No. 465

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

Court of King's Bench

(APPEAL SIDE)

On Appeal from a final Judgment of the Superior Court, for the District of Montreal, rendered on June 30th, 1930.

LADY DAVIS, et al.,
(Plaintiffs in the Superior Court),
APPELLANTS

— VS —

THE RIGHT HONOURABLE LORD SHAUGHNESSY, et al.,
(Defendants in the Superior Court),
RESPONDENTS

— AND —

THE FEDERATION OF JEWISH PHILANTHROPIES OF MONTREAL,
(Mis-en-Cause in the Superior Court),
MIS-EN-CAUSE

APPELLANTS' FACTUM

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INDEX TO APPELLANTS' FACTUM

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On Appeal from a final Judgment of the Superior Court, for the District of Montreal, rendered on June 30th, 1930.

10 **LADY DAVIS (Dame Eleanor Curran, of Cannes, in the Republic of France, widow of the late Sir Mortimer Barnet Davis, Knight; and MORTIMER BARNET DAVIS, Junior, gentleman, of the City and State of New York, in the United States of America),**

(Plaintiffs in the Superior Court),
APPELLANTS

— VS —

20 **THE RIGHT HONOURABLE LORD SHAUGHNESSY (William James Shaughnessy), and ALEXANDER M. REAPER, both of the City and District of Montreal,**

(Defendants in the Superior Court),
RESPONDENTS

— AND —

THE FEDERATION OF JEWISH PHILANTHROPIES OF MONTREAL, a body politic and corporate, duly incorporated according to law, and having its Head Office and principal place of business in Montreal aforesaid,

30 **(Mis-en-cause in the Superior Court),**
MIS-EN-CAUSE

APPELLANTS' FACTUM

This is an appeal from a judgment rendered on June 30th, 1930, by the Honourable Mr. Justice Surveyer, sitting in the Superior Court, at Montreal, dismissing, with costs reserved for adjudication 40 later, Appellants' action for the removal of Respondents as Executors and Trustees of the Last Will of the late Sir Mortimer Barnet Davis, and also dismissing with costs Appellants' petitions for the appointment of a sequestrator, and for an interlocutory injunction against a contemplated merger involving the loss to the Estate of the control of Canadian Industrial Alcohol Company Limited.

THE FACTS

I

Notwithstanding the formidable size of the record upon the present appeal, it is the suggestion of Appellants that the relevant facts will be found fewer in number and much less complicated than might at first be deemed to be the case.

Indeed there is comparatively little controversy as to what actually occurred during the period of 22 months which elapsed between the time Respondents took office following Sir Mortimer's death on March 22nd, 1928, and the institution of the suit to remove them on January 16th, 1930.

Appellants propose to sketch very briefly, and in the order of date, the chief events brought out at the trial, without any attempt at this stage to discuss the evidence in detail; and to simplify matters, to take up first the facts bearing on the action generally, and then to review separately the Canadian Industrial Alcohol Company situation.

II

Appellant Lady Davis is the widow, and Appellant Mortimer B. Davis is the only son, of the late Sir Mortimer Davis, outstanding citizen, business man and philanthropist, who died at Cannes, France, on March 22nd, 1928, and they are the joint life tenants of his Estate.

Appellant Lady Davis together with Respondents Lord Shaughnessy and Alexander M. Reaper, were appointed Executors and Trustees of the Will, with equal powers and rights.

In 1919, Sir Mortimer incorporated, under The Quebec Companies Act, a so-called one man company, known as Sir Mortimer Davis Incorporated, for the obvious purpose of being in a more advantageous position in connection with the Income Tax law.

To the Incorporated Company, Sir Mortimer transferred certain assets, many of nebulous value, and received in return $5,000,000 in Six Per Cent Serial Notes, and in addition $5,000,000 in shares, being all the issued stock of the Company, which assumed a large Bank loan. (Exhibit P-196, Vol. 3, p. 966.)

J. B. Waddell, former manager of the Union Bank of Montreal, took charge of the Incorporated Company, under Sir Mortimer, during the first five years of its existence, that is, from 1919 to 1924, and was given an interest of five per cent in its Serial Notes and shares. (Exhibit D-12, Vol. 2, p. 413.).

The largest single item among the assets transferred was 41,000 Common shares of the stock of the original Canadian Industrial Alcohol Company, which were later split up on a basis of 16 to 1, making 676,000 of the present "A" Shares (Exhibit P-196; Vol. 3, p. 966, l. 28).

Prior to his death, Sir Mortimer had reduced these holdings to 494,100 shares, equivalent to 51 per cent of the issued voting shares of the present Alcohol Company.

Sir Mortimer who had some time previously gone to reside permanently in France, was married there to Appellant Lady Davis in May 1924.

Lord Shaughnessy had been admitted to the Bar in 1910, and for some thirteen years, that is, until 1923, had been associated, on a salary basis and later as a sharing partner, with the law firm of Meredith, Holden, Heward & Holden, his professional earnings as shown by his Income Tax reports for the years 1921 to 1924, being as follows:—

1921	$ 8,994.59
1922	8,249.41
1923	14,447.09
1924	12,476.16

(Lord Shaughnessy, Vol. 9, p. 1756, l. 3.)

On September 17th, 1924, an agreement under private signature was entered into whereby Lord Shaughnessy was engaged by the Incorporated Company as General Counsel, or in such other capacity as the Board might from time to time determine, for a term of five years at a salary of $20,000 per annum, payable monthly.

The agreement also purports to contain a gift from Sir Mortimer to Lord Shaughnessy of securities of the Incorporated Company, having a par value of $434,000, and actually worth much more, viz., $196,500 of the Six Per Cent Twenty-Year Serial Notes and 2,375 shares of $100 par, which are stated to have been transferred to Hon. H. M. Marler and H. B. McLean as trustees, to be delivered by them

to Lord Shaughnessy at the end of the five-year period, and under the conditions set forth in the agreement (Exhibit P-13, Vol. 2, p. 393).

The agreement provided that the interest on the Serial Notes, and dividends, if any, declared upon the shares, would be payable to Sir Mortimer, who would also control the voting rights on the shares, until the end of the five-year period (Vol. 2, p. 396, ll. 10 to 19).

The entire agreement was subject to cancellation by Sir Mortimer, at any time and without any compensations, should Lord Shaughnessy's services not be satisfactory (Vol. 2, p. 394, ll. 30 to 36).

Finally, the agreement declares that the consideration of the same is in the nature of a gift (Vol. 2, p. 396, l. 21).

Prior to the date of the agreement, September 17th, 1924, Sir Mortimer had withdrawn from the Incorporated Company $1,827,-603.83, as shown by the Auditors' Report for the year ending September 30th, 1924 (Exhibit D-52 (a); Vol. 3, p. 919, l. 18).

On the other hand, the sum of $1,149,000 was standing at the credit of Sir Mortimer in a separate account representing an accumulation of that amount of interest on the Serial Notes of the Incorporated Company held by him (Exhibit D-52, Vol. 3, p. 917).

Had Sir Mortimer withdrawn the accumulated interest of $1,149,000, or had the Incorporated Company declared and paid a cash dividend sufficient to equal Sir Mortimer's withdrawals of $1,827,603.83, such interest or dividend would have been subject to heavy taxation under the Income Tax law.

For the purpose of meeting the situation, the Incorporated Company under date October 1st, 1924, went through the motions of revaluing its assets, followed by a distribution of treasury shares, equivalent to 65% on the shares then outstanding, and at the same meeting, authorized the repurchase by the Company of the new shares at par (Exhibits P-16 and D-133, Vol. 2, p. 378, ll. 1 and 25).

A complete explanation of the transaction is contained in the Auditors' Report of the Incorporated Company for the year ending September 30th, 1928 (Exhibit D-52 (a); Vol. 3, p. 918).

The exact manner in which the 65% stock dividend worked out

so far as the Shareholders were concerned appears by Exhibit P-83, Volume 2, p. 400.

It will be noted that while the arrangement just referred to appears according to the Minutes Book to have been authorized on October 1st, 1924, the same was given effect to in the Company's Accounts for the year ending September 30th, 1924.

In any event, the whole matter was formally put through 13 days following the dating of the agreement for the engagement of Lord Shaughnessy, who never contributed an iota towards earning the $3,250,000 distributed by the means reviewed; and in point of fact, he admits that his agreement only became effective on October 1st, 1924 (Vol. 9, p. 1756, l. 28).

A year later, that is, in September 1925, the Auditors' Report attributed to Lord Shaughnessy a statement to the effect that he did not wish to participate in the distribution in question, and a recommendation by the Auditors that the amount of $162,500 and interest appearing on the books of the Incorporated Company to the credit of Messrs. Marler and McLean should be transferred to the credit of Sir Mortimer (Exhibit D-53 and D-53 (a), Vol. 3, p. 927, ll. 12 to 26).

In the spring of 1926, upon the recommendation of Lord Shaughnessy, Respondent Reaper was engaged to act as secretary of the Incorporated Company (Exhibit P-259, Vol. 3, p. 798, l. 47).

In the summer of 1927, the Alcohol Company acquired the control of a Scotch blending plant, known as Robert McNish & Company, paying something like $250,000 for 90% of the outstanding capital stock. An issue of $5,000,000 debentures was put out by the McNish Company to provide the concern with a large stock of liquors, etc.

These debentures were guaranteed, both as to principal and interest, by the Alcohol Company, and were distributed to the sharholders of the latter concern in proportion to their stock holdings, at the price of $4.50 for a Debenture of $5.00 par value.

The Incorporated Company, as the holders of 51% of the shares of the Alcohol Company, took up approximately $2,500,000 of these debentures, and arranged to finance the payment of the same by a temporary call loan of $2,250,000, obtained at 4½% interest from the New York Office of the Canadian Bank of Commerce, the plan being to list the debentures in London and Montreal and to dispose of the same without delay.

In December 1927, the Alcohol Company being in need of additional working capital on its own account, made an issue of some 123,000 non-voting shares, known as " B " stock. These shares were issued to its shareholders at 20, netting about $2,500,000, and the Incorporated Company, on March 1st, 1928, took up 61,980 of these " B " shares, for that purpose, borrowing on call a sum of $1,250,000 from the Montreal Office of the Canadian Bank of Commerce; the plan being to dispose of the stock without delay.

In the fall of 1927, M. B. Davis, Jr., was married. His father disapproved of the match.

On November 30th, 1927, Sir Mortimer executed the Will in question in this Case.

Shortly before his death Sir Mortimer had in mind the formation of a finance corporation, along the lines of such well known concerns as National City Company, Dominion Securities Limited, Wood Gundy & Co., and had instructed Lord Shaughnessy to be on the lookout for a competent man to be put in charge (Exhibit D-123, Vol. 3, p. 845, l. 15).

In this connection Lord Shaughnessy met a man named Jennison, but upon inquiry from his former associates was warned that he was essentially a promoter who had been more or less successful at the financial game, and that they had never been able to put the fullest confidence in him. Lord Shaughnessy passed this report on to Sir Mortimer, adding his own comment as to the unfitness of the party for the position (Exhibits D-128, D-127 and P-258, Vol. 2, pp. 449 and 450; Vol. 3, p. 864 at p. 866, l. 31).

About the same time Sir Mortimer was also considering the development of a coal property in Alberta known as the Federal Mine, in which he had some years back invested upwards of $100,000 and had bought the entire assets at the liquidator's sale for $10,000. Sir Mortimer's plan is set out in detail in his last letter to Lord Shaughnessy, written on March 10th, 1928, and it was to merge the Federal property with an adjoining property owned by the Hon. Robert Rogers, involving a total expenditure by the Incorporated Company of from $20,000 to $30,000 for a double-checked investigation; the Company's securities to be accepted in payment of both properties, and the entire working capital to be obtained from the public on the issue of $600,000 bonds (Exhibit P-233, Vol. 3, p. 870 at p. 871, l. 16).

Sir Mortimer died, very suddenly, at Cannes, France, on March

22nd, 1928. Lady Davis accompanied the remains to Montreal for burial, and the funeral took place here on April 12th following.

The Will was probated on April 18th, 1928.

The very first direction to the Trustees and Executors contained in the Will was to pay the Testator's debts and funeral expenses; all Succession Duties to be paid by the Estate, and not by the legatees (Exhibit P-1, Vol. 1, p. 148, ll. 17 and 25).

Lady Davis and the two Respondents were appointed Trustees and Executors; all to have the same powers (Exhibit P-1, Vol. 1, p. 148, l. 31; p. 157, l. 38).

Lady Davis and M. B. Davis Jr. were each bequeathed an annuity of $67,000, and, in addition, one-half of the net annual revenues of the Estate, and one-half of the residue of the capital subject to substitution. In the event of the death of Appellant M. B. Davis Jr., his shares of the net annual revenue and capital were bequeathed to Lady Davis (Exhibit P-1, Vol. 1, p. 151, l. 5; p. 152, l. 30; p. 153, l. 14).

In the event of there being issue of the marriage of Sir Mortimer and Appellant Lady Davis, the revenues of the Estate, after her death, were to be paid to such children, and, on their death, the residue of capital was to pass to Sir Mortimer's grandchildren *par souche.*

In the event of there being no such issue, which is the case, the Trustees of the Estate were directed, after a period of 50 years from the date of the death of Sir Mortimer, to apply such residue of capital: 75% for the purpose of a hospital in Montreal, to be known as "The Mortimer Davis Hospital"; 12½% to the Federation of Jewish Philanthropies of Montreal, and 12½% to non-sectarian charitable institutions of the Province of Quebec (Exhibit P-1, Vol. 1, p. 154, l. 8).

Lady Davis was also bequeathed the use of the estate at Cannes, and all monies at Sir Mortimer's credit in France. M. B. Davis was specially bequeathed all of Sir Mortimer's jewelry and personal effects (Exhibit P-1, Vol. 1, p. 148, l. 43; p. 148, l. 1).

The other bequests in the Will are in favor of Sir Mortimer's relatives, chauffeurs, gardeners, etc., and legacies of $100,000 each to the following charities:

Montreal General Hospital;
Notre Dame Hospital;
Federation of Jewish Philanthropies;
Young Men's Hebrew Association.

(Exhibit P-1, Vol. 1, p. 149, l. 36; p. 150, l. 11; p. 151, l. 20; p. 152, l. 16.)

The problem of the Executors immediately following the death of Sir Mortimer, in March, 1928, was summarized by George C. McDonald in the course of his testimony at the trial on behalf of Appellants and is set out in one of the Exhibits specially prepared by him, which shows that, apart from the Bank loans incurred in connection with taking up the McNish debentures and the " B " stock, and without liquidating any part of the Alcohol or Asbestos shares, there was then a net deficiency of liquid assets of $1,283,151 (Exhibit P-211, Vol. 1, p. 248).

In the latter part of April, 1928, the Executors met to consider the affairs of the Estate. Lady Davis testified that on this occasion it was definitely understood that all the shares at the time being carried in a speculative broker's account on margin were to be sold, which would have released $1,000,000; and that Lord Shaughnessy stated there was nearly $1,000,000 cash in the Incorporated Company, and that the sale of the " B " stock would produce $2,000,000 additional, making $4,000,000 in all (Lady Davis, Vol. 9, p. 1793, l. 16).

Minutes of this meeting were prepared and afterwards signed by all three Executors, but refer only to matters of the Estate proper, no mention being made of the call loans or " B " stock held by the Incorporated Company. The minutes state that the Liggett & Myers shares, which were then worth about $1,000,000, were to be held in the speculative account until a more satisfactory price could be obtained. These shares were still on hand when the suit was taken, and on four different occasions in the interval had shown a market depreciation of approximately $250,000, although when sold in February, 1930, to meet the demands of the Provincial Government for Succession Duties, the price realized was about equivalent to the market value at the time of Sir Mortimer's death (Exhibit D-2, Vol. 2, p. 324, l. 10; also Exhibits P-187 and P-188, Vol. 3, pp. 983 and 984).

These minutes also show that it was entirely upon Lord Shaughnessy's initiative that the project of the Y.M.H.A. building, which has since run into upwards of $400,000, was proceeded with.

