

No. 465

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CANADA
PROVINCE OF
QUEBEC
DISTRICT OF
MONTREAL

Court of King's Bench

(APPEAL SIDE)

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR
COURT RENDERED ON 30TH JUNE, 1930

LADY DAVIS, et al.,

(Plaintiffs) APPELLANTS,

— AND —

THE RIGHT HONOURABLE LORD
SHAUGHNESSY, et al.,

(Defendants) RESPONDENTS,

— AND —

THE FEDERATION OF JEWISH PHILAN-
THROPIES OF MONTREAL,

MIS-EN-CAUSE.

RESPONDENTS' FACTUM

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MONTREAL:

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RESPONDENTS' FACTUM

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This is an appeal by the plaintiffs from the judgment of Mr. Justice Surveyer (rendered in the Superior Court on the 30th June, 1930) which dismissed the appellants' action for the removal of the respondents from their office of testamentary trustees and executors, and dismissed appellants' petition for sequestration, and dismissed appellants' petition for an interlocutory injunction.

THE FACTS

Joint Case,
Vol. 1, p. 27, l. 17

The appellants sued the respondents on the 18th January, 1930, asking the Superior Court to remove the respondents "from the offices of joint executors and trustees of the last Will of the late Sir Mortimer Barnet Davis." The trial commenced on the 3rd March, 1930, and during over forty days forty-one witnesses testified before the trial judge (thirty-three called by appellants and eight by respondents) and the arguments of counsel occupied a week more. In addition to seeing and hearing the witnesses give their evidence, the trial judge was furnished daily with the transcription of the evidence, and he rendered judgment about two weeks after the completion of the argument. The facts which had to be decided by the trial judge after so hearing and seeing the witnesses personally give all their evidence at the trial were contained in the 118 paragraphs of the appellants' declaration and in respondents' pleas thereto. 10

Joint Case,
Vol. 1, pp. 1 to 27

Joint Case,
Vol. 1, p. 1, l. 10

The female appellant and the two respondents are the three trustees and executors under the will of the late Sir M. B. Davis, who died in France on the 22nd March, 1928. The female appellant was married to Sir M. B. Davis about four years earlier and they lived at Cannes, in France, where the female appellant retained her domicile, as shown by the writ, while the two respondents live at Montreal. On the 30th November, 1927, Sir M. B. Davis made the will which came into effect at his death four months later. By that will he conferred upon his trustees and executors powers and discretion of unusually wide extent, for example (Article Fifth), he gave them all his estate and property, real and personal, in trust, and he provided (Article Fifteenth) that except where otherwise decided by them or to make payment of particular legacies, the capital of his estate was to remain absolutely vested in the hands of his trustees and executors for a period of at least fifty years, but they, however, might "in their absolute and uncontrolled discretion make partitions of the estate . . . should they consider it desirable and proper to do so, but not otherwise," and he gave to his trustees and executors (Article Eighteenth) "power to borrow money and oblig my estate for such obligations as they may see fit, . . . to invest and reinvest . . . without being limited to the investments in which trustees and executors are by law required to invest, to decide whether assets and liabilities are to be credited or charged to the capital or revenue of my estate," and he provided (Article Twentieth) that his trustees and executors would "be responsible for good faith only and each only for his or her own acts and deeds." 20 30 40

Joint Case,
Vol. 1, pp. 148 to 159

When the late Sir M. B. Davis selected his three trustees and executors and gave them such wide powers of administration and control over all his estate after his death, he was well acquainted

Joint Case,
Vol. 10, pp. 2216
and ss.

with them. Before he married the female appellant, he knew both of the respondents well. He knew the respondent Lord Shaughnessy since the latter's boyhood, and in 1920, when Lord Shaughnessy had been a partner for ten years in a Montreal law firm, Sir M. B. Davis engaged Lord Shaughnessy as his special counsel on an annual retaining fee. In 1924, Lord Shaughnessy, at his request, abandoned the active practice of the law and became directly connected with Sir M. B. Davis' business enterprises. He then became a director of Sir Mortimer Davis, Incorporated (the holding company of Sir M. B. Davis) and later became its President. Lord Shaughnessy also became, in 1921, a director and later Vice-President of Canadian Industrial Alcohol Company Limited and its President in 1925. The Canadian Industrial Alcohol Company Limited was controlled by Sir Mortimer Davis, Incorporated. 10

Sir M. B. Davis (more than three years before he made his last will) wrote Lord Shaughnessy (20th August, 1924):

Joint Case,
Vol. 3, p. 793, l. 45

“ The main object in having you join the Davis Corporation is for you to be there and look after its interests, after I pass on to some other place, where no one knows. Therefore, for my own protection I must see that you are safely installed.” 20

Joint Case,
Vol. 4, p. 113, l. 37

As to the respondent A. M. Reaper, he has been connected from about 1906 with companies with which Sir M. B. Davis was connected and from 1926 Mr. Reaper looked after Sir M. B. Davis' personal affairs and was a director of the company called “ Sir Mortimer Davis, Incorporated,” of which he was also Secretary-Treasurer and later Vice-President.

When Sir M. B. Davis died (on the 22nd March, 1928) his estate, although he had other important assets, consisted mainly of shares in Sir Mortimer Davis, Incorporated, his estate owning about ninety per cent of the capital stock of that Company. The chief asset of Sir Mortimer Davis, Incorporated, was over half of the voting shares of Canadian Industrial Alcohol Company Limited. The business of Canadian Industrial Alcohol Company Limited and its subsidiaries consisted largely of the sale of beverage alcohol to persons for exportation to the United States, which made the business hazardous and precarious owing to the United States' legislation prohibiting that business. Under the presidency of the respondent, Lord Shaughnessy, the business of Canadian Industrial Alcohol Company Limited was carried on successfully during Sir M. B. Davis' lifetime, and the business year during which Sir M. B. Davis died (ending 30th September, 1928) showed the best results that that Company had ever experienced. That year it made a net profit of \$3,136,680.14 (Exhibit P-11). Important changes then occurred 30 40

Vol. 3, p. 634

Joint Case,
Vol. 11, p. 2424, l. 15,
Vol. 10, pp. 2224
to 2230

in external conditions affecting that business. The United States made important changes with regard to the enforcement of the laws which made it more difficult for the customers of Canadian Industrial Alcohol Company Limited to export the liquor to the United States. Up to that time the Canadian government had not interfered upon the Canadian side with this export business, but Canadian legislation was also threatened, and subsequently introduced, preventing clearances being granted at the United States border for exportation to the United States. On top of these adverse influences, there came in the fall of 1929 a general and disastrous drop in stock market values of all listed shares and a concurrent and subsequent business depression of serious and unusual character. The drop in beverage shares generally and in the distillery business began in February, 1929 (Exhibit P-210). 10

Vol. 3, p. 744

So long as business was good there were no complaints or criticisms from either of the appellants, but, during the changed conditions, the female appellant in the summer of 1929 commenced to criticize and complain, and finally in November wrote (through her attorney) demanding the resignation of the two respondents as trustees and executors of the estate and from the offices and directorships held by them in Sir Mortimer Davis, Incorporated, and Canadian Industrial Alcohol Company Limited and its subsidiaries, and on the 18th January, 1930, the present Superior Court action was served upon the two respondents as defendants. No criticism or complaint of any kind was heard from the male appellant before the service of the action. 20

Joint Case,
Vol. 10, pp. 1949, 1979,
1988, 2033, l. 38, 2049,
l. 44 and following.
Vol. 5, p. 506 and
following

Joint Case,
Vol. 2, pp. 315 and 316

Joint Case,
Vol. 11, p. 2423, l. 24

The female appellant resided in France and in the latter part of the summer of 1929 she suggested to Lord Shaughnessy that she ought to nominate a director of Sir Mortimer Davis, Incorporated, to look after her interests. Lord Shaughnessy agreed to the appointment of Mr. George C. McDonald, a Montreal Chartered Accountant, but it transpired that Lady Davis intended that she also would continue to be a director herself as well as her nominee, Mr. McDonald, but Lord Shaughnessy considered that this would be contrary to the spirit and intention of Sir M. B. Davis' will under which the three executors were all to have the same powers. 30

Joint Case,
Vol. 8, p. 1477, l. 28.
Vol. 9, p. 1576.
Vol. 3, p. 980, l. 30

Joint Case,
Vol. 1, p. 157, l. 38

During the lifetime of Sir M. B. Davis the Canadian Bank of Commerce had advanced substantial sums of money to Sir Mortimer Davis, Incorporated, and to the Canadian Industrial Alcohol Company Limited, and after the institution of the present action that bank, disturbed (as it said) by the litigation and its effect, took steps to enforce payment of its advances. Nevertheless, the respondents called Sir John Aird, the President of the Canadian Bank of Commerce, as a witness at the trial, and he testified when asked, "What 40

Vol. 2, p. 281

Joint Case,
Vol. 10, p. 2181, l. 32

Joint Case,
Vol. 2, p. 287, l. 37

“do you say as to the company’s banker in reference to the general “executive management of the company?” (Canadian Industrial Alcohol Company Limited) that the bank had “always been satisfied “that we were safe in carrying it” (the company’s account) “under “the management that existed,” and during discussions with the bank concerning the outstanding loans while the trial was proceeding, the bank wrote to the respondent Lord Shaughnessy, “our first “condition would be efficient management, and in this connection “should be satisfied if you retain the position which you now occupy, “untrammelled by any additional restrictions.” 10

In concluding this reference to the facts the following chronological summary should be convenient:

Joint Case,
Vol. 10, p. 2216, l. 12

1920—The late Sir M. B. Davis retained respondent Lord Shaughnessy as special counsel.

