No. 78 of 1931.

In the Privy Council.

ON APPEAL

FROM THE COURT OF KING'S BENCH (APPEAL SIDE) OF THE PROVINCE OF QUEBEC.

BETWEEN—

LADY DAVIS (DAME ELEANOR CURRAN) and MORTIMER BARNET DAVIS (Plaintiffs)

Appellants

— AND —

THE RIGHT HONOURABLE LORD SHAUGHNESSY (WILLIAM JAMES SHAUGHNESSY) and ALEXANDER M. REAPER (Defendants)

— AND —

THE FEDERATION OF JEWISH PHILANTHROPIES OF MONTREAL (Mis-en-cause)

Respondents.

CASE OF THE APPELLANTS.

RECORD.

1. The Appeal herein is from the Judgment of the Court of King's Bench (Appeal Side) given on the 27th of June, 1931. The Court was composed of Justices Howard, Rivard, Létourneau and Hall. Book 6, p. 2573.

2. By the said judgment the Court of Appeal affirmed the judgment of Mr. Justice Surveyer given on the 30th June, 1930, and dismissed the Appellants' (Plaintiffs') appeal. Book 6, pp. 2467-2484.

3. The Respondent mis-en-cause, a legatee, has not entered an appearance and has filed notice that it does not intend to take any part in the Appeal. The Respondents Lord Shaughnessy and Mr. Reaper will be hereafter referred to as the Respondents.

Book 1, pp. 1-27. Book 2, pp. 148-159.

4. By the action, which was commenced by Declaration dated the 16th January, 1930, the now Appellants seek to remove the Respondents from their positions as executors and trustees jointly with the Appellant Lady Davis of the Will and of the trusts thereof of the late Sir Mortimer Barnet Davis, and there is also a Petition for the appointment of a Sequestrator. Lady Davis is the widow of the late Sir Mortimer Barnet Davis, the Testator, and the Appellant Mortimer Barnet Davis is a son of the Testator by a former marriage. The Testator had bequeathed to the Appellant Lady Davis the use and habitation of the estate at Cannes which is mentioned in paragraphs 8 and 9 of this Case, and had directed that if she did not live there the rent or the sale proceeds as the case might be should fall into residue, so that, as Mr. Justice Hall expressed it in his reasons for judgment:—

Book 2, p. 149, ll. 1-27.

Book 6, p. 2622, ll. 11-14.

"it is evident that he anticipated that she would continue to reside there, "and since his estate was almost entirely situated in, and administered at, "Montreal, she would participate only nominally in its administration."

She did in fact remain in Europe, as stated in paragraph 17 hereof, continuously from about May 1928 to June 1929.

Book 1, p. 8, ll. 31-43.

5. The trial lasted upwards of 40 days. The allegations made in the Declaration are of course given there in full detail, but their general nature is stated in paragraph 39 of the Declaration, wherein it is alleged against the Respondents in their capacity as Executors and Trustees in reference to the administration of the Estate and the execution of the trusts that by reason of the acts and omissions therein complained of the Respondents had:—

1. failed and neglected to do and perform the acts required of them as well by the said Will as by law;

2. infringed their duties as Executors and Trustees;

3. dissipated and wasted the property of the said Estate; and

4. by their administration exhibited their incapacity, dishonesty and total unfitness to hold and exercise such offices as Executors and Trustees;

and that each and every such acts and omissions constituted legal grounds for demanding the Respondents to be forthwith removed from their said offices.

6. The learned Trial Judge in his Notes of Judgment, whilst he disapproved of much that the Respondents had done stated that he had come on the whole to the conclusion that the Appellants had not made out a case for their removal; but the Appellants' submission is that enough and more than enough has been proved in the case to require the removal of the Respondents, and they rely, amongst other matters, upon the matters hereafter set forth in paragraphs 23 to 54 of this Case. Book 6, pp. 2484 2571. Book 6, p. 2555, ll. 29-30.

7. The law as to removal of executors or trustees is laid down in various Articles of the Civil Code of Quebec of which the following may be quoted :—

"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.

"285. The following persons are also excluded from 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.

"981 d. 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.

"981 f. When there are several trustees, the majority may act, unless "it be otherwise provided in the document creating the trust.

"981 k. Trustees are bound to exercise, in administering the trust, "reasonable skill and the care of prudent administrators; but they are not "liable for depreciation or loss in investments 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.

"913.. If there be several joint testamentary executors, with the same "duties to perform, they have all equal powers and must act together, unless "the testator has otherwise ordained.

"(Nevertheless if any of them be absent those who are in the place may "perform alone acts of a conservatory nature and others requiring dispatch)".

8. The Testator Sir Mortimer B. Davis died on the 22nd of March, 1928 and Probate of his Will (dated the 30th of November, 1927) was granted on the 18th of April, 1928. He was a very Book 2, pp. 148 159.

successful man of business, who had spent most of his working life in Montreal. About three years before his death, he had, without actually retiring from business, made his principal home at Cannes, maintaining his residences in Canada and occasionally returning thereto. During this time he was in constant communication by letter and cable with the Respondents with regard to his interests, which they were employed to administer. His last letter to the Respondent Lord Shaughnessy was written on the 10th March, 1928, shortly before his death.

Book 6, p. 2620, l. 42, to p. 2621, l. 2.

Book 3, pp. 870-2.

9. The Testator's estate consisted of *inter alia*:—

1. 44,625 shares and also serial notes (debentures) in a Company called Sir Mortimer Davis Inc. (mentioned below, in paragraph 11) and shares in other Corporations.

2. Real Estate.

3. His interest in a French Company called Société Davisq which owns a property situate in Cannes the enjoyment of which for life is given by the Will to his widow the Appellant Lady Davis, as stated in paragraph 4 hereof.

Book 2, p. 149, ll. 1-28.

10. The exact net value of the Estate at the time of his death including the Testator's holdings in Corporations is difficult to estimate, and is not of great importance, but from the first financial statement drawn up after the Testator's death (Exhibit p. 50) the gross value as at the end of March, 1928, the date of death, was given as $12,486,067.22 and the surplus over liabilities as $7,572,674.97.

Book 2, pp. 163-8.

Book 2, pp. 174-195.

11. The Company named Sir Mortimer Davis Inc. (hereinafter called "Davis Inc.") referred to above (in paragraph 9), was a "one-man Company" incorporated by the Testator on the 29th July, 1919, and to that Company he assigned the greater part of his property in consideration of the allotment to him of shares and serial notes of that Company. At the date of his death the Testator held approximately 95% of the issued capital of that Company.

12. Davis Inc. is thus not merely controlled by the Estate; it forms so large a part of the estate that the fortunes and interests of the one are practically the fortunes and interests of the other, and the Respondents, who at all times material to the litigation managed and controlled Davis Inc., held their offices in that company in the testator's lifetime at his will and after his death by virtue of their position as executors and trustees of the estate. The Respondent Lord Shaughnessy is President and the Respondent Mr. Reaper is Vice-President and Secretary-Treasurer, of Davis Inc. Each of the

Respondents acquired a Director's qualification share in Davis Inc. from the Testator during his lifetime.

13. In May, 1928, an Estate Share in Davis Inc. was transferred to and registered in the name of the Appellant Lady Davis with a view to qualifying her as a Director and at a Directors' meeting held by the Respondents in December, 1928, she was elected a Director. Book 3, p. 34, l. 15.