On April 27th, 1928, following an intimation by Lord Shaughnessy to both Lady Davis and M. B. Davis that he would prefer receiving some article of Sir Mortimer's personal jewelry rather than avail himself of the bequest of $1,000 " wherewith to purchase a memento," provided by the Will, M. B. Davis, while in a hospital in New York, handed Lord Shaughnessy his father's platinum watch, chain and match box, which had cost about $1,000 (Exhibit P-1, Vol. 1, p. 150; Lady Davis, Dan Young and M. B. Davis, Vol. 11, p. 2440, l. 25, p. 2443, l. 10, p. 2456, l. 12; p. 2460, l. 31.

He next obtained her signature to a Power of Attorney in favor of himself and Respondent Reaper jointly (Exhibit P-5, Vol. 2, p. 295).

On the afternoon of May 5th, 1928, the day Lady Davis left Montreal to return to France, Lord Shaughnessy called at her hotel with a document purporting to be an agreement between the Incorporated Company and the Estate on the one part, and Lord Shaughnessy on the other part, which had already been signed by Reaper both as Secretary-Treasurer of the Incorporated Company and as an Executor, and requested Lady Davis to sign the same as an Executor Lord Shaughnessy later signed as Vice-President and as an Executor (Exhibit P-15, Vol. 2, p. 404; Lady Davis, Vol. 9, p. 1802, l. 34, to p. 1805, l. 37).

The document purported to modify the agreement of September 17th, 1924, respecting the remuneration received by Lord Shaughnessy from certain directorships, and further to modify the terms of the gift from Sir Mortimer to Lord Shaughnessy, set out in the original contract, and to provide that should Lord Shaughnessy become incapacitated or die before the expiry of the five-year term which would have entitled the Estate to possession of all of the deposited securities, he or his heirs would be entitled to the number of shares proportionate to the period which would have then elapsed. The full significance of the latter change will be realized from the fact that at the time the monies at the credit of Messrs. Marler & McLean, along with the notes and shares, represented upwards of $800,000, taking the Incorporated Company's shares at their book value, 170 (arrived at upon the basis of 20 for the Alcohol shares), and of upwards of $1,400,000, taking the Incorporated Company shares at 500, on the basis of the price of 50, at which the Alcohol shares were later dealt in (Exhibit 19-A, Vol. 1, p. 198).

Lady Davis was not shown the original contract when she was asked to sign the document modifying its terms, and simply took the word of Lord Shaughnessy, in whom she at the time had implicit confidence.

Lady Davis left Montreal on May 5th for New York, and sailed for France a week later (Lady Davis, Vol. 9, p. 1807, l. 15).

On May 12th, 1928, Lord Shaughnessy took possession of a Rolls Royce automobile, the property of the Estate, and after using the same for some months, retained it in his possession for about sixteen months, that is, until September, 1929 (Goodsall, Vol. 4, p. 60, l. 33; p. 61, l. 46; p. 63, l. 47).

On June 1, 1928, Lord Shaughnessy signed an application, in affidavit form, for the issue to himself of an annual license for the Rolls Royce car in question, wherein it was declared that the same had been purchased from the Estate of Sir Mortimer Davis (Exhibit P-39, Vol. 2, p. 327).

About this time Lord Shaughnessy reported to Lady Davis that he was negotiating with the Distillers Corporation of Scotland for the sale of the Alcohol shares, and that these interests were " nibbling " at $60 per share, and that he was holding out for $80, and that he would like to get $30,000,000 or $40,000,000 in bonds in the Incorporated Company, which figures approximated the purchase money of the Alcohol shares at the prices just mentioned (Lady Davis, Vol. 9, p. 1797, l. 32).

Early in May, 1928, Lord Shaughnessy, without any demand by Lady Davis, paid her $200,000, the amount of her marriage settlement, and about the same time had one share of the Incorporated Company, belonging to the Estate, transferred into her name, and gave her to understand that she was being appointed a director (Exhibit D-107, Vol. 2, p. 538; Lady Davis, Vol. 10, p. 1998, ll. 1 to 29); (Lady Davis. Vol. 9, p. 1801, l. 35; p. 1806, ll. 1 and 23).

Only part of the stock which was being carried on margin at the time of Sir Mortimer's death was sold.

2,240 " A " shares and 6,620 " B " shares of Alcohol were sold almost at once, and good prices realized therefor.

On May 28th, 1928, an advance of $10,000 was made to Jennison from the funds of the Incorporated Company without any authorization or security (Exhibits P-71 (a), P-71 (b), and P-247, Vol. 2, pp. 450, 452 and 453).

About the end of May, 1928, Lord Shaughnessy refused to consider offers from O'Brien & Williams, one of the outstanding brokerage houses of Montreal, for the purchase of the entire block of

Alcohol " B " at a figure slightly below the then market of 45 (O'Brien, Vol. 9, p. 1764, l. 20).

Had this offer been accepted, the Estate would have realized upwards of $2,250,000 for an asset which is still on hand, and which has since depreciated over $2,000,000 in value.

The Estate was interested in 23,060 common shares of Asbestos Corporation held by the Incorporated Company and by Consolidated Asbestos Company. Lord Shaughnessy was a director and vice-president of Asbestos Corporation and was on that board to protect the interest of the Estate in the shares in question.

On the date of Sir Mortimer's death, March 22nd, 1928, Asbestos common was selling about 31, and in May following, sold at 39¾, which represented a market value of $910,870 for the shares held by the Estate.

No attempt whatever was made by Lord Shaughnessy to dispose of the Asbestos shares, and at the time of the trial they had depreciated to 2⅝, or to a value of $51,650, a depreciation of over $860,000, and have since practically vanished entirely (Exhibit P-186, Vol. 3, p. 982).

The delay of three months fixed by the Succession Duties Act for the fyling of the declarations of assets and liabilities, etc., expired on June 22nd, 1928, and it would appear that an additional delay of sixty days had been applied for and granted (Exhibit P-53, Vol. 2, p. 543, at p. 544, l. 7).

It may be noted that even before the expiry of the statutory delay of three months, Respondents had in their possession the statements of the Estate and of the Incorporated Company, which they fyled on September 14th following. The statement of the Incorporated Company, Exhibit D-19, was prepared by the auditors under date June 16th, 1928, and the statement of the Estate, Exhibit P-55, fyled for Succession Duty purposes, corresponds with the statement of the Estate, Exhibit P-50, which must have been prepared at the same time as the statement of the Incorporated Company (Exhibit D-19, Vol. 1, p. 196; Exhibit P-50, Vol. 1, pp. 196 and 198; Exhibit P-55, Vol. 2, pp. 546, 547 *et seq.*).

On July 11th, 1928, Lord Shaughnessy left with his family for Europe, and was away nearly three months, returning on October 4th following.

Before leaving, Lord Shaughnessy, as president of the Incorporated Company, signed and left with Reaper a sheaf of cheques drawn on its bank account; thirteen of these cheques together with twenty further cheques of the Incorporated Company were used by Reaper under instructions from Lord Shaughnessy to pay his private and personal creditors divers amounts aggregating $4,624.82 (Exhibit P-27, Vol. 2, p. 35, l. 30. See also cheques, Exhibit P-45, Vol. 2, pp. 341 to 351).

None of these withdrawals were ever debited against Lord Shaughnessy's salary as president of the Incorporated Company, the full amount of which was paid to him monthly by cheques deposited to his credit after having been endorsed by Reaper as his secretary.

While in Europe in the summer of 1928, Lord Shaughnessy, in answer to enquiries by Lady Davis as to how matters were progressing, repeatedly assured her that everything was coming on fine, and, at one of these interviews, handed her a copy of the statement of the Estate as at March 22nd, 1928, Exhibit P-50, but did not give her a copy of the corresponding statement of the Incorporated Company, Exhibit D-19, which had been available since June 12th, 1928.

Shortly before the expiry of the additional delay of sixty days, Reaper, on August 12, 1928, upon the pretext that part of the assets were situated in France, and the alleged difficulty of ascertaining the exact value of the same within the time provided, applied for six months' further delay to furnish the declarations required by the Act, which the Department refused to grant (Exhibit P-54, Vol. 2, p. 543).

Under date September 14th, 1928, the Estate's Notary, Mr. Phillips, sent the Collector of Succession Duties, at Montreal, a preliminary statement sworn to by Reaper (Exhibit P-55, Vol. 2, p. 546).

Upon Lord Shaughnessy's return early in October, 1928, his first act was to cover up by antedated entries the withdrawals of $4,684.22.

About the middle of October, 1928, Lord Shaughnessy called at the Pine Avenue residence and gave instructions to the caretaker Godsall for the delivery at his own residence of the major part of the Circassian walnut dining room set, which had been specially designed to match the expensive panelling of the dining room in the same wood, together with part of a Chippendale set and a French ottoman with needle point top (Godsall, Vol. 4, p. 64, l. 16, to p. 67, l. 26).

The replacement cost of the part of the dining room furniture set appropriated by Lord Shaughnessy was estimated by Robert Findlay, the architect who built the house, at between $3,000 and $4,000, and by S. B. Green, representative of the manufacturers, at $4,070, f.o.b. New York, to which duty would have to be added (Findlay, Vol. 4, p. 88, l. 41; Green, p. 91, l. 22; p. 92, l. 30).

In 1920 Sir Mortimer gave Hon. Herbert M. Marler 500 shares of stock of the Incorporated Company.

Prior to the purchase of these shares from Mr. Marler by the Estate, which is about to be referred to, he was intimately connected with the affairs of the Estate as follows:

(1) As holder of $30,000 Serial Notes of the Incorporated Company (Exhibit P-9, Schedule 3, Vol. 1, p. 227, l. 20).

(2) As the holder of 500 shares of the Incorporated Company.

(3) As a director of the Incorporated Company.

(4) As a trustee under the Donation of $200,000, dated October 26, 1921 (Exhibit P-68, Vol. 2, p. 528).

(5) As a trustee under the Donation of $3,000,000 Serial Notes, dated October 21, 1922 (Exhibit P-84 (c), Vol. 2, at p. 420, l. 4).

(6) As a trustee under the Donation of $1,200,000, dated August 1, 1923 (Exhibit P-69, Vol. 2, p. 531).

(7) As a shareholder of the Alcohol Company.

(8) As a director of the Alcohol Company.

Lord Shaughnessy knew from the legal opinion obtained from the Estate's solicitors, to which he referred in his letter to Lady Davis of June 8th, 1928, that under the $3,000,000 trust, $180,000 interest was payable annually to the trustees, to be added to the capital of the trust for 2½ years, that is, until M. B. Davis, Jr., became 30 years of age, which would necessitate cash withdrawals from the Incorporated Company for that purpose of $450,000, and that thereafter the annual interest of $180,000 should be paid punctually to the trustees for disbursement to the Estate (Exhibit P-229, Vol. 2, p. 296 at p. 297, ll. 20 to 33).

Lord Shaughnessy was also aware from the same source that

under the $1,200,000 trust, the Executors were required to forthwith pay over the capital of that trust to the trustees thereunder, together with the accumulated interest since Sir Mortimer's death.

He also knew that under the $200,000 trust of October 26th, 1921, the Executors were bound on demand to pay over the capital, with interest (Exhibit P-68, Vol. 2, p. 528).

All of this would have absorbed a large amount of the ready funds, and would have put a serious crimp in the plans which Lord Shaughnessy had in mind in connection with Jennison, and which were subsequently carried out in part.

Lord Shaughnessy could not have failed to appreciate that if Mr. Marler remained as a shareholder and director of the Incorporated Company and as a trustee under the three Trust Deeds, he would never permit Lord Shaughnessy to manage the Company or to deal with these trusts in the manner which he has done, and in particular to pay nothing on account of either capital or interest on any of the trusts.

So, even if it be true, as stated by Lord Shaughnessy in his letter to Lady Davis of November 7th, 1928 (Exhibit D-9), that it was Mr. Marler, and not he, who took the initiative in the matter, it is not difficult to imagine how readily Lord Shaughnessy took advantage of the opening to suggest that Mr. Marler should resign from the trusteeships, or how speedily he fell in with the further proposal credited to Mr. Marler concerning the sale of his shares in the Incorporated Company, which at once eliminated him as a director.

Mr. Marler was clearly in the way, and Lord Shaughnessy's attitude respecting his continued connection with Estate matters is reflected by the following extract from his letter to Lady Davis, reading:

> " Reaper and I think that it is a very good purchase, *quite apart from the fact that we get rid of Marler forever.*"

(Exhibit D-9, Vol. 2, p. 300 at p. 301, ll. 11 and 12.)

On October 31st, 1928, Lord Shaughnessy cabled Lady Davis, strongly recommending the purchase of Mr. Marler's shares at 170, and soliciting her concurrence which was given on condition that the purchase was made out of capital (Exhibits P-227, and P-228, Vol. 2, p. 300).

Incidentally, the statement in Lord Shaughnessy's cable to the effect that it was necessary to offer Mr. Marler's stock to the shareholders, was a deliberate distortion of the Company's by-laws, under which the directors had the right to put through the sale direct from Mr. Marler to the Estate (Exhibit P-42, Vol. 2, p. 336 at p. 372, l. 1).

By November 6th, 1928, Lord Shaughnessy negotiated definite purchase of the 500 shares owned by Mr. Marler for the sum of $100,000, being the equivalent of 200 per share (Exhibits P-85, and P-93, P-84a, P-84b and P-84c; Vol. 2, p. 417).

Lord Shaughnessy's letter to Lady Davis, written on the following day, November 7th, 1928, stating that the shares had been purchased from Mr. Marler at 170, and suggesting that it might be fair to give him a little additional as trustee under one of the trust deeds, was a deliberate misrepresentation of his understanding with Mr. Marler, as shown by the letters exchanged between them.

In the same letter, Lord Shaughnessy grossly misrepresented the situation of the whole Estate and of the Succession Duties in particular, when he said:—

> " Things are running very smoothly, and we have almost got
> " the Succession Duties settled—" This should be done by the
> " beginning of December."

(Exhibit D-9, Vol. 2, at p. 301, l. 22).

On December 4th, 1928, Marler was paid $100,000 by the cheques of the Estate for $85,000 and of the Incorporated Company for $15,000. The latter amount was however, debited to the Estate by the Incorporated Company, so that the full amount of $100,000 came out of the direct funds of the Estate (Exhibits P-33 and P-34, Vol. 2, p. 420, ll. 20 to 45; Reaper, Vol. 5, p. 339, ll. 12 to 29).

The journal—cash book of the Estate contains entries under date January 31st, 1929, showing the purchase of the full 500 shares from Mr. Marler for $85,000, and debits to H. M. Marler and H. B. McLean of $4,125 respecting the 25 shares purporting to be set over to them (Reaper, Vol. 5, p. 464, l. 44; p. 469, l. 11).

The account of Hon. Mr. Marler in the share register of the Incorporated Company shows entries about four months later, that is on March 30, 1929, of the transfer of the 500 shares as follows:— J. B. Waddell 25 shares; H. M. Marler and H. B. McLean 25 shares

and Estate Sir Mortimer B. Davis 450 shares (Exhibit P-81, Vol. 2, p. 421).

Under Lord Shaughnessy's administration, the Pine Avenue residence carried at $170,000, and the St. Agathe property carried at $63,350, have produced no return on the investment. On the contrary, the carrying charges of Pine Avenue amount to approximately $10,000 annually, while the carrying charges of the St. Agathe property which includes a farm approximate $9,000 additional (Exhibits P-8, [Exhibit IV and V], Vol. 1, at p. 185, ll. 15 and 35).

Whatever efforts have been made to dispose of the properties are without result. Lord Shaughnessy ordered the removal of the display " For Sale " signs placed upon the properties by the real estate firm of Henry Joseph & Co., on June 25th, 1929, the day following the acceptance of Mr. Joseph's resignation as a director of the Alcohol Company.

The furniture of the Pine Avenue residence and the house at St. Agathe had been retained, but no efforts whatever were made to obtain suitable tenants. So far as the St. Agathe property was concerned, Lord Shaughnessy decided against leasing the same, even to M. B. Davis, Jr., while on the other hand, he and his family and friends used the property on a number of occasions (Mrs. Awbrey, Vol. 4, p. 78, l. 45 to p. 81, l. 45; Lord Shaughnessy [discovery], Vol. 4, p. 54, l. 47).

At the end of December 1928, Lord Shaughnessy and Reaper resorted to the forms of meetings of Directors of the Incorporated Company:

(1) To validate a bonus of $5,000 withdrawn by Lord Shaughnessy in 1927.