Joint Case,
Vol. 11, p. 2258, l. 26

1921—Respondent Lord Shaughnessy on board of directors of Canadian Industrial Alcohol Company Limited. 20

Joint Case,
Vol. 9, p. 1773, l. 22

28th May, 1924—The late Sir M. B. Davis married the appellant Lady Eleanor Davis.

Joint Case,
Vol. 2, pp. 393 and following

17th September, 1924—The late Sir M. B. Davis and Sir Mortimer Davis, Incorporated, made five-year contract with respondent Lord Shaughnessy as General Counsel.

Joint Case,
Vol. 11, p. 2258, l. 30

1925—Respondent Lord Shaughnessy, Vice-President of Canadian Industrial Alcohol Company Limited.

Joint Case,
Vol. 4, p. 113, l. 36

1926—Respondent A. M. Reaper looked after private affairs of the late Sir M. B. Davis. 30

Joint Case,
Vol. 1, p. 159, l. 15

30th November, 1927—The late Sir M. B. Davis executed his last will.

Joint Case,
Vol. 9, p. 1773, l. 47.

22nd March, 1928—Sir M. B. Davis died.

Vol. 1, p. 160.

18th April, 1928—His will probated.

Vol. 2, pp. 323 and 324

25th April, 1928—Important meeting of executors. 40

Joint Case,
Vol. 2, p. 295

4th May, 1928—Appellant Lady Davis gave notarial power of attorney (as executrix) to respondents Lord Shaughnessy and A. M. Reaper as co-executors under the will of the late Sir M. B. Davis.

Joint Case,
Vol. 9, p. 1791, l. 36

12th May, 1928—Appellant Lady Davis sailed for France, after the funeral.

Joint Case,
Vol. 10, pp. 2223
and 2227

1929 (early)—Adverse outside influences affect sales of Canadian Industrial Alcohol Company Limited and market price of its securities.

Joint Case,
Vol. 10, p. 2032, l. 35.
Vol. 10, p. 2053, l. 19
Vol. 9, p. 1833

June, 1929—Appellant Lady Davis returned to Montreal and her relations with respondents were still cordial, but she wanted about \$400,000.00 a year from the estate instead of her fixed annuity of \$67,000.00.

Joint Case,
Vol. 10, p. 2033, l. 32

15th August, 1929—First letter of criticism from appellant Lady Davis to the respondents. 10

Joint Case,
Vol. 2, p. 312

5th October, 1929—Appellant Lady Davis revoked her power of attorney given on 4th May, 1928, to the two respondents.

Joint Case,
Vol. 2, pp. 315 and 316

21st November, 1929—Letters from appellants' attorney to respondents threatening legal proceedings.

Joint Case,
Vol. 1, p. 27, l. 44

18th January, 1930—Appellants' action served.

Vol. 4, p. 57, l. 2

3rd March, 1930—Trial began before Surveyer, J. 20

Vol. 11, p. 2467

30th June, 1930—Judgment dismissing action and dismissing petitions for sequestration and for injunction.

THE JUDGMENT APPEALED FROM

The respondents submit that the trial judgment is well founded in fact and in law and should be confirmed for the following, amongst other reasons: 30

(a) The trial judgment was rendered in the exercise of a discretionary power, which should not be disturbed by an appellate court under the circumstances.

(b) The trial judgment was based upon contradictory evidence upon questions of fact made by witnesses who were seen and heard personally by the trial judge when they gave their evidence and whose printed depositions only are before this court and which occupy some 2,400 printed pages, and its findings were not only amply supported by the oral evidence but particularly by the documentary evidence also contained in the record. 40

(c) No evidence was made that would justify a judgment removing the respondents from their office as trustees and executors under the will of the late Sir Mortimer B. Davis.

(d) To grant the appeal would mean the remaking in many material respects of the will of Sir M. B. Davis and would constitute an unwarrantable interference with his freedom of willing.

THE ARGUMENT

The respondents' argument will be dealt with under the following headings: 10

- (1) Law and jurisprudence.
- (2) The will of the late Sir Mortimer B. Davis.
- (3) The appellants' allegations (as plaintiffs).
- (4) The evidence.

20

(1) LAW AND JURISPRUDENCE

First: The fact that the trial judgment was rendered in the exercise of a discretionary power vested in the trial judge is clear from the wording of the articles of the Civil Code of this Province referring to the removal of trustees and executors. In those articles of the Civil Code (Articles 981 (d), 917 and 285) the wording is that trustees and executors "*may* be removed" or "*may* be deprived" and not that the court "*shall*" remove them from or "*shall*" deprive them of their offices in the circumstances indicated, but merely that the court *may* do so, and in this connection the following jurisprudence is important: 30

BEAUDOIN AND LA CORPORATION DE ST. HENRI DE LAUZON, R.J.Q., 33 K.B. 110 (1921).

This was an application for a "mandamus" against a municipal corporation. The Superior Court's judgment dismissing the application was confirmed by the Court of Appeal. Article 996 of the Code of Civil Procedure enacts that "the judge *may* order the issue of a "peremptory writ, commanding the defendant to do the thing "demanded." 40

Chief Justice Lamothe (page 111):

". La Cour de première instance a admis que les "corporations municipales peuvent être forcées, par manda-

“ mus, à remplir leurs devoirs; mais elle a déclaré que, dans le
“ cas présent, il n’y avait aucune urgence et que le deman-
“ deur avait d’autres remèdes que le mandamus ”
(page 112). “ La Cour de première instance fait usage alors
“ d’une discrétion que les tribunaux d’appel ne peuvent trou-
“ bler sans raisons graves ”.

CANADIAN BANK OF COMMERCE AND BURNETT
(liquidator), R.J.Q. 31, K.B., 424 (1921).

10

It was contended that the appellants had not obtained leave to
appeal as required under the Winding Up Act.

Mr. Justice Howard (page 429):

“ It is also well settled that it is within the discretion of the
“ judge of the trial court to decide for or against granting the
“ extension and that the Court appealed to will respect an order
“ made in the exercise of that discretion, except when it is shown
“ that there was disregard or oversight of a legal principle. In
“ this connection the concluding paragraph of the reasons
“ handed down by Mr. Justice Cross in *Calumet Metals v.*
“ *Eldridge*, already cited (20 R. de J. 21) may appropriately
“ be quoted:

20

“ “ It is true that this extension of the delay, for a period
“ more than twice the length of the time which parliament
“ in its wisdom, has mentioned in the act, involved a wide
“ exercise of judicial discretion in a matter which was in-
“ tended to be proceeded with expeditiously, but that does
“ not show that there has been error. Upon the whole, the
“ motion must be dismissed.’ ”

30

DOUGAN AND MONTREAL TRAMWAYS COMPANY,
26 K.B. 217.

MENARD AND CHOINIÈRE, 24 K.B. 528 and page 531.

40

Second: The respondents, whom the appellants seek to remove,
were appointed by the late Sir Mortimer B. Davis as trustees and
executors after he had become well acquainted with both of them,
and the terms of his will make it evident that it was only after full

consideration that he did so. It is submitted that as a result of the legal situation so created the courts must require even more clear evidence and more serious faults than would otherwise be the case before the courts could properly remove the respondents from their offices as trustees and executors.

Under the law of this Province (Civil Code, Article 831) the late Sir M. B. Davis had the following powers with regard to his estate, namely, to

“ dispose of it freely by will, without distinction as to its origin
“ or nature . . . and without reserve, restriction, or limitation ;
“ saving the prohibitions, restrictions, and causes of nullity men-
“ tioned in this code, and all dispositions and conditions contrary
“ to public order or good morals.”

10

The will of the late Sir M. B. Davis did not come within any of these exceptions and the provisions with regard to the appointment of the present respondents as two of his executors and trustees and with regard to the unusually wide powers and discretion given them were, therefore, effective.

20

Article 905 of the Civil Code gives the testator the power to name his testamentary executors, and Article 921 of the Civil Code enacts that:

“ The testator may modify, restrict or extend the powers,
“ the obligations and the seizin of the testamentary executor,
“ and the duration of his functions. He may constitute the tes-
“ tamentary executor an administrator of his property, in whole
“ or in part, and may even give him the power to alienate it with
“ or without the intervention of the heir or legatee, in the
“ manner and for the purposes determined by himself.”

30

To grant the present appeal and remove the respondents would be to make a different will than that Sir M. B. Davis thought fit to make.

MITCHELL AND MITCHELL, M.L.R., 4 Q.B. 191, confirmed by Supreme Court of Canada, 16 S.C.R. 722 (1889).

40

Tessier, J., Court of Appeal (page 194) :

“ Le jugement *a quo* paraît assimiler parfaitement la
“ position d’un exécuteur testamentaire à celle d’un tuteur.
“ Il y a une différence essentielle, en ce que l’exécuteur testa-
“ mentaire est choisi par le testateur et son libre choix doit être

“ respecté, à moins qu’il y ait des motifs d’une très grande force
“ pour le mettre de côté. Il en est autrement du tuteur; il est
“ choisi par une assemblée de parents sous le contrôle du juge,
“ et l’article 282, C.C. prononce l’exclusion absolue du tuteur;
“ il ne peut être nommé s’il a un procès pendant avec le mineur.

“ Mais cela peut-il *ipso facto* rendre nulle la nomination
“ d’un exécuteur testamentaire?

“ Il faut donc rechercher dans les faits prouvés et la con- 10
“ duite de l’exécuteur testamentaire dans la présente cause une
“ preuve suffisante pour justifier sa destitution ”.

DAME VALOIS AND J. B. DE BOUCHERVILLE, Canada
Law Reports, 1929, Supreme Court, page 234:

Rinfret, J., page 269:

“ Après tout, les tribunaux n’ont pas d’autre chose à faire 20
“ qu’à chercher la volonté du testateur et à lui donner effet, dans
“ les limites imposées par la loi.

