Privy Council Appeal No. 78 *of* 1931.

Lady Davis and another - - - - - - - *Appellants*

v.

The Right Honourable Lord Shaughnessy and others - - *Respondents*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by* LORD BLANESBURGH.]

Lady Davis, the first appellant in this case, is the widow of Sir Mortimer Barnet Davis, the testator in the cause. He died at Golfe-les-Pins, near Cannes, on the 22nd of March, 1928. He had been mainly resident in France for some years before his death, but he retained his domicile in the Province of Quebec, where, a prominent citizen of Montreal, he had spent the greater part of his business life. Lady Davis was his second wife. There was no issue of their marriage. Mr. Mortimer Barnet Davis, the second appellant, who attained the age of 30 towards the end of 1930, is the testator's only surviving son by a first marriage. No other issue of his survived him.

Lady Davis and the respondents, Lord Shaughnessy and Mr. A. M. Reaper, are, in that order, the three appointed executors and trustees of Sir Mortimer Davis's will. It is with the impugned administration by the respondents of his, at one time, enormous estate that the present litigation is concerned. The testator's will, prepared in France, was executed in London on the 30th November, 1927, some four months before his death. It was duly

proved at Montreal on the 18th of April, 1928, by the three executors named in it, and it is convenient to state at once in broad outline its main dispositions, leaving other provisions, to which attention must at some stage be directed, to be referred to in their proper place.

Each of the appellants, in addition to other individual benefits, takes an annuity of $67,000 and " one-half of the net annual revenues from the then residue of the estate " remaining after payment of other annuities amounting to $46,000 and of legacies aggregating $411,000. Lady Davis's interest in her moiety of residuary revenue is a life interest, and if Mr. Mortimer Davis predeceases her, then for the remainder of her life she takes his moiety also, his interest therein having been, like hers, one for his life.

The *corpus* of residue after determination of these life interests goes in the events which have happened to charity; that is to say, three-fourths for the erection, equipment and endowment of a hospital in the city of Montreal, to be known as " The Mortimer Davis Hospital," one-eighth to the Federation of Jewish Philanthropies of Montreal, and one-eighth to non-sectarian charitable institutions in the Province of Quebec, to be selected by the trustees of the will, but so that no division of the estate is to be made until after the expiration of at least 50 years from the testator's death. Accordingly, an administration extending over many years is in prospect, while, of the ultimate participants in the residuary *corpus* of the estate, only one is in existence—the Federation of Jewish Philanthropies—of which presently.

The action out of which this appeal proceeds was commenced on the 16th of January, 1930, in the Superior Court for the District of Montreal by the appellants as plaintiffs against the respondents as defendants, the Federation just mentioned being named and summoned as *mis-en-cause*. In a declaration of 118 paragraphs, the appellants charged the respondents with detailed acts of infidelity, incompetence and negligence in their administration of the testator's estate, and demanded their removal from office as executors and trustees of his will, with further incidental relief.

After a hearing before Mr. Justice Surveyor extending over nearly 50 days, that learned Judge, in an elaborate judgment delivered on the 30th June, 1930, dismissed the action, reserving for his further consideration the question of costs—a serious matter upon which, it may be observed in passing, no adjudication has so far been made.

There was an immediate appeal by the plaintiffs to the Court of King's Bench (Appeal Side) of the Province of Quebec, but it failed, the appeal being dismissed with costs by a judgment of the 27th of June, 1931.

This is a further appeal by the plaintiffs from that judgment.

The *mis-en-cause* may at once be disposed of. The Federation attended both Provincial Courts, but took no part in the arguments or proceedings in either. Although cited, it has not appeared before the Board. In a case in which the claims of revenue and *corpus* appear at certain stages to be in conflict it is unfortunate, although probably it was unavoidable, that *corpus* had in the discussions no direct representative.

The magnitude of the litigation will have already been appreciated. The record extends to nearly 3,000 closely-printed pages. The importance of the issues involved, not only to the parties immediately concerned, but to all interested in the administration, over many years, of what may again be an estate of great value cannot be gainsaid. Moreover, the charges made in the action against the respondents involved both their honour and their good faith, and although, as their Lordships hasten to say and emphasize, these charges, so far as they were charges of fraud, were not only repelled by both Courts in Canada, but were not again revived before the Board, the respondents cannot be expected to remain indifferent to a demand still persisted in that they be judicially deprived of offices of profit with which they were entrusted by a testator held in respect by both of them.

Their Lordships, however, as the result of an intensive examination of the whole record, have satisfied themselves that the issues with which alone they are required to deal can with their attendant facts be readily enough segregated from the mass of the printed material. In their earlier stages a certain prolixity in the proceedings was almost inevitable. The trial followed closely upon the institution of the action: time for preparation was limited: the evidence, both oral and documentary, is as a result comprehensive rather than selective: the trees are multitudinous: they have, it is to be feared, sadly obstructed some views of the wood. But when what is really material is brought into relief, the issues still open emerge with sufficient clearness, and, although their Lordships have not found the difficulties presented to be easy of solution, they have not, on the view which they take of the whole case, been called upon to apply to the problems set them other than well-recognized judicial principles.

The case of the respondents is unusual in this that, while justifying their actions unreservedly, they seek also to explain some of them by reference to policies and principles pursued, and held by the testator himself when in life. These they say they were only applying to the best of their ability when acting as they did.

Their Lordships do not pause to consider how far the provisions of the testator's will justify the admission of such considerations. It is, however, obvious that the case of the respondents, on this aspect of it, cannot be understood without some appreciation of the matters to which reference is made, and

this involves an inquiry into the testator's relevant activities in the years immediately preceding his death, which cannot, they fear, be brief. But having made it, they will be able with greater succinctness to consider in detail the sufficiency or otherwise of the grounds on which, before the Board, the appellants still rely for the order of removal which they claim.

At his death, and for a good many years before it, Sir Mortimer Davis appears to have been a man of great, if possibly somewhat precarious, wealth. Up to 1924 his headquarters and principal residence were at Montreal. His town house there, in Pine Avenue, and his farm, St. Agathe, in the country, he still owned at his death, and much of the record is taken up with questions relating to the use and disposal of these properties and to some of their adjuncts—to wit dining-room furniture and a motor car. But, although both residences were always kept in readiness for his coming, after 1924 he occupied them only at irregular intervals. In that year he married Lady Davis, and thereafter lived more or less continuously in France in the villa at Golfe-les-Pins, near Cannes, where he died, and which, with extensive demesne and garden lands, he had acquired for his own occupation.

The disposition of this French property by the will touches the appeal at more than one point. The villa, fully equipped and under the most ample description, is left to Lady Davis for her life, but subject to a direction that if it be sold or leased with her consent, the purchase money or rents, as the case may be, are to fall into residue. The testator no doubt assumed that Lady Davis would continue to reside at least for some part of every year at the place where their married life had been spent, and he made provision whereby it became her interest so to do. Whether any other relevant conclusion can properly be deduced from that assumption is a matter to be considered in its place. It is of interest further to note in passing that this property, which by his will the testator disposed of as if it were his own for an absolute estate, was in fact both at the date of his will and at his death in the legal ownership of a one-man French Company, the Société Daviso, which he had caused to be incorporated for the purpose of holding his French properties under his direction. It seems indeed that the only legal interest which at either date he possessed in the villa was under a lease granted to him by his own company. This is one illustration of a fact which becomes clearer as we proceed, that in such matters Sir Mortimer was essentially a realist. Company or no company, he was in truth and substance the absolute owner of the property and he disposed of it accordingly as his own.

Probably in his earlier years Sir Mortimer Davis was a business man in the strict sense of these words. In the years immediately preceding his death, however, his monetary activities seem to have been concentrated on the acquisition, supervision and

disposal of large and sometimes controlling interests in companies and undertakings engaged in different branches of industry, operating mainly in Canada and the United States, with a leaning, at the end, in favour of alcohol and tobacco. His legal position with reference to the bulk of these interests he modified in July, 1919, when he caused to be incorporated under the Quebec Companies Act another one-man company organized to take over the greater part of his then existing holdings, with its chief place of business in the city of Montreal, and with a nominal capital of $10,000,000, divided into 100,000 shares of $100 each. Of these shares only 50,000 were ever effectively in issue, and the whole of them, credited as fully paid, together with an entire issue of 50,000 $100 6 per cent. serial notes, were taken by Sir Mortimer as the purchase consideration for his holdings transferred. He never disposed of any of these shares for money, and he disposed of very few of them at all. He put one share in the name of every nominee director of the company, but each remained his own in equity. He made in February, 1920, a gift of 500 of the shares to Mr. H. M. Marler with whom he was closely associated, and later to be mentioned, in 1919 he transferred 2,500 upon a conditional trust for Mr. J. B. Waddell, and in 1924 2,375 under a similar trust for Lord Shaughnessy under agreements and in circumstances stated below. For the rest he retained all the shares of the company as his own, and at his death remained entitled, at the least, to 44,625 of them.

Of the 50,000 notes, 2,500 went under the trust for Mr. Waddell and 1,965 under that for Lord Shaughnessy, and further notes Sir Mortimer handed over to trustees under trusts set up by himself. At his death 7,035 of the notes still remained in his own name.

The above company, Sir Mortimer Davis Incorporated, has throughout the proceedings been referred to as the Incorporated Company, and, where distinctiveness requires, it will be so referred to in this judgment.

As might perhaps be expected in the circumstances, the purposes of the company as defined by its letters patent are not lacking in comprehensiveness. It may be doubted indeed whether they are less than conterminous with the legislative authority in such matters of the Province itself. Certain it is that if in the proper administration of the testator's estate any fetter is to be placed on the company's activities, it will not be found in the letters patent now conveniently included in the appendix to the respondents' printed case.

Wide, however, as were its chartered powers, the Company during the testator's lifetime was never more than a holding company, and there were doubtless many considerations of convenience which led Sir Mortimer to bring such a company into existence. But it seems to be accepted on all hands that his main purpose in erecting this façade—it was little more—was

to secure as his own, in any country where he might chance to find himself, a position in matters of income tax more favourable than that to which he might have been relegated had he retained his transferred holdings in his own name with himself collecting the dividends and profits thereon as they accrued.