14. At the time of the testator's death, the bulk of the assets of Davis Inc. consisted of a controlling interest in the issued capital of an important distilling concern entitled Canadian Industrial Alcohol Co. Ltd. (hereinafter called "Industrial Alcohol"). This interest consisted of 51% of the "A" or voting shares (called in the proceedings "Alcohol A") and a quantity of "B" shares (called "Alcohol B"), having the same rights to distribution but no votes. The Respondent Lord Shaughnessy is the President and the Respondent Mr. Reaper is a Director of Industrial Alcohol. (The testator had caused Lord Shaughnessy to be made a Director of Industrial Alcohol in 1921, and to become the President thereof in 1925.)

15. On the 17th of September, 1924, by an instrument of that date made between the Testator of the first part, Davis Inc. of the second part Lord Shaughnessy of the third part, and H. M. Marler and H. B. Maclean as Trustees of the fourth part, Lord Shaughnessy was engaged to serve the Company in the capacity of General Counsel or in such other capacity as the Board of Directors might from time to time determine at a fixed salary of $20,000 per annum subject to cancellation of the Agreement in the lifetime of the Testator and with a provision to the effect that after an uninterrupted service of five years from the date of the Agreement he was to receive from the trustees a free transfer of $195,500 6% 20 Year Notes and 2,375 shares of the Capital Stock of Davis Inc. which were to be delivered to the trustees by the Testator. The instrument also contained provisions that, if Davis Inc. should increase its Notes or Stock, the Testator should deliver proportionate amounts of the additional Notes or Stock to the trustees on the like trusts. Interest or dividends during the five years were to go to the Testator. There is a separate action as to the validity of this instrument and also as to the matters arising thereunder. Book 2, pp. 393-7.

16. By the Will hereinafter referred to, the Appellant Lady Davis and the Respondents Lord Shaughnessy and Mr. Reaper as trustees and executors are each entitled to be paid the sum of $5,000 per annum while he or she acts as such, such remuneration to be in addition to the remuneration which any of them might receive from Davis Inc. Book 2, p. 157, ll. 41-45.

17. On the 4th May, 1928, the Appellant Lady Davis, who was
Book 2, pp. 295-6. then on a visit to Montreal, executed as executrix and trustee a power of attorney to the Respondents, her co-executors and trustees, as she was unlikely to be in Montreal again for some time. She did not go to Montreal again until June, 1929, nor did she see either of the Respondents again until just before that month, when she saw Lord Shaughnessy in London as stated in paragraph 21 hereof, and then proceeded to Montreal, where, on differences arising as stated in the
Book 2, p. 312. said paragraph 21, she revoked the said power of attorney on the 5th October, 1929.

Book 3, p. 212, Book 6, p. 2628, l. 17. **18.** The "A" Shares in Industrial Alcohol owned by Davis Inc. as mentioned in paragraph 14 hereof were the shares that secured the control of Industrial Alcohol by Davis Inc., the "B" Shares owned by Davis Inc. were acquired by Davis Inc. on the 1st of March, 1928, at the price of $20 per share with the view to resale. To acquire the said shares Davis Inc. borrowed a sum of $1,250,000 from the Montreal Office of the Canadian Bank of Commerce. The said shares formed part of an issue made by Industrial Alcohol in 1927 for working capital.

Book 2, pp. 148-159. **19.** The material articles of the Will of the Testator are set out in the next succeeding paragraph, but its effect may be shortly stated as follows:—

Book 2, p. 148, ll. 17-20. A direction to the Trustees and executors to pay the testator's debts and funeral expenses and that all succession duties shall be paid by the Estate and not by the legatees;

Book 2, p. 148, ll. 31-37. The Appellant Lady Davis and the two Respondents appointed trustees and executors;

Book 2, p. 151, ll. 7-14. The Appellants Lady Davis and M. B. Davis each bequeathed an annuity of $67,000 and in addition one-half of the remainder 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 the Appellant M. B. Davis his shares of the net annual revenue and capital were bequeathed to the Appellant Lady Davis.

Book 2, p. 152, l. 30 to p. 153, l. 10.

Book 2, pp. 151-2.

Annuities also to other beneficiaries;

Book 2, p. 154, l. 8 to p. 155, l. 22. In the event (which happened) of there being no issue of the marriage of Sir Mortimer and the Appellant Lady Davis the trustees of the estate are directed after a period of 50 years from the date of the death of the testator to apply the residue of capital as to 75% for the purpose of a hospital in Montreal, to be known as "The Mortimer Davis Hospital", as to 12½% to the Federation of Jewish Philanthropies of Montreal, and as to the

remaining 12½% to non-sectarian institutions of the Province of Quebec.

Bequest to the Appellant Lady Davis of the use of the estate at Cannes and all the moneys at Sir Mortimer's credit in France and a special bequest to the Appellant M. B. Davis of all the deceased's jewellery and personal effects. Book 2, p. 146, ll. 1-27.

Bequests to relatives and servants and charities.

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20. The material Articles relating to the administration of the estate run as follows :—

"ARTICLE XIII. After providing for the foregoing the then remainder "of the net annual revenues from the then residue of my estate shall be paid "over to the extent of one half (½) to my said wife,. Lady Davis (maiden "name Eleanor Curran) during her lifetime, and to the extent of one half (½) "to my said son, Mortimer, during his lifetime. Should my said son "predecease my said wife, then the totality of the income of the said residue "of my estate shall be paid to my said wife during her lifetime. Should my "said wife, however, predecease my said son, her one-half share of the income "of the said residue of my estate shall follow the terms and provisions "regarding the share in the residue of my estate bequeathed to my said Wife "as provided for in Article Fourteenth herein below. Book 2, p. 152, l. 29, to p. 153, l. 11.

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"It is may (*sic*?) and I direct that the provisions made in this Will for "the benefit of my son Mortimer, anything to the contrary hereinbefore or "hereinafter notwithstanding, with the exception, however, of the specific "bequests made outright to him in Article Sixth hereof, are for his lifetime "only and that under no circumstances shall any children, issue or descen- "dants of my said son Mortimer receive any benefits whatsoever under this "Will, and that upon his death his share shall devolve to my wife if she "survive him or to the lawful issue of my marriage with my said wife, in "accordance with the terms and conditions hereinbelow set forth in Article "Fourteenth, if she predecease him and there be such issue her surviving, "and failing same, shall devolve as hereinbelow provided for in Article "Fourteenth in the case of failure of lawful descendants of mine, issue of "my marriage with my said wife, to the absolute and permanent exclusion "under any and all circumstances of any issue or descendants of my said son "Mortimer.

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"ARTICLE XV. Except where otherwise decided by my Trustees and "Executors or to make payment of particular legacies as provided 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 Book 2, p. 155, l. 23, to p. 156, l. 6.

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"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 consider it desirable and proper to do so, "but not otherwise.

"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 manage- "ment will greatly increase in value and thus yield in capital and revenue a "great benefit to my Estate.

"To disturb the organisation of this Company would result in a depletion "of its resources and would prevent the development of the various under- "takings 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.

Book 2, p. 156, ll. 24-8.

"ARTICLE XVII. While any beneficiaries under this my Will are minors, "their shares in my Estate shall remain in the hands of my said Trustees and "Executors, who shall use the revenue therefrom for their benefit.

Book 2, p. 156, l. 30, to p. 157, l. 9.