(2) To vote a like bonus to him for 1928.

(3) To increase from $20,000 to $25,000 his annual salary for the future; and,

(4) To increase Reaper's salary from $7,500 to $10,000 per annum.

(Exhibits P-47, Vol. 2, p. 383, l. 36; p. 387, ll. 10 to 21.)

On January 7th, 1929, Lord Shaughnessy, without any author-

ization, note or security, withdrew $10,000 of the funds of the Incorporated Company, by cheque on its bank account, signed by himself and Reaper (Exhibit P-44, Vol. 2, p. 353, l. 1).

On January 16th, 1928, the Jennison transaction took on its new form of a $50,000 purchase of shares of the Jennison Company, in replacement of the original loan of $10,000 (Exhibit P-18, Vol. 2, p. 461).

On February 24th, 1929, the Cadillac Coal transaction was definitely launched, and up to the time of the trial, had cost the Incorporated Company in cash and bank guarantees something in the vicinity of $250,000 (Exhibit P-19b, Vol. 2, p. 479; Reaper, Vol. 4, p. 284, l. 27; Vol. 8, p. 1460, l. 25).

On March 28th, 1929, the purchase of units of Investment Foundation Company took place at a cost of $97,500, and on April 18th, 1929, the 3,000 " Directors Common " shares of the same concern were purchased and registered in the names of Lord Shaughnessy and Jennison at a cost to the Estate of $45,000 (Exhibit P-261, Vol. 2, p. 465).

A year after Sir Mortimer's death, virtually nothing had been done towards the settlement of his Estate; and in particular:—

The funeral expenses were still unpaid;

The legacies to servants and charities had not been satisfied;

The provisions of the four trust deeds had been totally ignored;

Nothing whatever had been paid on the Succession Duties;

The McNish debentures had not been listed or sold;

The Alcohol " B " stock and the surplus of the "A" stock over the shares required for control, were still on hand, as also the sundry securities of the Incorporated Company;

The Liggett & Myers shares were still being carried on margin;

Ruinous interest charges were piling up;

No provision had been made for the capital and revenue requirements of the Estate; from the Incorporated Company as the only available source;

An insane policy of " reinvestment " of the revenue of the Incorporated Company had been inaugurated;

And so far as concerned Lord Shaughnessy personally, he throughout the year had lost no opportunity of benefitting himself at the expense of the Estate.

For many months, the heads of the Banks and other responsible financial institutions throughout the country had united in warning

the public that stock market speculation had gone too far, and sooner or later would result in a serious crash.

In the midst of all this, Lord Shaughnessy at the end of March 1929, again left for Europe.

Following the precedent set by him in 1928, he again signed and left with Reaper a large number of cheques on the bank account of the Incorporated Company, with instructions to use the same for the payment of his private and personal indebtedness, which was done to the extent of $2,875.82 (Exhibit P-28, Vol. 2, p. 364).

Lord Shaughnessy next began speculating in Alcohol shares for the account of the Incorporated Company, and finally tied up $75,000 of the Company's funds in the connection, by purchases of 160 " B " shares at about 39⅛ $6,263, and 2,200 "A" shares at about 31¼, $68,666.26. The Alcohol "A" shares were purchased in May and June 1929, and the " B " shares were purchased a few months earlier (Exhibits P-9, Vol. 1, at p. 215, l. 11; Reaper, Vol. 4, p. 247, l. 40; and p. 248, l. 28).

When Reaper was examined on the subject on March 7th, 1930, the "A" shares were selling at 10, and showed a depreciation of $46,666 from cost, the depreciation of the 160 shares of "B" stock then amounted to about $3,200 additional, bringing the loss to that date up to approximately $50,000, which has since been very considerably increased.

While in Europe, he again repeated to Lady Davis the assurances of the previous year, that everything in connection with the Estate was going along fine.

However, Mr. Corbett, a retired American lawyer, residing in Paris, and an intimate friend of Sir Mortimer, who had assisted in the preparation of his Will, strongly advised Lady Davis that her duty as Executrix required that she should keep in closer touch with the affairs of the Estate, and, acting upon his suggestion, she arranged to visit Montreal in the near future.

On May 12th, 1929, in London Lord Shaughnessy told Lady Davis that he had found a financial genius with whose assistance he planned to develop the resources of the Estate into an Investment Trust of $150,000,000, and although the immediate effect of this would be to restrict her, for the time being, to the annuity of $67,000 provided by the Will, ultimately the annual revenues would be very large.

Lady Davis sailed for New York immediately and came up to Montreal a few days before Lord Shaughnessy arrived on June 8th, 1929. She, in the meantime, ascertained that the financial genius was the party by the name of Jennison to whom reference has already been made.

Lady Davis was unable to obtain an interview with Lord Shaughnessy to go over the affairs of the Estate until June 24th, 1929. On this occasion, Lord Shaughnessy, in the presence of Reaper, deliberately misrepresented to Lady Davis the whole situation as to Jennison, stating that the only matter which concerned him was a $10,000 loan which would be called immediately and gave an assurance that no further speculative transactions would be undertaken, and in particular the Incorporated Company would be run along the lines of the Estate.

From a copy of the monthly statement of the Incorporated Company for April, 1929, which Lady Davis gathered up with her other papers, she learned for the first time of the so-called investments made by Lord Shaughnessy in connection with Cadillac Coal, Investment Foundation etc., as also the increase of the salaries of Lord Shaughnessy and Reaper; (Exhibit D-11, Vol. I, p. 212).

When Lady Davis called again to ask Lord Shaughnessy for an explanation of these matters she was unable to get an interview with him but met Reaper, who, in reply to her inquiry as to whether the Jennison loan had been called, stated that Lord Shaughnessy had not had time to attend to the matter, but that in any event he had decided to continue his relations with Jennison and not run the Incorporated Company as an arm of the Estate.

In reply to Lady Davis' request for information as to the position of the Estate, she was shown by Reaper a number of sheets of paper containing memoranda upon the subject, and later received the statement fyled as Exhibit P-6 which is fully analyzed in paragraphs 77 to 81 of the Declaration (Exhibit P-6, Vol I, page 174; Declaration Vol. I, p. 18, l. 30 to p. 19, l. 22).

At a subsequent interview, the appointment to the Board of the Incorporated Company of a representative of Lady Davis was agreed to, but upon the name of Mr. Donaldson, Manager of The Montreal Trust Company, being suggested, Lord Shaughnessy refused to agree to his appointment. Later he consented that Mr. George C. McDonald should go on the Board.

Lord Shaughnessy declared to Mr. McDonald that it was his

intention not to distribute annually the revenues of the Incorporated Company to the Estate to be paid over to Lady Davis and M. B. Davis, and when an effort was made to obtain Mr. McDonald's appointment, Lord Shaughnessy first put forward the pretext that the appointment could not be made until the Annual Meeting of the Company, which usually took place in December, and, later, shifted his ground and objected to the appointment of Mr. McDonald unless Lady Davis resigned as Director of the Incorporated Company.

Counsel for Lady Davis interviewed Lord Shaughnessy in an effort to arrange for representation upon the Board, with no better success, and, by August 8th, 1929, a deadlock had developed in the situation, which resulted in Lady Davis informing Lord Shaughnessy that, if he adhered to his attitude, she would have recourse to the Courts.

On August 15th, 1929, Lady Davis wrote Lord Shaughnessy, demanding the immediate preparation of an audited statement of the affairs of the Estate and Incorporated Company, specifying in detail the information to be shown (Exhibit P-7 (a), Vol. 2, p. 307).

On August 21st, 1929, Lord Shaughnessy replied, suggesting that the preparation of the statement with reference to the Incorporated Company should be deferred until after the end of the fiscal year on September 30th (Exhibit D-3, Vol. 2, p. 309).

On August 23rd, 1929, Lady Davis again wrote Lord Shaughnessy asking that the statements be prepared at once, and further requesting that she be supplied with an audited monthly balance sheet of both the Estate and the Incorporated Company (Exhibit P-7 (b), Vol. 2, p. 310).

Hearing nothing from Lord Shaughnessy, Lady Davis communicated with him by phone on August 28th, 1929, and later received a letter from him dated August 29th, 1929, containing a thinly veiled threat of withholding all information (Exhibit P-235, Vol. 2, p. 311).

The audits of the Estate and the Incorporated Company were prepared as of date August 31st, 1929, but were only delivered to Lady Davis some time in October following (Exhibits P-8 and P-9, Vol. 1, pp. 179 and 214).

On September 4th, 1929, Lord Shaughnessy issued his cheque for $2,875.82 in favour of the Incorporated Company, covering the

withdrawals of that amount paid out for his account between April 2nd and June 20th, 1929, (Exhibits P-28 and P-36, Vol. 2, p. 365).

The entry in the books of the Incorporated Company covering the return of this money was made as of date August 31st, 1929, for the manifest purpose of preventing the same appearing in the audit.

No interest was received by the Incorporated Company on the $4,684.22 of its funds diverted by Lord Shaughnessy to the payment of his personal obligations in 1928 or of $2,875.82, dealt with in the same way in 1929.

On September 4th, 1929, Lord Shaughnessy left Montreal on the annual western trip of the C.P.R. directors for a month's absence.

Before leaving, he prepared and signed a letter and certificate addressed to Hon. H. M. Marler and H. B. McLean for delivery to them by Reaper on the morning of September 18th, for the purpose of getting possession of the $196,500 Serial Notes and 2,375 shares of the Incorporated Company, as also of the 25 so-called Marler shares; and intimating that an adjustment would be made by him directly with the Incorporated Company with respect to the $162,500, representing the repurchase of the 1,625 shares issued to them under date October 1st, 1924, and interest thereon, which at that time amounted to some $217,000 (Exhibits P-17 (a) and P-17 (b), Vol. 2, p. 406).

On September 7th, 1929, that is the Saturday following Lord Shaughnessy's departure for the west, the Rolls Royce car which had been in his possession since May 12th, 1928, was returned without any explanation, and left in the lane outside the garage at Sir Mortimer's Pine Avenue residence.

On September 18th, 1929, Reaper delivered the letter and certificate just referred to to H. B. McLean, and obtained possession of the Serial Notes and shares.

Between September 24th and 28th, 1929, Reaper set over to Lord Shaughnessy $213,800.65, (the balance of the $217,000 after deducting $4,375, representing the 25 Marler shares at 170), $69,-777.10 being applied to offset Lord Shaughnessy's loan of $50,000 and the $10,000 appropriated by him on January 7th, 1929, and interest, and $144,623.63 being paid out of the Incorporated Companys bank account by cheques payable to Lord Shaughnessy and his brokers. As a matter of fact, the credits and withdrawals

exceeded by nearly $800 the total amount claimed to be due (Exhibits P-96 and P-70, Vol. 2, pp. 408 and 409).

The sum of $144,623.73 was passed out to Lord Shaughnessy by Reaper in cash without deducting his McNish and Alcohol " B " loans amounting to upwards of $20,000, this although the Market value of the collateral was considerably less than the amount of the loans.

In this,, as in all other matters connected with the Estate and the Incorporated Company, Lady Davis, who was in Montreal at the time, was completely ignored.

On October 5th, Lady Davis revoked her Power of Attorney in favour of Lord Shaughnessy and Reaper (Exhibit P-11, Vol. 2, p. 312).

On or about October 7th, 1929, the Auditors' statements of the Estate and the Incorporated Company, as of date August 31st, were delivered to Lady Davis.

The statement of the Estate disclosed, amongst other things, that for the 17 months from the death of Sir Mortimer in March 1928, to August 1929, expenditures, etc., for revenue account had amounted to $619,497.39, and that the gross revenue during the same period was only $175,933.63, resulting in a revenue deficit of $443,563.76 (Exhibit P-8—Exhibit IV, Vol. 1, p. 184).

This statement of the Estate further disclosed an item of $15,000 under the heading " Trustee under Deed of Donation—Cash to H. M. Marler $15,000," which subsequently turned out to be part of the $100,000 purchase price of the so-called Marler shares (Exhibit P-8—Exhibit VIII, Vol. 1, p. 189).

The statement of the Incorporated Company disclosed the following:—

Capital surplus—$4,154,812.30;

Surplus Income—$250,040.95;

Gross revenue for eleven months, (including Alcohol dividends of $875,793.46) $1,236,357.11;

Net profits for 11 months $732,152.63;

Total surplus income and net profits $982,193.58;

Loans to Estate $937,605.12;

(See Exhibit P-9—Exhibit "A", Vol. 1, p. 219).

The statement further disclosed that the revenue of the Company had been applied to the following, amongst other things:—

The appropriation of $10,000 on January 7th, 1929;

The increase of the Jennison transaction to $50,000;

The Cadillac outlay of $110,474.67;

Investment Foundation, $142,500;

Coal, Oil exploration expense $18,087.27, in addition to $61,708.80 for the previous year;

Purchase of Alcohol shares at a cost of $75,000, already entailing a loss of $50,000;

Accumulation of interest on all of Lord Shaughnessy's loans;

Accumulation of interest on the Davis Trust amounting to $283,030.90;

Arrears in the Sinking Fund of the Serial Notes of $140,000;

The statement of the Incorporated Company, in addition, disclosed that Lady Davis purported to be indebted to the Company in a sum of $39,536.87, secured by $31,440 of McNish debentures, and 1,000 shares of Alcohol "A", (See Exhibit P-9—Exhibit "E", Vol. 1, p. 223).

Lady Davis had no knowledge that Lord Shaughnessy had handled the transaction in question on the basis of a loan from the Incorporated Company, her intention being that the purchase of 1,000 Alcohol "A" shares should be put through a firm of brokers, and, as soon as she discovered that this had not been done, she immediately forwarded her cheque to the Incorporated Company for the full amount, (Exhibit P-237, Vol. 2, p. 313).

On November 17th, 1929, the Annual Report of the Incorporated

Company, as of date September 30th, was received by Lady Davis (Exhibits P-10, Vol. 1, p. 236).

The Annual Report disclosed the withdrawal by Lord Shaughnessy of the sum of $217,000 already referred to, and showed an increase in the bank overdraft from $80,884.93 at the beginning of September to $205,825.06 at the end of the same month (Vol. 1, p. 236, ll. 38 to 42).

The annual expenses of the Incorporated Company was shown at $73,792.73, of which $50,882.18 was made up of salaries and bonuses (Vol. 1, p. 239).

An analysis of the Auditors' Statements of the Estate and of the Incorporated Company revealed a state of chaos existed in their affairs, which, unless stopped at once, would lead inevitably to the forced liquidation of the entire Estate.

On November 22nd, 1929, Counsel for Lady Davis wrote Lord Shaughnessy and Reaper demanding their resignations as Executors and Trustees of the Estate and also as officers of the Incorporated and Alcohol Companies, which were refused (Exhibits P-12 (a), (b), (c) and (d), Vol. 2, p. 315).

In fairness to Counsel on both sides, it should be stated that between November 26th, 1929, and January 13th, 1930, the sincerest efforts were put forth in what proved a futile effort to obviate the unpleasantness and injury incidental to the institution of the present litigation.

III

In taking up the situation of the Alcohol Company, it should be pointed out that the control of that corporation held by the Estate through the Incorporated Company consists of 494,100 voting shares referred to as common or "A" shares, and that in addition the Estate holds in the same way 55,920 "B" non-voting shares, making a total of 550,020 shares. These shares are taken into the accounts of the Incorporated Company on the basis of 20, giving a book value of approximately $11,000,000.

The entire capital stock and capital surplus of the Incorporated Company, as shown by the Annual Statement of September 30th, 1929, amounts to less than $10,000,000, so that, if the Alcohol shares should be wiped out, the entire capital and surplus of the Incorporated Company would disappear.

On the other hand, the value of the Alcohol shares, if taken at 50, at which the " A " stock sold since Sir Mortimer's death, would amount to about $27,500,000 (Exhibit P-10—Exhibit " A "—Vol. 1, p. 238; Exhibit D-56, Vol. 3, p. 742, ll. 13 and 14).

Prior to 1919, Sir Mortimer had become interested in the Corby distillery, located at Corbyville, near Belleville, Ont., and had organized the original corporation known as Canadian Industrial Alcohol Company.