“ Il est possible que, comme conséquence de la dispense de
“ faire inventaire et de rendre compte, de la décharge de payer,
“ du fait qu’un testateur remet la ‘ disposition des biens dans
“ ‘ responsabilité ’, de la discrétion laissée au fiduciaire et de sa
“ soustraction voulue à tout contrôle quelconque, il en résulte
“ que certains cas, la fiducie n’existe que de nom (Mignault,
“ Droit Civil, vol. 5, p. 171). Mais l’on ne peut éviter d’ad-
“ mettre que ces dispositions et ces décharges sont autorisées 30
“ par le code. Après tout, la loi du Québec comporte la liberté
“ illimitée de tester, restreinte seulement par le code ”.

Third: The provisions of the Civil Code with regard to the
removal of trustees and executors are the following:

“ *Article 981d.* Trustees dissipating or wasting the property 40
“ of the trust, or refusing or neglecting to carry out the provi-
“ sions of the document creating the trust, or infringing their
“ duties, may be removed by the Superior Court.”

“ *Article 917.* If, having accepted, a testamentary executor
“ refuse or neglect to act, or dissipate or waste the property or

“ otherwise exercise his functions in such a 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.”

The provisions of the Civil Code with regard to the dismissal of a tutor (referred to in Article 917 above) are found in the following article of the Civil Code:

“ *Article 285.* The following persons are also excluded from 10
“ tutorship, 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.”

The respondents have not been able to find a great deal of reported jurisprudence applicable to the above provisions of our law, 20
but it is submitted that the following cases do justify the judgment appealed from and the contentions of the present factum:

BRUNET AND BRAZIER, R.J.Q. 7, Q.B. (1897), page 166.

Blanchet, J., page 183 (after referring to certain information which the legatees were not given although they were entitled to it):

“ Il ne suffit pas qu'il y ait des différences d'opinion entre 30
“ les fiduciaires pour destituer l'un d'eux au hasard, même s'il
“ y avait entente entre l'appelant et Paré, sans une preuve posi-
“ tive que cet accord entre eux a pour but et surtout pour résul-
“ tat de nuire aux intérêts de la succession, car les tribunaux
“ ne peuvent user de leur pouvoir que dans le cas où les fidu-
“ ciaires dissipent ou gaspillent les biens, refusent ou négligent
“ de mettre à exécution les dispositions du testament, ou man-
“ quent à leurs devoirs (981d), et la preuve sur tous ces points
“ nous paraît faire absolument défaut dans la présente cause ”.

MYERS AND MYERS, R.J.Q. 42, S.C., page 415, Court of Review, 1912. 40

Bruneau, J. (for the Court of Review), page 421:

“ Dans l'application de l'article 917 c.c. qui énumère ces
“ causes de destitution, les tribunaux n'ont usé de leur pouvoir

“ de révocation que dans des cas, pour ainsi dire exceptionnels
..... (page 430). “ Si l’on considère que le testateur a le
“ droit de disposer de ses biens, tel et de la manière qu’il l’en-
“ tend, pourvu que ses dispositions ne soient contraires, ni à
“ l’ordre public, ni aux bonnes mœurs, art. 831 c.c.; qu’il peut
“ modifier, restreindre, ou étendre les pouvoirs, les obligations,
“ la saisine de l’exécuteur et les devoirs de son administration,
“ art. 921 c.c.; si l’on considère le testateur, avec la loi romaine,
“ comme un législateur au milieu de sa famille, *disponat testator*
“ *erit lex*;—qu’il est de principe, en cette matière, suivant notre 10
“ droit, que toute disposition du testament non contraire à la
“ loi doit avoir son plein et entier effet, parce qu’elle repose sur
“ la liberté absolue de tester ”.

GOLDSTEIN AND MONTREAL TRUST COMPANY,
R.J.Q. 31, K.B. (1920), page 157.

Martin, J., page 159:

“ It is perhaps commonplace to remark that the rule in con- 20
“ struing a will is not to venture into conjecture but to find out
“ the intent of the testator from the terms of the will and sur-
“ rounding circumstances. The question is not what he intended
“ to say but what is intended by what he did say. We cannot
“ make another disposition for the testator nor substitute our
“ judgment for his. We must interpret to the best of our ability
“ the disposition made by him and give effect to the testator’s
“ intention as disclosed by the words which he has used.

“ La volonté testamentaire est despotique. Elle s’exerce 30
“ sans contrôle, et devient par là même plus difficile à pénétrer.
“ V. Dalos (Disposition entrevifs et testamentaire, No 3483).

“ These rules of construction were approved by the Privy
“ Council in the recent case of Auger v. Beaudry (48 D.L.R.
“ 356).

“ Our law, C.C. 831, permits of practically absolute freedom
“ in disposing of one’s property by will.” 40

Confirmed by Supreme Court of Canada, 63 S.C.R. (1921), page 207.
Anglin, J., page 216:

“ It is trite law, recently restated in the Privy Council
“ (Auger v. Beaudry (1929, A.C. 1010)) that speculation or con-
“ jecture as to the motives that may have influenced the testator

“ in giving to his bequests the form in which we find them can-
“ not warrant a refusal to give effect to the fair and literal mean-
“ ing of the actual language he has used.”

(2) THE WILL

The basis of this litigation is an attack upon the majority of the persons administering and controlling the estate of the late Sir M. B. Davis under the terms of the will appointing them.

10

Joint Case,
Vol. 1, pp. 148 to 159

The will is of an unusual and special character, and the following provisions of it are very important in this connection:

Vol. 1, p. 148, l. 40

Article V. The testator bequeathed in trust to his trustees and executors all his estate and property “ to be dealt with, administered “ and disposed of by them as follows:”

20

Article XIV. After providing for the ultimate residuary legatees, the testator added:

Vol. 1, p. 155, l. 18

“ My trustees and executors shall not be bound to call to
“ the inventory of my estate the beneficiaries or anybody on
“ their behalf mentioned in the foregoing sub-sections . . . and
“ none of the beneficiaries so mentioned shall be entitled to in
“ any manner question the acts of my said trustees and executors
“ or to demand from them anything more than an ordinary
“ account of their administration.”

30

Article XV:

Vol. 1, p. 155, l. 25

“ Except where otherwise decided by my Trustees and
“ Executors or to make payment of particular legacies as pro-
“ vided for in this Will, I direct that the capital of said residue
“ of my Estate shall remain absolutely vested in the hands of
“ my Trustees and Executors for a period of at least fifty years
“ from the date of my death, during which period no beneficiary
“ shall be entitled to demand any partition of my Estate. My
“ Trustees and Executors may in their absolute and uncontrolled
“ discretion make partitions of my Estate, partial or entire, prior
“ to the expiration of the period above named should they con-
“ sider it desirable and proper to do so, but not otherwise.

40

“ In explanation of this provision of my Will I desire to
“ state that the greater part of my Estate consists of notes or

“ debentures and shares of Sir Mortimer Davis, Incorporated,
“ a Company presently organized under the laws of the Province
“ of Quebec. In this Company is vested the control of several
“ important undertakings, all of which I believe by proper man-
“ agement will greatly increase in value and thus yield in capital
“ and revenue a great benefit to my Estate.

“ To disturb the organization of this Company would result
“ in a depletion of its resources and would prevent the develop- 10
“ ment of various undertakings entrusted to its care and to the
“ care of its officers and directors. I therefore expressly direct
“ and require that the beneficiaries of this Will shall not disturb
“ by their demands or actions the carrying on of the said Sir
“ Mortimer Davis, Incorporated, in any manner which in the
“ opinion of the directors of such Company may be prejudicial
“ to its interests.”

When Sir M. B. Davis made this Will the respondents were both
directors of Sir Mortimer Davis, Incorporated, but the appellant 20
Lady Davis was not, and there is no indication in the Will that she
was ever to become a director of that Company. The testator ob-
viously expected her to continue to live in France.

Vol. 3, p. 980, l. 45

The beneficiaries referred to in article XV are clearly the
appellants. Lady Davis contended for the first time in the summer
of 1929 that they were entitled to have distributed to them all the
revenues of the Incorporated Company without regard to its other
or future necessities (Exhibit P-195).

It is submitted that this was a fundamental error in law and a 30
misconstruction of appellants' rights under the Will and was one of
the real causes of appellants' action.

Respondents construed this clause as indicating that the Incor-
porated Company was to carry on after Sir Mortimer's death sub-
stantially as before, having regard, of course, to the estate's financial
necessities, but maintaining its separate corporate existence and
activities.

It is submitted that respondents were right in this interpretation 40
of the Will, but even if they were wrong—which has not yet been
found by any court—that would be no ground for their removal from
office unless they persisted in a mistaken legal view of the law after
the courts had clearly so declared.

Article XVIII. Article XVIII, which gave the trustees and
executors wide discretionary powers, reads as follows:

Joint Case,
Vol. 1, p. 156, l. 30

“ I give my said Trustees and Executors the seizin and
“ possession of all my property, both movable and immovable,
“ hereby extending their power and authority as such beyond
“ the year and day limited by law until the full accomplishment
“ of this my Will, and I hereby give them power to borrow
“ money and oblige my Estate for such obligations as they may
“ see fit (including endorsements, guarantees and other obliga-
“ tions of a commercial or business nature), to compromise,
“ transact and accept part in satisfaction of the whole of any
“ claim by my Estate, to grant Main Levee and Discharge of 10
“ security with or without receiving consideration, to sell, ex-
“ change, dispose of, pledge, hypothecate and alienate the whole
“ or any part of my property, movable or immovable, as they
“ may see fit, to receive the consideration therefor, to invest
“ and reinvest the monies of my Estate in such investments as
“ they may consider advisable, without being limited to the
“ investments in which Trustees and Executors are by law re-
“ quired to invest, to decide whether assets and liabilities are to
“ be credited or charged to the capital or revenue of my Estate
“ as the case may be, to employ such professional or other assist- 20
“ ance as they may deem requisite in the discharge of their
“ duties, and to appoint agents and attorneys for such purpose,
“ to advance monies to my Estate and any advances so made,
“ with the interest thereon, shall be a first charge against my
“ Estate, to make advances to any beneficiaries hereunder from
“ time to time as they may see fit, and to do any act authorized
“ herein without obtaining judicial authorization, even though
“ some of the interested parties may be minors or otherwise
“ incapable.”

