

Privy Council Appeal No. 69 of 1917.

**Dominion Trust Company (Executor of the
Estate of W. R. Arnold, deceased) - - Appellant**

v.

New York Life Insurance Company - - Respondents.

Same - - - - - Appellant

v.

Mutual Life Assurance Company of Canada - Respondents.

Same - - - - - Appellant

v.

Sovereign Life Assurance Company of Canada - Respondents.

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1918.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD BUCKMASTER.

LORD DUNEDIN.

LORD ATKINSON.

[*Delivered by* LORD DUNEDIN.]

These actions were raised in the Supreme Court of British Columbia by the Dominion Trust Company in liquidation and its liquidator as executors of the deceased W. R. Arnold against three insurance companies with whom Arnold had effectuated policies on his life. The first action against the New York Life Insurance Company was in respect of two policies, one term and one life, for 50,000 dollars each, the policies having been taken out in September 1916, just about a fortnight before the death occurred. The second action was

against the Mutual Life Assurance Company of Canada, in respect of a life policy for 50,000 dollars of date the 27th November, 1912, and the third against the Sovereign Life Assurance Company of Canada, in respect of a policy for 10,000 dollars dated the 23rd October, 1912.

Arnold died on the 12th October, 1914, from a gunshot wound through the heart in a garage belonging to him in the neighbourhood of Vancouver.

In each of the policies there was a clause exempting from liability if the death was self-inflicted within the period of two years from the date of the policy.

The main defence of each of the defendants was the same, viz., an allegation that Arnold's death was self-inflicted. There were other defences which were not common to the three actions. They were based on various alleged misrepresentations.

The learned Chief Justice before whom the actions depended consolidated the three actions in spite of the protests of the various defendants. Evidence was then led in the consolidated actions, and the learned Judge came to the conclusion that none of the defences had been made out, and gave judgment for the amount sued for.

Appeal was taken to the Court of Appeal, and it was argued that the consolidation of the actions was not within the power of the Court, and further, that the conclusions arrived at on the facts were wrong.

In that Court Macdonald C. J. and Galliher J. held that the consolidation order was within the power of the Judge, but that the evidence proved that Arnold committed suicide. Martin J. and McPhillips J. held that the consolidation order was not within the power of the Judge, and that consequently the trial was nugatory, and they expressed no opinion on the facts. In this state of opinion a formal judgment was pronounced allowing the appeal with costs, and setting aside the judgment of the Chief Justice, but not further dealing with the actions. Against this judgment an appeal was lodged to this Board, asking for restoration of the judgment of Hunter C. J. Leave was obtained on a petition by the respondents to raise on the appeal before this Board the contention that judgment ought to have been entered *de plano* for the respondents.

It appears to their Lordships that it is first of all necessary to settle the point as to the consolidation for if the consolidation was *ultra vires* of the Judge then there is no proper material on which judgment can be given as to the defences on the facts.

On this point their Lordships agree with Macdonald C. J. and Galliher J. Consolidation is regulated by Order 49, Rule 1, which is as follows :—

“ Causes, matters, or appeals may be consolidated by order of the Court or Judge in such manner as to the Court or Judge may seem meet.”

This rule differs essentially from the corresponding rule in the English Courts, where the words are added, "to be exercised in the manner in use before the commencement of the principal Act," thereby introducing a reference to the course of previous decisions. The rule of the British-Columbian Court is absolute, and seems to their Lordships to leave the matter so far as *ultra vires* is concerned entirely in the hands of the Judge. Whether consolidation in such cases is expedient is quite another question. Where actions, although having a common feature, have distinctive defences it would seem more than doubtful to take such a course. Nor does it alter the matter to say that in the event no prejudice was suffered. It might have been, and the decision had to be taken at the beginning. But though, perhaps, illjudged, it was not in their Lordships' opinion *ultra vires*. There was therefore proper material before the Court on which a judgment on the facts could be given. So far the appellants are right in their contention.

The learned Trial Judge gave a very careful and considered opinion, in which he set forth the chief considerations on the one side and on the other. The learned Judges of the Court of Appeal who disagreed with him on the facts contented themselves with stating that they had come to an opposite conclusion from that reached by the Trial Judge. Accordingly the learned counsel for the appellants strongly pressed on their Lordships the consideration that a finding of pure fact arrived at by the Judge who had tried the case and seen the witnesses ought not to be interfered with.

Their Lordships are of opinion that there must be discrimination as to what is the class of evidence being dealt with: whether the result arrived at depends on the view taken of conflicting testimony, or depends upon the inferences to be drawn from facts as to which there is no controversy. They may cite the words of Lord Halsbury in the case of *Montgomerie & Co. (Limited) v. Wallace-James*, 1904, App. Cas. 73:—

"Where a question of fact has been decided by a tribunal which has seen and heard the witnesses the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position than the Judges of an Appellate Court."