In December, 1925, Lord Shaughnessy succeeded Mr. Waddell as president of the Alcohol Company, and in the following spring the latter withdrew from active participation in the management of Sir Mortimer's interests.

In the fall of 1926, Sir Mortimer had under consideration the purchase of the Hiram Walker distillery. A year or so earlier, he had been negotiating for the purchase of the Gooderham & Worts distillery, and in some way, which has not been made clear by the evidence, H. C. Hatch, at the time director and sales manager of the Alcohol Company, to whom the negotiations had been entrusted by Sir Mortimer, made the purchase for his own account, in place of Sir Mortimer's, which incident terminated their relations (Lawrence, Vol. 6, p. 925, l. 24; p. 926, ll. 16 to 32).

The Hiram Walker distillery was also acquired by Hatch, and about the same time, W. S. Rainer, director and sales manager of the Alcohol Company, left to join up with Hatch (Lawrence, Vol. 6, p. 929, ll. 2 to 29).

W. J. Hume, distillery manager of the Alcohol Company, who had spent all his life in the employ of that Company, and had accepted election as a director and vice-president at the annual meeting in December, 1926, waited only long enough for Sir Mortimer to sail from New York, to send in his resignation, and followed Rainer over to the Hatch forces (Lawrence, Vol. 6, p. 927, l. 12, to p. 928, l. 47).

Hatch, Rainer and Hume occupy the positions of chairman of the board, president and treasurer respectively of the corporation known as Hiram Walker-Gooderham & Worts, and dominate that company (Lawrence, Vol. 6, p. 929, l. 47, to p. 932, l. 16).

The appreciation by Lord Shaughnessy of the conduct of Hatch, Rainer and Hume just referred to is summed up in a paragraph of a letter to Sir Mortimer on January 3rd, 1927, which reads as follows:

" In these respects, therefore, he (Hume) is only living up " to the traditions of the Douglas-Hatch school, in which he was " educated, and has, by his actions, earned the reputation of a " low skunk, devoid of loyalty, gratitude or decency " (Exhibit P-240, Vol. 3, p. 809, ll. 36-40).

Almost from the time of Sir Mortimer's death, Lord Shaughnessy sought to assume an absolute dictatorship over the Alcohol Company, and to arrogate to himself the entire management, to the exclusion of the other directors.

At this time the board included Henry Joseph, Hon. H. M. Marler, E. R. Decary and Col. F. M. Gaudet, who had served as directors for periods varying from five to nine years. All of them were well and favorably known to the business community, and the three first named were the only directors not in the employ of the Company.

One of Lord Shaughnessy's first acts, following Sir Mortimer's death, was to discontinue the executive meetings which had been held weekly. Mr. Waddell characterized this move as fatal (Exhibit P-38, Vol. 3, p. 858; Lawrence, Vol. 6, p. 883, l. 16; p. 922, ll. 26 and 44; p. 923, ll. 9 to 40; Waddell, Vol. 10, p. 2020, l. 10).

The Annual Statement of the Alcohol Company for the year ending September 30th, 1928, certified by Lord Shaughnessy, did not conform to the requirements of The Companies Act in a number of essential particulars, and was deceptive and misleading (Exhibit P-111, Vol. 3, p. 634).

About January 1, 1929, Lord Shaughnessy, without the knowledge of the board, increased from $25,000 to $30,000 the annual salary drawn by him as president of the Alcohol Company (Lawrence, Vol. 6, p. 892, l. 26; p. 893, ll. 12 and 36).

The practice was for the directors to meet once a month to consider a summary of the business of the previous month. The summary for May, 1929, has been fyled (Exhibit P-124, Vol. 3, p. 644).

The meetings for April and May, 1929, were omitted, thus leaving the directors entirely without information as to the Company's affairs for those months. This was on the occasion of Lord Shaughnessy's absence in Europe (Lawrence, Vol. 6, p. 883, l. 23).

Prior to February, 1929, the monthly summary for the directors

indicated the amount of the bank overdraft. However, by instructions of Lord Shaughnessy, from that time the amount of the overdraft was purposely concealed by including it with the item of " Accounts Payable." The overdraft covered up in this way in the May, 1929, statement amounted to $973,000 (Exhibit P-124, Vol. 3, p. 644; Lawrence, Vol. 6, p. 884, l. 39; p. 885, l. 25).

Mr. Joseph, after having been a director of the Company for nine years, showed his lack of confidence in the situation by disposing of his shares and resigning under date June 12th, 1929 (Exhibit D-8, Vol. 3, p. 699).

The Hon. Mr. Marler, although not leaving for the Orient for some time, resigned on July 2nd, 1929 (Exhibit D-5, Vol. 3, p. 700).

E. R. Decary resigned on July 17th, 1929 (Exhibit D-7, Vol. 3, p. 712).

Col. F. M. Gaudet resigned on July 23rd, 1929, after a most unjust but unsuccessful attempt had been made by Lord Shaughnessy to read him out of the organization.

As the resignation of Mr. Decary was sent in only after he had become aware, through Col. Gaudet, of his treatment by Lord Shaughnessy and that the latter was letting it be understood that the other directors approved of his stand, when, in fact, Mr. Decary had heard nothing of the matter, it is not difficult to understand the true motives of Mr. Decary's resignation (Exhibit P-170, Vol. 3, p. 702, ll. 16-29; also Exhibit D-7, Vol. 3, p. 712).

The Alcohol shares had been listed and dealt in extensively for many years on both the Montreal and Toronto Stock Exchanges, and the 49% of the stock held by the public was widely distributed to some 7,000 shareholders throughout Canada and elsewhere.

Alcohol " A " stock, which, in March, 1929, had sold as high as 44¾, in July sold as low as 21½, or, in other words, the price had been more than cut in two (Exhibit D-56, Vol. 3, p. 472, ll. 31 to 36).

Rumors of the resignation of directors and of a serious decline in the Company's earnings and the possibility of a cut or discontinuance of the dividend persisted. Enquiries from nervous shareholders began to pour in to the financial news agencies.

After several unsuccessful attempts to obtain an authoritative statement from Lord Shaughnessy, the Financial Times communi-

cated with him in writing, asking for a statement, which resulted only in a characteristic retort (Exhibits P-190 and P-191, Vol. 3, pp. 713 and 715).

Although the resignations of the four directors had been dealt with at a meeting of the board on July 24th, Lord Shaughnessy, a week later, gave out a statement to the press that nothing had been done about Mr. Decary's resignation, but that he might resign eventually owing to pressure of personal business, adding that there was not the least likelihood of any other members of the board resigning (Exhibit P-148, Vol. 3, p. 715, l. 25).

From this time until October, no statement was forthcoming as to the resignations of directors.

In the meantime, the public confidence in the situation was growing less day by day and the market was falling constantly, entailing an enormous loss both to the Estate and to the minority shareholders of the Company. The extent of this loss is shown by the special charts prepared (Exhibits P-182 and 183, Vol. 3, pp. 747 and 748).

In the latter part of September, the leading financial journals of Montreal and Toronto openly declared that the tremendous shrinkage in the market value of the Alcohol securities was attributable directly to the loss of public confidence in Lord Shaughnessy's management of the Company (Exhibits P-149 and P-150, Vol. 3, pp. 717 and 721).

Further criticism followed Lord Shaughnessy's failure to announce the resignations of the directors when the same had taken place, as also his failure to appoint any successors (Exhibits P-151 and 152, Vol. 3, pp. 722 and 728).

When the statement of the Company for the year ending September 30th, 1929, was issued in December following, it appeared that the rumors of a decline in earnings had not been entirely without foundation, as the same had dropped from $3,136,680.14 in 1928 to $2,073,977.46 in 1929, being barely sufficient to pay the regular dividend, amounting to $1,661,136.18, and the bonuses of $273,166.50, forming, together, $1,934,302.68 (Exhibits P-111 and P-99, Vol. 3, pp. 634 and 637).

The Annual Statement for 1929, certified by Lord Shaughnessy, was wilfully misleading and did not comply with the requirements of The Companies Act (P-99, Vol. 3, p. 637).

It will be useful to note that prior to the general break of stocks, towards the middle of October, 1929, Alcohol "A" stocks had experienced a low of 15, and the " B " stock a low of 13, in September, 1929, which would represent a shrinkage on the shares held by the Estate of something like 35 points, or $19,250,000, from the high of 50 established since Sir Mortimer's death.

In the meantime, further rumors cropped up to the effect that the Alcohol Company was about to be merged with one or more of its competitors, whose general position theretofore had been generally regarded as very much inferior to that of the Alcohol Company.

Lady Davis was much disturbed by these rumors, and on October 3rd, 1929, wrote Lord Shaughnessy immediately upon his return from the West, pointing out that she was being kept in the dark upon the subject, and asking for full information (Exhibit P-236, Vol. 3, p. 775).

On October 4th, 1929, Lord Shaughnessy wrote, assuring Lady Davis that there had not been a suggestion of negotiations, but further, that not even a commencement of discussion would ever take place without full consultation with her (Exhibit D-10, Vol. 3, p. 775).

On October 8th, 1929, F. J. Lash, K.C., General Counsel and Director of the Walker concern, interviewed Lord Shaughnessy with a view to bringing about some kind of a consolidation or merger of the Alcohol Company and Hiram Walker-Gooderham & Worts.

On October 18th, Lady Davis had an interview, by appointment, with Lord Shaughnessy and Reaper, which was afterwards made the subject of minutes of both the Executors and of the Directors of the Incorporated Company. It is somewhat significant that there is no reference whatever in these minutes to the negotiations which had at that time been opened up with Mr. Lash for a merger of the Alcohol Company with Walkers (Exhibits D-135, P-262, Vol. 2, pp. 325 and 392).

On November 7th, 1929, the Financial Post published an article to the effect that authoritative information had been received from the Alcohol Company that they had never been approached upon the subject of a merger, and that there was absolutely no foundation for the rumors (Exhibit P-153, Vol. 3, p. 782).

Even after the demand for his resignation, Lord Shaughnessy, without any disclosure to Lady Davis or her Counsel, continued his

activities with the Walker group with a view to carrying through the proposed merger. Several further interviews had taken place, both with Mr. Lash, K.C., and also with Mr. Morrow, another of the officials of the Walker Company, and Lord Shaughnessy had even gone as far as to forward to Mr. Lash a copy of the annual statement of the Alcohol Company before the same had been communicated to the shareholders of that concern (Lash, Vol. 9, p. 1711, l. 40).

The Annual Meeting of the Alcohol Company, called for December 17th, 1929, was adjourned by arrangement with Counsel to January 22nd, 1930. A formal statement was read to the shareholders by Lord Shaughnessy to the effect that the adjournment was being made because of certain negotiations which might result in a change in the personnel of the board (Lawrence, Vol 6, p. 936, l. 7).

Mr. Lash was following up closely the idea of a merger between the Walker Company and Alcohol, and, apparently, had placed the annual statements of those companies and of Distillers Corporation-Seagram before the firm of Clarkson, Gordon, Dillworth & Company of Toronto early enough to enable them to analyze the same in a letter addressed to F. K. Morrow, dated December 26th, 1929, in which they indicated further data required to enable the preparation of a statement placing the three companies on a common basis for comparison—both as to assets and earnings (Exhibit P-216, Vol. 3, p. 785).

This letter was forwarded by Mr. Lash to Lord Shaughnessy under cover of his letter dated December 27th, 1929. The letter contained a statement of Mr. Lash's understanding that Lord Shaughnessy's co-Executors of the Estate and co-Directors of the Incorporated Company were of opinion that a closer connection would be advisable and beneficial, and that they were willing to have such information furnished with respect to the business affairs of the Alcohol Company as might be necessary to enable a common basis for comparison to be made between that Company and Hiram Walkers.

This statement, in so far as Lady Davis was concerned, was certainly unwarranted, for she had never heard of the suggestion prior to the production of the letter in question at the trial (Exhibit P-215, Vol. 3, p. 784, l. 18).

Lord Shaughnessy turned over to Lawrence the letters received from Mr. Lash and Mr. Gordon, with instructions to prepare the information therein indicated.

It will be recalled that the negotiations for settlement of the matter out of Court terminated on January 13th, 1930, and it will be noted that Lawrence left the same night for Toronto and was in conference there the next day with Hume and Rainder upon the subject of the proposed merger, and also interviewed Mr. Lash (Lawrence, Vol. 6, p. 938, l. 18).

It is further to be noted that the action for the removal of the Executors and the Petition for the appointment of a Sequestrator were served on Saturday, January 18th, 1930, and that Lawrence left that night for Toronto and spent Sunday and Monday, January 19th and 20th, with Hume, Rainer and others. On this occasion, he took with him the data which was used by Mr. Gordon as the basis of his comparative statements of the Alcohol and Walker Companies, (Exhibit P-156, Vol. 3, p. 792—Lawrence, Vol. 6, p. 939, l. 17).

During the day and evening of Monday, January 20th, Lord Shaughnessy was in communication by long distance 'phone with Mr. Lash at Toronto, when it was arranged that he, together with Morrow and Hume, would come to Montreal and meet at Lord Shaughnessy's residence immediately on the arrival of the train, before breakfast.

Mr. Lash, with Morrow and Hume, arrived at Montreal and after breakfast repaired to Lord Shaughnessy's private residence for a conference. There the compilation prepared by Mr. Gordon was produced and discussed (Exhibit P-156, Vol. 3, p. 794).

In view of the institution of the suit and the application for a sequestrator, as also the rumours of impending applications for injunctions with reference to the merger and the Annual Meeting of the Alcohol Company, fixed for the next day, it was no doubt decided to proceed with some caution.

In any event, Mr. Lash spent the balance of the day and the early part of the evening in an effort to get Appellants' Counsel to agree to a deal whereby the Estate would part with a block of its shares in return for $2,000,000, and would exchange the balance of its holdings for shares of the Walker Company, with the result that the control of the Alcohol Company would rest in the Directors of the Walker concern, which proposal was not entertained.

Had Mr. Lash's suggestion been acted upon, it would, in effect, have passed the great bulk of the Estate into the control of the confederacy headed by Hatch, Rainer and Hume, and upon terms

which were wholly inequitable, having regard to the relative positions and assets of the two concerns.

One of the most striking features of Mr. Gordon's statement is that it purports to show the Alcohol Company insolvent to the extent of $1,661,196.86. This was accomplished by disregarding entirely the goodwill of a business of 70 years' standing, with brands known the world over, with an organization which, in the year ending September 30th, 1928, showed an operating profit of $3,136,680.14.

Apart from the depreciation in the Alcohol securities referred to, Lord Shaughnessy's administration of the Company had an even more disastrous affect upon its business generally, and culminated in a complete collapse of the all-important Sales Department of the concern.

In the year ending September 30th, 1929, approximately 400,000 cases were sold, which, as already pointed out, was barely sufficient in that year to earn the dividend.

Coincident with the merger rumours at the beginning of October, 1929, a pronounced falling off in the Company's sales commenced, and, within the following six months, that is on March 31st, 1930, the sales were 120,562 cases less than for the same period for the preceding year (Exhibit D-91, Vol. 3, p. 763).

Kelly, the director and sales manager, sent in his resignation on January 1st, 1930, although his intention of leaving had no doubt been communicated to Lord Shaughnessy well in advance of that date.

Kelly was drawing a salary of $15,000 from the Alcohol Company and, by the terms of his engagement, was entitled to 5,000 shares of the Company's stock at a very favorable price. These shares, at the high of May 1928, represented a value of $250,000.

Kelly abandoned his position as sales manager of the Alcohol Company and his contract for the 5,000 shares, to accept a position with one of its chief competitors, Distillers Corporation-Seagram, at a salary of $30,000.

At the conclusion of the evidence, at the end of May last, Kelly's successor had not been appointed, and the uncontradicted evidence shows that the sales department was in a deplorable state.

The fact that the business of the two chief competitors over

the same period showed increases both in volume and in profits, is a complete refutation of the various excuses and alibis put forward by Lord Shaughnessy in an effort to explain the situation of the Alcohol Company and the conclusion is inevitable that the same came about either by design or the result of the grossest incompetence imaginable.

The failure of the sales department to function left the Company without funds to carry on, and in the midst of the trial, it was compelled to apply to the bank for additional advances, when the bank for a time refused to renew the Company's loans or to make any new advances.

