposits belonging to the latter. As a result of the dealings between them it was found by Virtue J. that there was a balance in the latter's favour of £320.11.7. Accordingly the defendants recovered judgment for that amount on their counter claim. It is from this judgment that the plaintiffs now appeal.

The case comes from one of the attempts that were made in Western Australia to profit from the demand set up by the Government of the United States for a combination of the pentoxides of tantalum and of columbium, or as it is customary to call the element in England, niobium. In 1952 the Defence Materials Procurement Agency of the United States put in operation a plan to accumulate a huge amount of the compound and offered a high price. In the Pilbara district behind Port Hedland with Marble Bar perhaps as a focus there exists an area in which tantalum and niobium oxides accompanied by other minerals are to be found at or near the surface. The American offer appears to have led prospectors and others to take up various mineral leases in the area. Among these had been the plaintiffs who formed the Northern Mineral Syndicate. Near Turner River which runs not many miles from Port Hedland

this syndicate, besides taking up leases, had established by 1954 a treatment plant. The plant was not perhaps very advanced, depending as it did upon separation by specific gravity and washing, but it comprised vibrating screens and roughage jigs whence the smaller sized material went to cleaner jigs and the residue ultimately to a spiral process. There was too a small magnetic separator for the purpose of extracting magnetic iron. It is described as a crude home-made affair. However, at Rivervale near Perth a company named Perron Bros. Pty. Ltd. were prepared to complete the treatment of concentrates by roasting and the use of a magnetic separator. It is described as special plant.

As might be expected the terms on which the Defence Materials Procurement Agency would purchase were strict. They were embodied in a prescribed formal contract containing elaborate conditions. One condition having an important bearing upon this case was that the minimum lot supplied must be of 2000 lbs. dry weight. The specification for the material required that it should contain 35 per cent of the combined pentoxides, that is to say it should be 35 per cent Ta_2O_5 Cb_2O_5. Apparently with these there occur oxides of titanium, tin, iron and manganese. The specification treated them as impurities and moreover provided a maximum percentage for each, thus TiO_2 8 per cent, SnO_2 8 per cent, FeO_2 25 per cent, MnO_2 13 per cent. It was provided that the purchase must be made upon the analysis of Ledoux and Company Inc. of New Jersey and upon dry weights similarly established. It was a sale in New York, to which port the material was shipped. It was consigned for sale through either Derby & Co. (Aust.) Pty. Ltd. or British Metal Corporation (Aust.) Pty. Ltd. as purchasers' agents. These are Australian houses of metal agencies with houses in New York. The agencies, besides dealing with the shipment and

sale of the commodity made advances against the price and paid in the first instance the freight, insurance and other charges. The price paid in New York by the Defence Materials Procurement Agency consisted of a primary figure and a bonus of 100 per cent. The primary figure was an amount per lb. of the combined tantalum and columbium pentoxide content. The primary figure appears to have worked out at $2.02 per lb. so that with the bonus the price became $4.04 per lb. of $Ta_2O_5 Cb_2O_5$ in New York. The purchasers' agents before accepting consignments for shipment would examine the material for quality to some extent and if in doubt subject it to a specific gravity check. We are told of one at least of them, namely the British Metal Corporation, and probably it is true also of Derby & Co., that the agents would not refuse a parcel of less than 2000 lbs. provided it exceeded 100 lbs. But they would accept such a parcel for grouping with other such parcels together making up 2000 lbs. and would mix them in drums for consignment. The settlement would be pro rata and the record of the weight of the parcel or parcels of the individual producer would be kept accordingly. The net proceeds of sale would be remitted to the purchasers' agents who would settle with the supplier to them. That, of course, would mean in this case the plaintiffs, the Northern Mineral Syndicate. The buying programme of the Defence Materials Procurement Agency with respect to tantalum and columbium pentoxides was to extend to 31st December 1956 unless the figure fixed for the stock pile were reached earlier. In fact the programme was brought suddenly to an unexpected stop at the end of May 1955. How much better off the parties to the present litigation would have been had the plan run its allotted course one may doubt, but at all events its stoppage was decisive. The contribution of the defendants the Union Minerals Syndicate

to the production of concentrates containing pentoxides of tantalum and columbium had been but meagre and work on their mineral lease had long since stopped. But some of the ore had not got as far as acceptance in New York. For that reason in part and in part because of the low assay value of some of the material consigned, there was a loss to be borne by one or other of the syndicates. Hence the question in this appeal.

The defendants, the Union Minerals Syndicate, spent the earlier part of 1954 in examining their ground and preparing to work it. It does not seem that the examination proceeded on any very scientific principles but the result apparently was a high but unfounded belief in the richness of their earth in tantalum and columbium oxides - a belief it is said quite inconsistent with a study of the report by the Government Geologist upon the subject which had been published. By July 1954 a little more reason, though as yet by no means enough, had entered into their estimates and computations, and they decided, instead of undertaking for themselves the work of raising and treating their mineral-bearing earth, to contract with the plaintiffs the Northern Mineral Syndicate to perform that service. The plaintiffs' plant was about fourteen miles distant from the defendants' mineral lease. At or towards the end of August 1954 a written contract between the two syndicates was executed by two of their leading members respectively. It was undated and it was expressed to be provisional but it remained as the instrument governing their contractual relations. The document begins by a statement of the parties and by describing itself as a contract in relation to the treatment of the ground of the defendants' syndicate for the purpose of extracting tantalite columbite bismuth and/or any other valuable mineral except beryl. Of these all

