

80,1932

CANADIAN
LAW
LIBRARY

No. 78 of 1931

In the Privy Council.

ON APPEAL

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

BETWEEN—

20 LADY DAVIS (DAME ELEANOR CURRAN),
of Cannes, in the Republic of France, Widow of the
late Sir Mortimer B. Davis, Knight; and MORTI-
MER B. DAVIS, Gentleman, of the City and State
of New York, in the United States of America,
(Plaintiffs in the Superior Court) *Appellants*,

— AND —

30 THE RIGHT HONOURABLE LORD SHAUGHNESSY
(WILLIAM JAMES SHAUGHNESSY, K.C.) and
ALEXANDER M. REAPER, both of the City of
Montreal,
(Defendants in the Superior Court),

— AND —

40 THE FEDERATION OF JEWISH PHILAN-
THROPIES OF MONTREAL, a body corporate
having its HEAD OFFICE in Montreal,
(Mis-en-Cause in the Superior Court)
Respondents.

CASE OF THE RESPONDENTS
LORD SHAUGHNESSY AND ALEXANDER M. REAPER

1. This is an Appeal from a Judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, rendered on the 27th of June, 1931, by Howard, Rivard, Letourneau and Hall, JJ., unanimously dismissing, with costs, the Appeal of the present Appellants and affirming the Judgment of the Superior Court. Bk. 6, p. 2573

Bk. 6, p. 2467

2. The Judgment so affirmed had been rendered in the Superior Court on the 30th of June, 1930, by Mr. Justice Surveyer, dismissing Appellant's action seeking the removal of the Respondents Lord Shaughnessy and A. M. Reaper from their positions as two of the three Executors and Trustees appointed by the Last Will and Testament of the late Sir Mortimer B. Davis, and subsidiarily dismissing Appellants' incidental petitions for appointment of a sequestrator and for an interlocutory injunction.

Bk. 6, p. 2483

3. The Appellant Lady Davis is the widow and the Appellant Mortimer B. Davis the son of the said late Sir Mortimer B. Davis, and they are both substantial beneficiaries under his Will. By their present action they sought the dismissal of Respondents on many and various grounds set out in the 118 paragraphs of Plaintiffs' Declaration, printed on the first 27 pages of the Record, and summarized by the Trial Judge at the beginning of his formal judgment. The principal complaints contained in this long statement of claim may be summarized as alleging in effect that Respondents have failed and neglected to do and perform the acts required of them in their qualities of Executors and Trustees, have infringed their duties as such, have dissipated and wasted the property of the Estate, and by their administration have exhibited incapacity, dishonesty and total unfitness to hold and exercise their offices as Executors and Trustees. 10 20

Bk. 1, pp. 1-27

Bk. 6, pp. 2467 et seq.

4. To all these charges Respondents replied in detail, in separate but substantially similar pleas printed at pp. 28 et seq. of the Record, and summarized by the Trial Judge. In effect the pleas deny the truth of the charges and allegations made and contend that the Respondents have consistently in good faith to the best of their abilities carried out and given effect to the provisions of the Will. Whenever the term "Respondents" is used herein it signifies only the Respondents Lord Shaughnessy and A. M. Reaper. 30

Bk. 1, pp. 28 et seq.

Bk. 6, p. 2474, l. 43

5. This litigation concerns the estate and succession of the late Sir Mortimer B. Davis, and involves more particularly the proper interpretation and application of the provisions of his Will.

Bk. 2, pp. 148 et seq.

6. Owing to the unusual size of the Record, and the variety of issues involved, Respondents have found it impossible to keep this Case within the usual limits of length. The matter is discussed under the following grouping:—

- (a) Organization of Sir Mortimer Davis, Incorporated, and facts leading to Will, paragraphs 7 to 13.
- (b) Discussion of Will, paragraphs 14 to 18.
- (c) Causes of dispute paragraphs 19 to 30.
- (d) Analysis of Judgments, paragraphs 31 to 44.
- (e) Consideration of Appellants' complaints, paragraphs 45 to 110.
- (f) Reasons for dismissal of Appeal, paragraph 111.

40

Bk. 6, p. 2493, l. 9

7. On the 29th of July, 1919, Sir Mortimer caused to be incorporated a Joint Stock Company under the name of "Sir Mortimer B. Davis, Incorporated," hereinafter referred to as the "Incorporated Company." It had charter powers authorizing it, among other things, to subscribe for,

- underwrite and acquire and to dispose of and deal in stocks, bonds and other securities of other companies, including mining, manufacturing, commercial or industrial corporations, and with special power to promote, organize, manage or develop any company or business enterprise. Exhibit D.136 printed in Appendix hereto.
8. To this Company, Sir Mortimer Davis in 1919 conveyed the great bulk of his then assets, the chief of which consisted of a controlling interest in the capital stock of Canadian Industrial Alcohol, Ltd., a company engaged in the distillery business in Canada. Bk. 2, pp. 874 et seq.
Bk. 2, p. 219
Bk. 2, p. 881
9. From 1923 on Sir Mortimer Davis spent much time abroad, residing chiefly in France. In May, 1924, in France, Sir Mortimer was married to Appellant Lady Davis and continued to reside in France. 10 Bk. 5, p. 1918, l. 35
10. In August, 1924, Sir Mortimer approached Respondent Lord Shaughnessy, who was then in active practice as a King's Counsel at the Montreal Bar, and invited him to give up the general practice of his profession and to become associated with Sir Mortimer's business ventures, and more particularly the Incorporated Company. During these negotiations he wrote Lord Shaughnessy a letter dated August 20th, 1924, in the course of which he said: Bk. 5, p. 2216, l. 5 et seq.
Bk. 5, p. 2216, l. 12
- 20 "I am quite willing, as I stated to you, to secure you in any way that is fair, in case
"of anything happening to me.
"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." Bk. 2, p. 793, l. 43
11. On the 17th of September, 1924, Sir Mortimer and Lord Shaughnessy entered into an agreement providing that Lord Shaughnessy would enter the employ of the Incorporated Company in the capacity of General Counsel at a salary of \$20,000 per annum, and with the further provision that should he remain in the uninterrupted employment of the Company for five years from that date he would be entitled to receive from the Trustees under the agreement, certain debentures and notes of the Company, representing roughly 5% of Sir Mortimer's then interest. 30 Bk. 2, pp. 394-6
Bk. 5, p. 2216, l. 45
- Following the execution of this contract, Lord Shaughnessy gave up the practice of his profession, and devoted himself exclusively to the affairs of the Incorporated Company and affiliated enterprises.
12. In December, 1925, Sir Mortimer caused Lord Shaughnessy to be elected President of the Alcohol Company. Lord Shaughnessy had also become a Director and subsequently Vice-President of the Incorporated Company. In February, 1926, Sir Mortimer appointed Respondent Reaper as Secretary-Treasurer of the Incorporated Company, and shortly after also entrusted to him the keeping of his private records. 40 Bk. 3, p. 488, l. 40
Bk. 3, p. 113, l. 25
Bk. 3, p. 483, l. 3
- Sir Mortimer had known Mr. Reaper for twenty years, as Mr. Reaper had been employed as an officer of various companies in which Sir Mortimer had had substantial interest.
13. In the autumn of 1927 Sir Mortimer had a disagreement with his son, the Appellant M. B. Davis, of whose then recent marriage, among other things, he seriously disapproved. Bk. 2, p. 844, l. 32
Bk. 5, p. 1935, l. 4
Bk. 2, p. 298, l. 25
14. It was in these circumstances that on the 30th of November, 1927, Sir Mortimer Davis, at London, England, made his Will. While

Bk. 2, pp. 148 et
seq.

the whole Will is important and must be considered, the Articles in it which call for more particular attention are the following:—

Bk. 2, p. 149, l.1

Article VII bequeathed to Lady Davis the use and habitation of all his residences and properties in France, together with their contents and accessories, free of rent and taxes, and, with provision that any of these properties might be sublet or sold, with his wife's consent, but that the rentals or price should thereupon become part of his residuary estate.

“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 10
“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 consider it desirable and
“proper to do so, but not otherwise.”

Bk. 2, p. 155, l. 25

“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 Prov- 20
“ince of Quebec. In this Company is vested the control of several important
“undertakings, all of which I believe by proper management 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 development of the various undertakings en-
“trusted 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.” 30

15. Articles XVIII, XIX and XX further enlarge the powers of the Trustees and Executors, and Article XX concludes with this provision:

Bk. 2, p. 157, l. 38

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

16. Articles XXII, XXIII and XXV are as follows:

Bk. 2, p. 158, l. 1

“Article XXII.—The books and accounts of my Estate are to be kept in the 40
“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.

Bk. 2, p. 158, l. 5

“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.”

Bk. 2, p. 158, l. 25

“Article XXV.—I hereby direct that my Estate shall devolve and be governed
“and that my Will be interpreted in accordance with the provisions of 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, realization, 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.”

17. It was to carry out the provisions of this Will and to exercise the very wide powers thereby conferred upon his Trustees and Executors that Sir Mortimer Davis by Article V of his Will named Appellant, Lady Davis, and the two Respondents his Trustees and Executors, and to them he gave and bequeathed in trust all his estate and property to be dealt with, administered and disposed of as in the Will provided. Bk. 2, p. 148, l. 31
18. Sir Mortimer died at his Villa near Cannes suddenly on the 22nd March, 1928. Bk. 5, p. 2179, l. 9
19. On April 25th a meeting of the three Trustees and Executors was held in Montreal, of which minutes were kept and signed by all three. At this meeting a statement showing the then position of the estate was submitted and was fully explained. Bk. 5, p. 1943, l. 14
Bk. 2, p. 323
20. On May 4th, Lady Davis executed a general power of attorney in favor of the Respondents, “to be her attorneys for her and in her said capacity (of Trustee and Executor) to do and perform all such things as may be required in connection with the estate and succession of the deceased, the late Sir Mortimer B. Davis,” etc. Bk. 2, p. 295, l. 29
21. In July, 1928, Lord Shaughnessy saw Lady Davis and verbally reported the progress made and handed to her a complete statement of the affairs of the Estate as at the 22nd of March, 1928, date of death. Bk. 2, p. 296
Bk. 2, pp. 163-168
Bk. 4, P. 1808
ll. 3-13
22. On the 14th of September, 1928, Mr. Reaper filed a statement for succession duty purposes which was followed by protracted negotiations between the Respondents and the Succession Duty Office, discussing the accuracy of the statements and valuations filed, and this correspondence and these interviews continued until the 14th of May, 1929, when a statement was submitted by the Succession Duty Office greatly increasing the value of the assets and disallowing debts declared, thus making a difference in the net valuation of the Estate of upwards of seven and three-quarter millions of dollars. This was followed by further protracted discussions, interviews and correspondence which were still actively going on when this action was started in January, 1930, and which ultimately resulted in substantial concessions being made by the Government. Bk. 2, pp. 546-554
Bk. 2, pp. 562 et seq.
Bk. 4, p. 527
Bk. 2, p. 591
23. In the Winter of 1929 the Distillery business in Canada fell upon evil days and serious drops in business and earnings began to manifest themselves. As the result of diminished earnings and uncertain future prospects the stock market in Canada for all distillery shares became seriously affected and there were substantial drops in all quoted values beginning about February, 1929, and continuing almost without interruption thereafter until the institution of these proceedings. Bk. 5, p. 2221 et seq.
Bk. 5, p. 2342, l. 7
Bk. 5, p. 2407, l. 16
Bk. 2, p. 742
24. On June 24th, 1929, Lady Davis intimated that she wished for more money from her interest in the Estate, over and above the annuity of \$67,000.00 per annum which she had been regularly receiving and on the occasion of her next interview on June 27th, she, for the first time, informed Lord Shaughnessy that she had understood that the income of both herself and her step-son from the Estate would amount to some Bk. 5, p. 1970, l. 2
Bk. 2, p. 985, l. 41
Bk. 5, p. 2308, l. 1
Bk. 5, p. 1973, l. 38