So far as the Estate was concerned, the passing of the Alcohol dividend in April 1930 cut off what was virtually the only source of revenue and deprived it of something in excess of $800,000 per annum.

IV

By January 13th, 1930, it became apparent that there could be no result from continuing the negotiations which had been going on between Counsel for the parties for almost two months, and the same were terminated on that date.

Appellants were then faced with the choice of permitting the conditions which have just been reviewed continuing to complete disaster, or of instituting these proceedings for the removal of Lord Shaughnessy and Reaper as Executors and Trustees.

That their fears for the safety of the Estate, if left under Lord Shaughnessy's management, were justified, was completely demonstrated by the events which transpired immediately prior to and during the trial.

Early in February, 1930, the Provincial Government, under threat of suit within four days, compelled the payment of $700,000 on account of the Succession Duties amounting to $1,314,209.04; (Exhibits P-64 and P-65, Vol. 2, p. 609). To provide the funds to meet this demand, the Estate was obliged to make a distress sale of the Ligget & Myers shares, which together with rights were sold for the sum of $1,061,259.98, and which a few weeks later showed a substantial increase in value (Exhibit P-97—Not printed).

On March 21st, 1930, during the trial, the Canadian Bank of

Commerce called the Incorporated Company for payment of the Montreal loan of approximately $1,000,000 and the New York loan of approximately $2,250,000, and appropriated $1,000,000 standing at the credit of the Incorporated Company's bank account, and applied the amount to these loans, and at the same time notified the Alcohol Company that the indebtedness of $2,500,000 would not be renewed, and that the application for $1,000,000 additional would not be entertained. By the arrangement made with the bank subsequently the Incorporated Company was compelled to pay an additional $500,000 in reduction of its loans (Exhibit P-129, Vol. 2, p. 281).

Finally, in April, 1930, while the trial was still in progress, the Alcohol Company passed its dividend, which, so far as the Estate was concerned, cut off at one blow what was virtually its only source of revenue. These dividends amounting to something in the vicinity of $835,000 per annum.

The suit for the removal of Respondents was instituted on January 16th, and was served on January 18th, 1930.

Immediately following the service of the action, on January 18th, 1930, and as an incident of the same, Appellants served a petition for the appointment of a sequestrator. This petition was presented on January 20th, and was continued to January 31st for proof and hearing.

On January 22nd, 1930, as a further incident of the action to remove, Appellants applied for an interlocutory injunction against the carrying out of the Alcohol merger, which was permitted to stand over, upon the undertaking of Counsel for Respondents, that nothing further would be done concerning the merger.

Appellants at this time also made application for a further injunction in a separate suit to restrain the holding of the Alcohol meeting and the election of the Board of Directors until judgment had been rendered upon the action to remove the Executors, or until the sequestrator applied for had been put in possession. An interim injunction was granted ordering the adjournment of the Alcohol meeting, and the same was continued in force from time to time until after the rendering of the judgment now appealed from, following which the interim injunction was dissolved and the meeting was held and the old board re-elected.

THE ACTION

Appellants by their Declaration complained that Respondents had wholly failed and neglected to perform the acts required of them under the Will and by law; that they had infringed the duties of their office; that they had dissipated and wasted the property of the Estate, and that their administration exhibited their incapacity, dishonesty and total unfitness as executors and trustees and justified the demand for their removal (Declaration, Vol. 1, p. 1, at p. 8, l. 30).

A synopsis of the specific allegations of the Declaration is contained in the formal judgment appealed from (Judgment, Vol. 11, p. 2467 to p. 2474).

The conclusions of the action are for the removal of Respondents as executors and trustees, for an accounting to their successors, and for a personal condemnation to costs of the action (Declaration, Vol. 1, p. 27, ll. 13 to 45).

THE DEFENCE

Separate defences, which are virtually identical, were fyled by Respondents (Amended Plea of Lord Shaughnessy, Vol. 1, p. 28; Amended Plea of Reaper, Vol. 1, p. 81).

A summary of Lord Shaughnessy's defence is contained in the formal judgment (Judgment, Vol. 11, p. 2474, l. 44, to p. 2476).

THE JUDGMENT

The Judgment, while finding that Appellants had proved many of the matters alleged, held that the same did not justify the Court in ordering that Respondents be removed from office.

The incidental petitions for sequestration and injunction were dismissed with costs.

The costs of the action were reserved for further argument (Judgment, Vol. 11, p. 2482, l. 35; Notes of Judgment, p. 2569, l. 27).

In addition to the formal Judgment, the learned Trial Judge prepared lengthy Notes (Judgment, Vol. 11, p. 2467; Notes of Judgment, p. 2484).

THE ASSIGNMENT OF ERRORS

Appellants submit that the judgment of the learned Trial Judge is erroneous in the following respects:—

First Error:—Respondents neglected to carry out the provisions of the Will, and should have been removed upon that ground;

Second Error:—Respondents' administration exhibited incapacity, lack of reasonable skill, and failure to act as prudent administrators, and they should also have been removed upon those grounds;

Third Error:—Respondents dissipated and wasted the property of the Estate, and should also have been removed upon that ground;

Fourth Error:—Respondents' administration further exhibited dishonesty *infidelité,* and violation of their duties as trustees, and they should also have been removed upon those grounds;

Fifth Error:—Respondents' removal should have been ordered in the general interests of the beneficiaries of the trust.

Sixth Error:—A sequestrator should have been appointed, and an interlocutory injunction against the merger should have been granted, or in any event the petition for the same should have been maintained for costs.
been maintained for costs.

THE ARGUMENT

Appellants submit that each of the Assignments of Error rests upon sound basis in law.

Before taking up the facts under each Error, Appellants will submit their contentions as to the principles of law which govern the Case and which should have been applied by the learned Trial Judge, and upon which they now base their demand for the reversal of the Judgment and the maintenance of their action by the Court of Appeal.

Appellants submit that in every case the dismissal of executors and trustees is dependent upon three matters, viz.:—

(1) The will, to the extent that it derogates from the law;

(2) The law; and

(3) The facts.

It is unnecessary here to consider the Will as a factor, for it contains no derogation from the law.

Clause XX of the Will declares that the Trustees and Executors shall be responsible for good faith only, but this, as rightly held by the learned Trial Judge, refers only to pecuniary responsibility, that is, Respondents' obligation to indemnify the Estate for losses incurred in the course of their administration (Notes of Judgment, Vol. 11, p. 2496, ll. 33 to 45).

The grounds for the removal of executors are to be found in C.C., Arts. 917 and 285 (2), which, in effect, declare that *executors* may be dismissed for four reasons, viz.:—

(1) Neglecting to act;

(2) Incapacity;

(3) Dissipating and wasting the property;

(4) Dishonesty *infidelité.*

Similar provisions of the Civil Code concerning the removal of trustees are to be found in C.C., Arts. 981 (d) and 981 (k), under which *trustees* may be dismissed for reasons, practically analogous to those for removal of executors, viz.:—

(1) Neglecting to carry out the provisions of the document creating the trust;

(2) Lack of reasonable skill and failure to bestow the care of a prudent administrator;

(3) Dissipating and wasting the property;

(4) Violating their duties under the document creating the trust, or under the law.

The primary duties of executors are set out in C.C., Art. 919, under which they are required to pay the debts and discharge the legacies, and in the case of insufficiency of moneys for that purpose, to sell the property of the estate to the amount required.

The duties of trustees under C.C., Art. 981 (j) require that they shall administer the property and dispose of it, and *invest* the moneys.

It will be noticed from the articles of the Civil Code just cited that in the case of trustees, the dissipation and wasting of the property is an entirely separate ground of removal from that of lack of reasonable skill and the failure to administer prudently. It will also be noted that the concluding words of C.C., Art. 981 (d), as to the removal of trustees, are very broad.

The texts cited do not exhaust the law, which includes the rules laid down from time to time in the decisions of the Courts, such as the leading case of Broughton & Broughton, to the effect that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty.

The rule just cited is part of our law, not only because our trust law is borrowed from the English law, but also because our own Code requires trustees to give to the trust property the care of a prudent administrator.

In an action for the removal of executors and trustees, such as the present suit, there are two essentials, viz.:—

(1) There must be proved some act or omission in order to give the Court jurisdiction and discretion; and

(2) Thereupon, the judge must exercise discretion, taking a broad view of the interests of the trust.

In the exercise of this discretion, it is well to always bear in mind that the law of mandate applies, and that in the matter of revocation of the mandate the Court replaces the testator, so that the whole question resolves into a consideration of whether the testator, if living, would revoke the mandate.

Appellants submit that in considering the case, the artificial barriers between the Estate proper and the Incorporated Company are to be completely ignored, the testator's intention to that effect being manifest by his Will. This proposition was formally accepted by the learned Trial Judge (Notes of Judgment, Vol. 11, p. 2555, ll. 1 to 11).

Appellants refer to the Quebec, French, Canadian and English jurisprudence concerning the removal of trustees and executors reviewed in the appendix to the present factum.

FIRST ERROR

Appellants submit that the evidence fully establishes that Respondents failed and neglected to act and carry out the provisions of the Will in the following respects:—

(a) failing to pay the Testator's debts, including funeral expenses, trust donations, bank loans, etc.;

(b) failing to pay the legacies;

(c) failing to pay or adjust the Succession Duties;

(d) failing to sell the Alcohol "B" stock, surplus "A" stock, McNish debentures, Asbestos shares and sundry securities, all of which have since suffered enormous depreciation;

(e) refusing to administer the Incorporated Company as an arm of the Estate;

(f) refusing to distribute the annual net revenue of the Estate and diverting the same to speculations.

Appellants rely upon the findings of fact of the learned Trial Judge commenting upon Respondents' neglect respecting the payment of the debts and sale of assets.

Appellants submit that the facts proved, as above, fully justified a judgment maintaining the action.

SECOND ERROR

Appellants submit that the proof fully establishes the incapacity of both Respondents, their lack of reasonable skill and their failure to act as prudent administrators, and refer to the following, among other matters, viz.:—

(a) Respondents' failure with respect to the several subjects referred to under the First Error;

(b) failing to negotiate the customary arrangements with the Succession Duty Department, to enable the payment of the legacies, pending the final adjustment of the Department's contentions;

(c) carrying the Ligget & Meyers stock on margin and thereby repeatedly exposing the Estate to a loss of $250,000;

(d) placing the Estate in the position of a debtor to the Incorporated Company by loaning money, in place of the Incorporated Company declaring dividends or making distribution;

(e) having the chief asset of the Estate, in the form of the Alcohol stock, in the hands of the bank;

(f) being entirely without any plan for meeting the debts and legacies of the Estate and of providing for the indebtedness to the bank;

(g) As to the Alcohol Company:—

(1) forfeiting the confidence of the Directors and general public, resulting in an enormous depreciation of its securities;

(2) permitting the complete collapse of the sales department;

(3) operating the Company with a Board of " dummy " Directors;

(4) having no plan for the restoration of public confidence or to retrieve the position of the Company's sales;

(5) hawking the control of the Alcohol Company and entering into negotiations for disposing of the same without the knowledge of their Co-Executor, Lady Davis.

Appellants rely upon the findings of fact of the learned Trial Judge commenting upon the above items (a), (e), (g-1, 2, 3 and 4).

Appellants submit that the facts proved, as above, fully justify a judgment maintaining the action.

THIRD ERROR

Appellants submit that the evidence fully establishes that Respondents dissipated and wasted the property of the Estate to an enormous amount in reckless speculation in, among others, the following instances:

(a) in first loaning Jennison $10,000, and in later purchasing $50,000 of the shares of Jennison Company Limited;

(b) in purchasing the units of Investment Foundation Limited for $97,500, and in later purchasing the directors' common for $45,000;

(c) in advancing funds to Cadillac Coal Company and in giving bank guarantees involving in the aggregate $250,000;

(d) in the expenditure concerning coal, oil, nickel and other similar ultra-hazardous speculations;

(e) in speculating in Alcohol shares involving the sum of $75,000;

(f) in proceeding with the Y.M.H.A. building project at a cost to date, including the land, in excess of $400,000;

(g) in making donations in the name of the Estate and the Incorporated Company.

Appellants rely upon the findings of fact of the learned Trial Judge commenting upon the Jennison transaction and the purchases of and subsequent dealings with the Investment Foundation securities.

Appellants submit that the facts proved, as above, also justify a judgment maintaining the action.

FOURTH ERROR

Appellants submit that the Respondents' administration exhibits dishonesty, *infidelité* and almost innumerable violations by them of the duties of their office, arising out of their conduct in the following connections:

(a) the agreement of May 5th, 1928, modifying the terms of the gift contained in Lord Shaughnessy's contract of September 17th, 1924;

(b) the appropriation by Lord Shaughnessy of the Rolls-Royce automobile;

(c) the appropriation by Lord Shaughnessy of the dining-room and other furniture;

(d) the appropriation by Lord Shaughnessy of $4,684.22 of the Incorporated Company's funds in July-September, 1928;

(e) the use by Lord Shaughnessy and his friends of the Ste. Agathe property;

(f) the diversion from the Estate of the 25 Marler shares;

(g) the bonuses and increase from $20,000 to $25,000 of Lord Shaughnessy's salary as President of the Incorporated Company on December 31st, 1928;

(h) the increase of Reaper's salary as Secretary of the Incorporated Company;

(i) the unauthorized increase from $25,000 to $30,000 of Lord Shaughnessy's salary as President of the Alcohol Company, in January, 1924;

(j) the appropriation by Lord Shaughnessy of $10,000 in January, 1929;

(k) the placing in his own name, and in the name of Jennison, of the 3,000 " Directors' Common " shares of Investment Foundation in April, 1929;

(l) the appropriation by Lord Shaughnessy of $2,875.82 in April-June, 1929;

(m) the appropriation by Lord Shaughnessy of the notes and shares on September 18th, 1929;

(n) the appropriation by Lord Shaughnessy of $217,000 in cash on the same date;

(o) Lord Shaughnessy's failure to pay interest on the $50,000 loan;

(p) Lord Shaughnessy's failure to pay off the McNish and " B " stock loans, amounting to over $20,000;

(q) Lord Shaughnessy's conduct in ignoring Lady Davis and withholding from her information with respect to Estate matters;

(r) the deliberate deception of Lady Davis concerning the Jennison and other matters connected with the Estate.

Appellants rely upon the findings of fact of the learned Trial Judge commenting upon the above items, (a), (c), (g), (j), (k), (n), (p), (q) and (r).

Appellants submit that the above facts having been proved, also justify a judgment maintaining the action.

FIFTH ERROR

Appellants submit that even if it can be said that their action is not maintainable because of the matters referred to in the First, Second, Third and Fourth Errors, Appellants would still be entitled to ask that Respondents be removed *for the welfare of the beneficiaries of the trust, inasmuch as the evidence clearly shows that the continuance of Respondents as Executors and Trustees, will prevent the trust from being properly executed.*

In support of this submission, Appellants rely upon the precedents cited in the Appendix to the present Factum.

SIXTH ERROR

Appellants submit that in the event of the appeal being allowed and the action maintained, the Court should appoint a sequestrator in accordance with the conclusions of the special petition for that purpose.

Upon this point Appellants rely upon the authorities cited in the Appendix.

It is further submitted that Appellants were justified in applying for an interlocutory injunction against the merger, in connection with which Respondents carried on negotiations for months without any reference to Lady Davis; and that in any event this proceeding should be maintained for costs.

IN CONCLUSION

Appellants ask that the appeal be allowed and all three judgments appealed from be reversed and their action maintained and

Respondents removed as Executors and Trustees under the Will of the late Sir Mortimer B. Davis; and that a sequestrator be appointed and an injunction order to issue against the merger.

The whole with costs of both Courts against Respondents.

MONTREAL, November 4th, 1930.

W. K. McKEOWN,
Attorney for Appellants.

APPELLANTS' LIST OF AUTHORITIES
IN SUPPORT OF THE APPEAL

TABLE OF CONTENTS

§1

REMOVAL OF TRUSTEES

AUTHORITIES UNDER WINDING-UP-ACT. PAGE

§II

TRUSTEES AND DIRECTORS MUST NOT HAVE CONFLICTING INTEREST.

§III

VALIDITY OF GIFT TO LORD SHAUGHNESSY.

§IV

APPOINTMENT OF SEQUESTRATOR AND PROVISIONAL EXECUTION.