"ARTICLE XVIII. I give my said Trustees and Executors the seizin "and possession of all my property, both moveable and immoveable, 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 obliga- "tions as they may see fit (including endorsements, guarantees and other "obligations 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 security with or without receiving "consideration, to sell, exchange, dispose of, pledge, hypothecate and alienate "the whole or any part of my property, moveable or immoveable, 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 required 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 assistance 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 Estates 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 authorised herein without "obtaining judicial authorisation even though some of the interested parties "may be minors or otherwise incapable.

"ARTICLE XIX. My said Trustees and Executors shall have power to "make partitions of my Estate or any part thereof from time to time as may "be required and in making such partitions they are authorised to compose "the shares, fix the values whenever necessary of all assets composing the "same and to do all acts necessary or expedient to carry out such division in "their own discretion without its being necessary to have judicial proceedings "in regard thereto even though some of the beneficiaries may be minors or "otherwise incapable, and they are hereby authorised, if they see fit, to retain "in their hands any property not susceptible of advantageous division at the "time and to dispose of such property at a later date and divide the proceeds. Book 2, p. 157, ll. 11-23.

"ARTICLE XX. It shall not be necessary for my said Trustees and "Executors to give security for the administration and disposal of my Estate "in any country where such security may be required, nor to appoint any "Curator to any substitution or alleged substitution under this my Will, and "in making any Inventory or Inventories of my Estate my said Trustees and "Executors may omit any notifications and other formalities in regard "thereto and may make the same in such manner as they may see fit and the "costs of such Inventory or Inventories and putting my said Trustees and "Executors in possession of my Estate, as well as the costs of any partition "thereof, shall be paid out of the capital of the residue of my Estate. Any "of my said Trustees and Executors may resign without judicial authorisa- "tion and the expense of such resignation shall also be paid out of the capital "of the residue of my Estate. 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. Book 2, p. 157, ll. 24-40.

"ARTICLE XXII. The books and accounts of my Estate are to be kept "in the office of Sir Mortimer Davis Incorporated, and all meetings are to be "held and business transacted in that office unless agreed to otherwise by "all my said Trustees and Executors. Book 2, p. 158, ll. 1-4.

"ARTICLE XXIII. I charge my said Trustees and Executors to take an "active and energetic interest in the management of my Estate, and 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. Book 2, p. 158, ll. 5-11.

"ARTICLE XXIV. There shall always be three Trustees and Executors "acting for my Estate and any vacancies from time to time shall be filled by "individuals or Trust Companies appointed by Notarial Acts by the surviving "and acting Trustees and Executors while there are two, but if there be only "one acting, then the appointments necessary to bring the number up to three "shall be approved by a Judge of the Superior Court for the Province of Book 2, p. 158, ll. 12-24.

"Quebec in Montreal, after such Judge has been satisfied as to the suitability "of the persons to be so appointed as such Trustees and Executors, and if "there be no Trustees and Executors acting, three new Trustees and "Executors shall be appointed by a judge of said Superior Court on the "petition of any interested party.

Book 2, p. 158, ll. 25-33.

"ARTICLE XXV. I hereby direct that my Estate shall devolve and be "governed and that my Will be interpreted in accordance with the Laws of "the Province of Quebec and that my Trustees and Executors shall have "power to determine all questions and matters of doubt which may arise in "the course of their administration, realisation, liquidation, partition 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."

21. The Appellant Lady Davis had at first full confidence in the Respondents. She was considerably disturbed, however, when she met the Respondent Lord Shaughnessy in London in May, 1929, and he told her of a "financial genius" with whom he proposed to engage in various transactions on behalf of Davis Inc. She then went to Canada, and obtained certain information from the Respondents about the estate generally, and in particular about the "financial genius" (in fact one Jennison) and of the commitments undertaken with him (which form one of the matters of complaint herein and are more fully stated in paragraphs 31 to 35 hereof). She was still further disturbed by this information and by other incidents, including the refusal by the Respondents of her request for the appointment of an additional Director of Davis Inc. to watch her interests; and finally the parties became at arms' length and letters dated the 21st November 1929 were sent to the Respondents demanding their resignation. This action followed soon after.

Book 4, pp. 1819-1820.

Book 4, p. 1827, l. 24 to p. 1828.

Book 2, pp. 315-6.

22. The Appellants at the trial complained of many acts and omissions of the Respondents in the administration of the estate, including therein the management of Davis Inc. It is not necessary in this Case to give an account at length of all those matters of complaint; but the Appellants (without abandoning any of their complaints) will rely in the main, upon the hearing of this Appeal, on the matters stated in paragraphs 23 to 54 hereof as establishing against the Respondents such failure and neglect to carry out the provisions of the Will, lack of "reasonable skill and the care of prudent administrators", incapacity and dissipation or wasting of the property of the estate, and misuse of the moneys of the estate, as to entitle the Appellants to the relief which they ask. The matters of main complaint may be grouped under the following heads:—

(1) Failure to make payments provided for in the Will and to distribute the surplus revenue, and failure to administer Davis Inc. with proper regard to the interests of the estate and to the substantial identity of the estate and the Company (paragraphs 23 to 29 hereof).

(2) Employment of moneys of Davis Inc. in hazardous enterprises, viz.:—

(a) Jennison & Co. Ltd. (paragraphs 31 to 35).

(b) Cadillac Coal Co. Ltd. (paragraphs 36 and 37).

(c) Investment Foundation Ltd. (paragraph 38).

(3) Increase by themselves alone of their own salaries as officers of Davis Inc. by $5,000 and $2,500 per annum respectively and by Lord Shaughnessy of his salary as President of Industrial Alcohol by $5,000 per annum (paragraphs 39—41).

(4) Failure to call in loans of Davis Inc. to the Respondent Lord Shaughnessy and the making of a further loan to him; (paragraphs 42 to 44).

(5) Misuse by the Respondent Lord Shaughnessy of the moneys of Davis Inc. for his own purposes; (paragraphs 45 to 46).

(6) Misuse by the Respondent Lord Shaughnessy of the moneys of the estate to purchase shares for himself; (paragraphs 47 to 48).

(7) Payment out of moneys of the estate of alleged compensation to a trustee under a trust donation established by the testator; (paragraphs 47 to 48).

(8) Conversion by the Respondent Lord Shaughnessy of a quantity of furniture belonging to the estate; (paragraph 49).

(9) Conversion of a Rolls Royce Car the property of the estate by the Respondent Lord Shaughnessy; (paragraphs 50 to 51).

(10) Failure to sell or to take proper measures for the sale of the bulk of the Alcohol "B" Shares; (paragraph 52).

(11) Failure to summon the Appellant Lady Davis to executors' meetings and to Directors' meetings of Davis Inc.; (paragraph 53).

(12) Modification of the Agreement of the 17th September, 1924, (mentioned in paragraph 15 hereof) in favour of the Respondent Lord Shaughnessy (paragraph 54).

(1) FAILURE TO MAKE PAYMENTS AND TO ADMINISTER DAVIS INC. IN INTERESTS OF ESTATE.

23. The income from the part of the estate other than its interest in Davis Inc. has from the commencement of the administration shewn a revenue deficit by reason that the capital and revenue expenditure of the estate has exceeded the revenue. For instance, for the 17 months from the death of the Testator in March, 1928, to August, 1929, the expenditure for revenue account amounted to $619,497.39 and the gross revenue was only $175,933.63 resulting in a
Book 2, pp. 184-5. revenue deficit of $443,563.76 (Exhibit P.8 Exhibit IV). The surplus income and capital required for the administration of the estate must therefore arise from the estate's interest in Davis Inc.

