

58, 1939

In the Privy Council.

No. 1 of 1939.

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

BETWEEN

THE PEOPLE OF THE STATE OF NEW YORK (Plaintiffs  
in the Superior Court and Appellants in the Court of  
King's Bench) ... .. *Appellants,*

AND

THE HEIRS OF THE LATE JOHN M. PHILLIPS  
(Defendants in the Superior Court and Respondents in  
the Court of King's Bench),

AND

THE CROWN TRUST COMPANY ET AL, ES QUAL.  
(Defendants severing in their Defence and en reprise  
d'instance in the Superior Court and Respondents in  
the Court of King's Bench) ... .. *Respondents,*

AND

THE MONTREAL SAFE DEPOSIT COMPANY ... *Tierce Saisie.*

CASE FOR THE RESPONDENTS.  
THE HEIRS OF THE LATE JOHN M. PHILLIPS.

1. This is an appeal from the unanimous judgment of the Court of King's Bench (Appeal Side), Province of Quebec, Canada, rendered on the 29th of June, 1938, confirming a judgment of the Superior Court which dismissed the claim of the Plaintiffs (the present Appellants).

Proceedings  
p. 1 ; p. 254 ;  
Record.  
Vol. XII,  
p. 5510 to  
p. 5557.

RESPONDENTS' CASE

Record.

Vol I,  
p. 2, l. 35.

Vol. I,  
p. 32, l. 38,  
p. 67, l. 21.

Vol. I,  
p. 33, l. 20 to  
p. 34, l. 20 ;  
p. 66, and  
p. 67, l. 7 to  
l. 14.

Vol. I,  
p. 66, l. 40 to  
p. 67.

Vol. I,  
p. 2 to p. 33,  
l. 15.

Vol. I, p. 2 to  
p. 33, l. 14.

Vol. I,  
p. 33, l. 11.

Vol. I,  
p. 50 to p. 53,  
l. 14.

Vol. I,  
p. 34, l. 25 to  
p. 35.

Vol. I,  
p. 56, l. 15.

Vol. I,  
p. 2, ll. 39-40.

Vol. I,  
p. 3, l. 21,  
et seq.

Vol. I,  
p. 3, l. 21,  
et seq.

Vol. I,  
p. 3, l. 21 to  
l. 35

2. The question involved in these proceedings is the liability of the Respondents in damages in the sum of \$3,405,449.02 for which they were sued collectively as the heirs of the late John M. Phillips within six months of his death under the provisions of Article 135 of the Code of Civil Procedure. By means of a conservatory attachment effected before judgment on or about the 9th of July, 1928, the sum of \$312,000.00 in United States currency, lying in a deposit box in the vaults of The Montreal Safe Deposit Company, was seized. These monies, by agreement, were handed to and are still held by the Tierce-Saisie, The Crown Trust Company, pending the result of the present litigation which arises out of a Declaration served on the Attorneys for these Respondents on or about the 29th of January, 1929. <sup>10</sup>

3. The issues between the parties were fully set out in the pleadings which are of considerable length. The Declaration, served on or about the 23rd of January, 1929, over six months after the attachment of the monies, consists of thirty-three printed pages, containing forty-three paragraphs and many sub-paragraphs. The defence of these Respondents is set out in a Further Amended Plea dated 10th December, 1932. There was also an Answer and a Replication.

4. At no time did the Appellants, or the City of New York, the alleged rights of which the Appellants are purporting to exercise, have any direct relations with the deceased, John M. Phillips. The action is not based upon any contractual relationship between the Appellants and the Respondents but upon the allegations that the latter, as the heirs of said Phillips, be declared the personal debtors of the Appellants owing to the pretended fact that the said Phillips, from whom they inherited, had, prior to his death, successfully conspired with one Connolly, then President of the Borough of Queens, and a man named Seeley, the Assistant Engineer and a junior employee of the Borough, to cheat and defraud the City of New York.