Lord Davey in the same case used much the same language.

Now, that this is a case of the latter class there can be no doubt. It cannot be more strongly put than it was by the learned Trial Judge himself. He says :—

“ I feel fortunate in coming to a conclusion that I have not to deal with any question of untruthful testimony in respect of any of the witnesses. . . . I think that the only matter left for the Court is to decide as to what is the proper inference to be drawn from the facts, the material portion of which, if not actually the entirety of these facts, not being in serious controversy. The only question is as to what is the true inference to be drawn.”

Their Lordships therefore feel that they are here dealing with the opinions of one learned Judge who thought that suicide had not been proved, and of two learned Judges who thought that it had ; and the question for them is, which of these two opinions is to be preferred ?

The evidence to be examined in such a case falls at once into two distinct divisions. There is the evidence which bears on the motive for such an act, and there is the evidence of the facts as to the method of death, which include all actions of the deceased antecedent to, and possibly leading up to, the catastrophe.

Now, as regards the first of these branches, the position was this : Arnold was in a quite hopeless financial position. Enjoying a salary of 14,000 dollars a year, he owed at the time of his death about a million dollars, which he had not the faintest chance of repaying. But, further, it was not a case of simple indebtedness. He had been guilty of a long course of embezzlement in his position as managing director of the Dominion Trust Company. As he had confessed about a fortnight before to Hodges, the Government inspector, who had been sent to investigate the affairs of the company, “ he had committed crimes for which he was liable to be sent to the penitentiary.” He was on the brink of exposure and disgrace as well as of irretrievable financial ruin. He had made an appointment on the day on which his death occurred to meet Hodges, in order to give explanations and exhibit securities. He knew that the result of such examination would be to confirm what Hodges already knew ; and he knew that the presentation of Hodges’ report to the Government authorities meant the end so far as he was concerned. The learned counsel for the appellants was very anxious to demonstrate that there was no particular disclosure which on that particular day he had to dread—that Hodges knew the worst already. That, however, is not the point. The point is that the end was approaching, and was ever nearer as Hodges’ investigation proceeded and the time for sending in his report drew nigh. Further, he was in absolute want of ready money. He owed small sums right and left, and he had no more than a few dollars in his bank account. In

the whole circumstances if ever there can be said to be motive for self-destruction such motive was present in this case.

Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction being contrary to human instincts is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

The story can be shortly told. Arnold had a small country ranche. He was not a sportsman, and had no experience of shooting nor any familiarity with the management of guns. On the Saturday, two days before his death, he called at the house of a friend called Gibson, and asked him to come to the ranche in his (Arnold's) motor. They lunched together at the club, and motored to the ranche. At the ranche they met a man called Bladen, who was acting as overseer there, and who was to Arnold's knowledge in possession of a gun, and Arnold asked him to get his gun and bring it along. Arnold had come provided with cartridges, which he had instructed his chauffeur to buy, Gibson suggesting the probable bore to be selected. The cartridges were handed to Bladen, who loaded the gun with the cartridges. The gun was a single-barrelled magazine gun, with the magazine arranged to take only two cartridges. The action was what was described as a pump action—*i.e.*, the fore-end is made to slide backwards and forwards, which motion cocks the hammer and inserts the cartridge from the magazine into the breech. After one shot is fired the same action repeated expels the discharged case and repeats the action of cocking, and of inserting the second cartridge. A grouse was sighted, which flew and perched on a tree. Arnold had a shot at it and missed. After the shot he tried to recharge the gun, but the action stuck, and he handed it to Bladen, who got it to work and eject the discharged cartridge. Bladen is uncertain whether he put another cartridge into the magazine, but thinks it likely he must have done so. Arnold had never been seen with a gun before that day. No more shots were fired, and Arnold and Gibson returned to town in the motor, taking the gun and cartridges along with them. In the car Arnold began to handle the gun and was so clumsy that Gibson thought it was dangerous, and suggested that the gun had better be discharged. The car was stopped, and one shot was fired into the ditch. Arnold then said it was all right, and Gibson was satisfied. The gun was taken to Arnold's home and put in a cupboard.