Book 2, p. 206. **24.** From the Annual Statement of Davis Inc. as at the 30th September, 1928, it appears that the surplus account showed a balance brought forward at the 30th September, 1927, of $799,156.54 and a profit for the year ended 30th September, 1928, of $763,203.34,
Book 2, p. 238. total $1,562,349.88 (Exhibit P.51 Exhibit A); and from a similar statement of the same Company as at the 30th September, 1929, there was shewn a balance from the 31st March, 1928 (the Testator having died, it will be remembered, on the 22nd March, 1928) to the 30th September, 1928, of $250,040.95 and a profit for the year ended the 30th September, 1929, of $711,910.71—total $961,951.66; and the capital surplus was $4,154,812.30 (Exhibit P.10 Exhibit A).

25. In administering the estate and Davis Inc. the Respondents have not transferred from the Company to the estate any of the moneys or assets referred to in paragraph 24 hereof, that is to say, no dividends or surplus capital distributions from the sums standing to the credit of Davis Inc. for the years 1928-1929 have been declared or made and transferred to the estate account. In lieu thereof the Respondents have up to the 31st December 1929, borrowed money on behalf of the estate from Davis Inc. to the extent of $962,018.31, thus creating a position of extreme danger for the estate in the event of Davis Inc. being insolvent or even in cash difficulties.

26. Until the month of December, 1929, (i.e., just after the
Book 2, pp. 315-6. "letters before action" mentioned in paragraph 21 hereof, and just before the action was started) nothing was done as to repayment to Davis Inc. of the amounts borrowed by the estate. On the 4th December, 1929, notice of a Directors' meeting was given for the 9th December

Book 2, pp. 318-319. "for the purpose of considering the Company's financial affairs and the "advisability of declaring a dividend of twenty one per cent. to the share-"holders of record September thirtieth last,"

and on the 6th December 1929 an amended notice was given for the 9th December

> "for the purpose of considering the Company's financial affairs and the "advisability of declaring a dividend at such rate as the Directors may "determine to the shareholders of record on September 30th last"

and announcing that the Directors

> "will be asked to consider the propriety of reducing the capital of the Com- "pany to such extent as may be necessary to enable the Executors of the "Estate of the late Sir Mortimer B. Davis to repay to the Company all "amounts advanced by the Company and expended by the Executors on "account of capital indebtedness of the said Estate and to provide for certain "future requirements of the Executors on capital account."

Meetings of the Directors, the Respondents, and adjourned meetings were held, and a final adjourned meeting was fixed for the 6th January, 1930, which meeting was however not held. None of the business for which the meetings were called was in fact transacted. Book 3, pp. 625, 634-8.

27. Up to the conclusion of the trial the Appellants had received their specific annuities of $67,000 and the annuities provided for by the Will, including those of the Appellants, amounting to $180,600, had been paid, but legacies amounting to about $400,000 and the funds for certain deeds of donation and trusts amounting to $1,500,000 had not been paid. There are also outstanding a balance of succession duty and certain bank loans of Davis Inc.

28. Mr. George McDonald, a Chartered Accountant, called as a witness for the Appellants, made an analysis of the assets and liabilities of the Estate and Davis Inc., and was of the opinion that the capital surplus of $4,154,812.30 (shewn in paragraph 24 hereof) was sufficient and should have been available for disbursement on account of capital obligations of the Estate such as succession duties legacies debts &c. and that the revenue of the Estate added to the Estate's share of $961,951.66 (shown in paragraph 24) if distributed as dividends to the shareholders would have provided after payment of annuities and expenses $447,863.30 to the Estate for distribution to the Appellants. Book 4, pp. 1582-3

29. The Respondents have claimed that in administering the Estate they are not under a duty to administer Davis Inc. as an arm of the Estate in relation to the Appellants' rights under Article XIII of the Will, (supra, paragraph 20) to have the remainder of the net annual revenues from the residue of the Estate paid over to the Appellants in moieties and that they are not required to pay over to the Estate its share of the annual net profits of Davis Inc. or any part Book 5, p. 2241, l. 36. Book 2, p. 152, l. 29, to p. 153, l. 11.

thereof to that end, but that they are at liberty to administer Davis Inc. as an independent unit and to deal with the surplus assets and enter upon enterprises in any way that they consider the Testator might have done and they rely in support of this claim on the direction as to policies in Article XXIII of the Will (supra paragraph 20). The Appellants of course dispute this; and they point out that the annuities, involving $180,600 yearly, and the residue of annual revenue which has to be shared between the two Appellants, must be provided by Davis Inc. (as explained in paragraph 23 hereof) and that any policy involving the expenditure of the revenues or capital of Davis Inc. in enterprises speculative or otherwise must be inconsistent with the Will and with the proper administration of the Estate.

Book 2, p. 158, ll. 5-11.

(2) HAZARDOUS ENTERPRISES.

30. The Respondents have used the funds and credits of Davis Inc. (including of course the very surpluses which in the Appellants' submission should have gone to the Estate in dividends and been used in discharge of its obligations and for distribution by way of surplus revenue) in rash and hazardous enterprises, undertaken without proper enquiry or proper safeguards at a time when any consideration of the then prospects of business in general and distilling in particular would have led the Respondents to see the "handwriting on the wall" and to keep the funds out of any venturesome speculations. Particulars of the more important instances of this complaint follow, in paragraphs 31 to 38 hereof.

2 (a) JENNISON & CO. LTD.

31. The Jennison transaction was one in which Davis Inc., under the guidance of the Respondents, began by an unsecured loan of $10,000 to an individual and went on to an investment of $50,000 in a "finance" Company which so far as can be ascertained had at no time either assets or business.

Jennison was a gentleman who had been brought to the attention of the Testator during his lifetime as a possible person to be engaged in an investment corporation which the Testator was thinking of establishing. Jennison had given as a reference, among other people, a well-known American named Col. Goethals, who had replied to the Respondent Lord Shaughnessy's enquiries to the effect that Jennison was intelligent but that he did not quite trust him; the idea of employing Jennison had then been dropped.

Book 2, p. 845, l. 15, p. 857, l. 33, p. 866, l. 30.

Within a very short time of the Testator's death, however, we find from a letter from Jennison to the Respondent Lord Shaughnessy

Book 2, pp. 450-2.

of the 22nd May, 1928, that there had already been discussions between them with reference to some proposed business; and, in the letter, Jennison describing Jennison & Co. Ltd. as already incorporated under Dominion Laws with an authorized share capital of 1,000 preferred 6% cumulative stock and 1,000 shares of no par value Common Stock and asking for a loan of $10,000 on his note of hand for a period of six months, to be secured by the deposit with Lord Shaughnessy of 500 fully paid shares of Common Stock. Without even troubling to ascertain that no such company existed (for in fact the company was not incorporated until the 20th June, 1928), Lord Shaughnessy replied to the letter of the 22nd May 1928 agreeing *inter alia* to advance to Jennison $10,000 on his note and on the 28th May 1928 Davis Inc. drew a cheque in favour of Jennison for the $10,000 which was afterwards cashed by Jennison who gave his note payable on 1st December 1928. From the charter of Jennison & Co. Limited it appears that its main object was Book 2, p. 454, ll. 39-41.