that is and, so far as appears, ever was material is tantalite and columbite. The document then states the conditions. The first requires the plaintiffs, the Northern Mineral Syndicate, to do all work necessary for certain purposes which if they are restated in more logical order amount to this - the plaintiffs must prepare the "ground" for "transport": load the "ground" for transport: transport the "ground": extract the minerals from the "ground": and do all other work essential to gaining any valuable minerals contained in the "ground". In consideration of this work the defendants the Union Minerals Syndicate are to pay the plaintiffs the Northern Mineral Syndicate "the first Two pounds four shillingsworth of minerals recovered from each cubic yard of earth treated". "All minerals in excess of this amount which are recovered are to be divided equally between the two parties". Next follows a "guarantee" by the defendants the Union Minerals Syndicate that the plaintiffs the Northern Mineral Syndicate will receive at least £2.4.0 on the average for every cubic yard treated. It is upon this clause that the plaintiff's cause of action rests. The remaining provisions are perhaps of less importance but they cannot be neglected. One enables the Union Minerals Syndicate to indicate what portions of the ground are to be treated. Another requires the Northern Mineral Syndicate, so far as consistent with the efficient working of the plant, to keep the operations connected with the Union Minerals Syndicate separate from any other work which they may be carrying on. This stipulation the Northern Mineral Syndicate insist that they observed. Then there is an obligation upon the Union Minerals Syndicate to sell all minerals recovered and to appoint the Northern Mineral Syndicate as their agents for such sale.

Lastly it is provided that up to £2.4.0 advances from sales are to go towards paying the amount owing to the

Northern Mineral Syndicate for treatment and that any excess over that amount shall be divided between the parties in equal amounts.

The plaintiffs the Northern Mineral Syndicate began, perhaps even before the signing of the contract, to do the first part of the work incumbent upon them under the contract. They formed the necessary road to the mineral lease of the defendants' syndicate and they scooped up the earth containing the mineral deposits. Then they caused the earth to be carted to the plant. The carting extended from 23rd August to 19th September 1954. It was done by contract and whether for the purpose of paying the carters who did it or for better reasons a record was made of the amount of earth taken to the plant for treatment. The amount taken to the plant and treated is 1638 yards of mineral-bearing earth. Some attempt was made on behalf of the defendants at the trial to shew that the figure was too low but its correctness is no longer in contest. It forms the basis of the plaintiffs' claim in the action which consists of a "treatment" charge of £2.4.0 per yard in respect of 1638 yards or £3603.12.0 less certain moneys for which the plaintiffs were accountable. When the earth was actually put through the treatment plant does not clearly appear but we know that it must have been done at latest before 23rd October 1954, and there is reason to think it was done between 15th September and 25th September 1954. Fletcher, a plaintiff who was an active member of the Northern Mineral Syndicate, gave evidence that the treatment of the defendants' earth was done separately without any confusion with any other earth and there is no reason to doubt it was so. One may assume, if it matters, that the treatment was uninterrupted and no sufficient ground appears for any other inference. The concentrates obtained from the treatment of the earth of the defendants the Union Minerals

Syndicate were placed in drums. There is some ambiguity about the evidence concerning some large concentrates which were picked from the travelling belt carrying them away after the first screening. They were placed in a sugar bag and they may have been kept there although it might reasonably be supposed that they would be transferred to a drum. Subject to this, however, and perhaps one further matter, the effect of the evidence which may safely be accepted, and which one may assume the learned judge accepted, was that the concentrates were placed in drums of 44-gallon size and that the drums were closed and "sealed" by a strip of metal oxywelded to the drum. The drums were marked in white paint with the initials of the defendants' syndicate U.M.S. in large letters. The further matter is that the sands recovered from the spiral process though containing some of the desired pentoxides were of such low bearing quality that either at this or some subsequent stage they were by common consent disregarded. The concentrates in the drums were then dispatched for further treatment to Perron Bros. Pty. Ltd. at Rivervale, Perth. No record was made or kept at Turner River of the recovery of concentrates through the plant there. The evidence is that all the concentrates recovered went to Perron Bros. and also that all of them were dealt with at that plant. Though it was suggested that it would not be so with the larger dimensions there is no reason to doubt the testimony that all the better class of ore up to half an inch in diameter was put through the magnetic separator. Anything bigger than half an inch could not be taken by the machinery at Perron Bros. The concentrates were drummed, marked to identify the owner and weighed upon the scales of Perron Bros., and marked with the gross weight of the drum and the net weight of the contents after deducting tare.

All this was done with the plaintiffs' own concentrates and the same thing was done with those of the defendants the Union Minerals Syndicate. It was done under the supervision of a member of the plaintiffs' syndicate named Hawkins. Except for three drums which went direct to Derby & Co. through Port Hedland, he is definite that all the concentrates from the plant at Turner River went to Perron Bros. The three drums did not contain material of the defendants' syndicate. Hawkins said that he kept a notebook in which the weights of the concentrates dealt with by Perron Bros. were entered. This book was described in the plaintiffs' list of documents made on discovery in these terms:- "6. Pocket notebook kept by Henry Albert Oswald Hawkins containing notes of quantities of minerals". The notebook was produced, after discovery, for the defendants' inspection, but it then disappeared, owing apparently to its being left lying about the room after inspection. How the book was lost is not material though what it contained may be. Of this all we know is that when certain returns were made for the Mines Department the book was used as the source of information and that it formed the basis of the particulars given by the plaintiffs under the pleadings at the defendants' request. The reason for dwelling upon these matters is evident enough. The plaintiffs the Northern Mineral Syndicate stood in the position of accounting parties. They contracted to remove and treat the defendants' mineral-bearing earth and the resulting concentrates were to be sold through them. Plainly the method of recording the material treated and the minerals or concentrates won left much to be desired. Virtue J. described it as an "inexcusable failure to keep proper records of their transactions in relation to the defendants' property". The burden of proof lies upon a fiduciary agent in discharging himself of responsi-