- \$400,000.00 each per annum. With this Lord Shaughnessy took issue. Following this interview, Lady Davis began to assume a critical and eventually an openly hostile attitude to Respondents, and particularly to Lord Shaughnessy.
- Bk. 2, p. 985
Bk. 5, p. 1979, ll. 33
et seq.
Bk. 4, p. 1839, l. 35
Bk. 2, p. 985, l. 45
- 25.** Early in July, Lady Davis suggested that she should have a representative on the Board of Directors of the Incorporated Company. She proposed Mr. George C. McDonald, C.A., who afterwards appeared in this case as the chief financial expert witness for and spokesman of Appellants.
- Bk. 2, p. 986, l. 10
- 26.** On July 24th, Lord Shaughnessy agreed in principle to Mr. McDonald's appointment and the next day had an interview with Mr. McDonald, of which interview Mr. McDonald has made a memorandum filed as Exhibit P-195, from which it appears, and from Mr. McDonald's testimony in the same sense, that the Respondents declared their perfect willingness to accept Mr. McDonald as a Director of the Incorporated Company in the place of Lady Davis, but declined to have him on the Board in addition to her. Mr. McDonald's memorandum then contains the following important passage:
- Bk. 2, p. 980, l. 30
- "In discussing the policy of the Executors and the Directors of the Company, Lord Shaughnessy intimated that the late Sir Mortimer Davis had certain plans for the development of the Sir Mortimer Davis, Inc., these plans including investing money in industrial enterprises. I asked Lord Shaughnessy if he did not think that the death of Sir Mortimer Davis brought about a different situation for the Directors of Incorporated Company, intimating that it seemed to me the Incorporated Company should disburse all its revenue to its shareholders. Lord Shaughnessy did not agree that this was the case. He thought that the Executors of the estate would have to distribute all the revenue they received but the Directors of Sir Mortimer Davis, Inc., if carrying out Sir Mortimer's policy would be entitled to, after paying reasonable dividends, invest the surplus revenue in new enterprises and in the extension of other enterprises in which the Company was interested."
- Bk. 5, p. 1981, l. 40
Bk. 5, p. 1987, l. 18
Bk. 2, p. 986, l. 15
Bk. 5, p. 1988, l. 15
- 27.** Following Mr. McDonald's interview of July 25th, 1929, Lady Davis and Lord Shaughnessy continued the controversy as to whether Lady Davis was entitled not only to have Mr. McDonald on the Board as a representative, but also to remain upon it herself, as well as in reference to her share of the revenues, and on these points failed to agree, so that by August 8th, 1929, a deadlock had been reached and Lady Davis made open threats to appeal to the courts for the enforcement of what she claimed were her rights.
- Bk. 2, p. 394, l. 40
- 28.** On the 17th of September Lord Shaughnessy's five-year period of engagement with the Incorporated Company expired and he became entitled, to the debentures, shares and cash accruing to him by virtue of that agreement. The machinery provided in the contract was put into operation and on September 19th the Trustees received the necessary certificate of his services and delivered the securities accruing to him.
- Bk. 2, p. 312, l. 15
- 29.** On October 5th, Lady Davis revoked her power of attorney to the Respondents which had up to that time remained in force. On November 21st, Lady Davis' attorney wrote Respondents demanding

their immediate resignations from their offices as Joint Executors and Trustees and also from all offices then held by them in the Incorporated Company, the Alcohol Company and other affiliated companies and threatening immediate proceedings to have them removed. These demands were refused. On January 18th, 1930, the present action was served on Respondents and it was then for the first time that Respondents learned that the Appellant Mortimer B. Davis had joined in the present demands. Previous to that there had been no complaint from him.

Bk. 2, pp. 315 and 316

Bk. 2, pp. 316 and 317

Bk. 2, p. 318

Bk. 2, p. 320, l. 40 to p. 323, l. 15

10 **30.** The trial of the principal action and the incidental Petitions began on March 3rd and continued almost without interruption until the 21st of May. Thereafter the Trial Judge took the case under advisement and on June 30th, 1930, rendered judgment dismissing Appellants' action.

20 **31.** The formal Judgment of the Superior Court is supported by very extensive notes. In view of their length it may be convenient to note that in the matter of succession duties—the delay in the payment of which constituted one of the Appellants' most serious complaints—the Trial Judge finds that the question was taken up and discussed, and that the discussions were justified, and productive of good results. He also finds that the Respondents were entitled to assert the interpretation they had put forward of the Testator's Will, denying the right of the Appellants to absorb the total revenues of the Incorporated Company—at least until some Court had found that interpretation at fault. The modifications of Lord Shaughnessy's contract agreed to by Lady Davis on the 5th of May, 1928, were such as would clearly have been approved by Sir Mortimer, and were in confirmation of his intentions. As to the item of dining room furniture taken over by Lord Shaughnessy in satisfaction of his legacy of \$1,000, the Trial Judge points out that if Lord Shaughnessy was prohibited from purchasing property of the Estate under the Civil Code, and if the taking over of certain articles in satisfaction of a legacy of a sum of money could be construed as a purchase, then the real remedy for the Appellants was to have asked Lord Shaughnessy to return the effects, for which there is no conclusion in this action. The use by Lord Shaughnessy of an old motor car belonging to the Estate on a few occasions and the failure to have found a purchaser for it was not a reason for dismissal from office, while the week-ends spent at Sir Mortimer's Ste. Agathe property he found to have been in accordance with the express wishes of Sir Mortimer, and to be useful and even necessary.

Bk. 6, p. 2467 et seq.

Bk. 6, p. 2476, l. 38

Bk. 6, p. 2477, l. 22

Bk. 6, p. 2477, l. 32

Bk. 6, p. 2478, l. 10

Bk. 6, p. 2478, l. 20

40 **32.** As to the attack made on the legality of Lord Shaughnessy's personal contract of September 17th, 1924, the Trial Judge points out that this is the subject of another suit presently pending, in which the cancellation of the contract is sought by the present Appellants, and without prejudging that action, he expresses the view that in regard to removal from office, the parties to that deed had a perfect right to give effect to its terms as expressing the wishes of Sir Mortimer. The Marler shares of the Incorporated Company were sold, he finds, at \$170 a share, to which was added \$15,000 claimed by Mr. Marler as Trustee under various trusts, which purchase was made with Lady Davis' consent, and he points out that there is another action pending to annul this transaction also, but that it constitutes in any event no ground of removal.

Bk. 6, p. 2478, l. 30

Bk. 6, p. 2478, l. 42

- Bk. 6, p. 2479, l. 15 The expenditure on the Young Men's Hebrew Association building was merely carrying out the engagement undertaken by Sir Mortimer, and was specifically agreed to by Lady Davis. The Judge finds that Lady Davis was fully apprised before she left for Europe in 1928 of all facts then known, and that between May, 1928, and May, 1929, she received as many statements as she cared to examine, and was consulted even by cable on important transactions. After the trouble started in 1929 she was supplied with the information she desired, and any meetings of the Incorporated Company to which she was not called were purely formal ones. Negotiations for a merger of the Alcohol Company with other distillery companies were never far enough advanced to have made it necessary to communicate with Lady Davis on the subject. The increase of Lord Shaughnessy's salary as President of the Incorporated Company was, he finds, "merely the stabilizing of an habitual bonus," and not a ground of removal. As to the loans from the Incorporated Company to Lord Shaughnessy, three out of four were arranged during Sir Mortimer's lifetime on terms satisfactory to him. The fourth loan of \$10,000 (made in January, 1929, and repaid with interest in September following, during which period a large sum stood at the credit of Lord Shaughnessy's Trustees on the Company's books) he finds "reprehensible" but no cause for removal. The payments made by the Incorporated Company for Lord Shaughnessy's account during his sojourn in Europe were mere matters of convenience, and were refunded immediately upon Lord Shaughnessy's return. The dealings in Alcohol shares resulted in a profit to the Estate. The investment in Jennison & Company, while it appeared to him to have been done without sufficient precaution, did not constitute a ground of removal. This would apparently constitute in the Judge's opinion an error of business judgment, as would also the investment in Investment Foundation Limited. The obligations assumed by the Incorporated Company in connection with the Cadillac Coal Company he found in conformity with the policies of Sir Mortimer Davis, and assumed with reasonable precaution, and the monies spent by the Incorporated Company on explorations were also in accordance with such policies. The Incorporated Company's dealing with its debenture notes was in line with previous practice during Sir Mortimer's lifetime.
- Bk. 6, p. 2480, l. 2
Bk. 6, p. 2480, l. 15
Bk. 6, p. 2480, l. 32
Bk. 6, p. 2480, l. 38
Bk. 6, p. 2481, l. 1
Bk. 6, p. 2481, l. 5
- 33.** Dealing with complaints as to Lord Shaughnessy's management of the Alcohol Company, the Trial Judge found that Lord Shaughnessy in his attitude in regard to the management of that Company was merely carrying out Sir Mortimer's instructions; that the resignations of the outside Directors were properly explained and the negotiations for a possible merger were perfectly legitimate, although without result. The depreciation in the quoted market value of the shares of the Incorporated Company, and which indeed occasioned nearly all of the shrinkage in the nominal value of the Estate, the Trial Judge finds to be due mainly to the action of the American, Canadian and Ontario Governments which resulted in the curtailment of exports of alcohol to the United States; to the progress made by the Company's competitors particularly in the manufacture of alcoholic beverages for American consumption, and to other incidental causes enumerated but not attributable to Respondents.
- Bk. 6, p. 2481, l. 27
Bk. 6, p. 2482, l. 1
Bk. 6, p. 2482, l. 3

34. Mr. Justice Surveyer thereupon sums up his decision of the whole matter thus:— Bk. 6, p. 2555, l. 29

“On the whole, I come to the conclusion that the Plaintiffs have not made
“a case of removal against the Defendants.”

35. The conclusions of this Judgment of the Trial Judge dismissing Appellants’ action were unanimously affirmed by the four Judges of the Court of Appeal, who, however, did not share in detail all the views of the Trial Judge. 10

36. Mr. Justice Howard found himself in accord with the Trial Judge on the material facts and conclusions, but he added: Bk. 6, p. 2576, l. 5

“I shall therefore conclude by saying that while I do not share on all points
“the views expressed by the learned Judge of the Trial Court in his notes of judg-
“ment herein, I agree with him in his findings and conclusions on the material
“points at issue as restated and confirmed by my brothers Rivard and Hall, and I
“therefore concur in dismissing with costs the Appeal as submitted to this Court.”

20

Howard, J., had previously pointed out in his notes the distinction to be drawn between the actions of the Respondents as Executors and their actions as Directors of the Incorporated Company, which he thought were not on precisely the same basis, and he expressed grave doubt of the relevancy of the attack upon Lord Shaughnessy’s management of the Alcohol Company. Bk. 6, p. 2575, l. 18
Bk. 6, p. 2575, l. 41

37. Mr. Justice Rivard in his notes makes a full analysis of all the complaints submitted by Appellants, and the proof in reference to each particular claim. He points out that the primary dispute between the parties was the claim of the Appellants to have distributed to them the total revenues of the Incorporated Company, and he adds that this was the real cause of the litigation: 30

“C’est à cause de la différence d’opinion à ce sujet entre Lady Davis d’une part
“et les deux autre co-exécuteurs d’autre part, que la poursuite a été instituée.” Bk. 6, p. 2579, l. 40

He found that Respondents as Directors of the Incorporated Company had to have regard to its own interests, and that following the instructions of the Will it was their duty to carry out the policies laid down by Sir Mortimer. He interpreted this provision as signifying Sir Mortimer’s desire to assure continuity of the lines of action he had himself laid down in the management of his affairs, as found in his letters to Lord Shaughnessy and in his own course of dealing, and he points out that Sir Mortimer in addressing these instructions to his Executors, the Respondents, was addressing men who were perfectly conversant with his business policy. Speaking generally, therefore, he finds that the Respondents, following these instructions, carried out Sir Mortimer’s own policies in their administration in the affairs of the Estate and of the 40 Bk. 6, p. 2580, l. 5
Bk. 6, p. 2580, l. 42
Bk. 6, p. 2581, l. 4

Bk. 6, p. 2582, l. 44 Company, and, in reference to Respondents' administration of the Incorporated Company, he concludes as follows:—

“Je ne trouve donc pas dans la conduite des défendeurs, touchant l'administration générale de la Compagnie Davis, la preuve d'une négligence ou d'un défaut d'exécuter les dispositions du testament ou de la fiducie.