> "to act as fiscal agents, financial advisers, and managers for persons, firms, "corporations, and municipalities, and to carry on a general financial "agency, promotion, and investment business"

and that it was prohibited from carrying on certain business including that of a Trust Company. The original Corporators who were applicants for the charter were an accountant, two clerks, and three stenographers. The Company had no assets except such as might be acquired from moneys supplied by Davis Inc. Its capital was as stated in the letter quoted above, the preferred stock being of a par value of $100.

32. On the 3rd of December, 1928, Jennison wrote to the Respondent Lord Shaughnessy stating his proposals with regard to expenses of his Company on a twelve months budget including his salary of $30,000 and as to other matters and he proposed that Lord Shaughnessy and his associates should acquire the whole of the preferred stock and that the $10,000 loan together with $90,000 would be taken as payment in full, and that in consideration of the common stock that Jennison had referred to as issued in his letter of the 22nd May, he, Jennison, would contribute "the uncompleted "business in hand and the responsibility of operation." There was no very clear evidence that there was at this time any business in hand. On the 16th of January, 1929, Lord Shaughnessy as President of Davis Inc. replied to the proposals and agreed to subscribe for $50,000 (500 shares of $100 each) in the Preference Stock, such payment to include the $10,000 represented by the note for that amount together with interest; it being understood between them that no further Preferred Stock would be issued or sold without Book 2, p. 458.

Davis Inc. having the first right to purchase the same at par; Davis Inc. to receive 50% or 500 shares of no par value of the Common Stock of the Company, and an equal amount to be retained by Jennison, who in payment therefor was to contribute the uncompleted business then on hand and the responsibility of operation; Jennison's salary to be $20,000 per annum to be paid by Jennison & Company, and Davis Inc. to have two Directors on the Board; the management and operation of the business to be left entirely to Jennison and his organisation subject to the desire of Davis Inc. at any time to confer with Jennison in connection with the same and to give such help by way of advice as might be necessary. Davis & Co. would also be glad from time to time when the occasion arose to become underwriters on securities which they considered satisfactory.

33. Jennison duly received payment of the $50,000 for the Preference Shares, and the Respondents were appointed directors of Jennison & Co. Limited. Davis Inc. has never received anything in respect of this investment; the evidence at the trial was to the effect that no information was available as to what Jennison & Co. Limited had done with the money. Jennison was available to give evidence, but was not called. Other evidence was to the effect

Book 6, p. 2655, ll. 19-21.

> "that he was, at the time of the trial of this action, engaged in some work "which might be successful."

The Appellant Lady Davis gave evidence at the trial (which was not contradicted by either of the Respondents) that in the latter part of June, 1929, when she demanded from the Respondents an explanation as to what they had been doing with Jennison, the Respondent Lord Shaughnessy, in the presence of the Respondent Mr. Reaper, told her "that there was nothing between Jennison and Davis Inc., but a loan of $10,000," and that neither of the Respondents told her of the investment of $50,000.

Book 4, p. 1831, ll. 13-43; Book 5, pp. 1970-2; pp. 2031-2.

34. The oral evidence relating to this transaction is to be found in the Record,, in Book 3, at pages 13, 248-262, 411, 414-7, and 641-4; in Book 4 at pages 1831, 9, 40; and in Book 5, at pages 2008, 1970-2, 2011, 2016, 2246, 2252-5, 2262-4, 2299-2302, 2357, 2395-8, and 2421-3.

35. Of this transaction the Trial Judge said: —

Book 6, p. 2518, ll. 5-32.

> "I hope I was wrong, but I look upon this as an extremely crude piece "of business. It may be that Lord Shaughnessy did not tell us all he knew, "but I have certainly learned very little. The reports he had concerning "Jennison were very sketchy and the only thing that seems certain about "the whole matter is that the Company has spent $50,000.00. If Jennison

"promotes anything on the other side and thinks fit to keep the commission "for himself, I doubt very much that the Company will ever see any part of "it. In the case of an individual 'taking a flier of that kind' (to use Mr. "McDonald's expression), it is an act that success only justifies. . . . . "I see only one excuse for such an act. In December, 1928, and January, 1929, "when the negotiations with Jennison took place, Lord Shaughnessy could see "more than the handwriting on the wall with regard to Alcohol. He must "have felt that the Company could not keep all its eggs in such a basket and "looked for something else.

"A conservative investment would not have brought sufficient results "and he took the plunge."

The learned Trial Judge added that, as far as he could see, Sir Mortimer Davis would have done exactly the same thing, and on that ground alone, apparently, he held that the Jennison transaction was not sufficient to justify the removal of the Respondents.

2 (b). CADILLAC COAL COMPANY LIMITED.

36. Davis Inc. had acquired in the lifetime of the deceased from the Receiver of Federal Coal Company a coal property for $10,000. The deceased or Davis Inc. had previously invested $100,000 in the property and sustained $90,000 loss. Since its acquisition by Davis Inc. it had been leased to one C. S. Donaldson, and Davis Inc. had received in 1927 in respect of the royalties or rent for 1927, $5,832.79 net and for 1928 $2,920.17. It had been the intention of the deceased to amalgamate it with an adjacent property bearing the name of Rogers. In or about February, 1929, Davis Inc. under the direction of the Respondents promoted and incorporated the Cadillac Coal Company Limited (hereinafter called the "Cadillac Company"). The properties embraced therein were the Federal Coal and the Standard Coal, the latter not being a neighbouring mine but 12 miles distant. The nominal capital of the Cadillac Company is $500,000 consisting of 100,000 shares of $5 each with power to create and issue 7% Gold Bonds bearing interest from the 1st of January, 1930, to be accompanied by a trust deed. Lord Shaughnessy is the President, Mr. T. P. Cochrane the Vice-President, the Respondent Mr. Reaper Secretary-Treasurer, and Mr. H. Poillon and Mr. C. S. Donaldson, Directors. Mr. Poillon is a consulting engineer and lives in New York.

Book 2, pp. 871-2; Book 3, pp. 267-77; 282-90; 413; 646; 747. Book 4, p. 1460; Book 5, pp. 2010; 2063 et seq.: 2241-5.

Book 2, p. 871, l. 16.

37. By an Agreement dated 24th February, 1929, (Exhibit P.19 (b) made between Davis Inc. of the first part, the Cadillac Company of the second part, and C. S. Donaldson of the third part, it was agreed *inter alia* that Davis Inc. should assign to the Cadillac Company the Federal Coal property for the consideration of $450,000 in cash and $50,000 par value 7% Gold Bonds to be delivered with

Book 2, pp. 479-483.

reasonable dispatch and Donaldson agreed to assign his (Standard) leases for the consideration of $50,000 in cash and $100,000 par value of 7% Gold Bonds to be delivered with reasonable dispatch, and Davis Inc. undertook to provide $65,000 for certain purposes and further advances for working capital, apparently without limit, to be secured by 7% Gold Bonds of a par value and principal equal to the amount of the advances. Davis Inc. and Donaldson subscribed for shares to amounts equal to the cash payments undertaken by the Cadillac Company, and the matter was carried through by an exchange of cheques. Both before and after the execution of the agreement advances were made by Davis Inc. to Cadillac Company amounting in all to $114,000 and in addition Davis Inc. undertook obligations to the Canadian Bank of Commerce for the Bank Account of Cadillac Company of $80,000.00 and $20,000 for Workmen's Compensation and further advances of $30,000 = $244,000.000. At the date of the trial none of the Gold Bonds had been created or issued to secure the advances or otherwise and no Trust Deed had been executed, and there was thus no security for advances as against other creditors. The Respondent Mr. Reaper said in his evidence that he had got some information by telegraph as to the working of the mines and was waiting for figures. It is submitted that from the evidence it does not appear that there is any more than a general statement that the mines may in future produce coal at a profit on the capital sunk and to be sunk, nor does it appear that the present estimated expenditure will not be immeasurably increased.