bility for what is traced to his possession. Where he has not kept adequate accounts the burden is increased. But it must always be important to know what records were made and did exist. Here what is left unknown or uncertain must be presumed against the plaintiffs, if it is a matter going definitely to their liability to the defendants. But that does not mean that reasonable inferences should not be drawn in their favour or that their position should be prejudiced by the loss in the course of inspection of a record like the book described. Prima facie the plaintiffs, the Northern Mineral Syndicate, are responsible for the due disposal of the concentrates which have been won and are liable for the proceeds. If the plaintiffs have shewn that the concentrates obtained at the plant at Turner River found their way to Perron Bros., and that is a question to which it will be necessary afterwards to return, then the next step is to shew how they were disposed of and to account for the proceeds of such as were sold. It is at this point that the lost notebook might have proved of value. But there are other documents, even if they include those based on the contents of the notebook. From the other documents the following facts appear with reasonable certainty. The S.S. Pioneer Glen sailing from Fremantle for New York at the end of January or the beginning of February 1955 carried a large number of drums of concentrates for sale to the Defence Material Procurement Agency. Some of these were shipped by the British Metal Corporation, some by Derby & Co. In each case some of the drums were delivered by the plaintiffs the Northern Mineral Syndicate. A drum containing 1296 lbs. of concentrates of the defendants treated at Perron Bros. was included among those consigned through Derby & Co. It met the requirements laid down and was duly sold. The plaintiffs received the net proceeds and credited them to the defendants.

The amount credited was £1423.3.7. Another drum was consigned through the British Metal Corporation, perhaps by the same ship, perhaps later. It contained 1239 lbs. of the defendants' concentrates which had been up-graded by Perron Bros. The assay shewed so poor a content that it proved unsaleable and eventually was dumped in the sea. By the S.S. Pioneer Glen the British Metal Corporation shipped on account of the Northern Mineral Syndicate a drum containing according to the net dry weight at New York 1351 lbs. of concentrates. The drum was numbered 1 of the shipment of that Corporation and contained three lots mixed, a lot of 907 lbs. (local weight) attributed to the plaintiffs, another likewise attributed to the plaintiffs of 350 lbs. and a third lot which consisted of the 130 lbs. weight of the defendants' concentrates.

An assay of the whole was made by Ledoux & Co. and their return shewed Ta_2O_5 15.76 per cent and Cb_2O_5 41.07 per cent and no excess of impurities. Accordingly the whole drum was of an entirely satisfactory standard quite acceptable under the programme of the Defence Materials Procurement Agency. Indeed it will be seen that the percentage of combined pentoxides was high. But the programme was closed before the drum could be included. The evidence speaks of the assay not being determined in time to enable a sale to be made. But however it occurred the parcel was shut out; a matter for which the plaintiffs' syndicate could not be held responsible. It only remained for the British Metal Corporation to dispose of it to best advantage. In the end it was sold to Fansteel, a purchaser whose specification stipulated for payment on the tantalum pentoxide content only and required that this should be 20 per cent. A "blending operation" with other drums was carried out which brought the content of Ta_2O_5 to 20.51 per cent and this was paid for by Fansteel at $4.10 per lb. The

share of the proceeds attributable to the drum of 1351 lbs. was £409.11.6 and from this it was necessary to deduct charges. Were no charges set against it the share of this amount attributable to the 130 lbs. of the concentrates belonging to the defendants the Union Minerals Syndicate would be £38.7.9. Certain charges were however thrown against the amount. They have neither been explained nor questioned and their correctness is not a matter worth pursuing, although so much as appears about them may raise a doubt about the apportionment. The result has been to leave a debit of £19.12.4. By the judgment under appeal the plaintiffs have been charged with the full estimated value of this 130 lbs. of concentrates on the ground that it was improper on their part as agents to mix their principals' concentrates with their own. The value was estimated at £1.2.0 by reference to the return received from the parcel of 1296 lbs. When the facts are closely considered it seems to me that the plaintiffs ought not to be held guilty of a breach of duty in mixing the defendants' small parcel of concentrates with their own. They were authorized and indeed required to sell the concentrates and plainly it was to the Defence Materials Procurement Agency that they were to do so. Further, they were to do it by the established channels and methods. The Agency accepted only lots exceeding 2000 lbs. and in some way or other the parcel of 130 lbs. must have been combined with other parcels before it was tendered. The evidence on the subject given by the Western Australian manager of the British Metal Corporation was that in Fremantle the Corporation would accept parcels from 100 lbs. weight upwards for grouping to meet the minimum of 2000 lbs. acceptable. "We would mix them up in drums for consignment", he said. The plaintiffs' syndicate necessarily had authority to deal with their principals' goods as the course of business made necessary

or usual and desirable. It seems clear enough that in mixing the parcel of 130 lbs. they were only doing what was necessary to sell it to the Defence Materials Procurement Agency. It is objected that they ought to have obtained an assay of the tantalum and columbium pentoxide content of the drum. To this there are two answers. In the first place the expense of an assay was rarely incurred before export, reliance being placed on specific gravity tests. In the second place, from the high content of $Ta_2O_5 + Cb_2O_5$ of the whole when compared with the like content of other parcels of defendants, it seems most unlikely that the mixing lowered the percentage. But apart from that the failure to obtain an assay would go only to the proportional distribution of the price had the concentrates been taken by the Defence Materials Procurement Agency.