Bk. 6, p. 2583, l. 28 **38.** He points out that if there were possible errors of business judgment in not selling certain securities or in making certain investments, mere error of judgment is no ground of removal from office. He concurs in putting no blame upon Respondents in regard to the execution of the various trusts and approves their discussion of the matter of succession duties with the departmental authorities, and points out that in view of this serious discussion the Executors were right in withholding payment until settlement could be reached, and as a consequence in not paying specific legacies. He points out that Sir Mortimer well knew the Respondents when he selected them to administer his estate. He finds that Lord Shaughnessy's administration of the affairs of the Alcohol Company over a period of years was successful and that the falling off in profits and the depreciation in market value of the shares in 1929 were not his fault. In his view the cause of the depreciation in the quoted market value of the Alcohol shares, apart from the inevitable effect of the general financial crisis, affecting particularly at that time all beverage stocks, and the general fall in values, was the falling off in sales of the Alcohol Company's products due to the action of the Customs authorities preventing export, to the energetic steps taken to prohibit export of liquor to the United States, to the competition of rival companies better situated in this regard, and to other causes in no way concerning the administration of Respondents. The general complaint of incapacity in administration he finds unfounded. The amounts expended in connection with the Y.M.H.A. building were in fulfilment of an undertaking publicly given by Sir Mortimer, in effect a debt of honour. The investment in Jennison & Company was made following Sir Mortimer's policy. He is not even convinced that this was an error of judgment as there is yet no evidence of ultimate loss, merely such a business risk as the Company was accustomed to take. The Investment Foundation Limited he thought better of than the Trial Judge, and considered it a serious undertaking, without evidence of ultimate loss, certainly none attributable to Respondents; and in the matter of the Cadillac Coal Company he thought that the Respondents merely carried out Sir Mortimer's policy, as they did in the matter of mining explorations, etc. The accusations against Lord Shaughnessy in regard to the household furniture and the Rolls-Royce car he finds unfounded and he accepts Lord Shaughnessy's explanations as quite sufficient, and no evidence of infidelity. He likewise finds that the Marler shares were bought at \$170 per share and that the \$15,000 was paid in respect of his fees as Trustee. As to the carrying out of Lord Shaughnessy's contract in September, 1929, he thought that what was done was justified and that there was in that matter no want of fidelity to duty—this without prejudging the merits of the other pending case. The converting of Lord Shaughnessy's annual bonus into a corresponding in-

crease in salary he found neither illegal nor fraudulent, and the charges of fraud and infidelity in respect of loans by the Incorporated Company he likewise found unfounded. He also points out how exaggerated and unfounded were the charges by Appellants in regard to the payment by the Company of certain expenses for Lord Shaughnessy's account during his European absences. As to the complaint that Lord Shaughnessy made false representations to Lady Davis, or concealed from her what he should have told, he concurs in the view of the Trial Judge that these charges were not established. He therefore concludes for the dismissal of the Appeal in these words:—

“N'ayant trouvé dans les actes et dans les omissions qui sont reprochés au défendeurs rien qui manifeste leur négligence, leur incapacité ou leur infidélité dans la gestion de la succession non plus que la dilapidation des biens, je rejeterai l'appel.”

39. Mr. Justice Letourneau also analyses in detail all charges brought by Appellants against Respondents, pointing out that some of those urged are not included in the Plaintiffs' declaration or statement of claim. He agrees with Mr. Justice Rivard that the grounds urged, based on English law of trusts, that Respondents be removed from office in the interest of the beneficiaries is not sound under our Civil Code, which enumerates the grounds of removal. He interprets the references in the Will to the carrying out of Sir Mortimer's policies and the continuation of the Incorporated Company to signify that it was through the Company's operations that the “policies” were expected to be carried out, not in the estate proper; and these were the business principles in which Sir Mortimer had given the Respondents special training. He thinks there is an important distinction between the actions of the Executors as such and their actions as Directors of the Incorporated Company. Respondents' failure to foresee the general collapse in market values which subsequently happened might constitute an error of judgment, but was certainly no proof of incapacity within the meaning of the Code.

40. Letourneau, J., also finds that the fundamental question between the parties and the real cause of litigation was Appellants' claims to appropriate the entire net revenues of the Incorporated Company, or, as they said, to run the Company as “an arm of the Estate.” While he thinks it unnecessary for the purposes of this case to finally decide that issue—which might in the future be the subject of appeal to the courts—he makes no suggestion that Respondents were wrong in their view, but points out that even if Respondents were in error in their interpretation of the Will that would be no ground for their removal from office or evidence of incapacity or infidelity. He thinks that the fact that this was the real controversy between the parties should be borne in mind in weighing all the other grounds of complaint which the Appellants subsequently made. Respondents' attitude in the succession duty situation he thinks not unreasonable, and if Respondents misjudged the stock market so did many more who were not either incapable or unfaithful. Under Lord Shaughnessy the Alcohol Company enjoyed its greatest prosperity and the unfavourable factors which afterwards brought about a

Bk. 6, p. 2602, l. 30

Bk. 6, p. 2602, l. 40

Bk. 6, p. 2604, l. 25

Bk. 6, pp. 2605 et seq.

Bk. 6, p. 2609, l. 4

Bk. 6, p. 2609, l. 18

Bk. 6, p. 2610, l. 25

Bk. 6, p. 2611, l. 36

Bk. 6, p. 2612, l. 14

Bk. 6, p. 2614, l. 6

- drop in the market value of its shares, viz., competition, new legislation, general depression, etc., were not attributable to Respondents. Without entering into the merits of the other action pending regarding Lord Shaughnessy's contract of September 17th, 1924, he points out that the parties to it were entitled to give it effect at the time they did. This also explains their attitude to the various Shaughnessy loans secured thereby. He points out that Lord Shaughnessy's engagement stipulated for a salary not less than the amount originally provided, implying that it might be raised. He accepts Lord Shaughnessy's explanation as to the car and also in reference to the furniture, which was obviously taken over in good faith. Sir Mortimer's Estate was no ordinary one and he again expresses his conviction that Sir Mortimer did not intend that the Incorporated Company be hampered or prevented from carrying out the policies he had laid down for it in his lifetime; and he is also convinced that it was to Lord Shaughnessy, more particularly, that Sir Mortimer looked to carry out these policies, he having given him special training for that purpose. 10
- Bk. 6, p. 2616, l. 10
- Bk. 6, p. 2619, l. 27
- Bk. 6, pp. 2620 et seq.
- Bk. 6, p. 2621, l. 3
- Bk. 6, p. 2624, l. 40
- Bk. 6, p. 2626, l. 6
- Bk. 6, p. 2626, l. 25
- Bk. 6, p. 2626, l. 40
- Bk. 6, p. 2627, l. 12
- Bk. 6, p. 2627, l. 20
- Bk. 6, p. 2628, l. 45
- Bk. 6, p. 2629, l. 31
- Bk. 6, p. 2630, l. 15
- Bk. 6, p. 2631, l. 15
- Bk. 6, p. 2632, l. 30
- Bk. 6, p. 2633, l. 20
- Bk. 6, p. 2634, l. 25
- Bk. 6, p. 2635, l. 30
- Bk. 6, p. 2635, l. 40
- Bk. 6, p. 2637, l. 20
41. Mr. Justice Hall reviews the relations of Sir Mortimer Davis with Appellants and Respondents and with his "One Man Company," and then deals with the essential provisions of the Will and the value of the Estate at death. He notes that the depreciation in nominal market value is sufficiently explained by the fall in Alcohol and Asbestos shares. He thinks Sir Mortimer intended the Incorporated Company to continue as an independent entity, and that the policies referred to in Clause XXIII of the Will were the policies to be followed by this Company under Respondents, and as laid down in his correspondence, and he points out the distinction between the position of the Executors as such and the Directors of the Company. He concurs with his brother Judges that the fundamental point of dispute between Appellants and Respondents was Appellants' claim to the surplus revenues of the Incorporated Company. 30
42. The charges as to non-payment of funeral expenses he finds "frivolous," in view of the disputed character of the unpaid items. He notes that the memory of Appellant Lady Davis is "not entirely reliable." He thinks the Y.M.H.A. building should never have been a matter of criticism by Appellants, in view of Sir Mortimer's undertaking. The modification of the Shaughnessy contract in May, 1928, he finds not improper, and considers that the matter of succession duties was followed up with diligence and success. The Marler shares in the Incorporated Company were purchased at \$170 per share, and Lady Davis was consulted and concurred. He calls attention to the various and complete statements sent Lady Davis, especially that of the Incorporated Company, as at September 30th, 1928, which discloses many things complained of long afterwards, and her then apparent lack of interest in them. He finds exaggeration in Lady Davis' story of her London interviews with Lord Shaughnessy in May, 1929. He again reverts to the underlying controversy between Lady Davis and Lord Shaughnessy as to her claims for surplus revenues on June 27th, 1929, and he dwells upon the importance of the McDonald memo of July 25th. He notes that Lady Davis' demands for statements and information were never refused, and he is satisfied with the explanations given by Respondents as to the policy of 40

- financing the Estate through advances instead of dividends, till succession duties were settled. He points out that many of Appellants' complaints were first heard of in the action served. He reviews the various trivial complaints re furniture, motor car, week-end visits to Ste. Agathe, temporary payments of Lord Shaughnessy's accounts, etc., and finds no legitimate ground of complaint. The criticism of Respondents as to their administration of Pine Avenue and Ste. Agathe, he finds frivolous. He finds that the uncontested debts were paid to a large amount; that the discussion of succession duties was carried on actively and with good results, and he therefore finds no serious ground of criticism against Respondents in reference to their administration of the Estate proper.
- 10 **43.** He then considers the administration of the Incorporated Company as such, and finds Respondents justified in most of their decisions—e.g., in reference to sale of Alcohol B shares, and in any event a mistake on their part would be mere error of judgment, not involving dismissal from office. In view of the failure of Lady Davis and her advisors to make any suggestion in regard to selling Alcohol B before action brought, he thinks their subsequent criticism "frivolous." In reference to the Marler and McLean trust for Lord Shaughnessy and its execution, he points out that Sir Mortimer knew and approved the entries in the Company's books and that this is matter for decision in another pending case. As to the trading in Alcohol shares, he finds that on the whole considerable profit was made, and that in any event the repurchase of certain shares in supporting the market would at most be mere error of judgment, not infidelity or incompetence. He admits that, speaking generally, a loan to a Director is improper, but he points out the special circumstances in the case of Lord Shaughnessy. The \$10,000 paid was virtually a payment in advance in anticipation of the September settlement. The salary increases he finds no ground for dismissal, in view of the then prosperity of both Companies, etc., and in criticizing the investments made, he points out that they must be viewed in the light of the time. All investments made followed Sir Mortimer's own policies, and it was premature to say that the money had been lost. He found in the Investment Foundation venture no sign of infidelity or incompetence.
- 20 **44.** In considering Respondents' administration of the Alcohol Company, he attaches great weight to the opinion of the Company's bankers, who expressed satisfaction with Lord Shaughnessy's management. The reasons for the fall in market value of Alcohol shares were, he thought, those cited by his colleagues—increased competition, unfavourable Government regulations, hostile legislation, etc. In the Stock Market collapse all distillery shares suffered, though in the case of Alcohol, the sales by Directors gave added impetus to the fall and resulted in a quarrel between Lord Shaughnessy and Mr. Joseph. He concurs in the Trial Judge's appreciation of the Alcohol Company's situation, and points out that the merger negotiations never got beyond the mere preliminary stage. Mr. Justice Hall therefore ends his exhaustive review of all the facts by a finding that:
- 40 "The Record discloses nothing which can be interpreted as a sufficient ground for the removal of the Respondents from their offices as Executors and Trustees.
- Bk. 6, p. 2639, l. 35
Bk. 6, p. 2640, l. 25
Bk. 6, p. 2644, l. 20
Bk. 6, p. 2645, l. 40
Bk. 6, p. 2646, l. 5
Bk. 6, p. 2647, l. 12
Bk. 6, p. 2648, l. 40
Bk. 6, p. 2649, l. 7
Bk. 6, p. 2650, l. 6
Bk. 6, p. 2650, l. 30
Bk. 6, p. 2651, l. 15
Bk. 6, p. 2652, l. 5
Bk. 6, p. 2653, l. 15
Bk. 6, p. 2655, l. 40
Bk. 6, p. 2656, l. 10
Bk. 6, p. 2657, l. 5
Bk. 6, p. 2658, l. 30
Bk. 6, p. 2659, l. 15
Bk. 6, p. 2660, l. 30
Bk. 6, p. 2661, l. 6

"There has been, on the part of Respondents, no neglect to act or dissipation or waste of the property (see C.C. 917), nor is there evidence of incapacity and still less of infidelity (C.C. 981k)."