30

Articles XIX and XX. After treating broadly their power to make partitions of the estate and exempting them from giving security and other formalities, Article XX ends with the provision:

Joint Case,
Vol. 1, p. 157, l. 28

“ My said Trustees and Executors shall all have the same
“ powers and be responsible for good faith only and each only
“ for his or her own acts and deeds.”

Vol. 1, p. 158, l. 1

Article XXII. The trustees and executors are instructed that 40
the estate records were to be kept in the office of Sir Mortimer Davis, Incorporated, unless all otherwise agree.

Article XXIII. After charging the trustees and executors to take an active and energetic interest in the management of the estate, Article XXIII contains important provisions, namely:

Vol. 1, p. 158, l. 8

“ to carry out the policies I have laid down and particularly to
“ conserve the capital of my Estate and not to sacrifice the same
“ by premature liquidation.”

Article XXV. The testator's intention to give his trustees and executors the widest possible discretionary powers is shown clearly by Article XXV, which contains the following provision:

Vol. 1, p. 158, l. 28

“ My Trustees and Executors shall have power to deter- 10
“ mine all questions and matters of doubt which may arise in the
“ course of their administration, realization, liquidation, parti-
“ tion and winding up of my Estate, and their decision, whether
“ made in writing or implied from their acts, shall be conclusive
“ and binding upon all parties concerned.”

The question for the court is not whether these provisions are wise. They are obviously legal and must be respected and given effect to by the courts.

(3) THE APPELLANTS' ALLEGATIONS (AS PLAINTIFFS) 20

Joint Case,
Vol. 1, pp. 1 to 27

In view of the unusual size of the printed record, it may be useful to submit the following reference to the allegations contained in the declaration filed by the appellants as plaintiffs. Their amended declaration contains 118 paragraphs and occupies 27 pages of the printed case, and includes the following allegations:

Vol. 1, p. 1, l. 1

(a) *The Will.* The appellants first allege and file the will of the late Sir M. B. Davis, which is also expressly “ invoked and relied upon ” by the respondents. The provisions of that will are of great importance in connection with the present litigation and justify the trial judgment. 30

Vol. 1, p. 28, l. 8,
and p. 65, l. 7

Vol. 1, p. 2, l. 30,
p. 28, l. 15, p. 65, l. 15

(b) *The Incorporated Company.* The respondents both also admit the appellants' allegations in paragraph 6 of the declaration with regard to the Incorporated Company, “ Sir Mortimer Davis, Incorporated.” That Company was incorporated long before the death of Sir Mortimer Davis, and Article XV of the will contains important provisions with regard to that Company. 40

Vol. 1, p. 155, l. 25

Vol. 1, p. 3, l. 22,
p. 29, l. 1, p. 66, l. 1

(c) *Canadian Industrial Alcohol Company Limited.* Both the appellants' declaration and the pleas of the respondents contain allegations that the most important asset of Sir Mortimer Davis, Incorporated, is the shares of the capital stock of Canadian Industrial Alcohol Company Limited and (as will be discussed later) it was evidently the unavoidable but unfortunate slump in the market value

of that Company's stock and the falling off of its sales that caused the dissatisfaction of the appellants, who (as the respondents contend) improperly and unfairly seek to blame the respondents for those conditions, which affected the whole distillery industry.

(d) *Personal Attacks.* There are lengthy paragraphs concerning a number of alleged details which the respondents contend constitute untrue or distorted allegations which show the improper spirit of the appellants in this litigation. Paragraph 39 of the declaration accuses the respondents of "incapacity, dishonesty and total unfitness." 10
Paragraphs 42 and 43 accuse the respondent Lord Shaughnessy of "unlawfully, wrongfully and fraudulently converting to his own "use" assets of the estate. Paragraph 60 alleges that respondent Lord Shaughnessy unlawfully and fraudulently kept female appellant uninformed, "at times meeting her legitimate demands for information with menaces." Paragraph 62, that he was "guilty repeatedly of gross breaches of trust." Paragraph 65, that he systematically withheld important information from female appellant and "deliberately deceived her on many occasions . . . and is at the 20
"present time surreptitiously carrying on negotiations" for a merger. It is submitted that the trial judge has properly found that the appellants failed to prove these allegations.

Joint Case,
Vol. 1, p. 8, l. 37
Vol. 1, p. 9, l. 30

Vol. 1, p. 14, l. 24

Vol. 1, p. 14, l. 45

Vol. 1, p. 15, l. 16

THE EVIDENCE

The very large amount of oral and documentary evidence contained in the printed Joint Case makes it important for the parties to indicate to the appeal court what are the important features of that evidence with reference to the issues in this litigation, and the respondents submit that the following references justify the trial judgment and show clearly that the appellants are not entitled to be granted the conclusions of their action: 30

Vol. 1, p. 24, l. 30

First: The appellants have thought fit to allege for the purposes of their litigation "that the administration of the affairs of the "Alcohol Company by the defendant Shaughnessy, as President . . . 40
"demonstrates his absolute incapacity and total unfitness to discharge the duties of such office." This, if proved, would be an important consideration with reference to the conclusions prayed for by the appellants in this action (although those conclusions do not specifically cover this office), but the respondents confidently submit that the evidence is to the contrary effect, as is clear by the following references:

Vol. 2, p. 292, l. 42.
p. 281, l. 42.
Vol. 2, p. 283, l. 30

(a) There is no doubt that amongst the severest as well as the most competent critics of the management of any commercial enterprise are the responsible officers of the bank that has loaned substantial sums of money to that enterprise. At the time that the present litigation was instituted by the appellants the Canadian Industrial Alcohol Company Limited owed the Canadian Bank of Commerce \$2,500,000.00, and Sir Mortimer Davis, Incorporated, owed the same bank more than that amount. The respondent Lord Shaughnessy was President of both of these companies. After the trial of the present case had been going on for more than two weeks, accompanied by much publicity with regard to the intimate affairs of both companies) the Canadian Bank of Commerce made written demand for the payment of the latter debt and the Montreal manager of that bank wrote on the 24th March, 1930: 10

Vol. 2, p. 287, l. 15

“ It appears that according to your construction of the letter of the Attorney for the Plaintiffs he implies that a settlement of the lawsuit by the resignation of yourself and Mr. Reaper and the appointment of new Executors and Directors would satisfy the Bank. 20

“ The reasons for the action taken by the Bank are clearly indicated, in our letter to you of 21st instant and there are no other reasons, and it was not intended that any other reasons should be inferred or implied from the language used.

“ In so far as our position of creditor and holder of securities is concerned, it is, in our opinion, undesirable that any change should be made in the direction and management of the Companies, as this would have the effect of disrupting the business at a most critical period. Having in view the probable results of the proposed legislation referred to in our letter to you of 21st March, it would appear to us that your knowledge and experience of the operation of the distillery business, which form the basis of the undertakings of all the Companies concerned, should be invaluable at this juncture. 30

“ We repeat what is stated in our letter to you of 21st instant that the result of a continuance of the present litigation may well be that the securities now held by the Bank may depreciate still further to a point where they may prove inadequate to protect the Bank's loans. 40

“ Should we have further business relations with the Companies concerned, our first condition would be efficient management and in this connection we should be satisfied if you

“ retained the positions which you now occupy untrammelled by
“ any additional restrictions.”

(b) Sir John Aird, the President of the Canadian Bank of Commerce, was heard as a witness at the trial and after explaining the relations of his bank and of himself with the respondent Lord Shaughnessy and with the companies of which the latter was President, Sir John Aird testified that he happened to be in Cannes, France, and saw the late Sir M. B. Davis personally there the day the latter died and that Sir M. B. Davis then said that “ he had every
“ confidence of the business being capably managed while he was
“ away.” In answer to questions referring to the falling off in the profits of Canadian Industrial Alcohol Company Limited since the death of Sir M. B. Davis, Sir John Aird testified:

Vol. 10, p. 2179, l. 10

Vol. 10, p. 2180, l. 15

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Vol. 10, p. 2185, l. 40

“ What affected the business adversely was, in my opinion,
“ the increased competition and the adverse legislation which
“ had been rumoured both in Canada and the United States, and
“ those, I think, were the material things that affected the prog-
“ ress of the company.”

20

The witness was also asked:

Vol. 10, p. 2181, l. 30

“ What do you say as the Company’s banker, in reference
“ to the general executive management of the Company?”

and he answered:

“ Well, of course, in taking up any important account, one
“ of the first things we consider is the management and if we did
“ not think the management was satisfactory, we naturally
“ would not take it up. In this case we have had the account;
“ we have always been satisfied we were safe in carrying it under
“ the management that existed.”

30

Vol. 7, pp. 1086
and 1087

Vol. 10, pp. 2217
and 2218

(c) There is another useful indication of the recognized ability of the respondent Lord Shaughnessy and his suitability for the position of President of the companies in question, namely: the other directorships and offices that he held. He was a director of the Canadian Pacific Railway Company; director of West Kootenay Light and Power Company; director and chairman of the board of Yorkshire Insurance Company; director of Canadian Salt Company; director of Canadian Bank of Commerce; director of Lake of the Woods Milling Company.