There remains a parcel of concentrates the weight of which is given by some at 300 lbs. but by returns to the Mines Department as 360 lbs., a figure adopted by the learned judge. This parcel had been treated at Perron Bros. but with very moderately successful results. It seems to have been put with 460 lbs. of concentrates treated at Turner River but belonging either to a syndicate called McPherson & Co. or to the plaintiffs. The concentrates were entrusted for sale to Derby & Co. The latter, however, doubting their saleability eventually had an assay made. As a result the drum was not shipped. For some reason that does not appear the plaintiffs returned the concentrates to Turner River where they are said to have been and still to be available to the defendants. The evidence does not make it completely clear that what was returned to the "mine" was the drum containing the mixture of the 360 lbs. and the 460 lbs., that is a drum of some 820 lbs. The details were not gone into but it seems so. However that may be the judgment charged the plaintiffs with the value of

360 lbs. estimated at £1.2.0 per lb. The plaintiffs were so charged with that amount because it was held improper on their part to mix the concentrates.

For the reasons already given it does not appear to me to have been a breach of duty. But if it were, it is difficult to see why in the circumstances the measure of damages should be the full value of the goods. In any case there seems to be no clear reason why in face of the facts stated above the value should be based on the returns from the amount paid in New York with a bonus of 100 per cent for higher grade concentrates. But for the reasons already given I think that the plaintiffs ought not to have been debited with any amount in respect either of the parcel of 130 lbs. or the parcel of 360 lbs. of concentrate.

The result is that, as I view the matter, the plaintiffs have fully accounted for parcels of concentrates containing respectively 1296 lbs., 1239 lbs., 130 lbs. and 360 lbs. or 3025 lbs. in all. This the plaintiffs maintain is the full amount obtained from the 1638 cubic yards of earth removed from the mineral lease of the defendants the Union Minerals Syndicate and treated first at their plant at Turner River and then at Perron Bros. at Rivervale. The plaintiffs' case is that they have traced the raw material through their plant and the product through the plant of Perron Bros. and to the hands of the two metal agencies, Derby & Co. and the British Metal Corporation, and as to the parcel of 360 lbs. rejected at the hands of Derby & Co. back to the "mine". They have discharged the burden, they claim, of shewing what happened to the 1638 cubic yards and its product and are entitled to judgment for the balance of the contractual amount of £2.4.0 a yard for treating 1638 cubic yards after deducting the net proceeds of sale of the concentrates in America. Taking into account two other items that need not be discussed the balance

amounts to £2125.

To this claim the defendants the Union Minerals Syndicate make three further answers which need to be considered. First it is said that it was outside the authority of the plaintiffs the Northern Mineral Syndicate to forward the former syndicate's concentrates to Perron Bros. for further treatment or extraction. To do so, however, accorded with the course of dealing with concentrates from the plaintiffs' plant at Turner River; it was done at the cost of the plaintiffs as part of the work contracted for, and it increased the value of the concentrates: it was "up-grading". Moreover it is shewn that active members of the Union Minerals Syndicate knew of the course adopted and acquiesced in it. It is difficult to see how the objection could be sustained or what consequences in terms of money could flow from it if it were well founded. In the second place, it is said that the plaintiffs should not be considered to have discharged the onus of proving that all the parcels of concentrates making up the 3025 lbs. formed the product of the defendants' syndicate. This contention was based on the assertion that the drum containing the 1239 lbs. eventually dumped into the sea at New York should be attributed not to the defendants the Union Minerals Syndicate but to the plaintiffs themselves, the Northern Mineral Syndicate. In support of this assertion the defendants relied upon an item in one of the lists of the minerals delivered for sale which were returned to the Mines Department. In the list an item appeared shewing the drum among those delivered for shipment but under a heading appropriate to products of some mine owned by the plaintiffs the Northern Mineral Syndicate. It was shewn, however, that the lists had been made out by an officer of the Mines Department from notes obtained from the secretary acting for the syndicate, indeed for both syndicates, and that

the chances of mistake were real. The learned judge accepted the evidence that this was a mistake and it does not seem that this contention of the defendants can any longer be maintained. The third ground of objection to the conclusion for which the plaintiffs contend is that upon which most weight has been placed and it proved successful in the Supreme Court. It is in effect that it has not been shewn by the plaintiffs the Northern Mineral Syndicate that no more than 3025 lbs. of the defendants the Union Minerals Syndicate resulted from the treatment and that on the contrary the proper inference from the evidence, particularly that given by Fletcher as to the concentrates resulting at Turner River from the treatment of the defendants' earth, was that a much greater quantity was obtained. The defendants, of course, perceive that the question must arise, if this be so, what became of the missing concentrates. The logical possibilities open are these:- (1) that concentrates accounting wholly or in part for the supposed deficiency were shipped from Port Hedland; (2) that they were held at the plant or elsewhere at Turner River and there remained; (3) that they were consigned to Perth without going through Perron Bros.'s plant; (4) that they went to Perron Bros.'s plant but, when they emerged from treatment there, they were identified by markings or otherwise as belonging not to the defendants, the Union Minerals Syndicate, but to some other proprietor, more particularly perhaps to the plaintiffs, the Northern Mineral Syndicate. Doubtless there are other hypotheses but those enumerated alone seem practically feasible. There is evidence negativing all four of them but the defendants do not of course accept the evidence; all they seek is a reasonable hypothesis as an explanation. At the same time they point to the fourth possibility as that most probable and again they refer to the lists furnished to the Mines Department,