On Monday morning Arnold's chauffeur arrived with the car to take his master into town. On one of the children asking Arnold whether he was going to take the gun with him, he said, "Well, probably I had better, or mother won't have any rest," and he then took the gun out of the cupboard. He next told the chauffeur to put the remaining cartridges into the car, which was done. They drove to the garage, which was at a different place from the house, being situate on a small property which

was being laid out. The garage had rooms over it occupied by a gardener. Arrived at the garage Arnold took out the gun and leant it up against the wall. He then went out and spoke to the gardener, and walked through the grounds giving orders. Returning to the garage he told the chauffeur to back out the car and get into the road. The gardener coming into the garage found Arnold with the gun in his hand, while a stick which he always carried was standing propped against the wall. The gardener noticed that the breech-block of the gun was open, so that a cartridge was partially visible. He said to Arnold, "The gun is loaded." Arnold took no notice of the remark, but told the man to go outside and clear away a pool of water which had collected. The gardener did so, and Arnold was left in the garage alone with a son of the gardener, aged 8. This boy said that he saw Arnold hang the stick on a hose pipe and take the gun in his hand. He had then looked the other way, so that he did not see what Arnold was doing. A shot was heard. The gardener rushed in and found Arnold lying on his back dead, with the gun on the ground on one side of him and the stick on the other. The wound which caused his death was a wound which was through the heart, which was blown into bits. The entrance of it was just beside the nipple of the left breast, the aperture was such that the muzzle of the gun must have been touching the body, the hole went through the waistcoat but not through the coat or overcoat, both of which he was wearing, and the direction of the wound was such that the barrel of the gun must have been at right angles to the plane of the surface of the body.

If death was intentionally self-inflicted the *modus operandi* was simple enough. Having by orders got rid of the chauffeur and the gardener, he either placed the gun with its butt against the wall and its muzzle pressed close up against his heart, and so maintained it by pressure in a horizontal position, or he placed the butt on the ground and leaning over it brought the muzzle at right angles to the line of his body. Then in either case he released the trigger by means of his stick. On the shot taking effect he fell on his back, the gun falling to one side of him, the side of the wound, the stick to the other, the side of the hand which had directed it.

The opposite supposition is that the whole occurrence was accidental. It will be useful to examine each successive step which could have led to such a result.

First as to the fact of the gun being loaded. If the gun being empty when brought to the garage Arnold loaded it there in the absence of the chauffeur and the gardener, it would be almost conclusive in favour of suicide, as for no conceivable reason could he wish to load the gun in the garage. Accordingly the theory of the appellants is that after the shot at the grouse Bladen had put in another cartridge. That would put two cartridges in the gun. One was discharged in the ditch, but through ignorance Arnold thought that that emptied

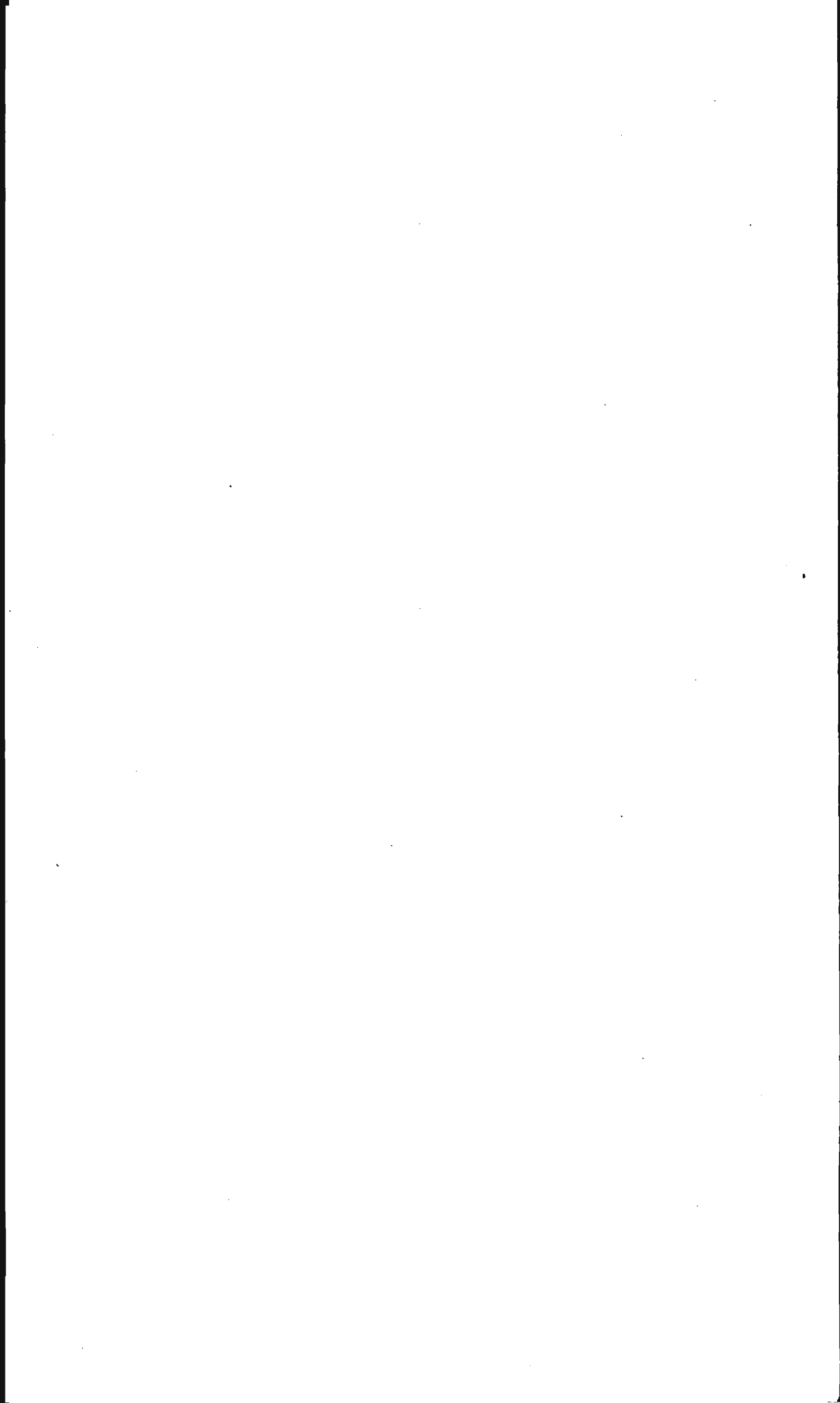
the gun. In reality, however, one remained, and this is borne out by the remark of the gardener that it was loaded. The gardener being gone it is supposed that he tried to get the cartridge out, and in so doing accidentally discharged the gun and shot himself.