APPELLANTS' LIST OF AUTHORITIES IN SUPPORT OF THE APPEAL

I

REMOVAL OF TRUSTEES

QUEBEC AUTHORITIES:

Duties of Executors and grounds of removal. C.C. Arts. 919, 917, 285.

C.C. 919 reads (in part) as follows:

" 919. . . . He (the Executor) pays the debts and dis-
" charges the particular legacies . . ."

" In the case of insufficiency of moneys for the execution of
" the Will, he may . . . sell moveable property of the Succes-
" sion to the amount required . . ."

" The Testamentary Executor may receive the debts due
" and may sue for their recovery . . ."

C.C. 917 reads as follows:

" 917. (If, having accepted, a testamentary executor refuse
" or neglect to act, or dissipate or waste the property or other-
" wise exercise his functions in such manner as would justify the
" dismissal of a tutor, or if he have become incapable of fulfilling
" the duties of his office, he may be removed by the court having
" jurisdiction.)"

C.C. 285 reads as follows:

" 285. The following persons are also excluded from tutor-
" ship, and even may be deprived of it when they have entered
" upon its duties:

" 1. Persons whose misconduct is notorious;

" 2. Those whose administration exhibits their incapacity
" or dishonesty."

Duties of Trustees and grounds of removal. C.C. Arts. 981j, 981k, 981d.

C.C. 981j reads as follows:

" 981j. The trustees, without the intervention of the par-
" ties benefited, administer the property vested in them and
" dispose of it, invest moneys which are not payable to the
" parties benefited, and alter, vary and transpose investments, in
" accordance with the provisions and terms of the document
" creating the trust.

" In default of instructions, the trustees make investments
" without the intervention of the parties benefited, in accord-
" ance with the provisions of article 981o."

C.C. 981k reads as follows:

" 981k. Trustees are bound to exercise, in administering
" the trust, reasonable skill and the care of prudent administra-
" tors; but they are not liable for depreciation or loss in invest-
" ments made according to the provisions of the document
" creating the trust, or of the law, or for loss on deposits made
" in chartered banks or savings banks unless there has been bad
" faith on their part in making such investments or deposits."

C.C. 981d reads as follows:

" 981d. Trustees dissipating or wasting the property of the
" trust, or refusing or neglecting to carry out the provisions of
" the document creating the trust, or infringing their duties, may
" be removed by the superior court."

(Note: Practically all authorities in Quebec deal with Executors rather than Trustees and are cited under the former heading in the digests. The only reported case found dealing with the removal of a trustee specifically is BRUNET v. BRAZIER, though it will be noted that in a number of the other cases cited below the Executor sought to be removed was also a Trustee.)

BRUNET v. BRAZIER (7 K.B. 166) 1897.

Infirmant le jugement de Gill J.

Juge:—" Il ne suffit pas qu'il y ait des différences d'opinion entre des fiduciaires, même lorsque le testament exige qu'ils

soient unanimes dans toutes décisions concernant les biens de la succession, pour autoriser le tribunal à destituer l'un d'eux au hasard, et le concours constant de deux fiduciaires contre le troisième, *sans une preuve qu'il a pour résultat de nuire aux intérêts de la succession,* n'est pas une cause suffisante de destitution de l'un de ces deux fiduciaires ".

In this case the sole fact that was found against the defendant by the Court of Appeals was that certain dissensions had arisen between the three trustees. The charges made by plaintiffs, the other two trustees, that he had virtually assumed the sole administration himself, that he had remunerated himself, had incurred useless and disproportionate expenses, had wished to sell a valuable asset of the estate at a price below its value, had refused a friendly partition of the estate, etc., were dismissed by the Court of Appeals in the following words (Blanchet J.):

" Après un examen attentif de la preuve, nous sommes arrivés à la conclusion que les intimés n'avaient pas établi les accusations qu'elles ont portées contre l'appelant. Il nous paraît prouvé au contraire que, loin d'être désastreuse pour la succession, son administration, dans l'ensemble, lui a été profitable au point de vue pécuniaire ".

The learned Judge then goes on to state the law as follows (p. 183):

" Les intimées ajoutent que les divergences d'opinion qui se sont produites entre l'appelant et Paré d'un côté et Mde Brais de l'autre, rendent l'administration de la succession impossible et lui causeront, si elles ne cessent pas, un tort considérable, et ils disent que cet état de choses nous justifierait *à lui seul* de confirmer le jugement. Il ne suffit pas qu'il y ait des différences d'opinion entre les fiduciaires pour destituer l'un d'eux au hasard, même s'il y avait entente entre l'appelant et Paré, sans une preuve positive que cet accord entre eux a pour but et surtout pour résultat de nuire *aux intérêts de la succession,* car les tribunaux ne peuvent user de leur pouvoir que dans le cas où les fiduciaires dissipent ou gaspillent les biens, refusent ou négligent de mettre à exécution les dispositions du testament, ou manquent à leurs devoirs (981d), et la preuve sur tous ces points nous paraît faire absolument défaut dans la présente cause ".

The formal judgment of the K.B. contains the following:

" Considérant que les intimées n'ont pas établi que dans la gestion de la fiducie créée par le testament de feu Alexis

Brunet, l'appelant ait, soit dissipé ou gaspillé la propriété de la fiducie, soit refusé ou négligé de mettre à exécution les dispositions du testament qui l'a créée, ou ait manqué à ses devoirs, de propos délibéré, et de mauvaise foi (981d C.C.) ; et qu'il appert au contraire de l'ensemble de la preuve qu'il a employé une habileté convenable et a agi en bon père de famille (981k C.C.) "

The Codifiers in their report state that while C.C. 917 is indicated as new law, it is merely the true expression of the existing law and included in the Code to remove certain doubts. They cite the following authorities:

(a) 8 N. DENIZART, Vo. Exec. Test., p. 213:

" Des héritiers sont bien fondés aussi à demander que la saisie soit otée à l'exécuteur testamentaire, *lorsqu'ils ont de justes soupçons* sur sa conduite, ou sur sa capacité. C'est par ces motifs qu'un arrêt du 19 mars 1765, rendu à l'audience de relevée, a jugé en faveur du sieur Micault, que le sieur de Jettonville n'aurait ni l'argent, ni les papiers du testateur dont il était l'exécuteur testamentaire ".

(b) BACQUET, Batardise—Ch. 7, No. 18.

(c) MACKINTOSH v. DEASE (2 L.C.R. 71), Ct. of Rev.

" Held: That where an executor whose powers have been extended by a testator beyond a year and a day, has become insolvent and is making away with the estate, the Court will interfere to deprive him of the control of the property and oust him from his office; but that the Court has no power in such case to appoint a sequestrator."

Day J., at p. 74, says:

" . . . the question then which comes up is this,—whether it is competent to this Court, notwithstanding the terms of the will, to deprive the defendant of his control of the property, and although some doubts were entertained on this point at the argument the Court is satisfied, on consideration, both *by general reasoning* and from special authority, that it has this power. The office of executor is simply a Mandat; the executor is the Mandataire of the Testator, and the only difference between him and the ordinary mandataire is, that instead of rendering account to his principal directly he renders it to his successor. Applying this, we think the Court has the power to afford relief."

HOWARD v. YULE (25 L.C.J. 229), 1881.

Rainville, J.:

" Attendu que les demandeurs allèguent que ledit défendeur n'a pas rempli ses devoirs comme tel exécuteur, savoir 1°,—qu'il n'a pas fait inventaire des biens de la dite succession; 2°,—qu'il a prêté des sommes d'argent considérable, savoir au montant de $22,422.25 sans aucune garantie quelconque, à des personnes qui étaient alors ou sont devenues depuis incapables de payer, sur lesquelles sommes aucun intérêt n'a été payé depuis plusieurs années . . . . et que ledit défendeur a aussi lui-même emprunté de la dite succession la somme de $26,203.84. Que ces faits constituent une délapidation et dissipation des biens de la dite succession et, indiquent, de la part du défendeur, une incapacité complète de remplir ses devoirs d'exécuteur. . . .

" Considérant qu'il résulte de ces faits que le défendeur a mal administré les biens de la dite succession et qu'il est démontré qu'il est incapable de les administrer;

" La Cour destitue ledit défendeur de ses dites fonctions d'exécuteur testamentaire et fidéi commissaire . . . . et ordonne qu'il soit nommé un séquestre pour prendre soin des biens de ladite succession ".

SEED v. TAIT (9 Q.L.R. 145), 1883.

" Held: That the refusal of an executor to allow his co-executor to take an equal share in the management of the estate, his applying the proceeds of a cheque to other purposes than that for which his co-executor had signed it, his payment to himself of his own charges against the estate without the sanction of his co-executor, and his enmity to the universal legatee, are sufficient grounds of removal, under articles 917 and 285 C.C."

McCord, J., speaking for the Court of Review, says at p. 146:

" The article 917 (though printed between brackets) is not intended to change the old law, but merely ' to settle points in part doubtful.' In fact the commissioners say in their report that it is ' conformable to the actual law ', ' although doubts have been entertained upon the subject '. It cannot therefore have been intended to restrict the old law.

" Now on reference to the authority cited by the commissioners at the foot of this article it will be seen there are circumstances under which an heir may apply to the court to have an executor removed, and that they are entitled to ask that removal '*lorsqu'ils ont de justes soupçons sur sa conduite*'. In the present case it seems to me that the defendant's refusal to allow his co-executor to take an equal share in the management of the estate, his doings in connection with the cheque already referred to, his payment to himself of his own charges against the estate " (at a high figure for frequent trips, ostensibly to attend to the business of the estate, and although he was allowed by the will a percentage for his remuneration), " and his enmity to the universal legatee, are quite sufficient to justify suspicions as to his conduct or management.

" Even under the strict application of articles 917 and 285, I think that the grounds urged against the defendant would be sufficient to justify the removal of the defendant. Article 285 says that tutors may be removed for dishonesty. This word has to be taken in its legal sense of unfaithfulness to duty. The word in the French version is '*infidelité*'. The defendant's conduct in refusing the co-operation of the other executor, and in paying himself the charges already referred to, are certainly *a failure to comply with the intentions of the testator, and consequently are unfaithfulness to his trust.* I have no doubt, moreover, that the enmity of a tutor towards the minor would be a just cause of removal, and in the same manner, according to article 917, the enmity of the executor towards the universal legatee should be a cause of removal."

FRENCH v. McGEE (M.L.R., 2 Q.B., 59), 1886.

" Held: Where testamentary executors transferred the control of the estate to another person, who paid the monies belonging to it into a bank in his own name, and afterwards drew them out; that the Court below *exercised a proper discretion* in removing the executors from office, even without evidence of fraudulent intention or actual dissipation of the property."

In this case the defendants, one of whom was the widow of the testator, considered themselves to be totally unfit to manage the estate and handed the administration entirely over to one Alfred Rodgers. Ramsay, J., speaking for the Q.B., at p. 63 says:

" The defendants attempt to justify their proceedings by saying that Rodgers was the person suggested by the deceased as

the proper person to assist his widow, the female appellant; that the money was placed in Rodgers' name to enable him to deal with it on his own cheque, and that when he drew it from the bank altogether it was to settle liabilities of the estate.

" It would be very difficult indeed to imagine any circumstances, short of absolute dissipation of the property, that could not be explained in that way; but an explanation of this kind is not satisfactory. It is possible that all the defendants say is true and that they have no intention to make away with the estate; but they have exposed it in a way they are not entitled to do, and we do not feel ourselves justified in reversing the judgment."

LESPERANCE v. GINGRAS (15 S.C. 462), 1899.

Held: L'insolvabilité d'un exécuteur testamentaire n'est pas seule et par elle-même une cause de destitution, mais le tribunal peut et même doit en tenir compte dans l'appréciation des actes d'incapacité et d'infidélité, de dissipation et de dilapidation qui sont reprochés à l'exécuteur.

In this case the insolvency of the executor was admitted and he was removed from office by Langelier, J., upon its being further shown that he had failed to pay certain annuities to beneficiaries under the will, had failed to pay certain taxes, and thus exposed certain of the estate property to sale, had declared to the collector of revenue, in error, that the testatrix had left more property than she really did and thus caused more duties to be paid than were due on the estate " *lesquels faits montrent son incapacité dans l'administration de la succession.*" It was also shown that he had dissipated a considerable portion of the estate.

ROBERT v. MARTIN (48 S.C. 27), 1915. Demers, J., at p. 33:

" Julien Longtin est décédé le 12 mars 1910; il y a plus de cinq ans. Depuis son décès, l'exécuteur testamentaire a tenu, en banque, à 3 pour 100 les deniers de la succession et il a toujours refusé et négligé d'en faire le placement. Je ne crois pas que la gestion de l'exécuteur testamentaire puisse être attaquée pour fraude. C'est un homme solvable. Mais je crois que sa négligence à placer les deniers dont les demandeurs ont droit de jouir, conformément à la coutume et à la loi, atteste une incapacité qui justifie les demandeurs de demander sa destitu-

tion. L'art. 917 dit que ' l'exécuteur testamentaire peut être destitué s'il exerce ses fonctions de manière à autoriser la destitution dans le cas d'un tuteur '. L'art. 285 dit: ' sont aussi exclus de la tutelle et même destituables, s'ils sont en exercise: 1°. les personnes d'une inconduite notoire; 2°. ceux dont la gestion atteste l'incapacité ou l'infidélité '. Les art. 294, 295, 296 fixent à six mois le délai pour placer les capitaux. L'art. 981 (o) indique que les exécuteurs sont également obligés de placer l'argent dont ils sont saisis. L'art. 290 dit ' que le tuteur doit administrer en bon père de famille '. Un bon père de famille ne laisse pas une somme valant de cinq à six mille piastres en banque durant un espace de temps aussi long, surtout à une époque où l'argent est en aussi grande demande ".

VALOIS v. DE BOUCHERVILLE (1929 S.C.R. 234):

This case has little or no bearing on the questions before the Court. Granted that the testator can extend or enlarge the powers of the executor to any degree he sees fit or authorize him to make decisions which are binding upon the parties interested, that does not in any way interfere with the jurisdiction of the Superior Court to remove him if he abuses the power, dissipates or wastes the property or otherwise brings himself within the scope of the articles of the Code which authorize the removal of an executor.

On the contrary, the greater the power conferred the closer the scrutiny required as to the person delegated to exercise it. Even if the Courts could not undo what had been done, they could and should step in to prevent a further abuse of power on the part of an incompetent or unfaithful executor.

FRENCH AUTHORITIES:

CARPENTIER (Répertoirs, Vol. 22, p. 259; Vo. Exec. Test.).

No 247: " L'exécution testamentaire étant un mandat peut être révoquée sur la demande des héritiers, *si l'exécuteur testamentaire se rend indigne de confiance ou compromet des intérêts qui lui sont confiés.* Mais les héritiers ne peuvent pas révoquer eux-mêmes directement l'exécuteur parce qu'il tient ses pouvoirs du DEFUNT ET non pas de leur propre volonté. Ceux-ci ne peuvent que s'adresser à justice pour obtenir sa révocation ".

BAUDRY-LACANTINERIE (et Colin), Donations et Testaments.

No 2696: " Les héritiers sont, nous l'avons vu, obligés de subir l'exécuteur testamentaire désigné par le testateur.

" Toutefois, si la gestion attestait son incapacité ou son infidélité, nous pensons que les héritiers pourraient s'adresser aux tribunaux et faire prononcer la révocation qu'ils ne peuvent eux-mêmes imposer . . . ."

DEMOLOMBE (Vol. 22—Donations entre-vifs—No. 107, p. 86).

" L'exécution testamentaire peut, en effet, prendre fin aussi; . . . .

" 4°. Par la révocation ou la destitution que les héritiers et les légataires ont certainement le droit de provoquer en justice contre l'exécuteur testamentaire, dont la gestion attesterait l'incapacité ou l'infidélité ou qui serait tombé en faillite ou en déconfiture ".

CANADIAN AUTHORITIES:

ROSE v. ROSE (22 D.L.R. 572), Ontario Ct. of Appeals 1915.