45. Under Quebec Law a testator enjoys complete and unrestricted freedom of willing. Article 831 Quebec Civil code reads thus:—

"831. Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favor of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals." 10

46. With this complete freedom of willing, the Courts should not interfere. As Mr. Justice Rinfret puts it in the Supreme Court of Canada, in the case of Valois v. Deboucherville, 1929, Canada Law Reports, Supreme Court, at p. 269:

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

"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 sans responsabilité, de la discrétion laissée au fiduciaire et de sa soustraction voulue à tout contrôle quelconque, il en résulte que dans certains cas, la fiducie n'existe que de nom (Mignault, Droit Civil, vol. 5, p. 171). Mais l'on ne peut éviter d'admettre que ces dispositions et ces décharges sont autorisées par le code. Après tout, la loi du Québec comporte la liberté illimitée de tester, restreinte seulement par le code." 30

Mr. Justice Martin in Goldstein and Montreal Trust Company, Rappports Judiciaries 31 K.B., p. 157, expressed the same thought when he said (p. 159):

"We cannot make another disposition for the testator, nor substitute our judgment for his."

47. The right and power of a testator to select his own executors and trustees is part of this freedom of willing, and with it the Courts cannot interfere by subsequent removal, except on the grounds indicated in the Civil Code, and in cases of gravest necessity. 40

48. The dominant document in this voluminous Record is the Will of Sir Mortimer Davis. The Appellants have contended that it is the interest of the beneficiaries (as they view their interest) that is the dominant consideration. Respondents submit that it is the expressed wishes of the testator which must be regarded. Realization of the interest of the beneficiaries, as they view their interest, would have utterly defeated the testator's Will.

49. Sir Mortimer Davis well knew the Executors and Trustees he chose. Lord Shaughnessy he had known from boyhood and he had confidence in him, as he had been his legal Counsel for eight years and his intimate business associate for most of that time. In 1924 he induced him to devote himself entirely to Sir Mortimer's affairs, and in so doing clearly had in mind that he was training him to carry on his Incorporated Company after he died. His letter of August 20th, 1924, shows this clearly. To ensure his diligence, he arranged to interest him to the extent of 5% in the Incorporated Company's Stock. In 1925 he appointed him to the Presidency of the Alcohol Company, and made him a Director and Vice-President of his Incorporated Company, and he gave him intensive training in his business policies. Sir Mortimer apparently valued the connection of a man occupying Lord Shaughnessy's position in Montreal, and particularly his status in the Canadian financial world, evidenced by his Directorships in the Canadian Pacific Railway Company, The Canadian Bank of Commerce, The Yorkshire Insurance Company, The Lake of the Woods Milling Company, The West Kootenay Light and Power Company, etc. Mr. Reaper he had known for twenty years. He had been intimately associated with Sir Mortimer's own affairs since 1926, under Lord Shaughnessy.

Bk. 5, p. 2216, l. 4

Bk. 3, p. 488, l. 40

Bk. 2, p. 793

Bk. 2, p. 393

Bk. 2, p. 793 et seq.

Bk. 5, p. 2217, l. 33

Bk. 4, p. 1086 and 7

Bk. 3, p. 483, l. 3

Bk. 2, p. 799, ll. 12-18

50. Since Sir Mortimer bequeathed to Lady Davis his extensive residential property in France, it is clear that he expected her to continue to reside in France, where she had always resided with him since their marriage. Her conduct in remaining in Canada barely ten days in the first fourteen months of her holding office, and in delegating all her authority to her Co-Trustees and Executors, shows that she realized this. It is therefore clear that it was to Respondents, and more particularly Lord Shaughnessy, that Sir Mortimer looked for the execution of his testamentary wishes. Unless, therefore, it has been shown that they have been guilty of gross neglect of duty, or infidelity, no Court would be justified in supplanting persons so deliberately chosen by the testator.

Bk. 2, p. 149, ll. 1-23

Bk. 2, p. 158, l. 1

Bk. 2, p. 295

51. The only grounds upon which the Courts can interfere with the expressed desires of the testator in the choice of those selected by him to carry out his testamentary wishes, are set out in Article 917 of the Civil Code:—

40 "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 grounds of dismissal of a tutor referred to are found in Article 285:—

"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."

52. As to Trustees, the provisions are substantially similar and are embodied in Articles 981d and 981k.

53. In the present case both the Trial Judge and all the Judges of the Court of Appeal have found that in fact there were no acts or omis-

sions of the Respondents proved which would give the Court jurisdiction to remove them, because the Respondents were, in their view, not guilty of having refused or neglected to act, or of dissipating or wasting the property of the Estate, or of failing to show reasonable skill and care. These concurrent and unanimous Judgments on the essential findings of fact are, it is submitted, fatal to Appellants' success upon this Appeal.

This is the consistent jurisprudence of both the Judicial Committee of the Privy Council and the Supreme Court of Canada:—

Allen v. Quebec Warehouse Co., L.R. 12 A.C. 101, P.C. 1886.

Whitney v. Joyce, 75 L.J. (P.C.) 89, P.C. 1906.

Senesac v. Central Vermont Rly., 26 Can. S.C.R. 641, S.C. 1896.

Weller v. McDonald, 43 Can. S.C.R., 85, Supreme Court 1910.

10

54. Moreover, the removal or non-removal of Executors and Trustees is matter for the discretion of the Judge presiding in the Court of First Instance. He is not obliged to remove Executors from office, even if he finds them guilty of the grounds set out in Article 917, but he "may" then remove them. As to the removal of Trustees, it is the Superior Court which, under Article 981d, has the power of removal. It is submitted that no other Court can legally override the sound discretion of the Superior Court.

20

55. That the discretion in this Case was soundly and wisely exercised is shown by its unanimous affirmation in Appeal, and by a perusal of the voluminous notes of all the Judges. It is respectfully submitted that any higher Tribunal ought not now to interfere with the unanimous discretion of the Judges in the Courts below.

56. The Courts below have found that it was the clear intention of Sir Mortimer Davis that his Incorporated Company should continue as a separate entity after his death. This was his very purpose in forming the Company, as Surveyer, J., says to give himself a kind of financial "immortality." His appointment of Lord Shaughnessy as the Chief Executive Officer of his Incorporated Company "to be there and look after its interests after I pass on," shows this clearly. The provisions of Articles XV and XXII of the Will also make this clear.

Bk. 6, p. 2493, l. 10

Bk. 2, p. 793, l. 45

Bk. 2, p. 155, l. 35

Bk. 2, p. 980, l. 45

57. Appellants contended, however, that they were entitled to absorb substantially the total net revenues of the Incorporated Company, by having them paid over in dividends to the Executors and by the Executors distributed to them, i.e., having the Company "run as an arm of the Estate." Lady Davis, insisted that she and her Co-Appellant were entitled to substantially \$400,000 a year each.

Bk. 5, p. 1933, l. 10

58. This is the real issue between the parties, as was clearly found by the Judges in the Court below. (Rivard, J., Bk. 6, p. 2579; Letourneau, J., p. 2611; Hall, J., p. 2627.) Had this issue not arisen, this suit would never have been taken. Appellants, by appropriate proceedings, could have appealed to the Court to have Respondents' decision in this matter overruled if they were wrong. Instead, they seek to remove the obstacles to the realization of their desires.

40

59. Mr. McDonald, C.A., on July 25th, 1929, was sent to interview Lord Shaughnessy as the spokesman of Lady Davis, and to urge the views she had herself expressed to Lord Shaughnessy. Mr. McDonald defines her position clearly in his memo. quoted in paragraph 26 above. His

Bk. 2, p. 980

testimony at the Trial is equally clear. He says Appellant's position on this point was absolutely fundamental.

Bk. 4, p. 1577, l. 15

60. It is proper, therefore, as suggested by Letourneau, J., to keep this in mind in weighing the complaints against Respondents which Appellants afterwards conceived. In Lady Davis' own words, she reached a "deadlock" with Lord Shaughnessy on August 8th, 1929, when she threatened appeal to the Courts. Even on July 4th preceding, she had implied as much to Mr. Reaper when he told her Respondents were going to run the Incorporated Company as an operating company. She
10 said: "Then I am afraid you are going to have trouble with me."

Bk. 6, p. 2612, l. 25

Bk. 2, p. 985, l. 15

Bk. 5, p. 1988, l. 20

Bk. 4, p. 1839, l. 35

61. It is now proposed to consider the complaints Appellants did make when they took their action, the Respondents' reply thereto, and the evidence offered in support thereof, and it will be convenient to consider these complaints in Three Divisions:—

FIRST—Administration of the Estate proper.

SECOND—Administration of the Incorporated Company.

THIRD—Administration of the Alcohol Company.

62. In the administration of the Estate proper by Respondents, the first complaint is that they failed to pay the Testator's debts. They paid
20 the debts to an amount of more than two million dollars. Certain funeral expenses had not been paid at the time of Trial, because the accounts were properly disputed, and Lady Davis concurred in that attitude.

Bk. 2, pp. 250-251

Bk. 2, p. 325, l. 33

63. Appellants' chief complaint against Respondents was their failure to settle and pay the succession duty exigible. The succession duties owing in England and France were settled and paid. The succession duty claimed by the Province of Quebec was in the result, successfully
30 contested. On September 14th, 1928, Mr. Reaper filed a complete preliminary statement. This showed total declared assets of \$11,183,353.36, and liabilities at \$3,659,721.71, showing a taxable surplus of \$7,523,631.65. In the eight months following the lodging of this return, there was an exhaustive discussion with the Department as to the accuracy of the statement filed.

Bk. 2, p. 251, l. 1

Bk. 2, p. 547, l. 40

Bk. 2, p. 548, l. 37

Bk. 2, pp. 543 et

seq.

Bk. 2, pp. 562 et

seq.

64. On May 14th, 1929, the Succession Duty Office for the first time prepared their claim. They added \$5,780,278.47 to the assets, and deducted \$2,002,500 from the debts declared, a difference between the Government and the Respondents, of \$7,782,778.47 and involving some
40 \$600,000 of succession duties more than they admitted to be owing. These negotiations were still pending when this action was taken. Subsequently the Government made concessions and admissions of error, which already involve a substantial reduction, but not all Respondents think should be conceded.

Bk. 2, pp. 591 et
seq.

Bk. 2, p. 591, l. 40

Bk. 2, p. 608

Bk. 2, p. 610

Bk. 5, p. 2215, ll. 5
et seq.

65. Pending settlement and payment in full of all succession duties the Executors were by the Succession Duty Act of the Province of Quebec prohibited from paying legacies. R.S.Q. Ch. 29, Section 14, paragraph 7 provided in effect, on pain of the penalties therein enacted, that no Executor or Trustee shall consent to any transfer or payment of legacies unless the duties exigible have been paid in full. This was the reason, and the courts below have found it sufficient, why the particular monetary legacies had not been paid at the time this action was brought.

66. Another cause of complaint was the failure of Respondents to sell the Pine Avenue property in Montreal and the Ste. Agathe farm, or in the alternative to rent them. Lady Davis concurred with her Co-Executors that the Pine Avenue property should be offered for sale at \$300,000.00 and there was never any suggestion of renting it till just before action brought. As to the Ste. Agathe property, all agreed to offer it for sale at \$100,000.00. The Minutes of Executors' Meetings of April 25th, 1928, and October 18th, 1929, show this clearly. No offers received reached half the asking price and all agreed in refusing them. Meanwhile the properties were listed for sale with Real Estate Brokers in Montreal and any possible buyer knew they were for sale. The real estate experts examined concurred with Respondents in thinking that to rent meanwhile would have spoiled the prospects of a sale.