first as shewing that a large number of drums was shipped and next because of the error to which reference has already been made, an error they treat as illustrating their point. But while the defendants are not bound to accept the evidence upon the matter adduced by the plaintiffs, it is necessary to observe that there is no reason to believe that the plaintiffs' case as to the treatment and disposal of the concentrates has not been accepted by the learned judge as an honest one. Again there can be very little doubt that the first two possibilities enumerated should be negatived on the facts. The third of these possibilities is perhaps not so decisively negatived by the evidence but the evidence is against it and, did it represent the fact, the fact could readily have been established. Apart from other considerations, it would be certain that the concentrates would be shipped. As to the fourth possibility, that to which the defendants point in particular, two things must be said. The first is that it involves the supposition that through confusion or otherwise somebody obtained the benefit of valuable concentrates that he could hardly have thought were his and that must have been carried into the shipment of the concentrates through Derby & Co. or the British Metal Corporation and into the subsequent accounting for their disposal. The second is that the missing notebook kept by Hawkins and produced for the defendants' inspection must have told the story unless it too had adopted the error or mistakenly recorded the erroneous attribution. Moreover, the oral evidence denies that such a thing occurred and it may fairly be said that it is very unlikely that it would happen and remain undiscovered. The chief reason, one may be sure, why the defendants are persuaded that something of the sort must have occurred, is that they cannot be brought to believe that their earth was not much richer in tantalum and niobium pentoxides than in truth it was. In evidence they

continued to insist that it would return 3 lbs. to the cubic yard and that certain of the plaintiffs' witnesses had said that it was doing so. Yet eighteen months after the earth had been put through the plant at Turner River the defendants' solicitor writes that it was the assay before treatment that shewed 3 lbs. of columbite and tantalite to the cubic yard and that as a fact he was advised that on treatment at the plaintiffs' plant 2 lbs. per cubic yard were recovered. That should have produced a result of 3276 lbs. One may remark that if 3276 lbs. emerged from the plant at Turner River, less than 3025 lbs. might have been expected to emerge after the further treatment at Perron Bros. Some particulars follow in the letter of what had been recovered at the end of September at Turner River and what then remained to be treated. It meant if the facts stated were right that 27 cwt. or 3024 lbs. had been turned out and it might be expected that another 450 lbs. would be added. A subsequent letter made some increase in the estimate in what may fairly be read as an attempt to better the impression left by the earlier statement. But even so it fell short of the defendants' present case; and when modified in the light of facts which appear to have been proved, it may be said not to support that case at all. But in the course of Fletcher's examination in chief he gave the following evidence:- "We extracted from defendants' earth one sugar bag of mineral from picking belt ½"+ (half inch plus) from roughage jigs almost a full drum - in vicinity of 16-17 cwt. - not actually weighed. One full drum weighed and that used as measure; couldn't say what measure weighed. That would be ½". Cleaning jig 4 drums. One ¾ filled one ½ filled. I have no idea of what there was in the other two." This evidence was seized on by counsel for the defendants and it would almost seem that it became the centre of his case. At a later stage in his testimony the witness described their methods of measurement at

the plant at Turner River. He said they had no weighing apparatus: they had a bucket measure. He did not remember the exact weight and the defendants' minerals were all measured by means of the bucket before going into drums. The weight of the contents of a full drum was variously estimated between 14 and 16 cwt. The defendants' counsel appears to have been prepared to take the weight as 15 cwt. That, of course, assumes some fixed or perhaps average specific gravity of the concentrates filling the drum. But if Fletcher's sugar bag of ½ inch plus were taken, as it was, to contain 120 lbs., and his full drum of "½ inch minus" to contain 15 cwt. or 1680 lbs., his three-quarter full drum to contain 10 cwt. or 1120 lbs., which probably is a fair enough conjecture, his half-full drum 7½ cwt. or 840 lbs., you obtained an out-turn of 3760 lbs. before you began to speculate what weight of concentrates you might be prepared notionally to put in the two drums of which Fletcher said "I have no idea of what there was in the other two". If you chose to make a more generous estimate of the weight of the contents of a drum you could, of course, increase the computed 3760 lbs. as you pleased within the limits of weight that you were prepared to suppose that a drum might conceivably contain. It is evident therefore that what you felt at liberty to ascribe to the drums whose contents Fletcher was unable to specify became a matter of central importance in the use made of Fletcher's evidence. It is hardly necessary to add that the argument for the defendants both in this Court and in the Supreme Court did not neglect the possibilities thus thrown open. Moreover the argument brought to bear upon the situation every consideration that could arise from the burden of proof lying on the plaintiffs as accounting parties. But as to this it must be observed that the burden the law places upon the accounting party is simply to establish to the reasonable satisfaction of the Court that his disposal of the principal's property has been proper and that any moneys coming to his hands have been applied in accordance with his duty.

He is not obliged in the course of discharging this ultimate burden to negative every evidentiary possibility that may be suggested. All that can be said about the two drums is that there is an evidentiary possibility that they contained concentrates. That may be taken into account, indeed it ought to be taken into account, in deciding whether the burden of accounting for the principal's property at the close of the transaction has been discharged by sufficient proof. But it can hardly be carried further than that. When, however, one turns to the probabilities concerning the two drums of the contents of which Fletcher was unable to speak, it is not difficult to believe that he had ground for neglecting them. The drums in question were two of four used for what came from the cleaning jigs. The cleaning jigs receive only the material that has gone through the inch vibrating screen, the half-inch vibrating screen and the three roughage jigs, - Denver jigs as they are called. It passes through the bottom screen as "pulp" and is pumped. When it has reached the cleaning jigs the extraction of concentrates is nearing completion. The reason why Fletcher neglected the contents of the second two drums at the cleaning jigs becomes apparent. The minerals coming from the third cleaning jig would not be of importance. It must be borne in mind that the second of the four drums was only half full. Surely the third and fourth would be unlikely to contribute much of value, if anything. And yet the contents of these last two drums have assumed a place of major importance in the case. To my mind speculation as to the possibility of their containing a large quantity of valuable concentrates, yielding a sufficiency of tantalum and niobium pentoxides, is misplaced. The whole process strikes me as somewhat illusory. It cannot displace the effect of the body of the evidence. And recourse to the burden of proof cannot convert speculation into fact - a fact

of a quantitative nature which is then to be applied as if it were a probative fact in the case. The body of the evidence to which I refer provides in my opinion sufficient proof that the plaintiffs have accounted for the proper disposal of the product of the defendants' earth and for the application of the proceeds of such concentrates as were sold. After all there is nothing inconsistent in a conclusion that even considerably more than 3760 lbs. was the weight of the output at Turner River and a conclusion that the final out-turn from the same material at Perron Bros. weighed 3025 lbs. in all. For the upgrading at Perron Bros. must have involved a marked reduction in weight. Such a reduction would shew no more than the necessity of upgrading at Perron Bros. But in any case I think it is a mistake to build so much on the piece of evidence under discussion as to displace the inference to which all else seems naturally to point.