Book 2, p. 481, ll. 7-20.

Book 2, p. 478.

2 (c). INVESTMENT FOUNDATION LIMITED.

Book 2, pp. 465-77; Book 3, pp. 262-9; 417-9; 644-51; Book 5, pp. 2202, 2255.

38. This Company was organised in the early part of 1929. It appears to be an investment Company, with a nominal capital of 40,000 $50 par value Convertible Preference Stock, and 200,000 Common Stock of no par value. The Preference Stock and Common Stock were sold in units consisting of one Preference Share and one share of Common Stock with a non-detachable warrant entitling the unit-holder to subscribe to one-half share of Common Stock at the rate of $20 per share in respect of each unit up to and including the 1st November, 1933. (Exhibit D.129 Book 2, p. 462). Amongst the Directors are the Respondent Lord Shaughnessy and Jennison. Davis Inc. acquired by purchase on the 28th of March, 1929, 1,500 units for $144,000. The units were placed not in the names of Davis Inc. but in those of the Respondent Lord Shaughnessy and Jennison and endorsed by them and handed to the Respondent Reaper. At the time of the purchase Davis Inc. was indebted for advances to the Canadian Bank of Commerce to the extent of $3,250,000, which was

secured by debentures in Robert McNish & Company Limited (a Scottish distillery Company in which Davis Inc. was largely interested), and "B" Shares in Industrial Alcohol. The shares are not listed nor readily saleable.

3. RESPONDENTS INCREASE THEIR OWN SALARIES.

39. The next matter of complaint is the action of the Respondents in voting themselves increased remuneration as officers of Davis Inc. On the 31st December, 1928, two Directors' Meetings of the Company were held, one before and one after the General Meeting of the Company, on the same day. The only persons physically present at these three meetings were the Respondents. At the Directors' Meetings they were present as officers of the Company; at the General Meeting they were present in their personal capacity, and also as representing the estate, whilst Lord Shaughnessy in addition held a proxy on behalf of the third Director Mr. Marler. Notice of the General Meeting was sent to the Appellant Lady Davis, who was in France, by Notice dated the 26th of December, 1928, "for the purpose of receiving the annual report, electing Directors "for the ensuing year, the election of Auditors, and such other "business as may properly come before the meeting." The first Directors' Meeting was held at 10.30 a.m., the General Meeting at 11 a.m., and the second Directors' Meeting at 11.30 a.m.

Book 2, pp. 383-7; Book 3, pp. 144-150; 641; 697-9; Book 5, pp. 2319-21; 2415-6.

Book 2, p. 302.

40. At the General Meeting at 11 a.m. Lord Shaughnessy, the Appellant Lady Davis, and Mr. Reaper were elected Directors for the ensuing term. The second Directors' Meeting was held at 11.30 a.m. and there it was reported that:—

Book 2, pp. 385-6.

Book 2, pp. 386-7.

> "bonus as had been arranged with Sir Mortimer B. Davis of $5,000 had been "paid Lord Shaughnessy for the year 1928, which action was approved,"

and it was resolved that:—

> "in place of paying an annual bonus to Lord Shaughnessy that he be placed "on a straight salary basis of $25,000 per annum payable monthly "commencing from January 1st, 1929."

Lord Shaughnessy, the Chairman, then suggested:—

> "that in view of the increased responsibility and work incidental to the death "of Sir Mortimer, the salary of Mr. A. M. Reaper be made $10,000 per annum "to commence from January 1st, 1929."

The Respondent Reaper's salary had previously been $7,500 and that of Lord Shaughnessy $20,000.

Book 3, p. 892.

41. The Respondent Lord Shaughnessy about the month of December 1928 increased his own salary as President of Industrial Alcohol from $25,000 to $30,000 per annum.

4. THE LOANS TO THE RESPONDENT LORD SHAUGHNESSY.

Book 3, pp. 134-9; 237 et seq.; 454; 659-680; 765; Book 4, p. 1471.

42. During the lifetime of the deceased three loans were made by Davis Inc. to Lord Shaughnessy, of $50,000 on the 25th January, 1927, with interest at 6%, without any security, $13,000 at 6% secured by McNish debentures belonging to the Respondent Lord Shaughnessy, the interest on which was from time to time set off against the interest on the loan; $7,248.72 at 6% (originally $7,500.00) secured on Alcohol "B" Shares, dividends on 375 Alcohol "B" Shares being from time to time credited against the interest in the account. After the death of the Testator the Respondent Lord Shaughnessy on the 7th January, 1929, while the above loans were still outstanding, borrowed a further sum of $10,000 at 6% the interest on which was from time to time charged against him, but which was not repaid until September 1929 as hereinafter explained; there was no resolution of the Directors or of the Company in reference thereto; the cheque was signed by the Respondents and endorsed by the Respondent Reaper. During the period of the pending of the loans the McNish debentures deposited as security for the $13,000 depreciated to the value of $10,500.

43. In the month of September, 1929, the five years period under the Agreement mentioned in paragraph 15 hereof having expired, there appeared in the books of Davis Inc. to the credit of the trust account of Messrs. Marler and McLean, the trustees under the Agreement of the 17th September, 1924, a credit of $217,000.00. The credit was in respect of a sum of $162,000, and interest thereon credited to the trustees in 1924 in respect of a payment due under the said Agreement from the Company to the trustees in relation to a dividend or distribution of profits on shares held by the trustees.

44. The Respondent Lord Shaughnessy claimed to be entitled to the said sum on the ground apparently that it represented a proportion of an increase of stock, and accordingly the Respondents set-off against that sum in the books of Davis Inc. the two said loans of $50,000 and $10,000 with the accrued interest thereon. The balance of the said sum was drawn out from time to time by the Respondent Lord Shaughnessy. The payment of the sum due to the Trustees under the Agreement of the 17th September, 1924, is the subject of a separate action as to Lord Shaughnessy's right thereto. The remaining loans of $13,000 and $7,248.72 were not

however repaid, but were carried in the books of the Company and the interest thereon was debited from time to time, and the principal and accumulated interest remained unpaid until the month of March, 1930, after the commencement of the present action.

5. MISUSE OF MONEYS OF DAVIS INC.

45. In July 1928 the Respondent Lord Shaughnessy went to Europe partly on pleasure and partly on business connected with the estate. Before his departure thirteen cheques of Davis Inc. drawn in blank on its Bankers and signed by the Respondents were left in Montreal and by his direction the Respondent Mr. Reaper was left in a position to fill in the same for any purpose that might be required in relation to Lord Shaughnessy's personal obligations in connection with his household and otherwise, and twenty cheques were signed by the Respondent Reaper and the Assistant Secretary-Treasurer of the Company, and filled in for the same purpose. The cheques were duly honoured by the Bank and thereafter the sums amounting to $4,684.22 were on the 5th October, 1928, repaid by cheque of the Respondent Lord Shaughnessy and credited in the Company's books as of the 29th September, 1928. No interest was charged, and in the meantime he was in receipt of his remuneration. Book 2, p. 351: Book 3, pp. 139-143.