67. Hon. H. M. Marler owned 500 shares of stock of the Incorporated Company. Late in October, 1928, he wished to sell these and approached Lord Shaughnessy on the subject. The Company's By-law XXXI required that a shareholder desiring to sell should first offer his shares to the directors at the price established by resolution of the shareholders at the last Annual Meeting and for thirty days "the shareholders of the Company in proportion to their respective holdings at the time shall have the privilege of purchasing the said shares by payment or offer of the prices" as established by resolution. Mr. Marler was told that the Company's Auditors, Price, Waterhouse & Company, had shortly before fixed \$170.00 a share as the proper value and that no offer at any more would be made. Mr. Marler made formal offer of his shares on this basis, but he also asked compensation for the concurrent surrender of his position as Trustee under various trusts to which he had been appointed by Sir Mortimer Davis and in respect of which substantial fees had accrued or would accrue. Lord Shaughnessy agreed to settle this claim for \$15,000.00 and reported the matter to Lady Davis in his letter of November 9th, 1928, without mention of any specific amount. Whether Lord Shaughnessy was or was not right in his application of the by-law—and it is submitted that he was quite right—is a matter for consideration in another action now pending between the Appellants and Lord Shaughnessy in the Superior Court and will be there decided, but even if he misunderstood the purport of the by-law, and no Court has yet found that he did so, that would be no ground for his removal from office.

68. Another cause of complaint was Respondents' failure to sell the Liggett & Myers' shares which at the time of his death Sir Mortimer was carrying with his New York brokers. The Executors considered the price for these shares then prevailing unfavorable, and at their Meeting of April 25th, 1928, decided to hold until a more satisfactory price could be obtained. Lady Davis concurred in this decision and signed the Minutes. At the Meeting of Executors held on October 18th, 1929, this decision was reaffirmed and Lady Davis again concurred. Appellants say these shares should have been sold at \$104 per share. They actually were sold, in order to make a succession duty payment after action

brought, at a price equivalent to \$108.07 or more per share, representing an advance of nearly \$40,000 on the 9,820 shares held.

Bk. 3, p. 199, l. 8

69. At the Executors' Meeting of April 25th, 1928, it had been resolved that the work on the Y.M.H.A. building be proceeded with. Although there is no allegation in Plaintiffs' Declaration complaining of this decision having been carried out, it was made matter of complaint and argument in the Courts below, and evidence was introduced on the subject, under reserve of objection. In 1926, at a complimentary dinner given in Montreal in his honour, Sir Mortimer publicly promised the Jewish community that he would erect a building for their Young Men's Hebrew Association (corresponding to the Y.M.C.A.). A Committee of prominent Jews was appointed to co-operate with him in the project, and before he died he had purchased a site for the building and caused plans therefor to be prepared by his architects. He died before the plans were completed, and his Executors, looking upon this undertaking as a debt, carried out his promise.

Bk. 2, p. 324, l. 19

Bk. 4, p. 133, l. 30

10

70. Under Article VIII of his Will, Sir Mortimer made the following bequest:

Bk. 5, p. 1967, l. 40

20 "To my friend the said Lord Shaughnessy a legacy of One thousand dollars (\$1,000.00) wherewith to purchase a memento."

Bk. 2, p. 150, l. 5

When Lady Davis was in Canada in May, 1928, Lord Shaughnessy says that he inquired of her whether she wished to have sent over to France any articles of furniture which would otherwise have to be sold. She replied in the negative and he then suggested that he himself, in payment of this legacy of \$1,000.00, might take over as a memento certain articles of furniture. To this he says she offered no objection. Later, he caused certain articles of furniture, notably a dining-room table and chairs and three other articles, to be removed from the Pine Avenue house to his own residence by the caretaker, who thereupon sent a list of the articles to Mr. Reaper at the office of the Estate. The articles so removed had been valued under oath by the valutors called in by Notary Phillips to inventory and value the household furniture at \$350.00 in all. When Lady Davis visited Lord Shaughnessy's residence to lunch and dine in 1929 she saw these articles of furniture installed in his residence and she made no comment or complaint thereon to him or to her co-Executor Mr. Reaper. Appellants make this matter of complaint.

Bk. 5, p. 2265, ll. 13 et seq.

30

Bk. 2, p. 329, l. 10

Bk. 3, p. 606, l. 40

Bk. 3, p. 609, l. 39

Bk. 5, p. 2043, l. 30

40 71. Sir Mortimer in 1916 had purchased a Rolls Royce Car, 1914 Model, and had used it thereafter when in Canada. It was an old modelled car without modern improvements, such as self-starter, balloon tires, etc. Lord Shaughnessy decided that he would try it out to see if it was worth spending money upon to modernize it before selling it. He had Sir Mortimer's chauffeur take it to his garage and thereafter used it some dozen times for short runs in the City when he decided that it was not worth modernizing. He went to Europe in July, 1928, and it was put away on hurdles in his garage. A year later it was discovered and sent back to Sir Mortimer's garage. When they took their action, however, Appellants had discovered that while Lord Shaughnessy was experimenting with the car he had obtained a license for it in his name, although the

Bk. 5, p. 2266, l. 40

insurance covering it had always remained in the name of the Estate. They therefore said Lord Shaughnessy had fraudulently appropriated the car. It seems that in the long printed form of application for the license which Lord Shaughnessy's chauffeur had put before him for signature, the chauffeur had written in to one of the spaces that the car had been purchased from the Estate Davis. Lord Shaughnessy carelessly signed this form without reading it, yet Appellants magnified this trifling instance as a major cause of complaint.

Bk. 5, p. 2267, l. 30

72. Just before his death Sir Mortimer had written Lord Shaughnessy inviting him to make use of his country place at Ste. Agathe and expressing the view that it was better that the house should be occupied. The Trial Judge thought so too, as did the Judges of the Court of Appeal. Lord Shaughnessy spent two week-ends and his family on one occasion spent an intervening week, after Sir Mortimer's death, and on these occasions supplied his own provisions although Sir Mortimer had invited him to make use of the farm produce. Appellants make these visits cause of formal complaint and extensive evidence.

Bk. 2, p. 862, l. 31

Bk. 3, p. 2643, l. 4

Bk. 3, p. 862, l. 35

Bk. 2, p. 158, l. 8

73. In Article XXIII of his Will, Sir Mortimer charged his Trustees and Executors to carry out the policies he had laid down. In the Will itself there are no "policies" laid down. Respondents, therefore, understood the direction as to the carrying out of Sir Mortimer's policies to refer to his policies in connection, more particularly, with the administration of the Incorporated Company which he controlled, and which they as his Trustees would control.

Bk. 3, p. 234, l. 42

Bk. 3, p. 522, l. 43

Bk. 5, p. 2241, l. 20

Bk. 3, p. 234, l. 42

Bk. 3, p. 522, l. 42

74. The first investment criticized was the Cadillac Coal Company. One of Sir Mortimer's well defined policies was that his Incorporated Company should exploit the Alberta coal field, in which he had been interested for years, and in the future of which he believed. At Sir Mortimer's death the Incorporated Company had a certain coal area under option, adjoining that which it owned, and Respondents called in to advise them in the matter Mr. H. A. Poillon, an expert mining engineer, whom Sir Mortimer had been accustomed to consult since 1912. Poillon reported against the property, and the option was dropped. He, however, recommended instead a merger with another operating property belonging to C. S. Donaldson, who was then operating under lease the coal properties owned by the Incorporated Company. This advice was followed by Respondents, who formed a Company known as Cadillac Coal Company, of which they were in absolute control, Donaldson having a mere minority interest. Although it was at time of Trial still in the development stage, the uncontradicted testimony in the Record is that the future of this enterprise is "very bright," and there is nothing to show that it will not be highly successful. The Trial Judge found it a venture after Sir Mortimer's own heart—a finding unanimously confirmed in Appeal.

Bk. 2, p. 871, l. 15

Bk. 5, p. 2063, l. 15

Bk. 5, p. 2065, l. 38

Bk. 2, p. 479

Bk. 5, p. 2066, l. 28

Bk. 5, pp. 2241-2245

Bk. 3, p. 647, l. 1

Bk. 6, p. 2520, l. 21

Bk. 6, p. 2245, l. 25

75. The next investment of the Incorporated Company criticized is that in Jennison & Company. Sir Mortimer had for some time before his death been desirous of going into financial promotion and underwriting enterprises, and had urged Lord Shaughnessy to find a proper man to take charge of such ventures (Exs. D-58, D-125, D-126). After many enquiries Lord Shaughnessy thought he had found the proper person in

Bk. 2, p. 857, l. 33

Bk. 2, p. 859, l. 15

Bk. 2, p. 861, l. 45

- C. S. Jennison, an experienced promoter and financial operator. With him Respondents entered into an agreement that he would form a company known as Jennison & Co., in which the Incorporated Company subscribed for \$50,000 of Preference Stock and received by way of bonus 50% of the Common Stock of the Company. This was a much smaller venture than Sir Mortimer had contemplated, as shown in his letter of January 30th, 1928 (D-125), in which he proposed to invest £125,000 in a finance corporation proposition. Jennison & Co. was engaged in promoting financial mergers, etc., and while possibly speculative in character, in all likelihood will prove profitable for the Incorporated Company. Bk. 2, p. 859, l. 30
- 10 **76.** Early in 1929 the Incorporated Company invested \$142,500 in the preferred and common shares of Investment Foundation Limited. This was a thoroughly reputable so-called "Investment Trust," organized in the Spring of 1929. It had a Board of Directors of highly representative men throughout Canada, and in the United States, Britain and France. The Courts below have found that it was well managed and came through the financial crash very creditably. It had over 1,000 shareholders scattered throughout Canada and elsewhere, and the Directors had in it substantial investments of their own monies. Lord Bk. 2, p. 464
Bk. 3, p. 644, l. 19
Bk. 5, p. 2255, l. 3
Bk. 2, p. 475
- 20 Shaughnessy and Mr. Jennison were named to the Board to represent the interests of the Incorporated Company, and in order to obtain for the Company certain special rights attached to "Directors' shares," the certificates for the shares subscribed for were put in their name, but by them endorsed and handed to Mr. Reaper for the Incorporated Company. Bk. 5, p. 2141, l. 33
Bk. 5, p. 2162, l. 3
- 30 Complaint was made in the Courts below of their action in doing so, but there is no such allegation in the Declaration, and the Company suffered no loss. These shares were bought 7% below the issue price to the public, and at the best price any insider paid. This was an ordinary business man's venture, well within the powers of the Incorporated Company and the discretion of its Directors. It may some day prove profitable; and there is no evidence of ultimate loss. Bk. 5, p. 2139, l. 20
Bk. 5, p. 2144, l. 25
Bk. 5, p. 2161, l. 45
- 77.** Sir Mortimer Davis on May 27th, 1927, had written Lord Shaughnessy:—"Without risk we cannot expect to accomplish anything." This was part of his policy in financial matters. Though a wealthy man, he left not a dollar invested in Government Bonds, or such securities. Bk. 2, p. 834, l. 20
Bk. 2, p. 182, 188
- 40 **78.** Appellants complain that in September, 1929, the Incorporated Company gave effect to the terms of the contract between it and Lord Shaughnessy, which had been arranged by Sir Mortimer in September, 1924, when he induced Lord Shaughnessy to join forces with him. This is the subject of another contested case taken by Appellants, subsequent to the present proceedings, and still pending before the Superior Court. Its merits, therefore, need only be briefly discussed, to show that at least there was colour of right for what Respondents did, and no question of their good faith. Appellants' chief ground of attack is that the Shaughnessy contract was void, because they said it was in essence a gift, and had not taken the notarial form required for gifts under Quebec law. Respondents' contention, which will be decided in the other case, is that it is no gift at all, as a gift must be essentially gratuitous, and Lord Shaughnessy had to serve five years to earn the benefits conferred. Bk. 2, pp. 422-427