In the Supreme Court Virtue J. took a different view. In effect he accepted the argument of the defendants. His Honour ascribed to the two drums to the contents of which Fletcher did and could not depose, concentrates of a weight of 1000 lbs. Moreover his Honour took the contents of the other drums at a greater weight than a capacity of 15 cwt. would give. Beginning from an estimated weight of concentrates at this point in the operations amounting to 5070 lbs. the learned judge proceeded to work out, by steps which, having regard to the view I take, it is unnecessary for me to discuss, a liability in the plaintiffs which is reflected in the judgment appealed from. For the reasons I have given I am with respect unable to agree in his Honour's conclusion. In my opinion the appeal should be allowed and judgment should be entered for the plaintiffs forming the Northern Mineral Syndicate for £2125.0.9 on their claim and the counter claim of the defendants forming the Union Minerals Syndicate should be dismissed.

NORTHERN MINERAL SYNDICATE

v.

UNION MINERALS SYNDICATE

JUDGMENT KITTO J.

NORTHERN MINERAL SYNDICATE

v.

UNION MINERALS SYNDICATE

The facts are fully stated in the judgment of the Chief Justice and I shall not repeat them in detail.

The plaintiffs claimed that they had treated in accordance with the contract 1638 cubic yards of the defendants' dirt and accordingly had earned, at £2 4s. 0d. per cubic yard, a total sum of £3603 12s. 0d. They gave the defendants credit for £1423 3s. 7d. as being the amount realized by sale of 1296 lbs. of columbite, and for £75 as being the value of certain stores they had taken over from the defendants. This left a balance of £2105 8s. 5d., to which they added £19 12s. 4d. described as the loss on sale of a quantity of columbite (130 lbs.) sold to the British Metal Corporation. Their net claim was thus for £2125 0s. 9d.

Each of the items making up the claim was substantiated at the trial, and none of them is touched by the cross-appeal. The contest in this Court has been in regard to the defendants' counter-claim. The counter-claim sought an order for a taking of accounts and a judgment for damages for breaches of certain terms of the contract. The learned trial judge made findings, not now challenged, which disentitled the defendants to damages save in one respect. He did not order an account: he proceeded to make his own findings as to the quantities of mineral for which the plaintiffs should account, and he decided that the defendants were entitled to recover an amount by which he found that the value of such minerals exceeded what was owing to the plaintiffs for treatment of dirt under the contract. His Honour treated saleable mineral recovered but not sold as having been worth £1 2s. 0d. a lb., and

no criticism of this step is now offered. Both sides, however, have attacked the findings as to the quantity of saleable mineral recovered, and the main difficulty in the appeal is upon the problem so raised.

The plaintiffs admitted having sold 1296 lbs. of the defendants' mineral for £1423 3s. 7d.. They also accounted for three other parcels: (a) a drum containing 1239 lbs., which had been sent to New York, and, having been found there to be worthless, had been dumped in the harbour; (b) a parcel of 130 lbs. already referred to, which the plaintiffs mixed with mineral of their own and sold to British Metal Corporation, the net price falling short by £19 12s. 4d. of the cost of sending to New York the drum that had to be dumped there; and (c) a parcel of 360 lbs., which had been mixed with material of the plaintiffs' and, upon the whole being found in Western Australia to be worthless, had been discarded there. The defendants raised an issue as to each of the items (a), (b) and (c). The 1239 lbs., which unquestionably was valueless, they contended was not their material but the plaintiffs', and accordingly they sought to charge the plaintiffs with 1239 lbs. of valuable material unaccounted for. The learned Judge, however, found that the parcel in question was the defendants', and as there was ample evidence to support the finding it must stand. As regards the parcels of 130 lbs. and 360 lbs., his Honour decided that, although the mixing may not have been in breach of the duty owed by the plaintiffs to the defendants, the plaintiffs had failed to show that before the mixing the parcels were worth less than the other mineral sold for the defendants, viz. £1 2s. 0d. per lb. net, and he therefore held the plaintiffs liable to give credit to the defendants for £539. This was a correct application of well-established principle and must be upheld. As a consequence, there must be deleted from the plaintiffs' claim the £19 12s. 4d.

described as loss on the sale of the 130 lbs. to British Metal Corporation.

There remains the question whether the plaintiffs should be treated as having recovered from the defendants' 1638 cubic yards of dirt more saleable mineral than the total of the admitted 1296 lbs., the 1239 lbs., the 130 lbs., and the 360 lbs., i.e. more than 3025 lbs. in all. The learned Judge approached the problem by endeavouring to work out, on the evidence before him aided by assumptions which he regarded as justified in the circumstances by the law governing the taking of accounts between principal and agent, how much material the plaintiffs should be considered to have recovered from their operations in dealing with the defendants' dirt. The operations fall into two parts. The first was carried out at Turner River, where the dirt was passed through screens and jigs, each yielding valuable material. Finally, it was passed through a spiral process, but this produced only sand which the plaintiffs discarded (rightly, the defendants agree) as not being worth worrying about. The second part of the operations was carried out at Perth, at a plant belonging to Perron Bros and lent to the plaintiffs for the occasion, where the material won by the earlier process was up-graded (to adopt the expression that they used) by means of magnetic equipment designed to get rid of iron compounds.