The Company had an elaborate set of bye-laws, which are printed in the record, and although it may be doubted whether during Sir Mortimer's lifetime more than the veriest lip service was ever done them—the instances in which they were completely disregarded are even in the record quite frequent—they do contain provisions which, since his death, have a direct bearing upon some of the questions arising for consideration on this appeal. The following may here be conveniently noted in this connection :—

Article 8 provides for the affairs of the Company being managed by a Board of not more than five nor less than three directors ; the majority of directors for the time being in office constituting a quorum : the President and Vice-President (Art. 9) are chosen by the directors from amongst themselves : the Board (Art. 16) are to fix the salary or wages paid to the officers of the Company, including officers who may also be directors, and also the remuneration of the members of the Board for their services as such. The directors (Art. 19) are not to be disqualified from contracting with the Company, whether directly or indirectly, but the interest of any director in any contract to be made by the Company is to be disclosed before the execution of the contract, and the director concerned is not to vote in respect of it. The directors (Art. 27) are empowered from time to time to set aside out of the profits of the Company such sums as they think proper as a reserve fund to be used to meet contingencies or for equalizing dividends or otherwise as they may think advisable in the interest of the Company, and they may employ the money and assets from time to time without being obliged to keep the same separate from the other assets of the Company. There are restrictions on the transfer of shares. These may not be transferred to outsiders until each member of the Company has been given the opportunity of acquiring his proportion of those offered at a prescribed price.

But Sir Mortimer, as has been already hinted, did not allow this elaborate mechanism to embarrass him. His complete control over his Company's affairs he exercised, as in the case of the Société Daviso, as if its property had been in the hands of a bare trustee for himself. He was its titular president until 1924, when his French residence commenced. Thereafter he held no office in the Company at all. But his real control was in no way dependent either upon office or place of residence. Before his final departure for France he was on October 1st, 1924, while still President, party to a resolution of the Board that a monthly statement of the affairs of the Company should

be sent him; and on August 4th, 1925, after he had ceased to hold any office, he caused another to be passed that no expenditure should be made by the Company nor obligations incurred thereby in excess of the amount of $10,000 without his express assent. One of the accounts sent to him every month for the rest of his life in compliance with the first of these resolutions is exhibited. It is so drawn up as to show at a glance the Company's transactions during the month and the changes in its resultant position. And the fact that, notwithstanding his residence in France, directions of Sir Mortimer down to matters of even trivial importance were given and without question obeyed, is shown by correspondence between himself and Lord Shaughnessy, who in 1925 became titular President of the Company. Some of that correspondence is exhibited, and a table of its details has been compiled, from which it appears that it consisted of no fewer than 980 letters and cables between January 1st, 1926, and March 21st, 1928.

In view of questions which have arisen since his death, perhaps the most striking manifestation of Sir Mortimer's control over the Company is found in the manner in which he dealt with its profits—his procedure being dictated, as may safely be assumed, by income tax considerations. The Company never declared any dividends, although it earned considerable profits from its business. No profits, as such, were ever distributed. The Company was Sir Mortimer's banker. By his direction it made payments of all kinds to him or on his behalf, every such payment being treated in account as a loan to himself at interest. Against his debit balance the accruing interest on his notes was brought into credit, so that he never received even interest payments in specie. How in October, 1924, his then debit balance was extinguished without payment and without any ostensible distribution of profits will be better described in another connection. Let it suffice here to add that whatever may be held to be the true relation in which, under Sir Mortimer's will, the incorporated company stands to his estate and its requirements, there can on this preliminary inquiry be no doubt as to the relation in which during his life it stood to himself. It was in every respect and always his obedient servant and in no sense his master, and if their Lordships are either required or entitled to speculate upon what Sir Mortimer would have done had he found the continued existence of the company inconvenient or restrictive of his aims or dispositions, they cannot doubt that he would have swept it away without hesitation and would have resumed the direct ownership of, so that he might deal as he wished with such of its assets as he could take as his own. That he considered the company to be himself, and hardly even disguised at that, cannot be doubted.

Accordingly, upon this preliminary inquiry the first important facts to emerge and with the utmost distinctness are: (1) that for

every effective purpose of management and control the company was Sir Mortimer and no one else, and (2) that although his interests in it covered the great bulk of his fortune, the company's activities, directed as they were from its chief place of business in Montreal, were all effectively and meticulously supervised and controlled by himself, although resident for the greater part of the time in France.

From 1919 to 1924 Sir Mortimer's control had been immediate and direct, but the active management of the Incorporated Company even during that period was in the charge of Mr. J. B. Waddell, already referred to, who had previously been manager of the Union Bank of Montreal. In 1919 he was introduced by Sir Mortimer into the Company's service, and by him appointed its Vice-President. His entry was followed by an agreement with Sir Mortimer of the 4th December, 1919, under which the $250,000 face value of the Incorporated Company's notes and the 2,500 shares in its capital stock already referred to (5 per cent. of each issue) were placed in the names of Mr. H. M. Marler and Mr. H. B. Maclean as trustees, to be handed, subject to the provisions of the agreement, to Mr. Waddell on the completion of five years' service with the Company. This agreement is only now material because some of its provisions are invoked to justify modifications in Lord Shaughnessy's already mentioned agreement of 1924 made after the testator's death under circumstances to which strong exception is taken by the appellants.

Lord Shaughnessy had been known to Sir Mortimer from boyhood. In 1920, at the age of 40, he had taken silk and was a partner in one of the leading legal firms in Montreal, earning a professional income mainly progressive and ranging between 1921 and 1924 from $9,000 to $14,500 in a year. In 1920 Sir Mortimer retained him as special Counsel: in 1921, at Sir Mortimer's instance, he was elected to the Board of Directors of the Canadian Alcohol, Limited, subsequently to be referred to as Alcohol, a corporation in which, as will be seen, the Incorporated Company held, as it still holds, a controlling interest. In 1924, at Sir Mortimer's request, Lord Shaughnessy gave up his legal practice, and on the 17th of September, 1924, on Mr. Waddell's retirement and in view of Sir Mortimer's intended residence in France, he entered, again at Sir Mortimer's instance, into the agreement already mentioned, to which Sir Mortimer, the Incorporated Company and he were parties of the first three parts, with the same Mr. H. M. Marler and Mr. H. B. Maclean as trustees, parties of the fourth part.

On the 20th August, 1924, a few weeks before the agreement was made, Sir Mortimer wrote to Lord Shaughnessy as follows :—

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

Frequent reference throughout the case is made by the respondents to this statement of Sir Mortimer's, and the agreement itself touches the appeal at so many points that it is desirable once for all to refer with some care to its provisions.

After a recital that Sir Mortimer, desiring to interest Lord Shaughnessy in the Company, had transferred and delivered to the trustees $196,500 in face value of the notes of the Company and 2,375 shares in its capital stock, to be delivered in full ownership to Lord Shaughnessy subject to the fulfilment of the conditions thereinafter provided, or, in the event of their non-fulfilment, to be returned to Sir Mortimer, it was agreed that the Company should engage Lord Shaughnessy in the capacity of general Counsel or in such other capacity as the Directors might from time to time determine, at a fixed salary of $20,000 per annum, payable monthly, Lord Shaughnessy undertaking during the period of his employment " to devote all his time, attention and energies to the advancement of the affairs of the Company in whatever capacity in which he may be employed or to the extent and in the manner which the directors of the Company may from time to time determine." As to the trust shares and notes it was provided (clause 2) that if Lord Shaughnessy remained in the uninterrupted employment of the Company during a period of five years from the date of the agreement, the trustees should transfer them to him as his absolute property. If Sir Mortimer were to die before Lord Shaughnessy had completed $2\frac{1}{2}$ years of employment with the Company, it was provided by clause 3 (*a*) that his services might be dispensed with by the Directors on six months' notice, and on payment to him of $50,000, and that thereupon the trust shares and notes should be transferred by the trustees to Sir Mortimer's estate. If Sir Mortimer were to die, as in fact he did, after completion of $2\frac{1}{2}$ years' service by Lord Shaughnessy, then the Company was by clause 3 (*b*) entitled to require the completion of his five years' term at a salary not less than that he was then receiving. All interest paid upon the notes and the dividends (if any) declared upon the shares held by the trustees were by clause 6, so long as they were so held, to be paid to Sir Mortimer, and it was, at his direction, that the trustees were to vote upon the shares. There is a provision in clause 5 that if the Company at any time increases its notes or capital stock, Sir Mortimer will add a proportional number of the increased notes or shares to the trust notes and shares, and another in clause 8 that the consideration for the agreement is in the nature of a gift and in view of the services to be rendered to the Company by Lord Shaughnessy, and Lord Shaughnessy agrees that, if having become owner of the trust notes and shares, he desires to sell them or any of them, he will offer them first to Sir Mortimer at the price prescribed by the clause. Sir Mortimer is by clause 1 given power to cancel the agreement during his lifetime in the

event of Lord Shaughnessy's services being unsatisfactory, it being provided that on such cancellation the trust notes and shares shall be transferred and delivered by the trustees to Sir Mortimer.

The terms of this agreement were amplified by a letter from Mr. Waddell, then Vice-President of the Incorporated Company, of the 15th October, 1924, and accepted by Lord Shaughnessy.

> "It is understood," the letter says, "that any remuneration you may receive as a director of this company, or any remuneration paid to you for services as a director of any other company in which this company is largely interested will be paid in by you to this company and not retained by you personally."

And after a reference to certain outside directorships then held by Lord Shaughnessy, the letter proceeds:—

> "It is of course agreed by us that you may continue your connection with these companies and that any remuneration received by you as director or officer of the same will be retained by you as your own personal property."

Now the validity of this agreement is impeached in other pending proceedings on the ground, *inter alia*, that the transaction it records was in the nature of a gift and was void in that it was not evidenced by a notarial deed duly registered. Upon that question their Lordships are not in these proceedings called upon to form any opinion, and they express none. It is, however, only fair to Lord Shaughnessy to say that when he in September, 1929, had the agreement fulfilled in his favour, without reference to any possible objection to its validity, no such objection had then been taken or even hinted at: that in this respect Mr. Waddell's agreement and his own are in identically the same case, and that on completion of Mr. Waddell's service in 1924, his trust shares and notes were handed over to him by the same trustees without any such question raised or suggested by Sir Mortimer.