- Bk. 2, p. 395, l. 33 **79.** Under his contract of September 17th, 1924, Lord Shaughnessy received in effect 5% of Sir Mortimer's then holdings of debentures and notes of the Incorporated Company. Shortly after the Company increased its capital upon a revaluation of assets and issued fully paid shares to its shareholders, in proportion to their then holdings. Messrs. Marler and McLean, the Trustees under the Shaughnessy agreement, received their proportion of this new stock, 1,625 shares. The minutes of this meeting were signed by Sir Mortimer himself. Under his agreement, Lord Shaughnessy was entitled to his proportion of all new notes or shares, so as to preserve his 5% proportionate interest. Immediately thereafter the Company redeemed these shares at par, and the amount of \$162,500 was thereupon put to the credit of Lord Shaughnessy's Trustees on the books of the Incorporated Company. This amount for five years thereafter remained always at the credit of Lord Shaughnessy's Trustees on the books of the Incorporated Company, and interest was from time to time added thereto, all with the knowledge and consent of Sir Mortimer Davis up to his death. At time of settlement in September, 1929, the amount then standing at the credit of the Shaughnessy Trustees was paid over to him by the Incorporated Company, after deduction, however, of certain amounts owing by him to the Company. 10
- Bk. 2, p. 378, l. 15
Bk. 2, p. 379, l. 5
Bk. 2, p. 395, l. 45
Bk. 2, pp. 917-918
Bk. 2, p. 921
Bk. 3, p. 661
- 80.** In view of Sir Mortimer's death, Lord Shaughnessy proposed to the Executors in May, 1928, that certain modifications should be made in the terms of his contract, to bring it in line with the understanding he had had with Sir Mortimer, and the course of dealing followed between them. The first modification was to provide that in the event of his death before the expiry of his five-year period, his heirs should be entitled to a number of shares, proportionate to the time of his service actually elapsed. A corresponding clause was in the Waddell contract, and in those of the various Alcohol Company officers, arranged by Sir Mortimer. As Lord Shaughnessy did not in fact die, the modification was without effect. The other addition to the contract was to make clear that Lord Shaughnessy was entitled to retain the salary he received as President of the Canadian Industrial Alcohol. This he had always retained during Sir Mortimer's lifetime, and so had Waddell, his predecessor, who held the same offices. Had Sir Mortimer lived, no agreement would have been necessary, but to avoid ambiguity the explanatory clause was added. Moreover, there is no complaint in Plaintiffs' Declaration about Lord Shaughnessy's keeping of his salary as President of the Alcohol Company. 20
- Bk. 5, p. 2271, ll. 10 et seq.
Bk. 2, p. 404, l. 35
Bk. 2, p. 681, l. 37
Bk. 3, p. 494, l. 35
Bk. 2, p. 953, l. 15
Bk. 5, p. 2271, l. 10
Bk. 3, p. 127, l. 20
- 81.** Complaint is made that the Incorporated Company bought certain shares of stock in the Alcohol Company, which at the time of Trial showed a paper loss. The Incorporated Company, before and after Sir Mortimer's death, had been accustomed to buy and sell shares of Alcohol Company stock in the market, and in a general way to support it. At times profits and at times losses were made on these transactions. Taking the period from the time of Sir Mortimer's death to action brought, Respondents in their tradings for the Incorporated Company made a substantial profit of \$179,573. 30
- Bk. 2, p. 949, l. 25
Bk. 2, p. 201, ll. 1-20
Bk. 3, p. 638, l. 36
- 82.** Appellants complain that Respondents, as Directors of the Incorporated Company, failed to sell before the Stock Market crash the

- shares of Alcohol B stock, held by the Incorporated Company. Respondents tried to sell these shares at any price they thought fair in the circumstances. In May, 1928, they gave an order to a prominent firm of stockbrokers to sell a block of 5,000 Alcohol B at \$45.00, but the brokers in the following months could only sell 4,200 of these shares. In all, Respondents succeeded in selling 6,060 shares up to September 30th, 1928, at an average price of \$44.69. Then the price sagged and Respondents awaited its recovery, which had not happened up to action brought. Lord Shaughnessy also attempted to arrange the sale of a block of shares in New York, without success. Inasmuch as in May, 1928, an important British distillery interested had "nibbled" for these shares at \$60.00, it was not unreasonable for Respondents to refuse to sacrifice the shares at what they thought less than real worth. For the Estate to have "unloaded" a large block (61,980 shares) would have broken the market for these shares, which was always narrow and sensitive, and the Respondents' first duty was to preserve the market status of Alcohol shares. Moreover, in the summer of 1928 the Alcohol Company was extremely prosperous, its revenues buoyant and prospects good, and Lady Davis herself thought a suggested value of \$80.00 not unreasonable.
- 10
- 20
- 30
- 40
83. Appellants complained that the Incorporated Company had never declared a dividend, but instead had financed the Estate's necessities by way of advances. During Sir Mortimer's lifetime the Company had never declared a dividend since its inception, nor did the Appellants ask for or suggest a dividend. Sir Mortimer drew out what monies he wanted by way of loans. Respondents thought that it was better not to declare a dividend until the dispute with the Succession Duty Office about the value of the shares of the Incorporated Company had been finally settled. It was, however, always the Respondents' intention to have the Incorporated Company declare a proper dividend as soon as the time was ripe, and Lady Davis was so advised in July, 1929. Article XV of the Will left to the discretion of the Directors of the Incorporated Company what dividends, if any, were to be paid, and the beneficiaries of the Will—clearly meaning the Appellants—are by its terms directed and required not to disturb by their demands or actions the carrying on of the Incorporated Company in any manner which, in the opinion of the Directors of the Company, may be prejudicial to its interests. Sir Mortimer anticipated possibly just such demands as were made by Appellants, claiming the right to absorb all the net revenues of the Incorporated Company.
84. As far as the Estate was concerned, the declaration of a dividend was a mere matter of book-keeping. It had already received its money by way of advances, and the declaration of a substantial dividend, or a reduction of capital, would not involve the payment of any additional cash to the Estate, merely a number of cross entries. At September 30th, 1929, the sum of \$941,649.32 had been advanced by the Incorporated Company to the Estate, and at December 31st following, these advances aggregated \$962,018.31. The only outside shareholder who would have had to be paid a dividend in cash was Mr. Waddell, who never had received or asked for a dividend.
- Bk. 5, p. 1769, l. 25
Bk. 2, p. 203, l. 15
Bk. 5, p. 2261, l. 4
Bk. 5, p. 1944, l. 1
Bk. 2, p. 199
Bk. 4, p. 1770, l. 1
Bk. 5, p. 2259, l. 19
Bk. 4, p. 1596, l. 23
Bk. 5, p. 1944, l. 1
Bk. 5, p. 2276, l. 5
Bk. 2, p. 969
Bk. 5, p. 2049, l. 42
Bk. 5, p. 2272, l. 43
Bk. 2, p. 238
Bk. 2, p. 242

- 85.** When Lord Shaughnessy was absent in Europe in the summer of 1928, on business of the Estate and the Alcohol Company, the Incorporated Company, under his instructions, paid a number of personal accounts for him, charging the amounts to him. These sums totalled \$4,684.22. Lord Shaughnessy returned to the Montreal office on October 4th, and the same day gave his cheque for the amount so advanced. As the financial year of the Company ended on September 30th and these amounts had been advanced during that year, their repayment was credited as at that date by Mr. Reaper, and in the same way he credited a number of other payments received in the first few days of October, including a cheque of Lady Davis for \$28,638.20, in repayment of an amount owing by her to the Company. Mr. Reaper says that this antedating of entries at the end of any period when books are being closed is common book-keeping practice, and the Courts below have so found. No criticism of these entries was offered by Messrs. Price, Waterhouse & Company, the Company's auditors, or by Mr. McDonald, the Appellants' expert accountant. The following year substantially the same thing occurred during Lord Shaughnessy's absence in Europe, on the business of the Alcohol Company. The amount then advanced was \$2,875.32. When the books were being closed at the end of August, these outstanding items were repaid by Lord Shaughnessy. At the time that all these amounts were outstanding, charged against Lord Shaughnessy, there stood at the credit of the Trustees under his contract sums exceeding \$200,000 which were accruing for payment to him on September 17th, 1929. Notwithstanding these facts, Appellants allege that these advances constituted an unlawful, wrongful and fraudulent appropriation by Lord Shaughnessy of the Incorporated Company's funds. The Courts below have found these payments were made as mere matter of ordinary convenience and accommodation by a Company to its chief executive officer.
- 86.** The Alcohol Company in 1927 purchased a 90% interest in Robert McNish & Company, Limited, a British Company engaged in the manufacture and sale of spirits. The idea was Sir Mortimer's own and he criticized Lord Shaughnessy for being rather "timid" about the venture. Under Sir Mortimer's directions this newly acquired subsidiary issued \$5,000,000.00 of 6% debentures, the principal and interest of which were guaranteed by the Alcohol Company. They were offered to the Alcohol shareholders in proportion to their holdings at \$4.50 for each \$5.00 debenture. The Incorporated Company took up its quota at a cost of \$2,224,917.00. The Succession Duty Office valued them at par, but the only prices at which trades in these debentures took place on the Montreal Stock Exchange between their listing and the trial of this case varied from \$3.50 to \$3.75 per \$5.00 debenture, much below cost of issue, and the sales made on the Exchange only totalled \$22,775.00 par value. Sir Mortimer had great confidence in the future of the McNish enterprise and he thought the debentures a "gilt edge security" that would bring 105% or better. (Exhibits D-59, D-63, D-119, D-120, D-122.) Sir Mortimer realized, however, that in the early days of the venture it would lose money, possibly £100,000 a year, and he thought it worth while notwithstanding. There was no market at the issue price or better and no evidence was offered by Appellants
- Bk. 2, p. 351, l. 35
- Bk. 3, p. 685, l. 28
- Bk. 5, p. 1999, l. 12
- Bk. 2, p. 365, l. 36
- Bk. 1, p. 16, l. 33 to p. 17, l. 32
- Bk. 6, p. 2480, l. 18
- Bk. 2, p. 841, l. 11
- Bk. 2, pp. 834-837
- Bk. 2, p. 491, et seq.
- Bk. 2, p. 596, l. 9
- Bk. 5, p. 2202, l. 38
- Bk. 5, p. 2203, l. 2
- Bk. 2, p. 88, l. 33
- Bk. 3, p. 869, l. 38
- Bk. 2, p. 835, l. 5
- Bk. 2, p. 837, p. 840
- Bk. 2, p. 863, l. 31
- Bk. 3, p. 863, l. 31
- 10
- 20
- 30
- 40

that such a block as was held could have been sold at any reasonable price. Some evidence was offered that there was delay in the listing of the debentures on the Stock Exchange, but there is no such complaint in Plaintiff's Declaration. Bk. 4, p. 1036, et seq.

87. Appellants say that the Incorporated Company ought to have sold its holdings of Asbestos Corporation shares. These had been acquired by Sir Mortimer as a long term investment. Although the market price prevailing at his death showed a substantial advance over cost, he did not sell and indeed gave Lord Shaughnessy instructions not to sell. Sir Mortimer thought highly of the Asbestos Industry and believed greatly in its future. Lady Davis and her advisers knew for months before action brought that they had not been sold and there was never any suggestion made that they ought to have been until the service of proceedings herein. Unfortunately and unexpectedly this Asbestos Corporation fell upon evil days and there was a corresponding depreciation in quoted market values, but the Respondents had no responsibility whatsoever for that depreciation or its causes. Bk. 5, p. 2323, l. 5 and l. 39
Bk. 5, p. 2325, l. 37
Bk. 5, p. 2027, l. 32
Bk. 5, p. 2054, l. 41

88. Lady Davis complains that in the management both of the Estate and of the Incorporated Company she was ignored by the Respondents, but this charge is negatived by the record as the Courts below have found. She was furnished with the statement of the Estate as at the time of death as soon as it was prepared and she made no comment thereon. She received the very full and complete financial statement and auditors' report of the Incorporated Company as at September 30th, 1928, and she made no comment thereon. When she received this very important financial statement, which she says she examined, she wrote her letter, Exhibit D-15, which is characteristic. She had completely delegated her functions to her Co-Executors and Co-Trustees by power of attorney which was in force from May 5, 1928, to October 6th, 1929. Until at the end of June, 1928, she wanted more money and could not get it, she showed not the slightest interest in or regard for her responsibility. Sir Mortimer had been accustomed to receive monthly statements from his Montreal office with which she said she was familiar. She never received these and never asked for them. In August, 1929, the most complete statements and auditors' reports were handed to her. Notwithstanding the general power of attorney she had given she was consulted by Respondents on many important matters. On December 31st, 1928, Lady Davis was elected to the Board of Directors of Sir Mortimer Davis, Inc. She had never been a Director before, although the Respondents had both been Directors before Sir Mortimer's death. Bk. 5, p. 1948, l. 47
Bk. 6, p. 2536, l. 13
Bk. 2, p. 302, l. 45
Bk. 5, p. 1949, ll. 1 et seq.