The learned Judge was satisfied that the plaintiffs did all that could reasonably be expected of them in the treatment of the defendants' material, and he negatived all suggestion of improper or dishonest motive on the plaintiffs' part. He summarised in these words some of the evidence given for the plaintiffs: "The plaintiffs' witnesses say that all the defendants' dirt was put through over a period of three weeks or so during

which no other dirt was treated, so that accidental mixture of the proceeds with the proceeds of other dirt was not possible. They say that the mineral recovered was put into 44 gallon drums which were branded with the initials of the defendant syndicate in white paint with the exception of certain over sized mineral hand picked at an early stage of the treatment process, which were kept in a sugar bag. They say that the drums were carefully and securely sealed before being transported to Perth to be up-graded at Perron Bros.' treatment plant where they were separately treated and dealt with.....". If his Honour had accepted this evidence he must have held that the plaintiffs had fully accounted for all the mineral recovered from the defendants' dirt. It would not then have mattered that, as the fact was, the plaintiffs produced no records of the results obtained either at Turner River or at Perrons'. But his Honour, without expressing any view against the credibility of the plaintiffs' witnesses, dealt with the case by the following steps. First, he accepted some evidence given by one Fletcher, who was one of the plaintiffs and acted as their field manager, as to the quantity of the defendants' material which was obtained at Turner River by the hand picking and the use of the jigs. There was, Fletcher said, a sugar bag of hand-picked ore, almost a full drum of mineral from the roughage jig, a drum three-quarters full and a drum half full from the cleaning jigs, and some amount - Fletcher said he had no idea what it was - in two other drums from the cleaning jigs. The drums used were 44 gallon drums, and Fletcher had said that each would hold from 16 to 17 cwt.of material. The learned Judge took the weight of ore in the sugar bag at 120 lbs. (there was evidence to support this), and attributed a weight of 1700 lbs. to the contents of the roughage jig drum, 1350 lbs. and 900 lbs. to the contents of the two cleaning jig drums which Fletcher

described as three-quarters full and half-full respectively, and added "say in all 1000 lbs." in respect of the two drums about the contents of which Fletcher was ignorant. The total was 5070 lbs.. Deducting the 3025 lbs. accounted for as abovementioned, there remained a difference of 2045 lbs. still to be accounted for. The evidence provided no ground for estimating how much of this difference represented iron compounds eliminated by the magnetic process of Perron Bros' plant. The learned Judge, however, took the step of assuming that twenty-five per cent was the proportion of this difference to regard as having disappeared in this way, and accordingly he charged the plaintiffs with having derived 1534 lbs. of saleable mineral over and above the quantity accounted for.

Even if Fletcher's estimate of the material in the drums at Turner River was correct as far as it went, the calculation which the learned Judge based upon it is open to at least two criticisms. First, to assume that the two drums about the contents of which Fletcher knew nothing contained between them 1000 lbs. of material is to take a step completely in the dark. There is nothing to commend it either in the evidence or in general considerations of probability. In support of their cross-appeal, the defendants argued for a still higher weight, namely 1800 lbs., contending that unless each of the two drums had been at least half-full the contents of one would probably have been put into the other. The obvious physical difficulty of lifting a 7 or 8 cwt. load is enough to deprive the suggestion of plausibility. But even the learned Judge's guess of 1000 lbs. seems unlikely to be right, for, since Fletcher observed three drums carefully enough to be able to remember that one was about full, one was three-quarters full and one was half-full, it is hard to believe that he, the field manager, would have had no idea of the contents of two other drums if they had had any

substantial quantity in them at all. The defendants argue that he must have known what was in the drums, because it was he who, on his own evidence, supervised the sealing of the drums before sending them to Perth for up-grading; and they add that if he did not know he should have known. In either case they say that the case is one for applying the rule that where an agent fails to keep and produce proper accounts everything consistent with the established facts will be presumed in favour of the principal. But whatever application the rule may have in this case, it is not at the point of deciding how much material was won at Turner River. The plaintiffs were not under any obligation as agents to keep accounts or records in relation to the process at Turner River or at any intermediate point between the delivery of the defendants' dirt to them and the selling of the ultimate produce after up-grading at Perrons'. The learned Judge did not criticise in any way their evidence that all the valuable material obtained from the process at Turner River went to Perrons' in sealed drums. The only conclusion which his calculation based on Fletcher's evidence would justify if its ingredients were accepted is that some of the defendants' material, either consisting of or containing saleable mineral, became lost to them after delivery at Perrons'. There is no reason to doubt that Fletcher fully performed his duty at Turner River. If he did, it cannot be right to fill in a gap in his recollection of the contents of the drums by a figure which nothing could justify except a failure, in breach of duty, to keep and produce records of the quantities dealt with there. Nor would it be right to conclude that because Fletcher supervised the sealing of the drums which went to Perrons' he must have known what was in the two drums for which he said he could not give any weights. It is much more likely that the two drums were not

among those which were sealed and sent to Perrons'.