But, apart from any reflection upon its validity, there are questions as to the meaning and effect of this agreement which will later have to be considered, and it is not inconvenient to refer to these now while the provisions of the document are immediately under notice.

First, Lord Shaughnessy it will be seen, is not entitled to claim any beneficial interest in the trust shares and notes or any of them until after he has served the Company for five years. In this respect Mr. Waddell's agreement provides that if during the five years' term Mr. Waddell leaves the Company's service with Sir Mortimer's assent, or is discharged therefrom without such assent, or dies, then a proportion of the shares and notes reckoned by reference to his actual service are to be handed over to him as his own. There is no such provision in Lord Shaughnessy's agreement, and, indeed, any arrangement to that effect would appear to be inconsistent with the clause 3 (*a*), which as above seen names an event on which all his rights may be extinguished on six months' notice by a payment of $50,000.

Secondly, the service by Lord Shaughnessy is expressly limited to five years by Sir Mortimer's death after the first 2½ years. Accordingly, in that event, Lord Shaughnessy would, after five years, neither be required to serve, nor could he require the Company to employ him. In other words, if the agreement was to continue further, it had to be renewed.

Thirdly, a question is suggested by the terms of the letter of the 15th October, 1924. In 1925 Lord Shaughnessy, appointed a director of Alcohol, as has been seen, in 1921, was nominated by Sir Mortimer to be President in succession to himself. There was attached to the office of President a remuneration of $20,000. Was this remuneration, when it came to be received by Lord Shaughnessy, to be included in the remuneration which under the letter he is required to account for, or may he claim to retain it on the ground that a President is an "officer" of a company who, even if necessarily also a director, does not as such receive his presidential remuneration? It has of course always to be remembered that except as stated in the letter the Incorporated Company was entitled to Lord Shaughnessy's full time in return for the $20,000 it paid him. It will be seen later how this difficulty, when apparently it came to be appreciated, was dealt with by Lord Shaughnessy. It is fair to him, however, at once to say that during Sir Mortimer's lifetime no objection was taken to his retention of his presidential $20,000 a year from Alcohol, a payment of which their Lordships think Sir Mortimer must have been aware.

Mr. Reaper's effective introduction to Sir Mortimer was made in a letter of Lord Shaughnessy's of the 8th January, 1926 :—

> "I have been considering the possibility of engaging Reaper, who was with the Asbestos Company. I have had a great deal of work with him in connection with the completing of that transaction, and I cannot adequately express the help that he has given me nor the high opinion I have formed of his knowledge of method and detail. It is true that he is not a young man, nor does he possess a great deal of initiative, but he is conscientious, honest and capable, and would help me more than I can tell."

Sir Mortimer assenting, Mr. Reaper was appointed Secretary-Treasurer, and subsequently a director, of the Incorporated Company. In the autumn of 1926 he undertook the clerical work of all Sir Mortimer's private affairs. The learned trial Judge, who heard an examination and cross-examination of Mr. Reaper extending over many days, stated that Lord Shaughnessy's picture of Mr. Reaper in his letter was a faithful one. Their Lordships, who have read his evidence, see no reason to differ from that conclusion. The criticism of Mr. Reaper's actions that can, they think, be justly made is that in everything he seems to have surrendered his judgment to Lord Shaughnessy, and to have accepted directions from him, being, as he assumed, principal trustee, as if they had been the directions of Sir Mortimer himself. Except in one instance, Mr. Reaper derived no personal

advantage from any of the respondents' transactions which are impugned, and their Lordships readily believe that in the excepted instance it never occurred to him that there could be any irregularity—if any there was—in his taking a sum to which Lord Shaughnessy thought he was justly entitled and for which they feel sure he had not himself asked.

Their Lordships come now to a further incident in this preliminary inquiry which in its wider aspect is illustrative of Sir Mortimer's methods with the Incorporated Company, and in one of its details lies at the root of a complaint made against Lord Shaughnessy by the appellants. The incident relates to the manner in which as at September 30th, 1924, Sir Mortimer extinguished the large debit balance which, as already explained, had been accumulating in his account with the Company. At that date the balance against him amounted, with accrued interest, to $1,827,603. But, on a revaluation of the entire assets of the Company which, not for the first time in its history, he caused to be made, it appeared that the Company was possessed of a surplus of assets over liabilities, including paid-up share capital, of not less than $4,338,799. Sir Mortimer accordingly caused resolutions of the Company to be passed whereby $3,250,000 fully paid Treasury shares were authorised to be issued *pro rata* to the shareholders in respect of that amount of the capital surplus so ascertained. By a further resolution passed at the same meeting the $3,250,000 new shares were directed to be at once paid off, so that each holder of the shares (there never, of course, having been any actual issue of any to him) became entitled, as a debt from the Company, to receive in cash their nominal value. The resulting sum payable to Sir Mortimer was entered at $2,892,500. Of that sum $1,827,603 was applied in extinguishing his debit balance, and the surplus—$1,064,896—remained to his credit in his account with the Company. It was doubtless considered essential for income tax reasons that this distribution should appear to be a capital distribution. It was pointed out by the auditors, however, that it could only be validly so regarded if the reduction and return of paid-up capital thereby involved had the authority of supplementary letters patent. And the auditors passed the accounts on the understanding, as they stated, that these had been applied for. Their Lordships have seen no trace on the record of any such application ever having been made, and they are left in doubt whether it was, or whether any form of judicial sanction to the reduction was ever either asked for or obtained. And, indeed, such sanction may well have been thought unnecessary, because the real transaction was undoubtedly a division amongst the shareholders to the extent of $3,250,000 of a surplus of $4,338,199, and this surplus, as "a profit of the Company," the Company in general meeting was entitled to distribute in dividend, if it pleased. For there is no provision in this Company's bye-laws restricting the fund for payment of dividends to a fund of "profits arising

from the business of the company." Nor to a shareholder holding his shares for an absolute interest did it make any difference, apart from fiscal considerations, whether the distribution was a return of capital or a division of profit. But if for the reason already given the distribution can only be legally justified as a division of profit, then the point becomes of importance in relation to one of the complaints made against Lord Shaughnessy, to which, although necessarily by anticipation, it is now convenient to allude, as so many of the facts arise out of or emerge from the distribution just described.

At the date of that distribution the 2,375 shares held in trust under Lord Shaughnessy's agreement had been transferred by Sir Mortimer into the names of the trustees. The sum distributed in respect of each share was $65. The sum to be credited to the trustees accordingly ought to have been $154,375. In fact, however, owing probably to the mistaken belief that Lord Shaughnessy's trust shares were, like Mr. Waddell's, 2,500 in number, and not 2,375 only, the sum credited to his trustees was the same as that credited to Mr. Waddell, viz., $162,500.

The trustees then were credited with $162,500, and that sum, with compound interest, at yearly rests, amounted on the 31st August, 1929, to $216,706—$54,206 representing interest. With reference to this credit, the following statement appears in the auditor's report on the Company's accounts for the year ending September 30th, 1925, when the sum credited to the trustees amounted to $172,250 :—

" We understand that the beneficiary under the trust does not wish to participate in this amount of $172,250, and under these circumstances it would seem that any steps that may be necessary should now be taken to have this amount transferred to the credit of Sir Mortimer B. Davis."

No such transfer was ever in fact made. There is no evidence that Sir Mortimer ever considered the matter at all, and the credit continued year after year, the heading in the Company's cash accounts sent always to Sir Mortimer being " Amount due shareholders *re* trust account," a somewhat colourless description, it will be agreed. Now, as is seen later, Lord Shaughnessy at the conclusion of his five years' term took from the Company payment of the total sum then standing to the credit of the trustees' account, and he did not raise with anyone the question of his right to do so. And his right to take that course was, apart altogether from his original refusal to claim the sum, challenged before the Board on the following grounds :—

(*a*) That the distribution by the Company was in truth a distribution of profits earned prior to the agreement and in any case distributed before Lord Shaughnessy under his agreement had any interest in these profits.

(*b*) That if the distribution was to be regarded as the trustees' proportionate share of an increase of shares under

clause 5 of the agreement, then at least the interest on the money representing them during the five years of service belonged to Sir Mortimer or his estate, and not to Lord Shaughnessy.

To that challenge in its place the Board will return.

After this digression, justified, as they hope, by convenience, their Lordships proceed to inquire into Sir Mortimer's methods of investment, a topic to which in the course of the record many references are made.

As a speculator or investor he was thus described by Lord Shaughnessy at the trial: "Sir Mortimer," he said, "was essentially a psychology that believed in making a lot of money out of money. He never fancied conservative investments at all. For instance, he would not buy bonds or very sound preferred stocks, and so on. He believed with the ability and the vision he possessed he could very safely take hold of old enterprises that required capital and management, or new enterprises requiring development—he could make a great deal more that way than he could by investing in what is generally accepted as conservative securities."

Sir Mortimer's transactions during the existence of the Incorporated Company bear out that description, while they show also that his expectations were frequently disappointed. The history of the Company discloses that at his death holdings taken over in 1919 as of the value of over $4,000,000 had entirely disappeared. This, however, is not to say that what had been lost on some of its holdings had not been gained on others. What rather is disclosed is that Sir Mortimer, not always wisely, counted on a success in his major ventures to result from his own subsequent supervision of them. He was a man prepared to put great sums in one basket, but it was of the essence that he should be able to keep and should keep his eye on that basket. There is nothing in the record between 1919 and his death to suggest one way or the other what his attitude would have been towards any investment which he could never himself nurse and watch.

At the time of his death there were two holdings of the Incorporated Company to which in this survey attention must now be called. The first was a holding of 5,000 shares in the Asbestos Corporation, valued at $106,071, and 37,185 shares in Consolidated Asbestos, Limited, valued at $609,000. With reference to these it is, perhaps, enough to say that Sir Mortimer believed in Asbestos, and he regarded these as permanent investments of the Company which it would be his policy, if possible, to retain.

At his death, however, the great bulk of the Company's assets consisted of a holding of 496,340 A shares in Alcohol. That holding represented 51 per cent. of the voting power in Alcohol, with the result that its ultimate control was, through the Incorporated Company, in the hands of Sir Mortimer, and passed

after his death to his executors. This asset alone, on the basis of $20 a share—the market price at the death was nearer $40—amounted to $9,926,800.