89. Appellants charge general inefficiency against Respondents in their management of the Incorporated Company, but this is negatived by the record. In the first four years of the Company's history under Mr. Waddell's management and with Sir Mortimer himself chiefly in control, the Incorporated Company made an operating and trading loss of \$1,015,-174.10. In the next four years under Lord Shaughnessy's management there was a great improvement and the Company's operating and trading profit amounted to \$3,289,439.69. Bk. 3, p. 515, l. 37 to p. 521, l. 20
Bk. 2, p. 958
Bk. 2, p. 959
Bk. 2, p. 960

90. Under Lord Shaughnessy the Incorporated Company enjoyed unparalleled prosperity, and Sir Mortimer on the day of his death told his

Bk. 5, p. 2180, l. 5 banker, Sir John Aird, how pleased he was with Lord Shaughnessy's management. This attitude the Bank of Commerce, which had loaned the Incorporated Company three million dollars or more, and the Alcohol Company two million dollars or more, shared; and its President, Sir John Aird, testified at the trial—"We have always been satisfied we were safe in carrying it (the account in question) under the management that existed." Sir John Aird likewise confirmed the terms of a letter addressed by the Manager of the Montreal Branch of the Canadian Bank of Commerce (where the active accounts were carried) to Lord Shaughnessy, in answer to an inquiry as to whether the Bank wished him to resign, as Appellants suggested. In the course of this letter the Montreal Manager said:

Bk. 5, p. 2185, l. 18 "Insofar as our position of creditor and the 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 the 21st of March, it would appear to us that your knowledge and experience of the operations of the Distillery business which form the basis of the undertakings of all the Companies concerned should be invaluable at this juncture 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."

91. Previous to Sir Mortimer's death the Incorporated Company was accustomed to make loans both to its shareholders and others, Sir Mortimer looking upon it very much as a "One Man Company." Amongst these loans arranged by Sir Mortimer himself were three to Lord Shaughnessy. The first was a sum of \$50,000.00 loaned by the Incorporated Company to Lord Shaughnessy without any security other than the amount then standing upon the books of the Incorporated Company at the credit of the Trustees under his contract. It was, however, duly authorized under Sir Mortimer's own instructions by resolution of Directors, some months after it had been made, and is not complained of by Appellants. When the Alcohol Company issued to its shareholders the McNish debentures and its B shares, Sir Mortimer arranged that Lady Davis, Lord Shaughnessy, his son and certain others of his family or employees would take up their proportionate allotment and that the transaction would be financed for them through the Company's loan from the Bank of Commerce. This was done and both Appellants shared in the transaction. As soon as the Bank of Commerce called for payment of the loans, of which his were a part, Lord Shaughnessy paid in full.

Bk. 3, p. 669, l. 45
 Bk. 3, p. 672, l. 28
 Bk. 3, p. 675, l. 25
 Bk. 3, p. 678, l. 3
 Bk. 2, p. 223, l. 15
 Bk. 4, p. 1470, l. 16

92. In January, 1929, the Incorporated Company made Lord Shaughnessy a further loan of \$10,000.00. At the time of this loan there stood at the credit of Lord Shaughnessy's Trustees upwards of \$200,000.00, payable to him in the following September, so that the Company was amply secured. This loan and interest were paid in full on the 17th of September following when the settlement with Lord Shaughnessy took place by deducting the amount thereof from the sum then payable to him. In view of the constant practice of the Incorporated Company in making

Bk. 2, p. 219
 Bk. 2, p. 223
 Bk. 2, p. 216, l. 15

such loans, the security held and its repayment in full, it is submitted that the transaction does not constitute any ground justifying removal from office.

10 **93.** Under his agreement of September 17th, 1924, Lord Shaughnessy's salary was fixed at \$20,000.00 per annum. The agreement, however, also provided that should Sir Mortimer die after Lord Shaughnessy had been in the employ of the Company for two and one-half years, but before the expiry of the five-year period, which actually happened, Lord Shaughnessy was to remain in the employ of the Company "at a salary
 15 not less than that which he is receiving at such time for the balance of the five years." During Sir Mortimer's lifetime Lord Shaughnessy had always received in addition to his stated salary a bonus of not less than \$5,000.00 per annum. In 1926 the bonus was \$10,000.00 (approved under Sir Mortimer's direction in January, 1927) and in 1927 and 1928 there were also bonuses of \$5,000.00 each. Mr. Waddell, Lord Shaughnessy's predecessor, as Vice-President of the Incorporated Company had received a salary of \$25,000.00 and, in certain years, a bonus. After Sir Mortimer's death Lord Shaughnessy became President of the Incorporated Company and his duties and responsibilities were greatly increased as he was deprived of Sir Mortimer's active co-operation. At the
 20 Meeting of Directors, therefore, on the 31st of December, 1929, at which Meeting, it is true, only he and Mr. Reaper were present, they being the only Directors then in Canada, it was resolved that in place of paying an annual bonus to Lord Shaughnessy he be placed on a straight salary basis of \$25,000.00. This was no violation of his engagement and was not more than his predecessor had received when occupying a position of inferior responsibility. The Incorporated Company at that time was at the very height of its prosperity and its net earnings at the end of its then last previous financial year amounted to \$763,203.34. It involved, in fact, no increase in compensation, merely changing, as the
 30 courts below have found, an habitual bonus into part of a stated salary.

94. At the same Meeting Lord Shaughnessy proposed that, in view of the increased responsibility and work incidental to the death of Sir Mortimer the salary of Mr. Reaper, who then became Vice-President as well as Secretary-Treasurer, should be increased from \$7,500.00 to \$10,000.00 per annum. The evidence is that Sir Mortimer himself had suggested this very increase before his death. When we consider that nearly all the higher officials of the Alcohol Company at that time were receiving salaries of \$15,000.00 or more, the increase of compensation by the Incorporated Company to Mr. Reaper seems not improper and it was made
 40 by the only authority then having power to deal with the matter.

95. This brings us to a consideration of the administration by Respondents of the Alcohol Company and the complaints of Appellants in that regard. The Respondent Reaper is not involved in this branch of the case as he was never an officer of the Alcohol Company and only became a Director a few weeks before the service of this action. These attacks of Appellants, therefore, are aimed at Lord Shaughnessy alone.

96. The most important charge laid by Appellants against Respondent Shaughnessy in connection with his management of the Alcohol Company was that he therein exhibited absolute incapacity and total un-

Bk. 2, p. 395, l. 25

Bk. 3, p. 517, ll. 20 et seq.

Bk. 3, p. 517, l. 39

Bk. 3, p. 518, l. 35

Bk. 5, p. 2321, l. 2

Bk. 3, p. 200, l. 25

Bk. 2, p. 387, l. 14

Bk. 3, p. 200, l. 25

Bk. 2, p. 207, l. 45

Bk. 6, p. 2480, l. 2

Bk. 2, p. 387, l. 17

Bk. 5, p. 2320, l. 31

fitness. Nothing is more clearly negated by the record. Under Lord
 Shaughnessy's management the Alcohol Company enjoyed prosperity
 away beyond anything it had previously known. It is not claimed that
 Lord Shaughnessy alone was responsible for this, but he is surely entitled
 to his share of the credit as he was then its active executive head.
 Exhibit D-88 is a comparative statement of the gross and net profits of
 the Alcohol Company before and after Lord Shaughnessy's tenure of
 office as President. In the four years before the Shaughnessy regime the
 Company's gross profit was \$8,795,513.72 and its net profit \$5,598,012.55.
 Mr. Waddell, the then Manager, testified that he thought this a "mar-
 vellous achievement," and it was certainly creditable. The next four years
 under Lord Shaughnessy's Presidency were, however, incomparably more
 prosperous. The gross profits for that period were \$14,098,733.12, an
 increase of 60% over the previous four years. The net profits for the
 same four-year period were \$10,306,992.34, an increase of 84% over Mr.
 Waddell's "marvellous achievement." The year ending September
 30th, 1928, was the most prosperous year in the history of the Alcohol
 Company, showing a net profit of \$3,117,541.63, and the last six months
 of that year were after Sir Mortimer died.

97. In the matter of dividends, the shareholders of the Alcohol
 Company also did much better under Lord Shaughnessy's Presidency. In
 the four years previous to his assuming office dividends and bonuses dis-
 tributed to shareholders totalled \$2,224,000.00. In the four years of the
 Shaughnessy regime cash dividends disbursed totalled \$5,488,406.62 and,
 in addition, there was a stock bonus valued much below prevailing market
 quotations of \$807,900.00, as well as a cash bonus paid in January, 1929,
 of \$273,166.50. More than one-half of all these dividends was received
 by the Incorporated Company, which at all times owned more than half
 the outstanding shares. In the six and one-quarter years before Lord
 Shaughnessy became President of the Alcohol Company the Incorporated
 Company received in Alcohol Company dividends \$1,654,351; and in the
 four and one-quarter years between Lord Shaughnessy assuming the
 Presidency and the institution of these proceedings the Incorporated
 Company received in Alcohol dividends in cash or stock, reckoned at
 current market value, \$5,756,053.00, an increase of almost 250%.

98. In the same way there was a great increase in the Alcohol
 Company's fixed assets, plant, machinery and materials. The manufac-
 tured spirits on hand also increased enormously.

99. The stock market values of the shares of the Alcohol Company
 quoted on the Montreal Stock Exchange suffered a serious collapse
 beginning in February, 1929, and continuing down to the institution of
 these proceedings, and thereafter. Appellants tried to hold Respondents
 liable for this collapse, but it was common to all beverage stocks dealt in
 on the Canadian exchanges, and, for the greater part of the period, com-
 mon to all stocks generally on all Canadian and American stock exchanges.
 After Sir Mortimer's death the market price of Alcohol Company stock
 went up 25%. This was no doubt due to the then prevailing prosperity of
 the Company, but it did not show want of confidence in Lord Shaughnessy.
 In February, 1929, the distillers doing business in Canada fell upon evil
 days, and there was a serious drop in business and profits, which became

Bk. 2, p. 678

Bk. 5, p. 2024, l. 21

Bk. 4, p. 1054, l. 8

Bk. 2, p. 678

Bk. 4, p. 1054, l. 20

Bk. 2, p. 634

Bk. 4, p. 1053, l. 38

Bk. 2, p. 678

Bk. 4, p. 1055

Bk. 3, p. 623, l. 41

Bk. 4, p. 1056, l. 1

Bk. 3, p. 624, l. 41

Bk. 2, p. 677

Bk. 2, p. 755

Bk. 2, p. 756

Bk. 4, p. 1058, l. 31

Bk. 4, p. 1061, l. 40

Bk. 4, pp. 965 et

seq.

Bk. 2, p. 742

Bk. 2, p. 747

progressively worse as the year advanced. The reasons for this depression in the distillery business were many, and are explained fully by Lord Shaughnessy and Sir John Aird. All the Judges of the Courts below have concurred in holding that the main causes of this shrinkage in business were the enforcement of Governmental regulations, both in Canada and the United States, thereby curtailing exports of alcohol, particularly from Canada to the United States, into which importation was illegal, the enactment or threat of hostile legislation in Canada, and the increase of competition in the distillery field.

Bk. 5, p. 2221 et seq.

Bk. 5, p. 2185, l. 40

- 10 **100.** The fact that business was bad and profits dropping seriously became known and the speculating public took fright and stampeded. Practically all beverage stocks, in any event all distillery shares, suffered in about the same proportion. This drop in market value of beverage and distillery shares was in no way to be attributed to mismanagement. Almost all other Canadian industries shortly thereafter suffered a similar fate. The shares and stocks of companies engaged in some other industries showed greater losses than the distillery shares, e.g., the pulp and paper industry. Many of the gilt-edged securities showed market losses infinitely greater in points dropped than those of the Alcohol Company.
- 20 The shares of the two foremost Canadian banks (Bank of Montreal and Royal Bank) each lost heavily in market value.