40

(d) It is important to note also the evidence showing the comparative results of the operations of Canadian Industrial Alcohol

Vol. 7, p. 1051, l. 48
Vol. 3, p. 678
Vol. 7, p. 1052 and following

Company Limited and its subsidiaries during the presidency of the respondent Lord Shaughnessy and at other times. Lord Shaughnessy became President of Canadian Industrial Alcohol Company Limited on 15th December, 1925, and Exhibit D-88 shows that for the four years preceding his accepting that office the gross profits of Canadian Industrial Alcohol Company Limited and its subsidiary companies were \$8,795,513.75 and the net profits \$5,598,012.55, while for the first four years of the presidency of the respondent Lord Shaughnessy the gross profits amounted to \$14,098,733.13 and the net profits \$10,306,992.34, and by far the best year in the Company's history was the third year of his presidency (1928) when the gross profits for that year alone were \$4,174,193.46 and the net profits \$3,117,541.63. This exhibit was produced and explained by Mr. J. G. Lawrence, the Secretary of Canadian Industrial Alcohol Company Limited, who was called by the appellants. 10

Vol. 3, p. 678

During these four years of Lord Shaughnessy's presidency, Canadian Industrial Alcohol Company enjoyed unparalleled prosperity. The increase in gross profits over the previous four years (during which Sir Mortimer himself was much more in Canada than in the succeeding years) was 60 per cent and the increase in net profits 84 per cent (Exhibit D-88). 20

Vol. 3, p. 679

There was also an enormous increase in the distributions to the shareholders. In the years 1922-1925 dividends aggregated \$2,224,000.00, with a cash bonus one year of \$200,000.00. During the years 1926-1929 under Lord Shaughnessy, the shareholders received in cash dividends \$5,488,406.62 and a cash bonus of \$273,166.50, and a stock bonus, reckoning the stock at about 25 per cent of its then market value, of \$807,900.00 (Exhibit D-88 and Exhibit P-143). 30

Vol. 3, p. 756

There was also a tremendous increase in other assets. Manufactured spirits on hand increased from 2,593,908 proof gallons on September 30th, 1925 (just before Lord Shaughnessy became President) to 7,958,670 proof gallons at September 30th, 1929 (Exhibit D-89).

Vol. 3, p. 757

There was a noticeable increase in quantity manufactured almost every year under Lord Shaughnessy's presidency (Exhibit P-109). The same exhibit shows that there was also a substantial reduction in the later years in the average net manufacturing cost per gallon. 40

Vol. 3, p. 642

The manufactured spirits on hand as at September 30th, 1929—the end of the last fiscal year of the Company before this action was instituted and tried—had an insured value of \$27,942,022.63 for Canadian Industrial Alcohol Company alone (Exhibit P-144). Including its subsidiaries the total manufactured spirits on hand were

insured for \$32,120,873.75. This represented an enormous increase over any previous condition in the Company's history. There was also a striking increase in the Company's fixed assets and those of its subsidiaries, amounting to upwards of \$1,000,000.00 during its last financial year 1928-1929, as shown on Exhibit P-118.

Vol. 3, p. 677

(e) The attack made upon the respondents, and particularly upon Lord Shaughnessy, by the appellants included references to the alleged alienation of "the confidence and interest of the public" and "the lack of public confidence," and the appellants were permitted, under reserve of the strenuous objections made on behalf of the respondents, to produce a large number of newspaper clippings which resulted in the respondents having also (under reserve of their objections) to produce other clippings, and the respondents now submit again their contention that these newspaper clippings do not constitute legal evidence and would not be important in any event, but that if taken into consideration at all it should be noted that those clippings include the following:

Vol. 3, pp. 715 to 738
and pp. 768 to 783

The issue of "Financial Service" of 28th November, 1929, contains the following:

Vol. 3, p. 736, l. 17

"The decline in the price of 'Alcohol' has resulted in criticism being levelled at the management. The death of Sir Mortimer Davis has made no difference to the management, as he took no practical hand for some years prior to his death, Lord Shaughnessy being in complete charge. Whilst Lord Shaughnessy has not had a great many years' experience in the liquor industry, he is a clever and capable executive with a wide knowledge of commercial and financial matters and he has the happy faculty of surrounding himself with exceptionally capable men on whose shoulders rests the practical management of the various departments of the business under their charge. There has been no change in management since 1928 when record earnings were reported, and it is the same today as then, the three vice-presidents of the company being outstanding men of many years' practical experience in the distillery business."

(f) The appellants do not make so violent an attack upon the respondent A. M. Reaper, but they do make general allegations that include the respondent A. M. Reaper, so that it should be pointed out here that not only does the fact of his being chosen by the late Sir M. B. Davis as one of the trustees and executors under his will indicate clearly Mr. Reaper's suitability and ability for the post, but

Vol. 4, pp. 113 to 313.
All of vol. 5.
Vol. 6, pp. 634 to 801.
and Vol. 8, pp.
1443 to 1472

one has only to consider the 715 printed pages of his evidence at the trial to realize his unusual ability as an expert accountant and his able, thorough and constant exercise of his duties in this connection. These long depositions of the respondent A. M. Reaper contain an unusually clear and accurate discussion of very lengthy and complicated statements and figures of all kinds that lasted many days. The trial judge after seeing and hearing the witness A. M. Reaper for so long a time made a specific finding in this sense.

Vol. 11, p. 2492, l. 20

10

Second: There is no doubt that the alcohol sale profits have fallen during the last year or so and that the stock market value of the shares of Canadian Industrial Alcohol Company Limited has shrunk greatly, and another allegation of the appellants which, if proved, would be a matter for serious consideration by the court upon the issues in this litigation is that the falling off in sales and the shrinkage of the stock market value of the shares were caused by the respondents' faults and particularly the faults of the respondent Lord Shaughnessy. The respondents respectfully submit, however, that the result of the evidence is directly the contrary and that these adverse conditions with regard to the sales profits and the stock market values were the result of circumstances clearly beyond the control of either of the respondents, as is clear from the following evidence:

Vol. 1, p. 8, l. 32,
p. 18, l. 20, and
p. 26, l. 5

20

(a) Canadian Industrial Alcohol Company Limited, a large block of whose shares constitute the main asset of Sir Mortimer Davis, Incorporated, depends chiefly for its profits upon the manufacture and sale of beverage alcohol, while the market for beverage alcohol is very restricted and consisted of sales for export across the United States border and sales for export by sea to foreign ports and sales to the Liquor Commissions of the Canadian Provinces.

Vol. 10, p. 2220, l. 43
Vol. 10, p. 2221, l. 34

30

The respondent Lord Shaughnessy gave the following evidence in this connection:

Vol. 10, p. 2222, l. 45

“ Q.—You have just stated it is a most precarious business.
“ Has that characteristic become better or worse within the last
“ year or two?

“ A.—Very decidedly worse. The precariousness of the
“ business is due to the fact that it is a business conducted in a
“ commodity largely purchased by people who have no right to
“ purchase it; who take tremendous risks in purchasing it; and
“ who change from day to day.

40

“ Q.—What was the second category to which you referred?

“ A.—The second category to which I referred was the ex-
“ port over the Detroit River—the duty paid export.

“ Q.—The Detroit River business?

“ A.—Yes.

“ Q.—What is the situation with regard to that business today, and what has it been for the past year, compared with what it was previously? I mean, as to the conditions surrounding it?

“ A.—Commencing in the early part of 1929—January and February—that business was sorely crippled. Today it is “ killed.”

10

He then explained certain provincial and federal alterations in their regulations and continued:

Vol. 10, p. 2223, l. 29

“ Q.—What was the effect of those coincident activities of the Provincial and Federal Governments?

“ A.—It greatly curtailed the shipments, through hampering and impeding the facilities.

20

“ Q.—And, did that affect the business of the Canadian Industrial Alcohol Company?

“ A.—Very materially, and far more than the other businesses.” . . .

Vol. 10, p. 2224, l. 21
and following

“ Q.—In addition to those Federal and Provincial activities, what was the effect of the legislation and the threat of legislation now being realized with regard to the Canadian control of the border?

“ A.—The threat of legislation as to the closing of the border, or the prohibitions against shipment, or the clearance of vessels—

30

“ Q.—(interrupting) This is Canadian legislation?

“ A.—Yes, Canadian legislation—had some effect upon the business of the Company for the reason that it caused apprehension among the buyers. But, it had a far greater effect upon the securities of the Company.

“ Q.—The market price of the securities of the Company?

“ A.—The market value of the securities.

“ Q.—You say it had some effect on the volume of business?

40

“ A.—Yes, it had some effect on the volume of business.

“ Q.—What has been the fact, say, during the past few months or the past year, with regard to the activities on the southern side of the border as to prevention and control of export shipments in that direction, compared with what those activities had been previously?

“A.—With the election of Mr. Hoover as President of the United States, and the programme upon which he went into office against his opponent, Mr. Smith, there was a tremendous increase of vigilance in the United States against the import of alcoholic liquors.

“ Q.—Had that any effect upon your Company’s business?

“ A.—Yes, very decidedly.

“ Q.—Mr. Lawrence has shown by the figures that there was a reduction in your Company’s sales last year as compared with the previous year. What, in fact, was the cause, or what the causes, of reduction? 10

“ A.—One of the principal causes, as I have just explained, was the falling off of this border business; which is by long odds the profitable business. Another cause was increased vigilance, causing in many cases a big loss of cargoes on the high seas. Arrests and indictments of operators in the United States—

“ Q.—(interrupting). Indictments issued in the United States? 20

“ A.—In the United States.

“ Q.—Have the United States issued indictments against others apart from operators?

“ A.—Oh, yes.

“ Q.—For example, what other classes have indictments been issued against?

“ A.—There have been indictments issued against distilleries, in some cases—officers of distillers.” 30

(b) George C. McDonald, the accountant called by the appellants as their chief critic of the respondents, had to admit (under cross-examination) as follows:

Vol. 9, p. 1590, l. 16

“ Q.— . . . the distillery shares all showed decline, did they not?