Now there can be no doubt that it was the testator's wish that the control of Alcohol should be retained after his death. But any investment in Alcohol was always highly precarious. Conditions were a little smoother and the business was very profitable in the later years of Sir Mortimer's life, but danger, as Lord Shaughnessy said in his evidence, was always in the offing, as it could not fail to be in view of the Prohibition Legislation of the United States and of the resulting fact that Alcohol was dealing in a commodity largely purchased by people who had no right to purchase it.

Amongst the complaints made against the respondents are complaints arising from their neglect to realise, as it is said they should have done, all Alcohol holdings not in excess of those essential for control, and in particular holdings in certain Alcohol B shares and McNish debentures, which were taken up not long before Sir Mortimer's death in circumstances which may be conveniently recalled at this point.

In December, 1927, at the instance of Sir Mortimer himself, Alcohol made an issue to its A shareholders proportionately of *non-voting* B shares at the price of $20 a share. The Incorporated Company, again at his instance, took up its quota of 61,980 of these non-voting shares, and for that purpose borrowed on call from the Montreal office of the Canadian Bank of Commerce the sum of $1,250,000 on the security, *inter alia*, of a block of its A Alcohol shares, Sir Mortimer's plan being to dispose without delay on favourable terms of these B shares, which had no influence upon control.

Again, in the summer of 1927, Alcohol, in execution of a plan supervised by Sir Mortimer himself, acquired the control of a Scotch blending plant, known as Robert McNish & Coy., Ltd. To finance that business $5,000,000 McNish debentures, guaranteed as to principal and interest by Alcohol, were distributed proportionately amongst the Alcohol shareholders at the price of $4.50 for each debenture of $5. The Incorporated Company took up approximately $2,500,000 of these debentures, and, as Mr. Justice Hall puts it, "Sir Mortimer arranged to finance the payment of the same by a temporary call loan of $2,250,000, obtained at 4½ per cent. interest from the New York office of the Canadian Bank of Commerce, the plan being to list the debentures in London and Montreal and to dispose of the same without delay." In the result to the extent of these secured overdrafts aggregating $3,500,000 the Incorporated Company was over-invested, and Sir Mortimer's desire to have the two investments speedily realised was probably in great degree attributable to his appreciation of the danger of

overdrafts as expounded by him in a letter to Lord Shaughnessy of the 28th October, 1926.

And here their Lordships bring this preliminary inquiry to a close, drawing from it the further conclusions that at the date of his will and at his death the Incorporated Company was possessed of only two holdings—its Asbestos and its Alcohol A shares, with reference to which Sir Mortimer's policy is clearly ascertainable : his policy as to Asbestos being to retain the shares as a permanent investment ; and as to Alcohol A, not to endanger control by sale at any other than a high price. As to the Alcohol B shares and the McNish debentures, just as it was his intention when these were taken up that they should as speedily as possible be disposed of by sale, so would it have remained his policy that, after his death, they should be disposed of in like manner at the earliest favourable opportunity.

On the 12th April, 1928, Sir Mortimer was buried at Montreal, where, as has been already stated, his will was probated on the 18th of the same month.

Lady Davis, who was with him when he died, came over for the funeral. She remained in Canada until the 5th of May, when she returned to France, and was not again in Montreal until early in June, 1929. It is quite obvious from exhibited correspondence that at Sir Mortimer's death she was on terms of personal friendship with Lord Shaughnessy, and that her confidence both in him and Mr. Reaper was complete. On her departure for Europe after the funeral she left with them a joint power of attorney in the widest terms, authorising them to represent her in all matters of administration as if she were personally present. It may be doubted whether this power really remained operative after Lady Davis's return to Canada in June, 1929, but it was not formally revoked until the 5th October following. Her return to Canada in June resulted from the advice of a Mr. Corbett, a retired American lawyer resident in Paris, who, an intimate friend of Sir Mortimer's, had assisted in the preparation of his will. Lady Davis' duty as executrix, Mr. Corbett had insisted, required that she should keep in closer touch with the affairs of the estate, and at his suggestion she arranged to visit Montreal in the near future. On her way there she met Lord Shaughnessy in London and was told by him of " a financial genius " whose services he was proposing to utilize—the financial genius being a Mr. Jennison, of whom more will be heard. This statement, according to Lady Davis, alarmed her, shook her confidence in the respondents, and satisfied her that there must be no delay in her return to Montreal to make her own inquiries into the situation generally.

On her arrival in June—at a later date under separate advice—she pursued these inquiries with increasing intensity, and on the 22nd November demanded the withdrawal of both respondents from the trust. After unsuccessful negotiations for

settlement extending over several weeks the present action, as already stated, was commenced on the 16th January, 1930.

Its progress and its fate in Canada have already been outlined. Its dismissal in both Courts there had a very material effect upon the case as presented to the Board, which was described by counsel as a mere shadow of that set up by the appellants' original declaration and the description is not without its justification. Not only, as has already been stated, were all charges of fraud then made dropped; but many of the substantive charges were no longer maintained, and one in particular, a mainstay of the appellants in the Courts below—the alleged mismanagement by Lord Shaughnessy of Alcohol—was not opened to the Board. And some of the charges which had disappeared ought never to have been made. Take, for instance, one in respect of a payment of $290,000 made in fulfilment of a promise of Sir Mortimer's given at a great public meeting to erect a suitable building for the use of the Young Men's Jewish Association at Montreal. Not only was the payment of the money passed at a meeting of executors, at which Lady Davis was present, but she herself, on completion of the building, attended the opening ceremony and handed over to the officers of the association the key of the building as the emblem of ownership. Not without reason does Mr. Justice Hall, speaking of this charge, say in his judgment:—

"It is difficult to find words fittingly to characterise the mentalities of the widow and son of the late Sir Mortimer Davies, who now charge the executors with maladministration in assuming the obligation merely because it was not based upon any written contract."

In these circumstances it is not surprising that Mr. Campbell, for the respondents, began his argument at their Lordships' Bar by observing that it was difficult for him to recognise in the case he was then called upon to meet the case with which he had been confronted and which had been litigated in the Courts below. And their Lordships cannot, nor is it right that they should seek to, disabuse their minds of the fact that this is a litigation in which grave charges of fraud have been made against executors and have failed. Nor ought they to forget that there have been included in the action charges now abandoned which ought never to have seen the light.

But Mr. Campbell did not suggest that the case which remained for the consideration of the Board demanded other than a serious answer. With honour satisfied, however, the answer to it might now, without raising misunderstanding, be accompanied by an assurance which the respondents had always been anxious to give, viz., that they had no desire or intention to pursue in the future, as executors and trustees of the testator's will, any course of administration authoritatively declared to

be open to objection. Accordingly, any expression by their Lordships of their views upon the questions raised would not be lost upon the respondents if, notwithstanding these proceedings, they were still permitted to remain executors and trustees of the testator's will, and elected so to continue—a pronouncement of great importance where the relief asked for is removal from office because of past lapses.

Their Lordships now return to the will of the testator. To its main dispository provisions they have already referred. To the statement of these it is necessary only to add that the testator gave to "his friend" Lord Shaughnessy a legacy of $1,000, therewith to purchase a memento, and he directed that each of his trustees and executors "shall be paid the sum of $5,000 per annum while he or she acts as such, and this remuneration is to be in addition to the remuneration which any of them may receive from Sir Mortimer Davis Incorporated."

In the forefront of the will is this clause :—

"Article II. I direct that all my just debts and funeral expenses be duly paid by my trustees and executors hereinafter named, to whose discretion I leave it to fix and determine the manner and expense of my funeral."

As regards the administration of the trustees and executors the following paragraphs are important :—

"Article XV. Except where otherwise decided by my trustees and executors or to make payment of particular legacies as provided for in this will, I direct that the capital of the 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.

"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 organised under the laws of the Province of Quebec. In this Company is vested the control of several important undertakings, all of which I believe by proper management will greatly increase in value and thus yield in capital and revenue a great benefit to my estate.

"To disturb the organisation of this Company would result in a depletion of its resources and would prevent the development of the various undertakings entrusted to its care and to the care of its officers and directors. I therefore expressly direct and require that the beneficiaries of this will shall not disturb by their demands or actions the carrying on of the said Sir Mortimer Davis Incorporated in any manner which in the opinion of the directors of such company may be prejudicial to its interests."

"Article XVIII. I give my said trustees and executors the seizin and possession of all my property, both moveable and immoveable, hereby extending their power and authority as such beyond the year and day limited by law until the full accomplishment of this my will, and I hereby give them power to borrow money and oblige my estate for such obligations

as they may see fit (including endorsements, guarantees and other obligations of a commercial or business nature), to compromise, transact and accept part in satisfaction of the whole of any claim by my estate, to grant main levee and discharge of security with or without receiving consideration, to sell, exchange, dispose of, pledge, hypothecate and alienate the whole or any part of my property, moveable or immoveable, as they may see fit to receive the consideration therefor, to invest and re-invest the monies of my estate in such investments as they may consider advisable, without being limited to the investments in which trustees and executors are by law required to invest; to decide whether assets and liabilities are to be credited or charged to the capital or revenue of my estate as the case may be to employ such professional or other assistance as they may deem requisite in the discharge of their duties; and to appoint agents and attorneys for such purpose; to advance monies to my estate and any advances so made, with the interest thereon, shall be a first charge against my estate; to make advances to any beneficiaries hereunder from time to time as they may see fit; and to do any act authorised herein without obtaining judicial authorisation, even though some of the interested parties may be minors or otherwise incapable.

"Article XX. It shall not be necessary for my said trustees and executors to give security for the administration and disposal of my estate in any country where such security may be required, nor to appoint any curator to any substitution or alleged substitution under this my will, and in making any inventory or inventories of my estate my said trustees and executors may omit any notifications and other formalities in regard thereto and may make the same in such manner they may see fit and the costs of such inventory or inventories and putting my said trustees and executors in possession of my estate, as well as the costs of any partition thereof, shall be paid out of the capital of the residue of my estate. Any of my said trustees and executors may resign without judicial authorisation and the expense of such resignation shall also be paid out of the capital of the residue of my estate. My said trustees and executors shall all have the same powers and be responsible for good faith only and each only for his or her own acts and deeds.

"Article XXII. The books and accounts of my estate are to be kept in the office of Sir Mortimer Davis Incorporated, and all meetings are to held and business transacted in that office unless agreed to otherwise by all my said trustees and executors.