46. Between the 2nd April and the 30th June, 1929, in like manner and for like purpose, twenty-one cheques were drawn in blank on the Company's Bankers signed by the Respondents, and by the direction of the Respondent Lord Shaughnessy these and eleven other cheques signed by the Respondent Mr. Reaper and the Assistant Secretary-Treasurer were used as aforesaid and honoured, and the amount of $2,875.82 repaid by the Respondent Lord Shaughnessy by his cheque of the 4th September, 1929, credited as of the 31st August, 1929. No interest was charged, and he was in receipt of his remuneration. Book 2, p. 364. Book 3, pp. 683-9.

6. MISUSE OF TRUST MONEYS FOR PURCHASE OF SHARES.
7. PAYMENT OF COMPENSATION TO A TRUSTEE.

47. These two heads of complaint arise out of the same transaction, and can best be treated together. The Testator by Trust donation dated the 1st day of August, 1923, of $1,200,000 in trust in favour of the beneficiaries therein named, provided for capital or securities payable or deliverable on demand of the Trustees; one of the Trustees was H. M. Marler (who was also a Director of Davis Inc. up to December, 1928). The net annual revenues were payable Book 2, pp. 531-7.

to the Testator during his life. The provision for remuneration of the Trustees was that during the lifetime of the Testator the Trustees should serve without remuneration unless otherwise and subsequently arranged by the Testator, and after the death of the Testator each Trustee should be entitled to the sum of $2,000 per annum for his services as such. By another Trust donation dated the 26th of October, 1921, of which the said H. M. Marler was also a trustee, and made in favour of Dame Eleanor Curran (the Appellant Lady Davis) on the trusts therein set forth, the clause as to remuneration empowered the Trustees to employ and pay for such professional or other assistance as they might deem requisite in the discharge of their duties and to charge and accept a reasonable remuneration for their services. The amounts of or securities for the said trusts were not provided in the Testator's lifetime.

Book 2, pp. 528-30.

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48. In or about the month of December, 1928, H. M. Marler desired to resign from the trusts and to sell 500 shares which he held in Davis Inc. The purchase price fixed by the Respondents at a meeting of Directors on the 31st December, 1928, was $170 a share the value placed on the shares by the auditors for the purpose of succession duties, namely $85,000. The Respondent Lord Shaughnessy agreed to buy 90% on behalf of the Estate, 5% on behalf of one Waddell and 5% (25 shares) on behalf of himself. The amount actually paid to H. M. Marler was not $85,000 but $100,000, and it was paid by two cheques, one for $85,000 drawn by the Estate on its Bankers (signed by the Respondents) and one for $15,000 drawn by Davis Inc. on its Bankers (signed by the Respondents) on the 4th December, 1928, the amount of which was afterwards debited to the Estate. The explanation given by the Respondent Reaper as to the payment of the $15,000 was that the matter was arranged by the Respondent Lord Shaughnessy in connection with H. M. Marler's resignation as trustee and that the amount was based on the length of time elapsed since the date of the instruments, and the Respondent Lord Shaughnessy stated that Marler had represented that if he resigned he should be compensated, and that although he Lord Shaughnessy was not altogether in agreement with that in the beginning, having written to Lady Davis and mentioned that the point had been raised and that it might be necessary to do something in that connection and receiving no reply, he took it for granted it was right and went ahead. The question of the Respondent Lord Shaughnessy's title to the 5% (25) of the said shares is the subject to a separate action, but he had the use of the Estate's money for the purchase of the 25 shares until on or about the 17th September, 1929.

Book 2, pp. 227: 300-1; 408; 419-20; Book 3, pp. 331-9; 450-2; 689; Book 5, p. 2346.

Book 2, p. 301, ll. 13-16.

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8. CONVERSION OF FURNITURE.

49. Shortly after the death of the Testator the Respondent Lord Shaughnessy removed from the Testator's Montreal house the whole of the dining room furniture, which had been specially made for the room and was of a replacement value of between $3,000 and $4,000 and certain other furniture, and took it to his own residence, where he has ever since kept and used it. Book 5, pp. 2440-2; 2264-6; 2375-7; 2378-84; 2455-8.

When he was challenged on the matter, he advanced as his explanation that, the Testator having left him a legacy of $1,000 "to buy a memento", he had elected to take the furniture in place of the legacy, (although the legacy in fact is still shown in the accounts of the estate as due to him). He gave evidence to the effect that he had casually mentioned in conversation to Lady Davis that he might take the furniture over on this footing, and she had not expressly dissented. When asked what attitude he would take up if the furniture proved to be worth more than $1,000, he said that he intended to have it valued when the succession duties had all been paid, and that if it was valued below $1,000 he would claim the balance and if it was valued above $1,000 he would return it and "perhaps" pay rent for its use. In fact there was some evidence that he had elected, shortly after the death of the Testator, to accept certain jewellery of the Testator in place of the memento legacy. By Article VI of his Will the Testator bequeathed certain articles including his jewellery to the Appellant M. B. Davis. On or about the 24th of April, 1928, the Appellant Lady Davis took the jewellery to M. B. Davis at Park View Hospital, New York, and a part of the jewellery consisting of a platinum watch, chain and match box was then handed to the Respondent Lord Shaughnessy. The Appellants' evidence was that at that interview, at the suggestion of Lord Shaughnessy, the articles were accepted by him in substitution of the $1,000. Lord Shaughnessy however denied that the gift was in substitution of the legacy of $1,000. Book 2, p. 150, ll. 4-5. Book 2, p. 148, ll. 43-7.

9. CONVERSION OF ROLLS ROYCE CAR.

50. In the assets of the Estate was a Rolls Royce Car. In May, 1928, Lord Shaughnessy had the car removed from Pine Avenue, the residence of the deceased, to his home, thereafter using it admittedly about 12 times, and retaining it until about September, 1929, when he caused it to be returned. His explanation of his thus dealing with the car was that his purpose was to try it out and see if anything could be done with it so that it might be sold if it did not cost too much to put in order, and that in July, 1928, he had it put on hurdles in his garage and fourteen months afterwards sent it back to Pine Book 3, pp. 57 et seq.; Book 5, pp. 2266-8; 2361-2375.

Avenue where it was again put on hurdles. In connection with his user of the car, Lord Shaughnessy had to fill up an elaborate form of application for registration. This form, as filled up, describes him as the owner of the car, and as having purchased it from the estate of Sir Mortimer Davis. It is signed by Lord Shaughnessy as follows:—

Book 2, p. 327.

"I, the undersigned, being duly sworn, do declare and say that the "information and answers given in the above application are true to the best "of my knowledge and belief.

"And I have signed

"SHAUGHNESSY."

and it bears what purports to be the signature of the Commissioner or other officer before whom it was sworn.

Lord Shaughnessy, however, said that his chauffeur filled it up for him and that he signed it without reading it and without being sworn. He did not explain why his chauffeur thought that he had bought it, and the chauffeur was not called as a witness. Lord Shaughnessy had no real explanation to give as to why (as the fact was) he had never made any effort at all to have the car sold.

51. The insurance was paid for by the Estate, and the licence by Lord Shaughnessy. On the other hand, William Godsall, an employee of the deceased for 22 years and apparently still employed by the Estate, said he removed the car on the instructions of Lord Shaughnessy, that Lord Shaughnessy said he would take the car and keep it himself, that he thought he would prefer to take the car and keep it himself than a stranger to get the car. The witness was not cross-examined; Lord Shaughnessy denied the statement and said he thought that conversation related to removal of furniture.