Secondly, the twenty-five per cent was a pure guess. It should be observed, however, that the learned Judge was not adopting the view that twenty-five per cent of the material obtained from the process at Turner River was eliminated by the up-grading at Perrons'. He assumed only that twenty-five per cent of the weight unaccounted for, that is to say of the difference between the material which emerged from Turner River and the final produce accounted for as having emerged from Perrons', represented iron compounds eliminated by the process at the latter place. That means that only a little over ten per cent of what emerged from Turner River was so eliminated. The defendants' counsel, supporting the cross-appeal, attacked the deduction of twenty-five per cent, but he did so under the impression that the Judge had made a mistake in his use of that percentage - that he had intended to apply it to the 5070 lbs., and by a slip had applied it to the 2045 lbs. instead. By way of offering a counter-suggestion, counsel pointed to some evidence given by a witness named Blanckensee, as being the only evidence from which the rate of loss at Perrons' might possibly be gauged. Blanckensee, testifying to the results of the treatment of his own material, said that from 7961 lbs. teated at Perrons' 7172 lbs. of saleable mineral had been recovered. Oddly enough, these figures show a loss of weight of a little under ten per cent, and so tend to support the Judge's application of twenty-five per cent to the otherwise unexplained difference between the figure which he worked out as the weight at Turner River and the weight of the ultimate produce accounted for.

If effect be given to these two criticisms, the learned Judge's calculation may be reshaped as follows, still taking the weight in a drum as being 16 cwt. (1792 lbs.). There was 120 lbs. in the sugar bag, say 1700 lbs. in the

almost-full drum, 1344 lbs. in the three-quarter-full drum, and 896 lbs. in the half-full drums. The total is 4060 lbs., or 1035 lbs. above the 3025 lbs. accounted for. If ten per cent of the 4060 lbs. is deducted from the 1035 in order to allow for the elimination of unwanted material at Perrons', the quantity to be substituted for the Judge's 1534 lbs. as the weight of saleable mineral unaccounted for becomes 629 lbs..

In a case of peculiar difficulty as to the facts, this result seems to me as near to the truth as a court of appeal is likely to get. Finding myself unable to uphold the calculation made by the trial Judge, I have considered the alternatives of ordering an inquiry or attempting to decide the case finally on the present material. The evidence before us is very difficult to follow, and nowhere in it is there to be found any completely satisfactory foothold for a final conclusion. It seems improbable, however, that the evidence adducible at an inquiry would be any more helpful, and the prospect of further appeals is very real. I have therefore turned to do the best I can with the case as it stands. The task is not made any easier by the fact that the trial Judge, proceeding on the basis of the calculation which has been described, refrained, quite understandably, from expressing any views as to the credibility of the witnesses. His reliance on a passage in Fletcher's evidence seems to have been only by way of accepting an admission on the part of the plaintiffs. I do not feel able to say that the plaintiffs have discharged the onus of accounting for all the material of value which they got at Turner River. I should so hold if I thought that on a clear balance of probabilities none of it went astray, but I am unable to see any clear balance of probabilities either way.

In the circumstances I think that the proper

course is to adjust his Honour's calculation in the way I have indicated, with the result that the plaintiffs should be charged as follows in respect of mineral ultimately recovered:

1296 lbs.	sold for	£1423 3s.	7d.
1239 lbs.	dumped	nil	
490 lbs.	mixed with plaintiffs' material and worth	539 0	0
629 lbs.	unaccounted for	691 18	0
		£2654 1	7

This sum, together with the £75 for stores taken, making a total of £2729 1s. 7d., should be set off against the plaintiffs' claim of £3603 12s. 0d.. The balance is £874 10s. 5d.. In my opinion, a judgment for the plaintiffs for that sum should be substituted for the judgment given in the Supreme Court in favour of the defendants.

SCOTT AND OTHERS TRADING AS
THE NORTHERN MINERAL SYNDICATE

v.

GRAYDEN AND OTHERS TRADING AS
THE UNION MINERALS SYNDICATE

JUDGMENT

MENZIES J.

SCOTT AND OTHERS TRADING AS
THE NORTHERN MINERAL SYNDICATE

v.

GRAYDEN AND OTHERS TRADING AS
THE UNION MINERALS SYNDICATE

I agree with the judgment of the Chief Justice.

It was established at the trial of the action that the plaintiffs treated 1,638 cubic yards of the defendants' dirt at Turner River for which they became entitled to £3,603.12.0.

The learned trial Judge decided that against this the plaintiffs were bound to account to the defendants for £3,924.3.7 upon the footing that from the defendants' dirt 4,559 lbs. of columbite had been recovered. In calculating this figure he made two guesses: the first that at Turner River two drums into which apparently the final recoveries from a series of jigs were deposited contained 1,000 lbs. of ore; the other that the treatment of the ore at Perron Brothers resulted in a twenty-five per cent loss of weight. The first guess, in my judgment, favoured the defendants; the second, as stated, the plaintiffs although I doubt whether this percentage was accurately applied. It is not possible upon the evidence to determine the actual recoveries at Turner River but it is not of ultimate importance and I do not think that the plaintiffs were bound to keep records of what quantities were there recovered. Nor is it possible to say what was the percentage loss of weight at Perrons but again that is not itself of critical importance. What is of vital importance is the quantity of ore finally recovered when the separation was complete. It is true that upon this the evidence is not entirely satisfactory but for the reasons given by the Chief Justice I think it does sufficiently establish that the plaintiffs recovered 3,025 lbs. of columbite and no more.

Furthermore, for the reasons given by the Chief Justice, the evidence does warrant the conclusion that the plaintiffs accounted for this quantity and that their account showed no

breach of duty on their part in dealing with the defendants' ore.

The plaintiffs were therefore entitled to £3,603.12.0 and were accountable for £1,423.3.7, the net proceeds of one drum of columbite sold to the Defence Material Procurement Agency, plus £75.0.0 for stores, less £19.12.4 being the defendants' part of the loss upon the drum sold to Fan Steel. This leaves a balance of £2,125.0.9,for which the appellants are entitled to judgment.