“ A.—I understand they did.

“ Q.—Did not that suggest to you there was a condition in the industry which was peculiar and reflected adversely on the Stock Market condition? 40

“ A.—There was something in that which was largely responsible.

“ Q.—You have been in Court since this case started?

“ A.—I think every day.

“ Q.—You assisted counsel on points on which they asked your assistance?

“ A.—Sometimes even unasked.

“ Q.—You have heard the evidence about the newspaper
“ publicity given, real or imagined adverse opinions affecting
“ the distillery shares. Whether they were true or whether they
“ were false, they obtained wide circulation in the Press?

“ A.—Yes.

“ Q.—And threatened hostile legislation, among other
things?

“ A.—Yes. I have heard of that.

“ Q.—Stiffening of the export regulations on the Detroit 10
“ border. Do you remember that has been testified to?

“ A.—I think stiffening of the export regulations on the
“ whole Canadian border.

“ Q.—Stiffening of the export regulations on the Canadian
“ and United States border?

“ A.—I have heard that.

“ Q.—Threats of hostile legislation at Ottawa?

“ A.—Yes.

“ Q.—And consequent uncertainty of the future of the 20
“ industry?

“ A.—Yes.

“ Q.—Well, now, insofar as these conditions were common
“ to all the distillery shares, the distillery industry, you do not
“ suggest Lord Shaughnessy had any special responsibility for
“ that, do you?

“ A.—I have just intimated that the Canadian Industrial
“ Alcohol suffered a bigger decline than any of the others.

“ Q.—I heard you say that a number of times.

“ A.—Bad management of that company might very well 30
“ have contributed a considerable portion to the development.

“ Q.—You think bad management in Alcohol might have
“ contributed to the decline in all the shares in that industry?

“ A.—It might have brought about a certain portion of the
“ general drop.

“ Q.—I want you to be frank with me.

“ A.—I think the management in Canadian Industrial Al-
“ cohol might well help to raise them.

“ Q.—Is it not fair to suggest that there were conditions 40
“ in the industry for which Lord Shaughnessy had no more res-
“ ponsibility than you had which contributed to the serious
“ decline in the market value of Alcohol shares?

“ A.—There were no doubt such conditions.”

Third: The appellants went so far as to allege that the res-
pondent Lord Shaughnessy “ has systematically withheld ” from the

Vol. 1, p. 14, l. 23

Vol. 10, p. 2053, l. 18

female appellant important information “ and has moreover deliberately deceived her on many occasions ” and “ fraudulently kept her uninformed . . . at times meeting her legitimate demands for information with menaces.” In this connection it is important to note that the female appellant herself testified that her “ relations with Lord Shaughnessy were still cordial down to June, 1929,” and, when under cross-examination at the trial:

Vol. 10, p. 1948, l. 47

“ Q.—Following your return to France in May, 1928, down until the end of December, 1928, did you receive any of these monthly statements? 10

“ A.—No. never.

“ Q.—Did you write Lord Shaughnessy or Mr. Reaper, inquiring why not?

“ A.—No. I told you before, Mr. Campbell, if you remember, I did not want to make a nuisance of myself. I thought they were busy settling the affairs of the Estate, and I had always heard that it took a reasonable length of time, a year, to do that sort of thing. I did not want to trouble them or worry them. I thought they might have sent them to me. 20

“ Q.—Well, you thought they might have sent them. You did not express that thought to them at that time?

“ A.—No. I did not want to be an unnecessary bother. I trusted him implicitly, otherwise I would not have given him a Power of Attorney.

“ Q.—I am not blaming you at all for not doing so, Lady Davis, I am establishing the fact that you did not receive them?

“ A.—No, I did not. 30

“ Q.—And you did not, down to your return to Montreal in the month of June, 1929, make any request to Lord Shaughnessy or to Mr. Reaper that you be furnished with these monthly statements?

“ No. I did not.

“ Q.—Lord Shaughnessy, when he visited you in the summer of 1928, handed you a preliminary statement which had been prepared, showing the condition of affairs of the Estate as at the date of Sir Mortimer’s death? 40

“ A.—Yes.

“ Q.—That is the statement which you filed in the course of your testimony as Exhibit P-50, which I now show you, is it not?

“ A.—Yes.

“ Q.—When you received that statement from Lord Shaughnessy, did you make any comment upon it?

“ A.—No.

“ Q.—Did you examine it?

“ A.—Yes.

“ Q.—That was in the summer of 1928?

“ A.—Yes.

“ Q.—And the next statement, I think you said you received was, the Financial Statement of the Incorporated Company as at September 30th, 1928?

“ A.—Yes.

“ Q.—That would be the end of the Company’s financial year following your husband’s death? 10

“ A.—Yes.

“ Q.—And you received that financial statement sometime in November or December 1928?

“ A.—Yes.

“ Q.—And you acknowledged it to Lord Shaughnessy in the letter which is already filed under date of 31st of December 1928, as I recall?

“ A.—Yes. 20

“ Q.—When you got that statement of the Incorporated Company as at September 30th, 1928, which has been filed as Exhibit P-51, did you examine it?

“ A.—Yes.

“ Q.—Did you hold any communication with Lord Shaughnessy or Mr. Reaper in reference to it, other than to acknowledge its mere receipt?

“ A.—No.”

“ Q.—So that from the 4th of July, 1929, your relations for the first time began to be a little strained? 30

“ A.—Yes.”

“ Q.—Up to the 4th of July, 1929, your relations with your Co-Executors had been quite amicable?

“ A.—Yes.

The statement of Sir Mortimer Davis, Incorporated, dated September 30th, 1928, which Lady Davis says she received and examined, was full and complete, but she makes no comment whatsoever upon it. All she says is: “ Received the September statement of the Sir Mortimer Davis Inc.”—and then goes on to talk about her “ boy friends,” etc. (Exhibit D-15). 40

Vol. 10, p. 1070, l. 24

Vol. 2, p. 302, l. 45

Until the summer of 1929, when she began to be worried by the general business conditions referred to above, not one constructive suggestion was made or any criticism uttered by Lady Davis. There

Vol. 9, p. 1607

was neither suggestion nor criticism from the other appellant down to the day the action was served. The respondents continued to employ after Sir Mortimer's death the same auditors as he had employed for the last ten years of his life, Messrs. Price, Waterhouse & Company, a leading firm of Chartered Accountants. At the end of every financial period they prepared complete reports both of Sir Mortimer Davis, Incorporated, and of the Estate. These reports were furnished to Lady Davis. Mr. MacDonald, her expert accountant, admits that they are complete and comprehensive, and there is not one word of attack on the accuracy of these reports, which contain no criticism of the administration by respondents of either the Estate or the Company. 10

It is submitted that Lady Davis was kept as fully informed as she desired to be or as was reasonable in the premises.

Vol. 11, p. 2270, l. 16

Fourth: Not only did the late Sir M. B. Davis know the respondents very well, and particularly Lord Shaughnessy, but Sir M. B. Davis took much trouble and incurred substantial expense in order to induce the respondent Lord Shaughnessy to give up the active practice of his profession of the law and to identify himself with Sir M. B. Davis' enterprises. The contract that was consequently drawn up is filed as an exhibit (P-13) and Sir M. B. Davis' purposes in that connection were further indicated by his letter written a month earlier, in which he said to Lord Shaughnessy: 20

Vol. 2, pp. 393 to 397

“ I am quite willing to secure you in any way that is fair, in case
“ of anything happening to me.

Vol. 3, p. 793, l. 45

“ The main object in having you join the Davis Corpora- 30
“ tion is for you to be there and look after its interests after I
“ pass on.”

Vol. 1, p. 11, l. 35

The appellants in their search for allegations to bolster up their present litigation have thought best to attack even this clear arrangement that was made in 1924 and completed in 1929, and have alleged that that contract:

“ was and is null and void *ab initio* for the reasons that such gift 40
“ was revocable at the mere will of the Donor and was not made
“ in notarial form and *en minute*, and had never been registered
“ in the manner required by law.”

In other words, after the respondent Lord Shaughnessy had more than five years previously entered into the contract in question and consequently given up the practice of his profession and changed his

Vol. 2, pp. 413 to 416

whole occupation and future prospects, and after that contract had been duly executed and completed five years later, the appellants allege as one of their reasons for demanding from the courts the removal of the respondents from the offices to which they had been appointed by the will, that that old agreement had not been made in notarial form and had not been registered. It was identical in form with that of his predecessor in office, Mr. Waddell, and appellants have never suggested any illegality in the Waddell agreement. The respondents will confidently contend, if necessary, at the right time and place that no such formalities were required under the circumstances, but reference is now made to these allegations in order to submit that they are entirely irrelevant and further that they are an indication of the straits that the appellants found themselves in when they came to endeavour to formulate allegations as a basis leading up to the conclusions that they had decided to pray for. The issue in reference to the legality of that contract is at present the subject of another contested action between these parties which has not yet been tried. It obviously cannot be adjudicated on in these proceedings, but respondents were certainly justified in considering it prima facie valid when, up to the time it was completely fulfilled, no suggestion of illegality had ever been made by anyone. 10 20

Fifth: The appellants, as plaintiffs, made a large number of other allegations which are shown (as the respondents contend) either to be untrue or improperly and unfairly interpreted and distorted, and which would not in any event form a basis for the conclusions of the appellants' action. The respondents submit that the following references in any case show that all these attacks were sufficiently repelled: 30

Vol. 1, pp. 20 and 21

(a) It was alleged that the respondents did not do their duty with regard to the sale of the residences in Montreal and Ste. Agathe, but the evidence shows that the respondents acted throughout with good business judgment in handling these properties, which are of a character very difficult to sell:

Witnesses:

Vol. 5, pp. 591 to 599.
Vol. 10, pp. 2117
and following
Vol. 11, pp. 2314
to 2317

A. M. Reaper,
L. H. Ewing,
Lord Shaughnessy. 40

Vol. 3, p. 844, l. 41

Exhibit D-123, letter from Sir M. B. Davis to Lord Shaughnessy, 14th November, 1927.