"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."

"Article XXIV. There shall always be three trustees and executors acting for my estate . . ."

The value of the testator's estate at his death is not easy to determine, but it is not a matter upon which for any purpose of this judgment it is necessary to be precise. According to a statement prepared by Messrs. Price, Waterhouse & Co., who for many years had been his accountants and were the auditors of the Incorporated Company from its formation, the estate at death showed a net balance of $7,572,674. But this figure was probably very conservative, as it rested on the value of the estate shares in the Incorporated Company being taken at $170 a share, which valuation again rested on that Company's Alcohol shares, A and B, being taken at their book value of $20, and

not at their then market price of $40 a share. With Alcohol shares taken at market price, the value of each share in the Incorporated Company jumped to $280, and the net balance of the estate to not less than $12,481,424. None of these figures, however, can be regarded as other than approximate. What remains true is that, at Sir Mortimer's death, his estate was of great value. What must also, their Lordships think, be taken to be approximately true is that by the 8th of April, 1930, two years later, the residuary estate had almost if not entirely disappeared, although not without hope of future recovery. This enormous depreciation is mainly attributable to the intervening collapse in the market price of the Alcohol shares to $8 each, with nearly all of them still retained unsold. This disaster to the estate, it is alleged by the appellants, is directly attributable to the respondents' neglect to realize, with which charge there is closely associated the complaint of Lady Davis that always, but more particularly after her return to Canada in 1929, she was denied the information to which she was entitled and was excluded by the respondents from her proper position as an executrix and trustee of the will. By reason of its influence upon so many of the later charges, their Lordships will deal at once with this complaint of Lady Davis's.

In itself it is trivial enough and in no way sufficient to justify any order for the removal of the respondents from office. During the greater part of the period to which it applies the respondents were acting under the power of attorney given by Lady Davis. Any meetings held after her return to Canada, to which she was not summoned, were formal in character, and were prior to the actual revocation of the power. The view of the Courts below on this subject may fairly be taken to be that Lady Davis was never refused any information for which she asked, although it was not always given with enthusiasm. It must further be remembered that by the autumn of 1929 Lady Davis had put herself at arm's length with the respondents and cordial association in the work of administration was hardly to be expected. So far, therefore, this complaint has little to justify it. Its real seriousness is exposed by the principal answer made to it by the respondents, an answer which seeks, as a matter of principle, to justify Lady Davis's exclusion from complete participation in administration and, at the same time, seeks to confer upon Lord Shaughnessy a position in the trust of indisputable authority hardly inferior to the testator's while he lived.

The view of the position, taken by the respondents in this matter and reflected in their answer to this complaint of Lady Davis, has coloured the whole course of administration of the estate since the testator's death, and it lies at the root of the controversies with Lady Davis. If Lord Shaughnessy had in his administration governed himself by what their Lordships conceive to be the true limitations of his office, it is hardly too much to say that the occasion for most

of the still remaining charges against him would never have arisen, and that Lady Davis's support and confidence in him need never have been withheld. What, however, seems to have been assumed and acted upon by the respondents throughout was that under the trust arrangements made by Sir Mortimer's will, following as nearly as might be the order established by him when in life, Lord Shaughnessy became the principal or governing executor and trustee, with the pride of place attaching to his Presidency of the Incorporated Company, with Mr. Reaper in the position of subordination which he had held while Sir Mortimer lived, and with Lady Davis, resident in France, and not intended, or at least not expected, to take any part in the oversight of administration.

And this view has been judicially upheld in these proceedings. Mr. Justice Surveyor, for instance, in his judgment goes so far as to say that Sir Mortimer could not have doubted, that, so far as the executors appointed by him were concerned, Lord Shaughnessy would have the absolute control; while Mr. Justice Hall in his judgment describes the two respondents as the principal executors and trustees, Lady Davis, although one of the executors and trustees, would, being resident in France, participate only nominally in the administration.

Acting on this view, the learned trial Judge affirms in terms the withholding from Lady Davis of information as to pending negotiations on a question so important as the merging of Alcohol interests throughout Canada, giving as his reason that these had not advanced far enough " to justify the defendants in informing female plaintiff thereof "; and with reference to other negotiations for a merger more limited in scope, " that these were never far enough advanced to make it part of defendants' duties to keep female plaintiff informed thereof."

Their Lordships believe all this to be profoundly mistaken. It is a conclusion which is not only not warranted, it is, they think, one actually contradicted by the terms of the testator's will, and it finds no support if, in relation to the management and control of Sir Mortimer's estate while he lived, reference is made to his own activities, as already detailed in this judgment. To take the will first. No hint of precedence of one executor over another is there to be found except, perhaps, such as may be involved in the order in which they are named. And although Lady Davis's prominence so regarded is doubtless an illustration of the chivalrous " Place aux dames," she is certainly according to that test placed in no position of subordination. But passing that by, their Lordships are struck by the testator's insistence that there must always be three trustees of his will—not two, much less one only—and that each of the three original trustees and executors is to receive $5,000 a year while he or she acts as such. Surely too, Lady Davis was to have at least a share in fixing and determining the manner and expense of the testator's funeral; nor was she excluded from the testator's injunction to his " said trustees and

executors" to take an active and energetic interest in the management of [his] estate. When to these provisions of the will is added the fact, proved at the trial, that Lady Davis was throughout in the testator's confidence in relation to his business affairs, and when her remarkable intelligence as displayed in the witness-box is recalled, the conclusion is inevitable that in this matter the will means what it plainly says. And as against all this, is there any implication to the contrary in the fact that Lady Davis's more or less permanent residence in France is contemplated by the testator when it is found, as their Lordships have shown, that for nearly four years preceding his will and his death he had himself exercised from the very same residence in France complete control over all his Canadian affairs with the respondents assisting?

In short their Lordships' conclusion on the whole matter is that, so far from Lady Davis being intended to be in subordination to her co-trustees and executors, Sir Mortimer Davis looked upon her, with her extensive beneficial interests in his estate, as perhaps most nearly representative of his personality and that any preponderant influence of one over the others, if such in the event supervened, would be due to his or her quality and to nothing else.

It is accordingly not enough for the respondents to say in answer to this complaint of Lady Davis, that she was given all the trust information for which she asked. No trust information in relation to this estate is the monopoly of any one or of any two of the executors or trustees. It must be equally at the disposition of all three. An illustration of the failure by the respondents to appreciate this as being the true position of affairs is shown by the way in which the monthly account of the Incorporated Company prepared for Sir Mortimer during his life, and continued since his death, was dealt with. A copy was each month supplied to or was made available for both respondents. But no copy was ever sent to Lady Davis, and with reference to an incident during an interview with Lord Shaughnessy in June, 1929, when she inadvertently picked up and brought away what turned out to be the April account lying on his table, it was suggested to Lady Davis in cross-examination that her taking the account away was not inadvertent, as if her right to see it was questionable. To their Lordships, on the contrary, it seems extraordinary that a copy of every one of these most informative monthly accounts was not sent to Lady Davis as a mere matter of course, whether asked for or not. The attitude of the respondents with reference to this document could only have arisen from a complete misapprehension both of Lady Davis's position and of their own. Again, apart from agreement authorising them, Lady Davis is surely entitled to require that no negotiations with reference to trust affairs of real importance shall ordinarily be initiated by any trustee or executor except at the least with the knowledge of all. Still further, Lord

Shaughnessy as President for the time being of the Incorporated Company and of Alcohol, positions which were and are his solely in consequence of the voting power of the testator's estate, had and has no more right to withhold information from, or neglect the instructions of, the executors and trustees as a body than he would have had the right to withhold information from Sir Mortimer or neglect his instructions when he was alive. His responsibilities to his co-trustees and executors as President in no way differ from those of a President, not a trustee, to the whole body of the trustees and executors. In short, while in their Lordships' judgment, as they have said, there is nothing serious in Lady Davis's complaint here as formulated, this particular answer of the respondents to it is no answer at all, and in the interests of proper administration of this estate it is essential that they should fully realise that fact.

Their Lordships propose now to deal, and in the first instance together, with certain complaints against the respondents which have one element in common, although they are also complained of separately on grounds peculiar to each. These are :—

(1) Failure to make payments provided for in the will.

(2) Failure to sell or to take proper measures for the sale of the Alcohol B shares.

(3) Employment of moneys of the Incorporated Company in three enterprises :—

(*a*) Cadillac Coal Co., Ltd.

(*b*) Investment Foundation, Ltd.

(*c*) Jennison & Co., Ltd.

Now, at the root of all these complaints and particularly of the first lies the alleged neglect on the part of the respondents by timely sale of available realisable property to place themselves in a position duly to pay the testator's just debts and to have timeously available funds for the payments which under the will had to be made to legatees and annuitants with no undue delay.

The primary duty of the executors imposed upon them by the will duly to pay the testator's just debts, imposed on them a heavy burden. Sir Mortimer's death brought into existence in the shape of donations, covenants, duties, funeral expenses, legacies and annuities, new claims amounting to at least $3,250,000, the total sum sufficient to clear the estate and Company of pecuniary claims was between $9,000,000 and $10,000,000, and it was given in evidence for the appellants by Mr. McDonald that if in order to raise the necessary moneys all the properties of the estate and the Company, other than Alcohol A and Asbestos shares and McNish debentures, had been realised, there would still have remained a deficiency in liquid assets required of over $1,250,000.

The obvious duty of the executors, therefore, so it is suggested, was to proceed by immediate realisation to provide the moneys necessary to meet the heavy burdens on the estate, carefully to refrain from making any investments, whether in the

Incorporated Company or outside it not urgently called for, and most especially to realise the Alcohol B shares in accordance with the testator's intentions and at any reasonable advance on $20, the price at which so shortly before they had been acquired. It is the respondents' neglect in all these matters that was made the subject of grave criticism at their Lordships' Bar.