10. FAILURE TO SELL ALCOHOL "B" SHARES.

52. Davis Inc. held at the time of the death of the Testator about 62,000 Alcohol "B" Shares (as mentioned in paragraphs 14 and 18 hereof). These shares had been bought very shortly before the Testator's death, carried no voting rights in Industrial Alcohol, and were intended for early re-sale. In spite of the fact that a heavy bank loan had been incurred to take them up, and of the need of the Estate for moneys with which to meet very large liabilities of different kinds, the Respondents made no real effort to dispose of the shares, and in fact only sold in all about 6,000 thereof. The values were well maintained for a considerable time after the death, but fell slowly in 1929; the Respondents took no warning from the many signs of impending deterioration of the shares, as a result of

Book 3, pp. 211; 213-6; 264; 403; 471-3; 584; 677; 733; 797; Book 4, pp. 1551, 1563; 1592; 1763-1772; Book 5, pp. 2259-61; 2312-3; 2327; 2398-9; 2402-5.

which Davis Inc. was still holding just under 56,000 of the shares when a catastrophic fall of values occurred in the Autumn of 1929. Had they accepted various offers which were from time to time put before them, they would have provided much needed cash and have saved hundreds of thousands of dollars when the collapse came.

11. FAILURE TO SUMMON LADY DAVIS.

53. The Appellant Lady Davis was in Montreal from June, 1929, onwards. She was one of the three executors and trustees of the estate and one of the three Directors of Davis Inc. The position of the estate and of the Company was anxious and complicated. She was entitled to know what was being done therein, and her growing suspicion of the Respondents made it more than ever essential that she should be given full opportunity to receive information and to take part in the management. In the face of all those facts, the Respondents neglected to summon the Appellant Lady Davis to any meetings either of the executors or of the Board of Davis Inc. between her arrival in Canada in June and the 18th October, 1929. The only excuse put forward in the action for this conduct of the Respondents was that the Appellant Lady Davis did not revoke her power of attorney until the 5th October, 1929, as mentioned in paragraph 17 hereof. It is humbly submitted that this provides no justification whatever.

Book 3, p. 164, l. 41.

Book 2, p. 312.

12. MODIFICATION OF 1924 AGREEMENT.

54. On the afternoon of the 5th May, 1928, the day on which the Appellant Lady Davis was leaving Montreal for Europe, the Respondent Lord Shaughnessy called at her hotel with a document purporting to be an Agreement between Davis Inc. and the Estate of the one part, and the Respondent Lord Shaughnessy of the other part, which had already been signed by the Respondent Mr. Reaper both as Secretary-Treasurer of Davis Inc. and as an Executor, and requested the Appellant Lady Davis to sign the same as an Executor. She did so, as found by the learned Trial Judge, without the document being explained to her. The Respondent Lord Shaughnessy later signed the document as Vice-President of Davis Inc. and as an Executor.

Book 4 pp. 1802-5; Book 5, pp. 2270.

Book 2, p. 404.

Book 6, p. 2502, ll. 20-23.

The effect of the document was, *inter alia*, to modify the Agreement of the 17th September, 1924, by providing that should the Respondent Lord Shaughnessy become incapacitated or die before the expiry of the period of five years mentioned in that Agreement,

Book 2, p. 393.

(which would have entitled the Estate to all the securities deposited with the trustees under that Agreement), he or his heirs should be entitled to receive a proportion of those securities corresponding to the portion of the five-year period which should then have elapsed.

Book 6, pp. 2467-2484. **55.** The judgment of the trial Judge, Mr. Justice Surveyer, was delivered on the 30th June, 1930, dismissing the action and the Book 6, p. 2573. Petition for sequestration, and the Appellants appealed to the Court of King's Bench (Appeal Side) and Judgment affirming the Judgment of the 30th June 1930 was given on the 27th June 1931. The reasons both of the Court of Appeal and the Judgment and Notes of Judgment of the trial Judge are of great length and do not lend themselves to any short statement *en resumé*. In both Courts disapproval was expressed of much that the Respondents had done, but the conclusion was reached that they ought not to be removed from their offices. It is humbly submitted that in arriving at this conclusion the learned Judges have fallen into two fundamental errors.

In the first place, they appear to ignore the cumulative effect of the Respondents' acts and omissions, and to act on the principle that if each separate act or omission, taken by itself, is although open to grave objection not enough by itself, in their opinion, to justify the removal of the Respondents, all the said acts or omissions, however objectionable, will not altogether justify dismissal.

In the second place, they seem to regard the suggestion that Sir Mortimer Davis in his lifetime might well have "taken the plunge" as justifying the Respondents in similar plunges; in this they not only ignore the fundamental difference between a man dealing with his own property, answerable solely to himself, and persons in a fiduciary position administering trust property, but they also leave out of sight the distinction between the position of Sir Mortimer Davis, who had no particular capital obligations which had to be discharged, and that of the estate, which had to meet enormous demands for debts, succession duties, legacies, and other such charges.

56. The Appellants humbly submit that upon the grounds hereinbefore set forth and upon all other the grounds disclosed by the evidence in this action the Respondents ought not to remain in their position and they submit accordingly that the Judgment of the Court of King's Bench (Appeal Side) should be reversed, that the Respondents Lord Shaughnessy and A. M. Reaper should be removed from their positions as Executors and Trustees of the Will of the Testator dated the 30th of November 1927 and that the Petition for Sequestration should be referred to the Superior Court of Quebec to

consider the question of the appointment of a Sequestrator pending the taking of accounts and the appointment of new Executors and Trustees in lieu of the Respondents, for the following, amongst other,

REASONS.

1. Because the evidence establishes the incapacity of the Respondents to execute the trusts of the Will and to administer the estate, their failure and neglect to carry out the provisions of the Will, their failure to exercise reasonable skill and the care of prudent administrators, and their infringement of duty and dissipation and waste of the property of the estate and of the Company.
2. Because the evidence establishes that the administration of the Respondents has been such as to endanger the said properties.
3. Because the evidence establishes that in their administration the Respondents have shown a want of fidelity.
4. Because the evidence establishes that the continuance of the Respondents as Executors and Trustees is endangering the estate and the said properties.
5. Because the continuance of the Respondents as Executors and Trustees will prevent the trusts from being properly executed.
6. Because on the facts of the case and the law applicable thereto it is for the welfare of the beneficiaries that the Respondents should be removed from their offices of Executors and Trustees.
7. Because the Judgments of the Courts below are wrong and ought to be reversed.

D. N. PRITT.

HORACE DOUGLAS.

No. 78 of 1931.

In the Privy Council.

ON APPEAL

FROM THE COURT OF KING'S BENCH (APPEAL SIDE) OF THE PROVINCE OF QUEBEC.

BETWEEN:

LADY DAVIS (Dame Eleanor Curran) and MORTIMER BARNET DAVIS (Plaintiffs) *Appellants*

— AND —

The Right Honourable LORD SHAUGHNESSY (William James Shaughnessy) and ALEXANDER M. REAPER - - - - (Defendants)

— AND —

THE FEDERATION OF JEWISH PHILANTHROPIES OF MONTREAL (Mis-en-cause) *Respondents.*

CASE OF THE APPELLANTS.

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