5. The alleged conspiracy between these three men was to enable Phillips to sell at exorbitant prices precast pipe, for sewer purposes, to various contractors who built sewers in the Borough of Queens, in the City of New York, during the years 1917 to 1928, in the result that Phillips benefited in excess of the fair and market price of the said pipe to the extent of the sum claimed from the Respondents. <sup>30</sup>

6. The general charge as to the conspiracy is set forth in Paragraph 9 of the Declaration as follows :—

“ 9. That in or about the month of January, 1917, and continuing down to and including the second day of April, 1928, at the Borough of Queens, County of Queens, in the City of New York, the said John M. Phillips, Maurice E. Connolly and Frederick C. Seeley did unlawfully, wilfully, knowingly and corruptly, conspire, combine, confederate and agree together with each other, and with divers other persons, to Plaintiffs unknown, to cheat and defraud the City of New York out of property, and did cause the City of New York, <sup>40</sup>

“ through its duly constituted officers, to pay large sums of money for  
 “ work done and material and equipment supplied to construct pipe  
 “ sewers in the said Borough of Queens, in excess of the fair, reasonable  
 “ and proper cost thereof, in the manner and by the means hereinafter  
 “ set forth.” Record.

7. Paragraphs 10 to 19 of the Declaration purport to state details of the  
 alleged conspiracy which the Appellants contend constitute overt acts  
 establishing its existence. These may be summarized briefly as follows :— Vol. I,  
p. 3, l. 36 to  
p. 7, l. 31.

10 (A) The City's specifications were so prepared that, as an alternative  
 to the use of the monolithic type of sewer, a precast pipe such as sold  
 by Phillips could be used ; Vol. I,  
p. 3, l. 36 to  
p. 5, l. 19.

(B) Bids of contractors unfavourable to Phillips would be rejected  
 by Connolly who would award contracts at excessive and exorbitant  
 prices to other contractors friendly to Phillips ; Vol. I,  
p. 6, l. 4.

20 (c) On or about the 8th day of December, 1924, the specifications  
 for the monolithic type of construction were altered to provide for a  
 waterproofing membrane in the invert of the pipe and in the man-  
 holes connected with the monolithic sewer, thereby preventing con-  
 tractors from competing on the monolithic type on a fair and competitive  
 basis against the precast type of sewer. Vol. I,  
p. 7, l. 17 to  
l. 31.

8. The details of the damages allegedly suffered by the City of New  
 York are set out in the Declaration in paragraphs 20 to 33 and in the many  
 sub-sections thereof. Vol. I,  
p. 7, l. 33 to  
p. 29, l. 35.

9. By their Plea, the present Respondents admitted the Appellants'  
 allegations that the sum of \$312,000.00, seized by the conservatory attach-  
 ment, was the property of the Estate of the late John M. Phillips, and denied  
 the numerous allegations of the Declaration as to the merits of the Appellants'  
 claims. Certain affirmative allegations were made in their Plea by these  
 Respondents which they beg leave to quote here as they have summarized  
 30 the position of the Respondents regarding the matters at issue on the present  
 appeal :— Vol. I,  
p. 50 to p. 53,  
l. 15.  
Vol. I,  
p. 32, l. 22  
and ll. 23 ;  
28 and 29 ;  
31-34.  
Vol. I,  
p. 51,  
ll. 15-19.  
Vol. I,  
p. 51, l. 20 to  
p. 53, l. 7.  
Vol. I,  
p. 51, l. 20.

“ (12) That the period referred to in Plaintiffs' action was a period  
 “ of experiment during which many new and improved methods and  
 “ materials in the construction of sewers were introduced in the Borough  
 “ of Queens, the whole in an endeavour to meet the demand for sewer  
 “ requirements then existing in the said Borough. Vol. I,  
p. 51, l. 20.

40 “ (13) That the construction of sewers in the Borough of Queens  
 “ was exceedingly difficult and hazardous to a supplier of pipe because of  
 “ the wet and shifting nature of the soil, the great depth beneath  
 “ the surface of the ground and the level of the sea at which the pipes  
 “ were laid and the consequent stress and strain to which they were  
 “ exposed as well as the necessity that they be absolutely watertight. Vol. I,  
p. 51, l. 31.