It is fair to the respondents to say that complaint of their failure to realize was not put forward until this action was commenced, although the facts on which the charge is founded were well known to Lady Davis and her advisers some months before. So far, for instance, as the failure to realise Pine Avenue and St. Agathe by sale is concerned, as late as the 18th October, 1929, at a meeting of the executors with Lady Davis present, the refusal of an offer of $200,000 for Pine Avenue and of $55,000 for St. Agathe was confirmed, and it was decided that the asked prices of $300,000 and $100,000 should be maintained. In face of the fact that the Pine Avenue Property had been on offer since before Sir Mortimer died, that its municipal valuation was $170,000 only, that at that figure as its real value it was included in Mr. Reaper's return for succession duty purposes and was accepted by the authorities at $198,000, that it was costing the estate $14,000 a year in upkeep and was bringing in no return, and in view of the fact as regarded St. Agathe that its upkeep was costing $8,500 a year and its assessed value $63,000 only, the attitude of all three executors in October, 1929, when the financial situation was rapidly becoming serious is difficult to understand. It is an attitude which makes it necessary to exercise great caution in assigning blame to the respondents for their failure to realize by sale the Alcohol B shares which had been acquired in the circumstances already stated. But this failure was more extraordinary still. According to Lady Davis, it was agreed at a meeting of executors on 28th April, 1928, that these shares should be sold. Lord Shaughnessy stated that $2,000,000 could be obtained from them. There is, however, no reference to this in the minute of the meeting, but the minute, it must be added, is confined to matters concerning the estate proper, and does not deal with anything that would strictly be like this, a transaction of the incorporated Company. What happened was that authority was given to sell these shares at a price not below $43, and within a month 6,000 and upwards were so disposed of. No effort was ever again made to dispose of any others, although prices up to $39 a share were obtainable for more than a year after the testator's death and some not unattractive offers were summarily turned down. In that interval the respondents sold some 2,240 A shares at a good price. Later, however, in 1929 this admirable transaction was undone by the application of $75,000 of the Company's funds in purchases of 160 B shares at about $39½ and 2,200 A shares at about $31¼. These seem to have been pure speculations, and not even transactions to support the market such as had frequently been entered into in Sir Mortimer's lifetime.

When Mr. Reaper was being examined in March, 1930, a depreciation of $46,660 from cost was already shown on these A shares and of $3,200 on these B shares. Indeed, in 1929, the respondents seemed to have forgotten the necessity for realization altogether; it was then that they made the three investments above mentioned, embarking in them moneys of the Company exceeding $700,000 in amount. It seems that at this time the respondents were more concerned to develope the commercial activities of the Incorporated Company than to carry out the more prosaic task of raising the necessary moneys for the discharge of estate and company liabilities. In their Lordships' view their failure in this essential duty may well be described as neglect, nor can it be said that the grievous slump in Alcohol shares which has supervened was not largely due to a risk inherent in the security, well understood by Lord Shaughnessy, and therefore one, so far certainly as the B shares were concerned, to be guarded against with the utmost vigilance. Very similar considerations apply to the McNish debentures also left unsold. But there were difficulties in the way of their disposition on a large scale which makes their retention more intelligible. In their Lordships' opinion the complaint against the respondents is in this respect justified, and they need not go further into the consequences which resulted from their failure in this regard, serious as these were and fully elaborated as they have been in the course of the proceedings. In the circumstances it would they think serve no useful purpose to examine these in detail as their Lordships are not in this judgment assessing liability even if there be any, a matter with reference to which they say nothing.

As to the employment of the Company's funds in the three investments above mentioned, a general attack is made upon these as being part of a policy of developing the commercial interests of the Company at the expense of income, and their Lordships will presently consider whether such a policy is justified by the terms of the will. Apart from this criticism and that the investment was ill-timed, they think that the complaint with regard to the Investment Foundation has little substance. It no doubt involved a large sum of money, and at the time of the action the value of the shares had depreciated to a considerable extent, but the enterprise could not be regarded as a hazardous one.

Cadillac Coal is on much the same footing. The testator in his lifetime had acquired certain interests of the Alberta Coal Field upon which he seems to have thrown away a good deal of money. In February, 1929, the first respondent on behalf of the Incorporated Company formed the Cadillac Coal Company as an amalgamation of the existing coal interests of the Company with another property in the neighbourhood. Most ill-timed, the scheme again involved the advance of large sums of money and a serious commitment for future finance, but upon the evidence their Lordships are unable to hold that it was in itself a hazardous speculation.

Jennison & Co., they think, stands upon a different footing. It commenced with an unsecured loan of $10,000 to a Mr. Jennison, who came to the first respondent with some dubious credentials and was taken up by him as " a financial genius," through whom it was proposed that the Incorporated Company should embark on a new business as general financiers. In January, 1929, the formation of a company for this purpose was agreed to by the first respondent. The Incorporated Company subscribed $50,000 inclusive of the $10,000 already advanced to Jennison, who was to operate the venture at a salary of $20,000 per annum. He was said to have some rather mysterious business on hand in connection with a brewery amalgamation, but there is only the vaguest evidence as to his activities. The first respondent himself apparently knew nothing about them. Mr. Reaper was in complete ignorance, and owing to Jennison's absence in England he could not be called at the trial. He is now dead and there is no suggestion that there are any assets of the company remaining, either tangible or intangible.

Their Lordships refrain from going further into this matter. They can only regard the venture as a speculative transaction of the worst kind, which reflects little credit on the first respondent.

In relation to these investments, however, there is also bound up the question which at the trial was in acute controversy between the parties: what was the relation in which the Incorporated Company stood to the estate proper. Was the Company to be administered as an arm of the estate, or was it to be regarded as a separate entity carried on with reference only to its own advantage within the limits of its powers and taking regard, only as a secondary consideration, to the interests of the estate strictly so called and to the respective rights therein of those interested in income and of those interested in corpus? The purchase of the three properties in question was attacked by the appellants as an application of the Company's profits to a capital purpose. It was defended by the respondents as being, even on that footing, completely justified. In the view of the appellants it was the duty of the Company to distribute all its profit revenue to its shareholders; in the view of the respondents it was the right of the Company uncontrollable by the testator's estate to invest and presumably capitalize any surplus revenue in new enterprises and extensions of other enterprises in which the Company was interested. Mr. Reaper's view was that the Incorporated Company was to continue to run on much the same lines as before Sir Mortimer's death. He thought they might be a little more conservative on some lines. It appears to their Lordships that the view here contended for by the respondents cannot be upheld. Their Lordships find nothing in the will to indicate that the shares in the Company are merely an authorised investment, and that its directorate, whether composed of trustees or not, is to be uncontrolled by those representing the estate. To their Lordships it seems clear that the President and directors of the Company are no more put above

the trustees and executors than during the testator's lifetime was Lord Shaughnessy placed above Sir Mortimer. And so long as the Company is controlled by the estate the trustees must not give the go-by to the provisions of the will. They must have the closest regard to the rights in income and in capital created by the will, not forgetting the welfare of the Company, and limited of course in their action by the minority interests in the Company. On this subject much was made in argument of the last paragraph of clause 15 of the will. In their Lordships' opinion no more must be read into that paragraph than its words import. It is directed to a state of things extending over a long period of years, when the directors of the Company need none of them be trustees of the will. It would be most dangerous construction to hold, that the reference in the sentence to interference by the beneficiaries had undermined or was intended to qualify the supreme control of the executors and trustees.

To put the result in a concrete form, it is, their Lordships conceive, the duty of the trustees to see that so far as is possible tenants for life shall not be deprived of income to which if there had been no Company they would have been entitled, nor shall they receive as income returns, representing, for example, a bonus distribution to which with the Company out of the way they would have had no right at all. The methods adopted by Sir Mortimer in this matter, and to which attention has been already drawn, would without many reservations be quite inadmissible to the trustees. In their Lordships' judgment the extreme views of the respondents on this matter cannot be supported.

In a second group the claims are all illustrative of the embarrassing position in which Lord Shaughnessy was placed, when setting out to adjust claims of his own against, and to take benefits or concessions from, an estate of which he was executor and trustee. In one instance the embarrassment extends to Mr. Reaper.

Their Lordships under this head will first deal with a group of charges having Lord Shaughnessy's service agreement of the 17th September, 1924, as their centre of origin. In anticipation of the discussion which follows, the provisions of that agreement have already been detailed and some of its difficulties of construction indicated. The charges now to be considered are based upon Lord Shaughnessy's own adjustment of these difficulties.

The first has reference to the modification of the provisions of the service contract effected by an agreement with Lord Shaughnessy of the 5th May, 1928, to which the Incorporated Company and the executors and trustees, including Lady Davis, appear as parties.

This agreement was prepared by Lord Shaughnessy himself; accepted apparently without criticism or objection by Mr. Reaper, and executed by him, as Secretary and Treasurer of the Company and as trustee and executor of the will, and, so executed, tendered by Lord Shaughnessy to Lady Davis for signature on the day of her departure from Montreal.

The agreement, after referring to the service agreement of 1924, recites that it was subsequently agreed between the parties thereto that the conditions later expressed should form part of that contract. Then, referring to the letter of the 15th October, 1924, there is a recital of a further agreement that the letter was not intended to cover remuneration received by Lord Shaughnessy as an officer of Alcohol. The agreement as an operative instrument then (*a*) provides for Lord Shaughnessy's receipt of a due proportion of the trust shares and notes in the event of his death or incapacity prior to the completion of his five years' service with the Company, and (*b*) permits him to retain as his own personal property any remuneration already received or to be received as an officer of Alcohol or in any other company in which the Incorporated Company might be interested, "any writings or agreements to the contrary notwithstanding."

Now, it was not suggested at the trial that either of the agreements as there recited had ever actually been entered into, while the great benefits secured to Lord Shaughnessy by this modification of the existing arrangement will at once be realised when reference to the documents of 1924 is made. But Lady Davis had no knowledge of these earlier documents: the modifying agreement was put before her by Lord Shaughnessy as a formal matter to protect his family should he die. It was not read to her, nor read by her, nor further explained, nor was her attention more pointedly called either to its intent or effect, while, it goes almost without saying, no suggestion was made to her that, in the interests of the estate, it might be well to take separate advice upon the proposal. The best assumption to be made in Lord Shaughnessy's favour, their Lordships think, must be that the seriousness of the agreement, with himself a trustee preparing and asking for it, was in no way present to his mind. Otherwise he could not have taken Lady Davis's signature in the way in which he did.