Bk. 2, p. 742

Bk. 2, p. 744

Bk. 4, p. 1588, l. 20

Bk. 4, p. 1589, l. 19

Bk. 4, p. 1590, l. 16

Bk. 4, p. 1166, l. 128

Bk. 4, p. 1188, l. 8

Bk. 2, p. 751

Bk. 2, p. 752

Bk. 2, p. 743

Bk. 2, p. 753

Bk. 4, p. 1655, l. 8

Bk. 2, p. 751

Bk. 4, p. 1591, l. 30

Bk. 2, p. 753

101. In the case of the Alcohol Company, there were some inside happenings which the Courts have found contributed to the stock market debacle. Mr. Henry Joseph was a well-known Montreal business man, who had been a member of the Alcohol Board for many years. At a Meeting of the Directors of that Company which he attended on January 23rd, 1929, a serious falling off in profits was disclosed. Without consulting Lord Shaughnessy, he immediately started to sell his shares, and in the next few weeks sold out nearly all his holdings at satisfactory, though falling prices. Another Director of the Company was Col. F. M. Gaudet, who was also a Vice-President. Some years before, Sir Mortimer had arranged a contract between Col. Gaudet and the Alcohol Company, under which he was enabled to acquire 2,000 shares at a price of \$6.00 per share, much below the market. These shares were paid for almost entirely by dividends declared upon them and credited against the price during Col. Gaudet's period of service. In January, 1928, by making a payment of \$60 in cash, he obtained delivery of these shares. It is clear from the recitals of the contract under which he acquired them, that he was expected to retain them. In May, 1929, Col. Gaudet sold substantially all his 2,000 shares and realized nearly \$60,000. When Lord Shaughnessy heard of Col. Gaudet's action, he asked him to resign, and after some acrimonious correspondence, Col. Gaudet did so. Sir Mortimer would certainly have been no less critical, as appears from his letter to the Incorporated Company, dated November 23rd, 1925, in the course of which he said: "Any Director you will ask to resign who you find dishonourable enough to use or give private information."

Bk. 2, p. 711

Bk. 5, p. 2342, l. 7

Bk. 5, p. 2407, l. 16

Bk. 2, p. 680

Bk. 2, p. 710

Bk. 4, p. 1032, l. 35

Bk. 4, p. 1137, l. 20

Bk. 2, p. 680, l. 20

Bk. 4, pp. 1025-1027

Bk. 4, p. 1077, l. 15

Bk. 2, p. 711, l. 5

Bk. 2, p. 700

Bk. 5, p. 2342, l. 17

Bk. 2, p. 796, l. 20

Bk. 5, p. 2431, l. 1

102. Mr. Joseph resigned as a Director of the Alcohol Company on June 12th, assigning as a reason that he expected to be absent from Montreal a good deal in future. On July 2nd, 1929, the Hon. H. M. Marler, who had been appointed Canadian Minister to Japan, found it

Bk. 2, p. 1699, l. 25

necessary to resign as a Director, because of his approaching absence, but accompanied his letter of resignation with a very cordial communication to Lord Shaughnessy. Mr. E. R. Decary, who had a merely nominal interest in the Company, holding only two shares, resigned on the 17th July, 1929, because of pressure of other business, but he also wrote a letter in cordial terms to Lord Shaughnessy.

103. Sir Mortimer Davis did not himself believe in outside Directors. He thought them a source of weakness and "leakage." In his letter to Lord Shaughnessy of December 18th, 1925, he said:

"It was a mistake to put outside people on the Alco Co. Board. The Tobacco Company has only men who take an active part; however, some day we will correct this condition."

Had, therefore, Lord Shaughnessy deliberately provoked the resignation of all Directors other than officers and employees of the Company, he would have been carrying out Sir Mortimer's policy, but in fact, except in the case of Col. Gaudet whom he dismissed for what he thought disloyalty, and possibly Mr. Joseph, Lord Shaughnessy did not seek the resignation of the other outside Directors, and he proposed to replace them in due course.

104. Appellants invoke the resignation of these Directors as an evidence of loss of confidence in Lord Shaughnessy. At the Annual Meeting called for December 17th, 1929, Lord Shaughnessy was given proxies totalling 73% of the outstanding stock. This would, of course, include the 51% held by the Incorporated Company, but the balance were held by nearly 2,000 outside shareholders. Among those who gave proxies to Lord Shaughnessy were nearly all the prominent brokerage firms in Montreal.

105. Appellants complain that Lord Shaughnessy arrogated to himself the attributes of the whole Board of Directors and that he refused information to his co-Directors. In fact, Lord Shaughnessy never went as far as Sir Mortimer had instructed him to go in taking on his shoulders the full responsibilities of the Alcohol management. When he put him into the Presidency of the Alcohol Company in 1925, Sir Mortimer wrote Lord Shaughnessy: "The responsibilities rest entirely on you," and a few weeks later wrote him again: "Remember you are the responsible head and don't let your Directors know any more than is necessary, most of them are only thinking and care for the stock end of the proposition and will play with the stock." Mr. Lawrence, the Secretary of the Alcohol Company, testified that no information was ever refused by Lord Shaughnessy to any director asking for it and that the Directors' Meetings were harmonious and that no director at any Board Meeting ever expressed dissatisfaction with the management by Lord Shaughnessy.

106. It is charged that there was a collapse of the Sales Department of the Alcohol Company and that that was the cause of the shrinkage of business and profits, but there was no change in the personnel of the Sales Department until after action brought. Mr. Kelley, the Sales Manager, left soon after this action started to take a position with a

competitor at an increase of salary from \$15,000.00, which he was receiving from the Alcohol Company, to \$30,000.00

107. Appellants complained that Lord Shaughnessy was promoting negotiations for a merger of the Alcohol Company with one or more of its competitors. While all the officials of the Alcohol Company examined were of one mind as to the abstract proposition that a merger on proper terms would probably be wise, and all the judges of the Courts below have thought the same, the fact is that the pourparlers never got beyond the stages of mere preliminary "academic" conversations and
- 10 Lord Shaughnessy was never the mover in the matter. In October and November, 1929, Lord Shaughnessy was approached by Mr. J. F. Lash, K.C., of Toronto, who was a Director of one of the Alcohol Company's chief competitors ("Walkers"). Several conversations were held between them, Mr. Lash when in Montreal calling upon Lord Shaughnessy for that purpose and always taking the initiative. The merger mentioned in these discussions was a possible merger between the Alcohol Company and one or both of its chief competitors, Walkers & Distillers Corporation; and a prominent accountant of Toronto was asked by Mr. Lash, K.C., to put together the balance sheets of these three companies to see what sort
- 20 of a picture they would make if consolidated.
108. Lady Davis herself approved in principle of such a merger and thought it "a very good thing." In their preliminary stages discussions of this kind must necessarily be confidential and confined to few persons. In fact the negotiations never got far enough to justify detailed discussion with Lady Davis, though some hint was given to her of their possibility at the Directors' Meeting of October 18th, 1929. Mr. Lash thought the threatened suit would be disastrous for the whole distillery industry and wished to head it off if he could. There was nothing "surreptitious" in the manner in which Lord Shaughnessy listened to the overtures made to
- 30 him, and he did nothing more. No one was ever committed to anything and Lady Davis was furnished with all information which circumstances warranted.
109. Appellants' attacks were aimed principally at Lord Shaughnessy individually, but Mr. Reaper was made a co-defendant and his rights and reputation are involved by the charges levied. Mr. Reaper was in the witness box for many days and his evidence in his main examination occupies nearly seven hundred printed pages, in the course of which he showed a remarkable knowledge of the affairs of the Estate and the Incorporated Company and a capacity for expressing himself clearly
- 40 thereon. It is, therefore, comforting to note that the Trial Judge records in his notes of judgment that Counsel for Appellants at the argument of this case in the Superior Court conceded that Mr. Reaper was conscientious, honest and capable, and the Trial Judge adds that a quotation from a letter of Lord Shaughnessy to Sir Mortimer containing that characterization was "a faithful picture as Sir Mortimer had had occasion to verify before making his Will." There is no dissent from this appreciation of Mr. Reaper by any of the judges of the Courts below.
110. Having in mind the foregoing review of practically all causes of complaint put forward and attempted to be proved by Appellants, it is submitted that the Judge of the Superior Court properly exercised a

Bk. 4, p. 1106, l. 3
Bk. 4, p. 1285, l. 1

Bk. 2, p. 776, l. 40
Bk. 2, p. 779, l. 35
Bk. 4, p. 1079, l. 35
Bk. 4, p. 1089, l. 43
Bk. 5, p. 2232, ll. 2 to 29
Bk. 5, p. 2236, l. 23

Bk. 2, p. 785, l. 40
Bk. 5, p. 2232, l. 45
Bk. 5, p. 2233, l. 30

Bk. 5, p. 2057, l. 2
Bk. 5, p. 2058, l. 1

Bk. 4, p. 1731, l. 25
Bk. 4, p. 1733, l. 1

Bk. 5, p. 2237, l. 24

Bk. 3, p. 113 to p. 801

Bk. 6, p. 2491, l. 45

Bk. 6, p. 2492, l. 20

sound discretion in dismissing the Appellants' action for the removal of the Respondents from office. This discretion so exercised has in turn been unanimously confirmed by the judges of the Court of King's Bench, and it is, therefore, respectfully submitted that no higher tribunal should interfere with a discretion vested by law in the authority so exercising it, or disturb the concurrent findings on all material facts found by the courts below.

111. Respondents therefore humbly submit that the present appeal should be dismissed for the foregoing, and following, amongst other,

10

REASONS

1. Because under Article 831 of the Civil Code of the Province of Quebec a Testator enjoys complete freedom to express his testamentary wishes, with the carrying out of which the courts ought not to interfere.

2. Because the appointment of Executors and Trustees to carry out his testamentary wishes is part of the freedom of willing so conferred on every testator.

3. Because, in the Province of Quebec, the grounds on which alone the courts have jurisdiction to interfere with the choice of Executors and Trustees so made by a Testator are limited to the ground set out in Articles 917, 285, 981d and 981k of the Civil Code, that is, in effect, refusal or neglect to act, dissipation or waste of the property, incapacity, infidelity or want of reasonable skill and care. 20

4. Because the existence of these grounds is a question of fact and if the facts are not established the courts lack jurisdiction to exercise the power of removal.

5. Because in this case, after a long and exhaustive trial of the issues, the Superior Court has found that grounds of removal did not in fact exist and that Respondents had not been guilty of refusal or neglect to act, of dissipation or waste, of incapacity, of dishonesty or failure to exercise reasonable skill and care. 30

6. Because, in consequence, the Trial Judge in the exercise of his discretion refused to remove the Respondents from office and this exercise of his discretion was sound and fully justified.

7. Because the findings of the Trial Judge upon all material facts against the contentions of Appellants and in favor of those of Respondents were unanimously confirmed by all the Judges of the Court of King's Bench. 40

8. Because the Judges of the Court of King's Bench unanimously affirmed the exercise by the Trial Judge of the discretion vested in him as aforesaid.

9. Because, in these circumstances, no higher tribunal should interfere with these concurrent findings on questions of fact and with this exercise of a sound discretion.

10. Because, in the Province of Quebec, the dominant consideration in all such cases is the observance of the wishes of the Testator and not the interests of the beneficiaries, as they may conceive them to be.

11. Because the law of trusts, as in England or other common law jurisdictions, is not in force in the Province of Quebec and the decisions thereunder do not apply.

12. Because the real issue between the parties to this cause was as to the rights of Appellants in the revenues of Sir Mortimer Davis, Incorporated, available for distribution in dividends and these could only be or may hereafter be tried by appropriate proceedings, other than those for removal of Respondents from office.

13. Because in fact it has been shown, as found by the Courts below,
10 that the Respondents have not been guilty of refusal or neglect to act or of dissipation or waste of the property of the Estate or of incapacity or dishonesty or want of reasonable skill and care; but that, on the contrary, Respondents, in good faith and to the best of their abilities have honestly and competently fulfilled their duties and responsibilities as Executors and Trustees of the Estate of the late Sir Mortimer B. Davis and as Directors and Officers of the Companies controlled by it.

14. And for the reasons given by the Judges of the Court of King's Bench and of the Superior Court.

20

GEORGE A. CAMPBELL

LOUIS S. ST. LAURENT

30

40