Held: " A trustee is prevented not only from doing things which bring an actual loss upon the estate but from doing anything which has a tendency to interfere with his duty and to injure the trust; the fact that the trustee purchased a block of stock on his own account and with his own money from a company controlled by the estate, in which the trustee was also a beneficiary, does not entitle the *cestuis que trustent* to a declaration by the court that he is a trustee for them of the shares so bought subject to a lien in his favour for the price paid; but if it be shewn that his interest and his duty conflict because of such purchase, that would be a ground for removing him from his office as trustee."

RE CURRAN (18 O.W.N. 98), Ontario 1920, Middleton, J. Here, where trustees could not agree, they were removed and a trust company appointed in their stead.

RE SOMERSET (1928, 2 W.W.R. 697), Kilgour, J. (Manitoba).

Held: " On the application of an executor held that an order should go for the removal of his co-executor on the ground that the latter's conduct had been such as to endanger the trust property, although nothing in the nature of fraud or dishonesty was imputed against him."

Kilgour, J., at p. 698, says:

10 " Nothing in the nature of fraud or dishonesty is imputed to the executor whose conduct is complained of. The ground of the application rather is that his attitude and conduct extending over a period of years has made it clear that it is *not in the interests of the estate and of its beneficiaries* that he should be allowed to continue to act. In the result I agree with this contention, and am of opinion that a case has been made for an order removing the executor."

20 In this case the executor in question had neglected or refused to agree to a compromise scheme to aid in liquidating a mortgage which was an asset of the estate. The learned judge says:

" . . . And most of all his evident disinclination or inability to co-operate with his fellow executor in Winnipeg or make any effective contribution looking to the solution of the difficulties connected with the administration of the estate, is impeding rather than helping the winding-up of the estate."

30 At p. 699 he says:

" In my opinion Elbourne's conduct has been unreasonable and of a kind that has tended to endanger the trust property. . . . Elbourne is doubtless honest, but is evidently obstinate and has failed to apply a reasonable degree of intelligence or help of any kind, so far as can be seen, to the solution of the difficulties of the estate. His course seems to have been purely obstructive. He is himself the husband of one of the beneficiaries. A number of infants resident in the state of Oregon are said to be entitled
40 to the one-seventh share of their deceased mother. Their wishes as regards the present application do not appear. The remaining five beneficiaries, however, entitled to 5/7 of the estate, desire the removal of Elbourne. I think it may be well said that his conduct has been such as to endanger the trust property and for that reason comes within the principle of Letterstedt v. Broers."

RE PURDOM (35 O.W.N. 79), 1928.

In this case the deceased during his lifetime made a will appointing a trust company his executor and concurrently made a trust deed affecting nearly all his real estate, conveying the same to the same trust company in trust for his wife and children.

At his death he was liable to the Bank of Toronto on a guarantee of a certain company's indebtedness, and upon the bankruptcy of this company the Bank sought to recover against the estate.

Meanwhile the Trust Company had mixed the trust moneys with the estate moneys indiscriminately and had paid off a number of mortgages and other debts and claims by beneficiaries.

It was held, Orde, J., that the Bank which made the present application was entitled to have the estate and trust administered by the Court, although their appeal to the Supreme Court was still pending as to their right to recover from the estate, and the Trust Company was accordingly removed.

RE ANDERSON (35 O.W.N. 7), 1928—McEvoy, J.

In this case the testator and the executor sought to be removed had been partners and had later transferred their partnership assets to a limited company, taking out shares in return. At the time of his death the testator had a slight majority control of these shares (280 to 253). The judgment, as reported, goes on to say:

" Langstraff (the executor) will not allow his co-executor to vote the shares of the testator in such a way as to elect a board of directors to the liking of the Andersons, who are, among them, the beneficial owners of all the shares of the testator. Langstraff swears that he is voting the shares or preventing them from being voted in the interest of the estate of the testator. By means of his position as executor and trustee he makes himself the majority shareholder instead of the minority shareholder. He enables himself to elect a majority of the directors, and puts himself in a position where he is able to so arrange the finances of the company as to keep the Andersons in terror of bankruptcy if they do not submit to his dictation as to business policy and otherwise.

" The applicants say . . . that Langstraff's interests are in conflict with his duty as director.

" When charges of misconduct are not made out, or are greatly exaggerated, the Court may, nevertheless, if satisfied

that the continuance of the trustee would prevent the trust being properly executed, remove the trustee, as the trustee exists for the benefit of those to whom the creator of the trust has given the estate."

Here Langstraff was removed and his co-executor was left to act alone.

RE McGANNON (36 O.W.N. 102).

Here certain securities were transferred in trust for the benefit of the applicant who sought the removal of the trustee. The report says:

" The learned judge, after stating the effect of the evidence, expressed the opinion that the friction and irritation which had arisen and the inability or unwillingness of the trustee to cope with the situation rendered it desirable in the interest of the trust and for the protection of Susan McGannon, an aged lady, the settlor, that the trustee should be removed and a trust company appointed in his stead."

ENGLISH AUTHORITIES:

UNDERHILL ON TRUSTS (7th ed.), p. 390.

" Where a trustee, charged with breach of trust, appointed a new trustee against the plaintiff's wishes, both were removed; and a similar course was followed where the donee of the power appointed a new trustee because the old one would not commit a breach of trust. *Indeed the court will remove a trustee and appoint a new one in his stead where the only complaint against him is that, from faults of temper, it has become impossible to transact the trust business with him.* This sometimes appears to be a slur upon a perfectly honest but impracticable trustee; but, as Lord Blackburn said in Letterstedt v. Broers (9 A.C. 371):

" ' In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule, beyond the very broad principle that their *main guide must be the welfare of the beneficiaries.* Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. . . .

It is true that friction or hostility between trustees and the immediate possessor of the trust estate, is not of itself a reason for the removal of trustees. But where the hostility is grounded upon the mode in which the trust has been administered, . . . it is certainly not to be disregarded . . . *If it appears clear that the continuance of a trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee,* and if there is no reason to the contrary from the intentions of the framer of the trust to give the trustee a benefit or otherwise, *the trustee is always advised by his counsel to resign and does so. If without any reasonable ground he refuses to do so, it seems to their Lordships that the court might think it proper to remove him.'* "

LEWIN ON TRUSTS (13th ed.), pp. 491 *et seq.*

" As the property of the *cestui que trust* depends for its continuance upon the faith and integrity of the trustee, it is reasonable that the *cestui que trust,* whose interest is thus materially concerned, should be allowed by all practicable means to secure himself against the occurrence of any act of misconduct, and therefore he is entitled to have the custody and administration of the trust property confided to the care of proper persons.

" In exercising its inherent jurisdiction of removing trustees, the court has not laid down any general rule beyond the very broad principle that its main guide must be the welfare of the beneficiaries. In cases of positive misconduct a court of equity has no difficulty in interposing to remove trustees who have abused their trust; it is not, indeed, every mistake or neglect of duty, or inaccuracy of conduct of trustees which will induce the court to adopt such a course. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity. Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of trustees. But where hostility is grounded upon the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate or where it is likely to obstruct or hinder the due performance of the trustee's duties, the Court may come to the conclusion that it is necessary for the welfare of the beneficiaries that a trustee should be removed."

Lewin then goes on to quote at length from LETTERSTEDT v. BROERS (*supra*). At pp. 493 and following of his 13th Edition, 1928, he has the following to say:

" If a trustee refuse to act or become so circumstanced that he cannot effectually execute the office, as where a trustee goes abroad to reside permanently, or the trustees of a chapel entertain opinions contrary to the founder's intention, or if a trustee of money become bankrupt, or if a trustee misconduct himself in any manner, as by dealing with the trust property for his own personal advancement, by suffering a co-trustee to commit a breach of trust, or by absconding on a charge of forgery; in these and like cases the *cestui que trust* may have the old trustee removed, and a new trustee appointed in his room. And in such a suit it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute to him any corrupt or improper motive in the execution of the trust, or to allege that his behaviour is the vindictive consequence of some act on the part of the *cestui que trust,* or of some change in his situation . . . and if the old trustee be removed on the ground of misconduct, he must bear the expense of the appointment of a new trustee, as an act necessitated by himself."

The following cases represent all those which appear to be pertinent to the present action and which are cited in the 1928, 1927 and 1926 editions of Lewin, Godfroi and Underhill respectively:

LETTERSTEDT v. BROERS (1884, 9 A.C. 371). P.C. from S. Af.

Held: There is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy.

The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate.

This case is the leading authority and practically the only one in which the question of the removal of trustees is discussed at any length. See Lord Blackburn in EWING v. ORR EWING, 10 A.C., at p. 530, a Scottish appeal to the House of Lords, where he says:

" There is very little to be found as to the principles which should regulate the discretion of a court in changing trustees. The only case which I know on the subject is LETTERSTEDT

v. BROERS. The conclusion which the Judicial Committee of the Privy Council came to there, on principle (for they could find no authorities), was that the court must be mainly guided by the welfare of the beneficiaries, and that ' if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.' "

In addition to the passages quoted from the Letterstedt case above, Lord Blackburn, who also rendered the Judgment of the Board in that case, says at p. 385:

" There may be some peculiarity in the Dutch Colonial Law which made it proper to make the prayer in the way in which it was done to remove them from the office of executor; if so, it has not been brought to their Lordships' notice; the whole case has been argued here, and, as far as their Lordships can perceive, in the Court below, as depending on the principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction ' in cases requiring such a remedy,' as is said in STORY'S EQUITY JURISPRUDENCE, s. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general principles.

" STORY says, s. 1289: ' But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.'

" It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting

them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

" The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee . . . the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position."

MOORE v. M'GLYNN (1894—1 Ir. R. 74).

Held: A trustee of a will carrying on the business of his testator is not guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, provided that he does not resort to deception or solicitation of custom from persons dealing at the old shop. A trustee and manager of a business was removed, however, under such circumstances, from being such trustee and manager.

COMMISSIONERS OF CHARITABLE DONATIONS v. ARCHIBALD, 11 Irish Equity Reports, p. 187.

IN RE WRIGHTSON (1908, 1 Ch. 789).

In this case, following the Letterstedt decision, it was held that: In an administration action the Court has jurisdiction at any time during the proceedings to remove trustees if it considers such removal necessary for the preservation of the trust estate or the welfare of the *cestui que trust*, and that notwithstanding such removal has not been expressly asked for by the pleadings,

10 but application for the removal of trustees was here refused on the ground that there remained nothing for them to do but wind up the estate, the testator's widow being dead and the whole of the estate being divisible among persons *sui juris* and where the application was in any event only at the instance of some of the *cestuis que trust*.

RE BARKER'S TRUSTS (1 Ch. Div. 43).

20 Here Jessel, M.R., says:

" It is the duty of the Court to remove a bankrupt who has trust money to receive or deal with so that he can misappropriate it . . . The reason is obvious. A necessitous man is more likely to be tempted to misappropriate than one who is wealthy; and, besides, a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people."

30

EX PARTE REYNOLDS (31 E.R. 816), 1800.

In this case one of two assignees of a bankrupt purchased in the estate for himself, and both he and the other were removed. The Lord Chancellor said of the latter:

" He permitted his co-assignee to purchase; and being a
40 party in the business, it is not fit he should manage the affairs of the creditors."

UVEDALE v. ETTRICK (2 Ch. Ca. 130).

Here, where a trustee pertinaciously insisted on being continued in the office, though his co-trustees were unwilling to act with him,

Lord Nottingham said: " He liked not that a man should be ambitious of a trust when he could get nothing but trouble by it," and without any reflection on the conduct of the trustee, declared he should meddle no further in the trust.

AUTHORITIES UNDER SECTION 32 OF THE WINDING-UP ACT:

The Dominion Winding-up Act, section 32, has the following wording:

" A liquidator may resign or may be removed by the Court on due cause shown . . ."

The following more or less pertinent cases have been decided under this and similar wording in the various English Bankruptcy Acts:

IN RE EXCHANGE BANK-CLOYES v. CAMPBELL (15 R.L. 373). Mathieu, J., 1885.

Juge:—Que lorsqu'il n'y a pas une harmonie parfaite entre les liquidateurs d'une banque en faillite, et que les créanciers et les actionnaires demandent la révocation de l'un des liquidateurs, cette demande sera accordée, et la révocation sera prononcée.

RE HATZIC PRAIRIE CO. LTD. (15 D.L.R. 772), 1914, B.C. Court of Appeals.

Held: That liquidators of a company in voluntary liquidation had practically delegated their powers as such to a trust company and gave themselves no concern as to effort to sell the assets, is a ground for the removal of the liquidators from office.

IN RE BRITISH NATION LIFE ASSURANCE ASSOCIATION (L.R. 14 Eq. Cas. 492), 1872.

Held: The court has jurisdiction under sec. 141 of the Company's Act, 1862, to remove liquidators appointed at a meeting

of a company at which resolutions for a voluntary liquidation have been passed where no personal unfitness is suggested against them, if it is of opinion that it is for the general benefit of the company that they should be removed.

IN RE MARSEILLES EXTENSION RY. & LAND CO. (L.R. 4 Eq. Case. 692), 1867.

Held: When a company is being wound up voluntarily under the supervision of the Court, the Court has a discretionary power to remove the liquidators appointed by the company without any proof of misconduct or unfitness on their part, if having regard to all the circumstances, it is of opinion that their removal will conduce to the more efficient winding up of the company.

Sir R. Mallins, V.C., at p. 694, says:

" The question is, what is meant by the words ' on due cause shewn '. . . . I think that the contention is borne out by the case of EX PARTE PULBROOK, that the court may take all the circumstances into consideration, and if it finds that it is, upon the whole, desirable that a liquidator should be removed, it may remove him . . .

" But then the question arises whether I ought to exercise the power in this case. There is no personal objection alleged or proved against the liquidators; but I am satisfied that it is a serious and valid objection to their efficiency as liquidators, that a considerable number of the creditors are opposed to their continuance in office; *just as in the case of an ordinary trust it is a serious obstacle to the performance of the trust if a large number of the cestuis que trust are dissatisfied with the trustees . . .*"

EX PARTE NEWITT (14 Q.B.D. 177).

Held: " Cause shewn " does not mean only conduct amounting to fraud or dishonesty on the part of the trustee; it is enough to prove conduct—such as vexatious obstruction of the realization of the estate in the interest of the debtor—which shews that it is no longer fit that the trustee should remain a trustee.

IN RE ADAM EYTON LTD. (36 Ch. Div. 299), 1887.

Held: The jurisdiction of the Court to remove a liquidator under ss. 93 and 141 of the Companies Act 1862 " on due cause shewn ", is not confined to cases where there is a personal unfitness in the liquidator. Whenever the court is satisfied that it is for the general advantage of those interested in the assets of the company that a liquidator should be removed, it has power to remove him and appoint a new one.

II

TRUSTEES AND DIRECTORS MUST NOT HAVE CONFLICTING INTEREST

BROUGHTON v. BROUGHTON, 5 D. M. & G. 160 (43 Eng. Reprint 831).

The general principle is stated clearly by Lord Cranworth. At p. 164 of the report he said:

" The rule applicable to the subject has been treated at the Bar as if it were sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is that this check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee, and the only ques-

tion is, how far the circumstances of the present case take it out of this rule."

The principle so stated was quoted and approved by Stirling J. in the Court of Appeals in RE DOODY: FISHER v. DOODY; HIBBERT v. LLOYD, L.R. (1893), 1 Ch. 129. Also by our own Supreme Court in CAPE BRETON COLD STORAGE COMPANY LIMITED v. ROWLINGS, 1929 S.C.R., p. 505.

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IN RE GEORGE NEWMAN & CO. (L.R. 1895, 1 Ch. 674).

Held: Directors cannot pay themselves for their services, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting.

20 Lindley, L.J., speaking for the Court of Appeal, says at p. 685:

" But in this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a
30 private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for
40 such misapplication as soon as anyone properly sets the company in motion. . . . Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders at a meeting duly convened for the purpose can, if they think proper, remunerate directors for their trouble

or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such matters as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried, and duly recorded."

GARDNER v. CANADIAN MANUFACTURER PUB. CO. (31 O.R. 488).

Held: By the by-laws of an incorporated company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C and G, were present, one being the president and the other the secretary of the company, a resolution was passed that " the matter of the compensation to C, the editor, and G, the advertising solicitor of the company, was considered, and the sum of $1,000 each be ordered to be placed to their respective credits in the books of the company for services rendered during 1895 in addition to their regular salary, and to be charged to their salary account." C, as a matter of fact, had not been appointed editor, or G advertising solicitor, the object of the resolution being to appropriate all the funds of the company and to prevent a stockholder, who owned the greater part of the stock and had made a claim against the company, from being paid. Held: That the resolution could not be sustained, nor could any moneys received under it be retained.