Respondents carried out the instructions—the “ policy ”—of this letter.

Vol. 1, p. 19, l. 37

(b) The appellants also attack the respondents emphatically with regard to the important question of succession duties. In an estate of such a character it is an important duty of the trustees and executors under the will to see that they do not pay any greater amount to the Government as succession duties than the estate is legally liable for. The respondents, with the aid of Mr. E. W. H. Phillips, notary, set to work early in May, 1928, to prepare the necessary inventory, which had of course to include the assets abroad as well as those in Canada, and in September, 1928, they filed with the Collector of Succession Duties a statement of assets and liabilities, upon which the Government, after considerable delay, claimed that the valuation of the estate's assets should be increased and its liabilities decreased to such an extent that the Government showed an increase in the taxable net assets of \$7,750,000.00. This meant an actual increase of about \$650,000.00 in the amount claimed to be due to the Government for succession duties. The respondent Lord Shaughnessy testified as follows in this connection:

Vol. 10, p. 2213, l. 38,
and pages 2214
and 2215.
Vol. 4, pp. 174 to 192.
Vol. 5, pp. 524 to 585

10

Vol. 2, pp. 591, 594
and 595

Vol. 10, p. 2215, l. 13

“ Q.—Why did the Executors not accept the government's valuation and the government's deductions in liabilities? 20

“ A.—Because we did not think they were just. There were a great many cases where they were obviously wrong. We had not an opportunity to go into it carefully and could not find out how they based this huge figure of \$280 per share. We wanted more information before we would accept it.

“ Q.—With such information as you have had from the beginning, are you and Mr. Reaper still of the opinion that your valuation of the liabilities are correct?

“ A.—I think we are. We found a great many discrepancies, in such information as we had been able to get from the government, which seemed to be absolutely obvious; the wrong calculations and too high valuations on stocks. 30

“ Q.—Whose calculations were wrong?

“ A.—Theirs; the government's. I think we still persist in the idea our calculation is correct.

“ Q.—Having that conviction, what is your view as to whether it is better with a creditor who is claiming these Succession Duties, more than he is entitled to, to see him and try to get him to be reasonable before you pay him anything? 40

“ A.—We worked with the idea it would be better to get the thing settled and pay it all at once.

“ Q.—To get the amount settled?

“ A.—To get the amount settled, because if we paid it on account it lessened our chances on the final settlement. That is the view we took and we were not suffering any damage in

Exhibits D-49
and D-50,
Vol. 2, pp. 610
and 611

“ that, because we were saving interest. If we made a payment
“ on account, we would have to make loans, and inasmuch as we
“ were getting $6\frac{1}{4}$ per cent or $6\frac{1}{2}$ per cent on that money and
“ only paying the government five per cent, we were not losing
“ anything on that.

“ Q.—On the amount of the call loan?

“ A.—On the amount of the call loan, which we would have
“ to use probably for the payment of the Succession Duties.”

Exhibits P-10
and P-51,
Vol. 1, pp. 236
and 206

All that time Sir Mortimer Davis, Incorporated, had out on call 10
\$880,000.00 earning six per cent or better.

Vol. 2, pp. 543 to 609
Vol. 2, pp. 562 to 611

It is respectfully submitted that the respondents used good
judgment and sound business tactics in the course that they pursued
in this connection. They clearly did not neglect this important
matter, as will be seen by the very considerable correspondence that
they had to carry on with the government's representatives, some of
which was produced in Exhibits P-53 to P-65 and Exhibits D-21
to D-50. Besides the letters written there were numerous interviews 20
with officials of the Succession Duty office and it is submitted that
the respondents showed energy and diligence in the interests of the
estate. The government has consequently made substantial conces-
sions already, but not nearly all that the respondents think is fair
and proper for the estate.

Vol. 6, p. 867, l. 40

(c) Canadian Industrial Alcohol Company Limited owned
nearly the whole of the capital stock of Robert McNish & Co. Lim-
ited, a Scotch distillery, and that investment has so far proved
unprofitable, so the appellants endeavoured in the court below to 30
saddle the respondents with blame in that connection. This was
most unfair, as is clear from the evidence. This large investment
in Robert McNish & Co. Limited was made by the late Sir M. B.
Davis himself in his lifetime. On the 25th July, 1927, the respond-
ent Lord Shaughnessy wrote the late Sir M. B. Davis a letter
(Exhibit D-121) in which he discussed this McNish investment
which Sir M. B. Davis had proposed and Lord Shaughnessy then
wrote:

Vol. 3, pp. 839
and 840

Vol. 3, p. 840, l. 10

“ The question of a large flotation such as you mention gives 40
“ me some concern ” and he ended up his letter with the following
words:

“ Briefly my point is that we should have some oppor-
“ tunity of testing out the possibility of making a great success
“ of this Brand before involving ourselves in heavy obligations
“ in that respect.

“ I do not want you to think from this that I am not in sympathy with the idea as on the contrary I consider that if successful it would be a great stroke, but the large flotation which you have suggested could be done with much more safety after we have sized up the situation rather than before.”

Vol. 11, pp. 2291 to 2297

Vol. 5, p. 585, l. 8 to p. 589 and pp. 613 and following

Lord Shaughnessy in producing the letters exchanged with Sir M. B. Davis in connection with this unprofitable investment explained the situation fully and A. M. Reaper also testified in this connection. 10

Vol. 3, p. 841, l. 11

Sir M. B. Davis in writing to the respondent Lord Shaughnessy on the 27th July, 1927, (Exhibit D-122) wrote:

Line 41

“ I can see by the tone of your letter that you are timid with the proposition

“ I have given it the utmost consideration and am quite satisfied that I am right and fully decided to go ahead.” 20

Vol. 3, p. 840, l. 45

and he also telegraphed “ Please carry out instructions.” Yet the appellants seek to blame the respondent Lord Shaughnessy for the losses in connection with this investment. Sir M. B. Davis contemplated that it would be unprofitable at first, but considered it worth while notwithstanding.

Vol. 3, p. 863, l. 31

(d) The appellants in their pleadings and argument in the court below referred to a number of other investments and outlays of the estate of the late Sir M. B. Davis and of the company Sir Mortimer Davis, Incorporated, and the respondents respectfully submit that the following references to the evidence suffice to show that the conduct of the respondents as trustees and executors of the estate and as directors of Sir Mortimer Davis, Incorporated, was reasonable and proper and cannot in any event form the basis for such an action as the present action. These were reasonable business men’s investments made by Sir Mortimer Davis, Incorporated at a time when it was prosperous and in line with the “ policies laid down ” by Sir M. B. Davis. 30

Vol. 1, p. 158, l. 8

Asbestos Corporation: Lord Shaughnessy, volume 11, pages 2321 to 2325. 40

Cadillac Coal Company Limited: H. A. Poillon, volume 10, pages 2065 and following and pages 2110 and following; A. M. Reaper, volume 6, pages 646 and following; Lord Shaughnessy, volume 10, pages 2241 to 2245.

Investment Foundation Limited: H. C. Flood, volume 10, pages 2130 and following; Lord Shaughnessy, volume 11, pages 2255 and following; A. M. Reaper, volume 6, pages 644 and following.

C. S. Jennison & Company Limited: Lord Shaughnessy, volume 10, pages 2246 and following and volume 11, pages 2263 and following.

Sir M. B. Davis' letters just before his death, volume 3, pages 856, 861, 868 and 870. 10

Young Men's Hebrew Association Building: A. M. Reaper, volume 5, pages 599 and following.

Vol. 1, p. 25, l. 36 (e) The appellants endeavoured to attach blame to the respondent Lord Shaughnessy by alleging that his "incapacity to hold and perform the duties of the office of President of the "Alcohol Company" resulted in the resignation of all of the directors "other than those who were employees." This was disproved by the written communications received from those directors themselves: 20

Honourable H. M. Marler wrote resigning as director and added:

Vol. 3, p. 700, l. 1 " I think it is well that I should take this action, seeing " that I am leaving Canada for an indeterminate period. If you " think otherwise, I will be very glad indeed to discuss the " matter with you. 30

" In any event, will you allow me to extend my very sincere thanks for the many courtesies I have received at your hands and to assure you also that my association with you these many years has been most pleasant in every particular." 30

Vol. 3, p. 699, l. 26 Mr. Henry Joseph resigned his directorship by a letter reading:

" I beg to resign from the Board of Directors of the Canadian Industrial Alcohol Co., as I expect to be absent from Montreal a good deal in future." 40

Mr. E. R. Decary also resigned by letter in which he wrote:

Vol. 3, p. 712, l. 23 " I may say that I have been considering resigning from your Board for the last eight months, as the increase in my business makes it imperative that I relinquish some of my directorships.

“ May I take this opportunity of telling you how much I have
“ appreciated our relations together, and to assure you that,
“ notwithstanding the severance of my connections with your
“ Company, if at any time there is anything I can do with any
“ of our friends to foster the interests of your Company, you
“ are at liberty to call upon me.”