Now the character and position of the wound were such that it could not be self-inflicted by anyone holding the gun in the ordinary way and carelessly or unknowingly pulling the trigger. It is impossible for anyone to hold the gun (which their Lordships had the advantage of seeing) by the grip and place the muzzle at right angles to his own breast. The appellants are therefore driven to this theory. They suggest that finding the action stick, he, in order to exert more force, either jammed the butt of the gun against the wall, or put it on the ground, and then leaning against the muzzle with his breast proceeded to apply force to the fore-end, and that while he was doing so the gun went off. There seem to be several quite fatal objections to this theory. In the first place, the hypothesis being that the gun was loaded and that he knew it was loaded; it is almost inconceivable that anyone however inexperienced would prefer to put the muzzle against his chest and the butt to the wall or the ground, rather than to reverse the position and put the butt to his chest and the muzzle to the wall or the ground, a position which would make it just as easy to apply force at the fore-end, if he ever attempted such a position at all, which seems extremely improbable in itself. In the second place, if the jamming of the gun against the wall or ground was resorted to in order to keep it steady so as to exert strength, the natural place against which to jam it would be the middle of the breast-bone and not against the left nipple. In the third place, there would be no reason whatever for having the stick in his hand, where it would only be an incumbrance, and he must have had it in his hand for it was last seen by the gardener propped against the wall, and by the little boy hung on the hose-pipe, neither of which positions would account for its being found on the floor beside the body.

On consideration of the whole circumstances of the case their Lordships are driven to the conclusion that death was self-inflicted by the deliberate intention of the deceased, and they agree with the result at which Macdonald, C.J., and Gallihier, J., arrived. They are quite unable to attach any weight to the circumstance on which the learned Trial Judge placed much reliance, the behaviour of Arnold in reference to the call of nature. Nor is there, in their Lordships' view, any great cogency in the argument that various facts make it unlikely that he would choose of settled purpose that particular morning for the deed. If he had entertained the idea of putting an end to his troubles by suicide the particular moment might be uncertain to the last, and indeed suggested by some circumstance accidental in itself. But the determining element in the case is the real evidence afforded by the wound, its position,

and its relation to the clothes worn, by the presence of the stick, which all point to the practical impossibility of the injury being caused by any accidental handling of the gun. however clumsy.

The case must go back with a declaration that judgment should be entered for the defendants and the action dismissed. The defendants must have their costs in the Courts below and before this Board. The costs of the petitions of the respondents for leave to cross-appeal must, as was settled when leave was granted, be borne by the petitioners. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

DOMINION TRUST COMPANY (EXECUTOR OF THE ESTATE OF W. R. ARNOLD, DECEASED)

v.

NEW YORK LIFE INSURANCE COMPANY.

SAME

v.

MUTUAL LIFE ASSURANCE COMPANY OF CANADA.

SAME

v.

SOVEREIGN LIFE ASSURANCE COMPANY OF CANADA.

DELIVERED BY LORD DUNEDIN.