Now, their Lordships are in no way here concerned with the validity or otherwise of this agreement. Upon that question they express no opinion at all. They are concerned only with the propriety of Lord Shaughnessy's conduct as a trustee with reference to it, and from that point of view his action, they think, while it may possibly be excused, cannot be justified. The provisions of the 1924 agreement of service thereby affected were, as has been seen, deliberate and of the essence of the arrangement therein embodied. And while it is true that Lord Shaughnessy's remuneration as President of Alcohol had been retained by him while Sir Mortimer still lived, his duty, as a trustee, if that retention was not certainly based on contract, was, on Sir Mortimer's death, to investigate and even reject a claim for its continuance if it was not strictly maintainable against the estate or the Company. It was not for Lord Shaughnessy to make the claim on his own behalf, and then himself alone as a trustee and President of the Company to admit it. Lord Shaughnessy's action in this matter, however unconsidered,

was action to which no kind of judicial approval can be extended. Nor is it less to be condemned because in the event the modification as to the shares and notes became otiose.

The second charge is with reference to the appropriation on purchase from Mr. H. M. Marler of the 500 shares in the Incorporated Company which had, as already stated, been gifted by Sir Mortimer to him in 1920. The whole transaction with reference to the purchase of these shares from Mr. Marler bulks very largely in the record, but their Lordships need now only deal with that part of it where Lord Shaughnessy, claiming under the service agreement as modified, took as his own 25 of these shares, it being a very serious question whether the whole of them, and a less difficult question whether some of them, were not at the moment of purchase claimable by the testator's estate. Payment was made for the shares on December 4th, 1928. Under the bye-laws of the Incorporated Company, already stated, each shareholder was entitled to his *pro rata* proportion at the transfer price—in this instance $170 a share. Twenty-five shares were appropriated to Mr. Waddell in respect of his 2,500 shares in the Company, 25 were claimed by Lord Shaughnessy in respect of his trust shares under the service agreement, and 450 were taken by the testator's estate. The purchase price both for Lord Shaughnessy's shares and for the 450 estate shares was found and paid by the estate, and Lord Shaughnessy was entered as debtor for $4,250 in respect thereof. In carrying out this transaction Lord Shaughnessy assumed as against the estate, at a moment when, apart from the modifying agreement, he had no present interest of any kind in the trust shares, and when the interest conferred by that agreement did not necessarily confer the right that under his service agreements he and not the testator's estate was entitled to take up these shares; he assumed also that he was entitled to take up 25, like Mr. Waddell, with his 2,500 shares, although the trust shares held under his agreement were 2,375 only in number, and although his contingent interest therein under his modifying agreement was at that moment substantially less than 2,375.

Now, this whole transaction is challenged in other proceedings, and on the question of its validity their Lordships say nothing. But here again Lord Shaughnessy, himself a trustee, is found deciding in his own favour and without intimation to the third trustee beneficially interested even that they existed, these doubtful claims of his against the estate. In this instance also no judicial approval of his action is possible.

The third claim relates to the settlement and adjustment of Lord Shaughnessy's rights in respect of the trust shares and notes upon the fulfilment, on the 18th September, 1929, of his five years' term under his service agreement.

The possible questions as between Lord Shaughnessy and the estate which then arose have already been foreshadowed in the earlier part of this judgment. His method of dealing with these must now be explained.

On the 4th September, 1929, Lord Shaughnessy left Montreal for a month's duty with the C.P.R. Before leaving he prepared and settled a letter and certificate addressed to the trustees of his service agreement, enabling Mr. Reaper to obtain on his behalf from these Trustees on the 18th of the month the 2,375 shares and the $190,500 notes of the Incorporated Company, as also an endorsement of the 25 so-called Marler shares, the certificates of which, although the shares had been transferred to the trustees, had never been handed to them. The letter further intimated that an adjustment would be made by him directly with the Incorporated Company with reference to the $162,500 already mentioned in this judgment, with interest, no payment of that sum or any part of it having ever been made to the Trustees. In pursuance of Lord Shaughnessy's instructions given before he left Montreal, Mr. Reaper obtained the scrip from the trustees, and set over to Lord Shaughnessy $213,800 out of the Company's funds, there having been deducted as at the 31st August, 1929, from the sum then credited to the trustees, but without addition of interest, the $4,250 purchase price of the Marler shares, which had been found by the Company. From the sum of $213,800, $60,000 odd were applied in discharging, with interest, two outstanding loans from the Company to Lord Shaughnessy of $50,000 and $10,000, later to be referred to, and the balance of $144,000 odd was paid as to part to Lord Shaughnessy's account with his own bankers; as to the rest, as directed by him. Loans from the Company to Lord Shaughnessy in respect of purchases by him of McNish Debentures and Alcohol B shares, and amounting to upwards of $30,000, were left outstanding.

These payments to Lord Shaughnessy were reflected in an increase of the Company's bank overdraft from $50,882 at the beginning of September to $205,825 at its close.

At this time Lady Davis was at Montreal, but the whole transaction was carried out by Mr. Reaper without any kind of notice to her.

Here again their Lordships are not concerned with the validity or otherwise of what was then done. They are only concerned to see how far the conduct of the respondents reflects upon their responsibilities as trustees and executors. And, first of all, in this connection their Lordships find nothing to reprobate in Lord Shaughnessy's assumption involved in what he did that the service agreement of 1924 was in all respects valid and effective. That assumption was only natural. But the transaction, without any kind of notice to a co-trustee and beneficiary, involved the acceptance by him in his own favour of the propositions following:—

1. That the $162,500 belonged to himself.

2. That his original renunciation of any claim to it did not remain in force.

3. In any case, that any interest on the money was his to be claimed by him.

Whether the $162,500 was not a sum properly attributable to a holding of 2,500 shares and in excess of the sum attributable to a holding of 2,375 shares only was apparently a question not present to his mind. This last question accordingly is mentioned only to show that the Board has not overlooked it.

Dealing with the first three propositions alone, their Lordships cannot doubt that Lord Shaughnessy's action in accepting them and acting upon his own decision without notice to Lady Davis is conduct on the part of a trustee not to be justified. It can at best only be palliated or excused.

Again, their Lordships cannot ignore, although the sum involved is trivial, the omission of Lord Shaughnessy to charge himself with interest on the $4,250, when taking from the Company compound interest on the $162,500. Nor can their Lordships regard as altogether conscientious the withdrawal of so large a payment from the Company's coffers, almost on the day, when so many liabilities of the estate still remained, nearly a year and a-half after the testator's death, undischarged.

The claim in this group with which, in a logical order, it is convenient next to deal relates to the increase by the respondents by $5,000 and $2,500 per annum respectively of their remuneration as President and Vice-President and Secretary of the Incorporated Company, and by Lord Shaughnessy of his remuneration as President of Alcohol by $5,000 per annum. Here again their Lordships are not concerned with, nor are they deciding, the question whether any of these further emoluments can be retained by the respondent who received them. The respondents' action in taking them is here regarded only as a test of their fitness to retain the office of executor and trustee of the testator's will.

The additional remuneration to themselves as officers of the Incorporated Company the respondents voted at a meeting of directors of that Company held on the 31st December, 1928, at which they alone were present. The following is an extract from the minutes signed by them both :—

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

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

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

As to the bonus for the year 1928, it appears from Mr. Reaper's evidence that that had been paid to Lord Shaughnessy on the 6th November, 1928, without the authority of any resolution, and there is, it will be noticed, no reference in the resolution

passed to the fact that the increased responsibility incidental to the death of Sir Mortimer had to some extent, at all events, been remunerated by the $5,000 a year to which, under his will, each of the respondents was entitled so long as he remained an executor and trustee.

But other things, more important, perhaps, were apparently also forgotten. The details already given in this judgment of Lord Shaughnessy's service agreement and of the by-laws of the Company make it possible to state these succinctly.

1. It was apparently forgotten that by Lord Shaughnessy's service agreement he could be required at the instance of the Company or of those representing the testator's estate to serve as President of the Company from the death of Sir Mortimer until the 18th September, 1929, at a salary of no more than $20,000 a year. Lord Shaughnessy could not be required to accept less than that sum. He could not demand more.

2. It seems to have been forgotten in providing for "a fixed salary basis of $25,000 per annum" that Lord Shaughnessy's contract of service would expire on the 18th September, 1929 and that any renewal of it would have to be sanctioned by a further agreement with the Company with reference to which Lord Shaughnessy would, under By-law 19, have no right to vote.

3. The quorum for a directors' meeting was two: By-law 8. It seems to have been forgotten that such a quorum must be a disinterested quorum, because their Lordships cannot doubt that the principle enshrined in the *Greymouth Port Elizabeth Ry. and Coal Company*, ([1904], 1 Ch. 32) is fundamental in Quebec as in England. There may be many things in the Incorporated Company which by reason of the actual constitution of the Board, can only be done in general meeting. Lord Shaughnessy, without full authority from all the executors and trustees, could never have used the estate shares to vote in general meeting this additional remuneration to Mr. Reaper and himself.

But their Lordships refer to these matters merely to illustrate the want of due consideration given to these resolutions. The real condemnation of them from the point of view with which here they are alone being regarded is that they were passed without any kind of notice or intimation to Lady Davis, although she had been elected by the respondents to be a director of the Company at a meeting of shareholders held a few minutes earlier. It is impossible to justify such action by two trustees without the assent or at least the knowledge of the third, who alone in this transaction was disinterested, and who was at the same time representative of beneficial interests in the trust estate. The $5,000 per annum additional remuneration to Lord Shaughnessy as President of Alcohol he simply took on his own responsibility.

Now both of the respondents held their offices in the Incorporated Company as a result of their holding their necessary qualification from the estate. Lord Shaughnessy's position as

President of Alcohol flowed from the control of Alcohol held by the Incorporated Company. The action of the respondents in this matter cannot, their Lordships think, be justified. Whether it calls for their dismissal from office is a matter for later consideration.

Now that all fraud is out of the case the remaining charges against the respondents are less serious.

First, there is the failure to call in loans of the Incorporated Company to Lord Shaughnessy and the making of a further loan to him of $10,000.

This complaint may be disposed of summarily. At the testator's death Lord Shaughnessy was indebted to the Incorporated Company in a sum of $50,000 on loan secured by the deposit of securities. In January, 1929, a further sum of $10,000 was borrowed by him at interest and without security. These loans, as already stated, were in September, 1929, repaid out of the $212,800 then handed to Lord Shaughnessy on the expiration of his agreement of service. There were also the McNish and Alcohol B loans already referred to which were only repaid during the course of the action. It was admitted by counsel for the respondents that in the matter of the $10,000 loan especially Lord Shaughnessy failed to realize his duty as executor and trustee, and no attempt was made to justify that loan, but it was urged that all charges of fraud being withdrawn, and all loans having now been repaid, there was no ground upon this head to ask for the removal of the respondents.