Vol. 3, p. 797

These were the only outside directors on the board. Sir M. B. Davis did not believe in outside directors and had thoughts of eliminating them (Exhibit D-117). 10

Vol. 1, p. 9, l. 29
and following

(f) The appellants went so far as to accuse the respondent Lord Shaughnessy with having “ fraudulently converted to his own use ” certain furniture and an automobile and the use of the Ste. Agathe dwelling, and it is submitted that the evidence serves to indicate that these allegations were maliciously made and are wholly unfounded and that they only serve to indicate the kind of tactics that the appellants thought best to resort to in want of any serious grounds for their attack upon the respondents. These matters were all trivial and Lord Shaughnessy explained fully the circumstances in each case. The appellants’ own witness L. J. Marchand testified that Lord Shaughnessy had himself paid for all the provisions when he occupied the house at Ste. Agathe, which was corroborated by the appellants’ other witness Mrs. G. J. Awbrey. It is important to point out as well that Sir M. B. Davis, a month before he died, wrote to the respondent Lord Shaughnessy to the following effect: 20

Vol. 11, pp. 2264
to 2269
Vol. 4, p. 104, l. 45,
and p. 105

Vol. 4, p. 85

“ Re House at Sainte Agathe: We are delighted to have
“ you use the house as we know that Marion will take care of
“ it and, as a matter of fact, it is better that the house should
“ be occupied. I think it will do you a lot of good to go up
“ there for week-ends, and also for the family to spend some
“ time there. There ought to be good milk, eggs and produce
“ from the farm; see that your family get same, otherwise it
“ will be only used up by the people on the place.” 30

Vol. 3, p. 862, l. 29

Vol. 1, p. 22, l. 38

(g) The appellants also allege that Lord Shaughnessy “ impro-
“ vidently speculated in the securities of the Alcohol Company in
“ the name of the Incorporated Company,” but the witness A. M. 40
Reaper testified from the records that the dealings after the death
of Sir M. B. Davis showed a profit of about \$30,000.00 for the “A”
shares and a profit of \$149,619.29 for the “ B ” shares. This is cor-
roborated by the reports of the Company’s auditors, (Exhibit P-51).

Vol. 4, p. 244, l. 25

Vol. 6, p. 638, l. 36

Vol. 1, p. 203

Sixth: There are other useful facts proved in the very voluminous record of the evidence; for example:

(a) The appellants alleged that the female appellant “left for Montreal immediately” on account of an announcement made to her in May 1929 by the respondent Lord Shaughnessy as to the future policy to be adopted, but when she came to testify under oath in the witness box, the female appellant testified as follows:

Vol. 10, p. 1959, l. 21

“ Q.—When you received Lord Shaughnessy’s letter, Exhibit D-9, dated December 7th, 1928, in reference, among other things, to the purchase of the Marler shares, did you make any comment in your reply (if you did reply) to the proposals in that letter? 10

“ A.—No.

“ Q.—Lord Shaughnessy returned to Europe in April, 1929, with Lady Shaughnessy and some members of his family, and I think you told us you had a number of interviews with him on the occasion of that visit?

“ A.—Yes. I saw them once or twice in Paris, and then I saw them in London.

“ Q.—During those discussions you had with Lord Shaughnessy in April, 1929, had you any apprehensions as to the situation in reference to the Estate? 20

“ A.—No.

“ Q.—You were satisfied, from what you then heard, that things were apparently going all right?

“ A.—Yes, he assured me that they were going all right.

“ Q.—And as far as you then knew that assurance was justified? 30

“ A.—Yes.

“ Q.—When was it you decided to sail for America following those interviews with Lord Shaughnessy in April, 1929?

“ Witness: When did I decide to sail for America?

“ Counsel: Yes.

“ A.—I had it in mind probably a month before to come to America, because of my discussions with Mr. Corbett. I have stated that.

“ Q.—Can you recall when you took your passage?

“ A.—As I recall it, I had reservations on two or three boats. 40

“ Q.—Made some weeks before you actually left?

“ A.—Yes, probably. It was quite difficult at that time of the year.

“ Q.—In any event, you made your plans to come to Canada some weeks, if not months, before you actually came on the occasion of that visit?

“ A.—Yes, I had it in mind.

“ Q.—Then you went to London on your way to take your
“ ship?”

“ A.—Yes.”

(b) The evidence of J. G. Lawrence, Secretary of Canadian Industrial Alcohol Company Limited, with regard to the proxies of record is also an interesting indication of the lack of foundation for the appellants' attacks. He testified that at the annual general meeting of shareholders called for the 17th December, 1929 (just before the institution of the present action) there were proxies in favour of the respondent Lord Shaughnessy and the Vice-President, E. J. Lauster, representing 260,954 shares of the Company's voting stock, and explained the character of those proxies. They were given by over 1,900 shareholders and included nearly every important brokerage firm in Montreal who held shares. 10

Vol. 7, p. 1084, l. 37

Vol. 7, pp. 1085
and 1086

(c) The appellants alleged that the respondent Lord Shaughnessy

Vol. 1, p. 15, l. 20

“ is at the present time surreptitiously carrying on negotiations
“ having for their object a sale or merger of the Alcohol Com-
“ pany ” 20

and endeavoured to make a serious complaint in that connection. The evidence, however, showed clearly that all that the respondent Lord Shaughnessy had done was to take a suitable and useful interest in tentative preliminary approaches that were being made to him by outside parties and that there was absolutely no basis or excuse for the attitude adopted by the appellants in that regard: 30

Vol. 1, p. 26, l. 23

Witnesses: F. J. Lash, K.C., volume 9, pages 1703 and following; Lord Shaughnessy, volume 10, page 2231, line 40, to page 2240.

The merger discussed in these tentative pourparlers was a merger of Canadian Industrial Alcohol and its two chief competitors, Hiram Walker-Gooderham & Worts Limited and Distillers Corporation-Seagrams Limited. The newspapers talked about such a possibility before anyone approached Lord Shaughnessy on the subject, but he was said in the press to have discouraged the suggestion (Exhibit D-96 and Exhibit D-109). Even Lady Davis conceded that a merger of the three leading competing companies such as was discussed would, in her opinion, be a very good thing. Lady Davis was asked: 40

Vol. 3, p. 776, and
p. 780, l. 10

Vol. 10, p. 2057, l. 37,
and following

“ Q.—Have you objections to the whole principle of a
“ merger of Industrial Alcohol with any other Company engaged
“ in the same industry?”

“ A.—I think a merger of the three largest companies on right terms would be a very good thing. I think a merger with Walker alone would be ridiculous.

“ Q.—So it is your view that a merger of Canadian Industrial Alcohol, plus Hiram Walker-Gooderham & Worts Limited plus Distillers Corporation would, subject to consideration of detailed terms, be advisable in the interests of Canadian Industrial Alcohol?

“ A.—I think a combination of the three companies would probably be all right, but certainly not with Walker alone.” 10

This is the very “ combination ” about which there were preliminary pourparlers.

On December 29th, 1929, Mr. J. F. Lash, K.C., wrote Lord Shaughnessy:

“ I refer to the conversation which Mr. Morrow and myself had with you in connection with a suggested arrangement for a closer connection between Canadian Industrial Alcohol Company Limited, Hiram Walker-Gooderham & Worts Limited and possibly Distillers Corporation Limited,” 20

and he goes on to discuss a possible combination of these three companies (Exhibit P-215 and Exhibit P-216).

Vol. 3, pp. 784
and 785

Lord Shaughnessy at no time was in the slightest degree committed to the principle of a merger, nor had the parties ever got down to a discussion of the terms. The negotiations were wrecked by this litigation. 30

The confidential report of Major Gordon of Toronto, to which appellants took exception, was never seen by Lord Shaughnessy until after action brought.

(d) Appellants also attack the respondents' administration of the affairs of Sir Mortimer Davis, Incorporated, and they declare that the results of respondents' administration of its affairs demonstrates their incapacity and total unfitness, and renders their immediate removal from office imperative. The record absolutely negatives the truth of this allegation. 40

Vol. 1, p. 18, l. 20

As in the case of Industrial Alcohol, so it was in the case of Sir Mortimer Davis, Incorporated. Under Lord Shaughnessy's active management the Incorporated Company enjoyed unparalleled prosperity. During the four years preceding Lord Shaughnessy's appoint-

Vol. 3, p. 958 ment as an officer of the Company it made an aggregate operating and trading loss of \$1,015,174.10 (Exhibit D-18).

Vol. 3, p. 959 In the next four years during Lord Shaughnessy's active management the Incorporated Company made an aggregate operating and trading profit of \$3,289,434.69 (Exhibit D-17).

Vol. 3, p. 960 There was also a substantial reduction in average administration expense, and the percentage of operating profit to gross revenue increased enormously under Lord Shaughnessy's administration (Exhibit D-132). 10

Vol. 10, pp. 2179 and 2180 There is no answer to these figures. No wonder Sir M. B. Davis was pleased and satisfied, as Sir John Aird testified in the passage already quoted.

Vol. 11, p. 2483
Vol. 1, pp. 99 and following
Vol. 1, pp. 133 and following In addition to the appellants' main action for the removal of the respondents as trustees and executors under the will, the appellants took other proceedings in this action, which were also dismissed by the trial judge, namely: a petition for a sequestration and a petition for interlocutory injunction. The respondents respectfully submit for the same reasons as have been submitted above that the trial judgment was right in dismissing these proceedings as well. 20

The respondents submit, therefore, that the trial judgment should be confirmed in all respects and this appeal dismissed with costs. 30

MONTREAL, 17th November, 1930.

MEREDITH, HOLDEN, HEWARD & HOLDEN,
Attorneys for Respondents.

No. 465

Court of King's Bench
(Appeal Side)

LADY DAVIS ET AL,
(Plaintiffs) Appellants

AND

**THE RIGHT HONOURABLE
LORD SHAUGHNESSY ET AL,**
(Defendants) Respondents

AND

**THE FEDERATION OF JEWISH
PHILANTHROPIES OF MONTREAL,**
Mis-en-cause

RESPONDENTS' FACTUM

**MEREDITH, HOLDEN,
HEWARD & HOLDEN**
Attorneys for Respondents