As to the right of a director to vote to fix his own salary or remuneration:

THOMPSON ON CORPORATIONS, 3rd Edition, paragraph 1830 (supported by numerous American authorities).

" 1830. DIRECTORS CAN NOT VOTE TO FIX THEIR OWN SALARIES.—Under the doctrine that directors occupy such a fiduciary relation to the corporation as will ordinarily prevent them from dealing with the corporation in their own behalf, and in respect to any matters springing out of their office of trustees for the corporation and the stockholders, it is almost universally held that directors, acting as such at their meetings, have no power to vote themselves salaries or compensation for their services, either before or after such services have been rendered. The purpose of the law is said to be to guard against the greed of directors and officers and to prevent them from rewarding themselves for services which they hope they may be able to perform by virtue of their official position."

MASTEN & FRASER (Company Law of Canada, 3rd Ed., 1929).

At p. 610 under the heading " Director Voting on Contract "— cite the following authorities:

It is not necessary in order to vitiate a contract or arrangement between a director and his company that the director should actually record his vote, where several directors are interested in similar contracts and by arrangement each votes in favour of the other's contract: THORPE v. TISDALE (1909), 13 O.W.R. 1044, 1049.

Where there would be no quorum without the presence of a director who is disentitled from voting on the contract he cannot be counted as being present for the purpose of making a quorum: YUILL v. GREYMOUTH (1904), 1 Ch. 32; RE D. & S. DRUG CO., DONALD'S CLAIM (1906), 10 W.W.R. 612. Nor, if several directors are interested in what is in reality one transaction, can a quorum be obtained by splitting the resolution into parts and taking a vote on each part separately: ZIMMERMAN v. TRUSTEE OF ANDREW MOTHERWELL (1923), 54 O.L.R. 342..

FOSTER v. FOSTER (1916), 1 Ch. 532.

Where the articles of association provided that a director might contract with the company but forbade his voting, and the director voted in favour of the resolution appointing him managing director at a remuneration, it was held that there was a contract between the director and the company within the meaning of the articles, and that the appointment was irregular, but that it could be cured by a vote of the company in general meeting.

STIEBEL'S COMPANY LAW (3rd Ed., 1929), Vol. I, pp. 275 *et seq.*

" It follows from the fiduciary nature of the office of a director that no director may make any profit out of his office unless such profit is expressly sanctioned by the company at large, or is authorized by the constitution of the company. Any director who infringes this principle or allows a co-director to do so will have to account to the company for the profit, and no director may take or concur in giving to a co-director any bribe for any act done by him as a director (GENERAL EXCHANGE BANK v. HORNER, 1870, 9 Eq. 480)."

" Directors will be liable to make good to the company profits which they have made when acting on its behalf, even though their company could not have made the profit, itself, e.g., profits a director has earned in his character of member of another company for bringing business to such other company (BOSTON DEEP SEA FISHING CO. v. ANSELL (1888), 39 Ch. D. 339); and they will have to make good to the company profits which they have made when trading in perfect honesty with the company (ALBION STEEL & WIRE CO. v. MARTIN (1875), 1 Ch. D. 580). Directors who have wrongfully taken the benefit of a contract with their company will be liable to indemnify the company in cases where, if the company had assigned the benefit of the contract, it would have been their duty as directors to have stipulated for an indemnity (EASTERN SHIPPING CO. v. QUAH BENG KEE (1924), A.C. 177).

COSTA RICA RY. CO. v. FORWOOD (1901) 1 Ch. 746.

Action for an account for secret profits alleged to have been received by a director. Vaughan Williams, L.J., speaking for the Court of Appeal says at p. 759:—

" I do not suppose that in the arguments on behalf of the respondents it was intended directly to question the stringency of the rule which does not allow directors, trustees, agents or others standing in a fiduciary relation, to enter into engagements conflicting, or which may possibly conflict with the interests of those whom they are bound to protect. But, although that general rule was not really questioned, yet it did seem to me that a great deal of the argument suggested something of this sort, even if Sir A. Forwood was interested in these contracts, and interested in a way which made it impossible to deny that he might possibly have had an interest which might conflict with his duty, still it would be wrong to hold him accountable, either because it would not be fair to do so, or because the company of which he was a director had not suffered any injury, or because the profit which he had earned was a profit which could not really be earned by the company itself. A whole series of partnership cases was cited to us in order to show that a partner could not be held responsible for profits that his firm could not have gained. It seems to me, without going at length into authorities, that there is no ground for any such contention. There is one case which was not cited during the argument, though there was ample other authority cited to the same effect, but which I will refer to for what I may call a ' text-book reason,' for the head-note contains an admirable summary of the law, a summary fully justified by the speeches of the noble Lords; and that is the case of ABERDEEN RY. CO. v. BLAIKIE (1854) 1 Macq. 461. The headnote is this:

> ' It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest in conflict or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object. It may be that the terms on which a trustee has attempted to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted.'

As I understand, the rule is a rule to protect directors, trustees, and others against the fallibility of human nature by providing that, if they do choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby, and

will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their *cestuis que trust*, and although the profits may be such that their *cestuis que trust* could not have earned them at all. With reference to this last point, there is a recent and direct decision that the fact that the profits could not have been earned by the *cestuis que trust* is wholly immaterial; and that is a decision of the Court of Appeal in Boston Deep Sea Fishing vs. Ansell.

THOMPSON ON CORPORATIONS—Paragraph 1321 says:—

"1321—PERSONAL INTEREST MUST NOT BE ANTAGONISTIC TO THE CORPORATION.—The peculiar trust relation held by a director does not admit of his creating any relation between himself and the trust property which will make his interest antagonistic to that of his beneficiary. The relation of a director to his corporation is fiduciary, and the law forbids him from making a contract in which his private interest may conflict with the interest of the corporation. The directors in all such cases occupy a position of trust and act in a fiduciary capacity. In all the contracts they make they represent the stockholders and not themselves; and in all their official actions they are to consider, not their private interests, but that of the stockholders, whose property they manage and control. This rule is so strict and so rigidly enforced that the law will not permit these officials to subject themselves to any temptations to serve their own interest in preference to the interest of the stockholders. . . . The rule forbidding contracts between corporations and directors does not depend on the existence of fraud or mismanagement, but is based on a public policy which excludes all necessity of investigation either of the honesty or wisdom of dealings in a dual capacity. It has been said that the rule which prevents the agent or trustee from acting for himself in matters where his interest would conflict with his duty, is sufficient also to prevent him from acting for another whose interest is adverse to that of his principal."

NORTHWEST TRANSPORTATION CO. v. BEATTY (12 A.C. 589).

Sir R. Baggallay:—

" The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

" On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmation or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it."

GIGUERE v. COLAS & STANDARD FOUNDRY. (1915—48 S.C. 198.)

Juge:—Les directeurs d'une compagnie à fonds social étant des mandataires doivent administrer les biens qui leur sont confiés en bon père de famille; et ils ne peuvent s'approprier ces biens sans considération, soit directement ou par personne interposée, soit par des manœuvres artificieuses. Néanmoins ces actes, des directeurs ne pourront être annulés que s'ils causent un préjudice à la compagnie.

Ces directeurs ne peuvent voter à leur président une indemnité, comme salaire, qui n'est justifiée ni par les services rendus, ni par l'état des affaires de la compagnie, pour lui permettre d'acquérir des actions lui donnant la majorité et le contrôle dans l'assemblée des actionnaires. Les résolutions relatives à cette indemnité et à l'émission des actions achetées avec cette somme sont nulles.

RORAY v. HOWE SOUND (1915—22 D.L.R. 855) B.C.

Directors have no right to be paid for their services and cannot pay themselves or each other or make presents to themselves out of the assets of the company unless authorized by the by-laws or by the shareholders at a properly convened meeting.

III

VALIDITY OF GIFT TO LORD SHAUGHNESSY.

C.C. Arts. 776, 806, 808, 981a.

C.C. 776 reads as follows:

" 776. Deeds containing gifts *inter vivos* must under pain " of nullity be executed in notarial form and the original thereof " be kept of record. The acceptance must be made in the same " form.

" Gifts of moveable property, accompanied by delivery, " may, however, be made and accepted by private writings, or " verbal agreements.

" Gifts validly made out of Lower Canada, or within its " limits but in certain localities excepted by statute, need not be " in notarial form."

C.C. 806 reads as follows:

" 806. All gifts *inter vivos,* of moveable or immoveable " property, even those which are remunatory, must be regis- " tered; save the exceptions contained in the two following " articles. The donor himself cannot set up the want of registra- " tion, neither can the donee or his heirs; but it may be set up " by any person entitled to do so under the general registry laws, " by the heir of the donor, by his universal or his particular " legatees, by his creditors, even though they be posterior and " not hypothecary, and by all other persons interested in having " the gift declared void."

C.C. 808 reads as follows:

" 808. Gifts of moveable effects, whether universal or par- " ticular, are exempt from registration when they are followed by " actual delivery and public possession by the donee."

C.C. 981a reads as follows:

" 981a. All persons capable of disposing freely of their " property, may convey property, moveable or immoveable, to " trustees by gifts or by will, for the benefit of any persons in " whose favor they can validly make gifts or legacies."

O'MEARA, v. O'MEARA, 55 S.C., p. 34.
20 P.R., p. 101.
28 K.B., p. 332.
(P.C.) 61 D.L.R., p. 241.

MESSIER v. BEIQUE, S.C.R. 1929, p. 9.

It will be noted that this was an instance of a *donation rémunératoire.*

IV

APPOINTMENT OF SEQUESTRATOR AND PROVISIONAL EXECUTION

In support of their demand for the appointment of a sequestrator, appellants rely upon C.C. 1823 and C.P. 973.

C.C. 1823 (3) reads as follows:

" 1823 (3). The court or the judge upon application by " the interested party may, according to circumstances, order " the sequestration of a thing moveable or immoveable, con- " cerning the property or possession of which two or more per- " sons are in litigation."

C.P. 973 reads as follows:

" 973. All demands for sequestration are made by petition " to the court or to the judge.

" It may also, according to circumstances, be ordered by " the court without being demanded by the parties."

It is now settled jurisprudence that C.C. 1823 is not limitative, but that a court or a judge has discretion to appoint a sequestrator, whenever, in his opinion, the interest of the parties demand it. SEE IN THIS SENSE:

AINSE v. PILOTE (27 S.C. 71), Pelletier, J., 1904;
LAURENDEAU v. FORTIER (18 Q.P.R. 248), Allard, J., 1916;
GARCEAU v. VEZINA (35 B.R. 24) King's Bench, 1923,— Remarks of Howard, J.

The provisions of law cited have been applied on several occasions in actions for the removal of executors and trustees, and also where disputes have arisen in respect to wills, donations, etc.

BROOKE v. BLOOMFIELD (23 L.C.J. 140) Queen's Bench, 1875.

" Held: That a judge of the Superior Court has power to " appoint a sequestrator *pendente lite* in an action to remove " executors under a will from office for mal-administration."

In this case the petition for the appointment of the sequestrator was granted *during the pendency of the suit,* and an application to revise the same was refused by Mackay, J., and the Court of Appeal unanimously confirmed.

HOWARD v. YULE (25 L.C.J. 229) 1881.

Rainville, J.:—

" Held: La Cour destitue le dit défendeur de ses dites " fonctions d'exécuteur testamentaire et fidei commissaire . . . . " et ordonne qu'il soit nommé un séquestre pour prendre soin " des biens de la dite succession ".

In this instance it would not appear that the plaintiffs had not applied for the appointment of a sequestrator during the pendency of the suit, but had merely adopted conclusions to that effect in their declaration. The court in rendering the final judgment upon the merits of the action, ordered the appointment of a sequestrator.

LESPERANCE v. GINGRAS (15 S.C. 462) 1899.

" Held: Quand le tribunal prononce la destitution d'un " exécuteur testamentaire, il peut ordonner la nomination im- " médiate d'un séquestre pour administrer la succession ".

In this case the application for the appointment of a sequestrator was made by petition *during the pendency of the Suit,* and the petition came on for hearing at the same time as the merits of the action, and was decided upon the same evidence, as occurred in the present instance. The Court in rendering judgment maintaining the action, also ordered the appointment of a sequestrator.

(A foot note by the Law Reporter—the present Mr. Justice Mignault—after referring to MacIntosh v. Dease, 2 L.C.R., page 71, states: " Le pouvoir du tribunal d'ordonner la nomination d'un séquestre paraît concédé maintenant ".)

HERITABLE SECURITIES CO. v. RACINE (24 L.C.J. 107), Review, 1879.

Sicotte, J., at p. 108:

" Held:—D'après la lettre et l'esprit de notre loi, et l'in- " terprétation donnée par nos tribunaux, il faut dire et conclure, " qu'il suffit pour autoriser le séquestre, que l'insolvabilité ou la " conduite de celui qui possède, laisse des doutes sur le sort des " fruits pendant le litige; à fin, comme le remarque Pigeau, " d'obvier aux maux qu'entraîne la lenteur de l'instruction et " les chicanes des plaideurs ".

BUSSIERE v. LEDOUX (12 S.C. 438) Review, 1897.

In this case Plaintiff made a donation to her children subject to a life rent in her favour under the terms of which two sons-in-law were to administer the property donated during six months and two sons during the remaining six months of the year. Dispute arose between these administrators, one of whom wished to apply all the revenue after payment of the rent and annual charges to the payment of certain hypothecary debts become due, while the others wished to distribute the revenues to the donees.

The Court of Review, modifying the judgment below, held that, in the circumstances, there was occasion for the appointment of a sequestrator to administer the property in question, and that the surplus revenues should first be applied in payment of the debts before division among the donees.

A reporter's foot-note points out that the decision is of interest because the case dealt with does not occur in the enumeration of C.C. 1823, which had been held limitative in Sun Life v. Mandeville (4 S.C. 201) and Bedeel v. Smart (6 S.C. 332). It is pointed out, however, that in the present case the parties appear to have been in accord on the appointment of a sequestrator.

EVANS v. SLAYTON (54 S.C. 518), 1918:

Lamothe, J.:—

" Held: There is litigation concerning the property of the " moveables and immoveables of an Estate when the Will of " the testator is attacked in nullity before the court; and under " these circumstances a sequestrator may be appointed ".

MURRAY v. MURRAY (22 Q.P.R. 239), King's Bench, 1920:

" Jugé: (4) L'intérêt des parties dans ce cas (une action " directe en faux pour faire déclarer nul le testament d'une dame " Gurrey) est suffisant pour justifier la mise sous séquestre des " immeubles concernés dans le litige ".

GARCEAU v. VEZINA (35 B.R. 24), King's Bench, 1923:

" Jugé:—Lorsque des immeubles et des créances hypothé- " caires sont légués en propre et à des légataires différents par " deux testaments faits à sept ans de distance, et que le second " est contesté pour défaut de capacité mentale chez le testateur, " il y a lieu à la nomination d'un séquestre aux propriétes en " litiges ".

DIONNE v. GAGNON (61 S.C. 226), 1922:

Bruneau, J.:

" Jugé:—Une action en partage rend litigieux des biens de " la succession jusqu'au partage; dans ce cas, il y a lieu d'exercer " le pouvoir discrétionnaire accordé au tribunal par l'art. 1823 " C.C. et de nommer un séquestre ".

V

INJUNCTION AGAINST MERGER

In support of their demand for an Injunction to prevent the consummation of the merger of the Alcohol Company with Hiram Walker-Gooderham Worts, concerning which Respondents had been surreptitiously carrying on negotiations for months without any disclosure to Lady Davis their Co-Executor and Trustee, Appellants rely upon the express terms of C.P. 957 (2).

C.P. 957 reads (in part) as follows:

" 957. Any judge of the Superior Court may grant an inter- " locutory order of injunction in any of the following cases: . . . .

" (2) During the pendency of a suit: . . . .

" (b) Whenever the opposite party is doing or is about to " do some act in violation of the plaintiff's rights, or in contra- " vention of law, respecting the subject of the action, which is " of the nature to render the final judgment ineffectual."