Next there was the alleged misuse by Lord Shaughnessy of the moneys of the Incorporated Company for his own purposes. The complaint under this head relates to certain payments made in Montreal by Mr. Reaper on Lord Shaughnessy's personal account during the latter's absence in Europe on two occasions, in 1928 and 1929. These were made by cheques of the Incorporated Company, and amounted in the one case to $4,684.22 and in the other to $2,875.82. They were repaid by Lord Shaughnessy, in the first year, on his return, in the second, not till about four months afterwards, but in each case without interest. A point was made of the fact that on each occasion the repayment was made after the date of the closing of the Company's accounts, but was credited as being received a few days before, so that in the published accounts no reference to the transactions appeared, and they were, in fact, unknown to Lady Davis. Fraud being now out of the case, their Lordships attach little importance to this incident. Their Lordships do not doubt that in these transactions Lord Shaughnessy was treating the Company as his banker, as Sir Mortimer had done in his lifetime. But had he been more fastidious he would have charged himself with interest on the advances. For, the Company's own account being overdrawn, it was itself paying interest on all moneys provided for Lord Shaughnessy's accommodation.

The last claims with which their Lordships need deal are described as the conversion by Lord Shaughnessy of a quantity of furniture and of a Rolls Royce car belonging to the estate.

The furniture in question, dining-room furniture at the Pine Avenue house, was admittedly appropriated by Lord Shaughnessy for his own use. It is defended as having been taken in satisfaction of the legacy of $1,000 given to him under the will "wherewith to purchase a memento." There is a regrettable conflict of testimony with reference to this matter. But now that the charge of fraud is withdrawn, the transaction is not of sufficient importance to call for further notice here.

The matter of the motor car is also in their Lordships' view a comparatively trivial one. It was an old car which Lord Shaughnessy took to his own garage, and he used it a dozen times on short trips. It remained in his garage until October, 1929, and was then returned without explanation. According to Lord Shaughnessy, his only object was to ascertain if the car was worth repairing, and that when he left for Europe in 1928 it was overlooked. There is no doubt that it was licensed in the name of Lord Shaughnessy as owner, and some stress was laid upon a declaration which he is supposed to have made to this effect, but their Lordships are not satisfied that this is brought home to him personally. The taking of the car indicates a further lack of fastidiousness in Lord Shaughnessy's dealings with the estate which their Lordships have already noted in reference to questions of interest, and regret. But with the charge of fraud originally made in reference to this car withdrawn, their Lordships do not regard an unfortunate but somewhat trifling incident as being worthy of further notice.

Having now completed their review of the so-called acts of incompetence, infidelity or negligence still imputed to the respondents and the conclusions with reference to each of these at which their Lordships have arrived, the Board must now decide whether the case made against the respondents justifies a recommendation of removal of either of them from the position of executor and trustee of the testator's will.

In this connection two propositions for their Lordships' guidance were strongly pressed by learned Counsel for the respondents. In reaching a decision the Board should, it was contended, govern itself exclusively by the principles in such matters of Quebec Law and not by the principles of English Law, where these were divergent. Further, it was suggested that, as the removal of executors and trustees was proper subject matter for the exercise of a judicial discretion, and as two Courts of the Province had refused, in the exercise of that discretion, to remove the respondents from office, it would not be in accordance with their Lordships' practice, if, indeed, it would be competent for the Board, to advise that a discretion so concurrently exercised be over-ruled. Their Lordships are fully alive to the force of both contentions. As to the first, they agree that the

question at issue is essentially one of Quebec Law and practice and that any reference to the principles of English Law as such would naturally be only by way of illustration, or by way of guidance where the matter in question had not been the subject of clear provision by the Codes of Quebec or where Quebec authority upon it was either non-existent, indecisive or conflicting. As to the second contention, their Lordships will express their views upon it in terms of the present case. They would not have thought it incumbent upon them or even right to reconsider the discretion twice exercised in the Provincial Courts had they found that that exercise had been based upon a view of the facts and of the proper conclusions and inferences therefrom which their Lordships as a result of their own survey can accept as just or adequate. But that is not the position. Their Lordships find on examination that they take a more serious view of the case actually made than did any of the learned Judges who have so far considered it. Mr. Justice Letourneau, for example, bases his conclusions largely on the view that the Incorporated Company was superior to the estate and doubts accordingly whether the actions of the respondents in relation to their conduct of the affairs of that Company are cognisable in these proceedings at all; while Mr. Justice Hall, in his luminous judgment, was unable to discover in the actions of the respondents any room for serious judicial criticism and none for judicial action. Indeed, their Lordships are unable to find in the judgments of any one of the learned Judges real guidance as to the conclusion he would have reached had it been his duty to exercise his discretion upon the whole case as it now presents itself to the mind of the Board. The exercise by their Lordships of their own discretion in the matter has accordingly become a responsibility of which they cannot divest themselves.

In proceeding to its exercise they would first observe that on the facts as they now see them they are not called upon to enter into a discussion of any difference that may exist between the outlook in such matters of the law of Quebec and the outlook of the law of England. It is suggested that the law of Quebec has in these removal cases primarily in view as the question to be answered whether trustees, like the respondents, have forfeited the confidence manifested in them by the testator, who placed them in a position of trust, while, according to the law of England, the inquiry rather is whether it is not necessary for the welfare of the beneficiaries or for the benefit of the trust that the trustees should cease to remain in office. In the present case the question is academic, for the reason that, in their Lordships' judgment, the acts and omissions of the respondents unexplained and unexcused are sufficient to justify a discretionary order for removal, whichever be the form in which the question is propounded.

The Board accordingly is not called upon to embark upon any discussion of the interesting legal questions so much canvassed

in argument. The real issue in the case raises a question not of law, but of fact which may be put thus :—

Now that every imputation of fraud or *mala fides* has disappeared : now that with regard to any course of administration hitherto adopted, but now shown to be irregular or unjustified, there is no longer any risk of its being continued or revived, are there not here apparent, circumstances, explanations and excuses sufficient in the exceptional circumstances of an exceptional, if not, indeed, a unique case, to call for the exercise in the respondent's favour of the judicial discretion ?

And on a review of the whole case their Lordships have been able to reach the conclusion that their answer to that question may be in the affirmative.

It would be tedious to detail all the considerations that have led them to that answer, but they will advert to some which have largely influenced them.

First of all, they are willing to accept the view that the respondents, when they were not carrying out what they believed would have been the testator's policy had he been alive, were, especially when taking any benefits for themselves, going in no way beyond what they believed the testator would have at once conceded had the matter come before him. So soon as Lord Shaughnessy was satisfied of that he deemed himself entitled, although only one of three executors and trustees, to bind the estate, just as Sir Mortimer might have done when holding his property in absolute ownership. And in that attitude of absolutism Mr. Reaper acquiesced, and in every instance assisted in making it effective. Next, with special reference to the first set of claims dealt with in this judgment, their Lordships are struck by a fact, to which they have already alluded, that the respondents' delay in realization was not, before action, made the subject of complaint, while for some of that delay Lady Davis had a responsibility hardly less than that of the respondents. This is not a circumstance to excuse the respondents, but it is one which lends support to the view that the present criticism of their action may to a very substantial extent be a case of wisdom after the event. Again, the respondents' actions were, their Lordships think, largely influenced by their belief, erroneous though their Lordships' think it to have been, but supported in these proceedings by high judicial authority, that it was their duty to conduct, in its own separate interests, the affairs of the Incorporated Company with the exigencies of the estate proper, little more than a secondary consideration. From that point of view the failure to realize the Alcohol B shares became a mistaken forecast of the future course of the market in the stock ; and the investments in Cadillac Coal, Ltd., and Investment Foundation, Ltd., were mistaken only in being ill-timed ; and while the Jennison venture remains unrelieved and unexcused, it was not a transaction

which could, in view of its singularity and of the comparatively limited amount involved, of itself justify acceptance by their Lordships of the appellants' claim.

As to the second group of charges, their Lordships have been specially influenced by the fact that no imputation upon Lord Shaughnessy's honour or integrity in relation to them is now made. In that view and remembering as Lord Shaughnessy doubtless did the testator's practice in such matters and his habitual generosity these may all be regarded as innocent mistakes, capable of rectification even now to the extent, if at all, to which liability has thereby been created.

In the result therefore, the appeal in their Lordship's judgment fails, and, inasmuch as in the course of the litigation grave charges of fraud against the respondents have been made, have been repelled and are only now abandoned, it is incumbent upon their Lordships to see, in obedience to the wholesome rule essential for the protection of trustees, that the costs of the respondents of the proceedings throughout are duly provided for.

In a normal case it would be proper to order that these costs should be paid by the plaintiff-appellants. This, however, is not a normal case, and that practice should as their Lordships think be modified in this instance. The action and this appeal although both have failed have not been without substantial advantage to the testator's estate in that they have served to bring about the correction of errors which, continued or persisted in, might have had serious consequences in a prolonged administration. Particularly is this statement true in its reference to this appeal. The modifications in the direction as to costs called for in these circumstances will be found embodied in the order in that matter with which this judgment will conclude.

In the result their Lordships will humbly advise His Majesty that this appeal be dismissed.

As to costs, the order of the Court of Appeal of the 30th June, 1931, in respect of costs will not be disturbed. The costs in the Superior Court, reserved by the learned Trial Judge, will be left to be dealt with by him if his jurisdiction in the matter is still existent. If it is not, the respondents in their Lordships' judgment will be justified in taking their costs of action in the Superior Court out of the general estate as part of their costs, charges and expenses as executors and trustees of the will. The costs of the appellants and respondents of this appeal will be paid by the executors and trustees out of the corpus of the testator's residuary estate : the costs of the respondents first, and those of the appellants last. To the extent of any deficiency, these costs of the respondents, but of the respondents only, will be taken by them out of the general estate as part of their costs, charges and expenses as above.

In the Privy Council.

LADY DAVIS AND ANOTHER

v.

THE RIGHT HONOURABLE LORD SHAUGHNESSY AND OTHERS

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