“ (14) That during part of the period referred to in Plaintiffs' Vol. I,  
p. 51, l. 39.  
 “ action the deceased, John M. Phillips, was interested in the sale and/or

Record.

“ manufacture of reinforced concrete pipe which he sold and supplied  
 “ to various contractors who entered into contracts of purchase therefor  
 “ with him.

Vol. I,  
 p. 51, l. 44.

“ (15) That any such reinforced concrete pipe sold or manufactured  
 “ by said Phillips and used in the Borough of Queens during the period  
 “ aforesaid was of better quality, higher cost and better adapted to the  
 “ requirements and peculiarities of sewer construction in the said  
 “ Borough than any other available.

Vol. I,  
 p. 52, l. 4.

“ (16) That any sales of reinforced concrete pipe made as aforesaid  
 “ between Phillips and various sewer builders having contracts in the 10  
 “ Borough of Queens were entirely a matter of contract and agreement  
 “ between the said Phillips and any such contractors respectively as  
 “ vendor and purchaser were freely entered into by both parties neither  
 “ of whom was bound to contract with the other and all such contracts  
 “ are, in any event, matters foreign and irrelevant to any issues existing  
 “ between Plaintiffs and the said Defendants and Plaintiffs are not  
 “ legally entitled to invoke or in any way discuss any such contracts  
 “ of sale in the present action.

Vol. I,  
 p. 52, l. 16.

“ (17) That any plans and specifications for the construction of  
 “ sewers in the Borough of Queens, or for materials to be used therein 20  
 “ were prepared by competent engineers, in accordance with the best  
 “ principles of the engineering art, with the approval of the governing  
 “ bodies of the Borough of Queens as well as of the City of New York,  
 “ which bodies are constantly entitled to and did supervise and review  
 “ the discretionary acts of any minor Borough official and employee in  
 “ any way connected therewith; and the construction work was like-  
 “ wise carried out under the supervision of the said engineers and  
 “ governing bodies; and especially were the plans and specifications  
 “ concerning the making and use of reinforced concrete pipe right and  
 “ proper and such specifications could have been complied with by any 30  
 “ manufacturer of pipe or contracting sewer-builder who desired to  
 “ manufacture in conformity therewith.

Vol. I,  
 p. 52, l. 33.

“ (18) That the cost of the manufacture of any such pipe to and/or  
 “ the price paid therefor by any contractor using the same for the  
 “ purpose of constructing sewers in the said Borough of Queens was  
 “ altogether a matter of indifference to the authorities of the said  
 “ Borough and the City of New York, who required no information as to  
 “ such costs and prices and who were interested only in the price of the  
 “ completed sewer and not in the costs of and the amounts paid by  
 “ contractors for the various ingredients, materials and elements such as 40  
 “ labour and other kindred factors which entered into the construction  
 “ of any given sewer; and such costs and prices could not be determined  
 “ from the bid or estimate submitted by the contractors, the form of  
 “ which bid or estimate was duly and legally prepared with the consent  
 “ and knowledge of the properly constituted executive authorities of  
 “ the Borough of Queens and of the City of New York with the aid of  
 “ efficient technical and legal advisers.

“ (19) That no right of action exists in favour of the Plaintiffs  
 “ entitling them to advance the present claim or any portion thereof and  
 “ the Plaintiffs’ action is unfounded both in law and in fact and should  
 “ be dismissed.”

Record.  
 Vol. I,  
 p. 53, l. 4.

10. The contractors referred to in the Declaration, who purchased precast pipe from Phillips were not made parties to the suit nor did the Appellants suggest that the State of New York had paid any monies in excess of its strict obligations assumed under contracts regularly entered into and still subsisting and in which the only prices fixed are for completed sewers.

10 11. The binding force of the said contracts is not questioned. On the contrary, the express validity and regularity of all the contracts pertinent to the issues herein and of the assignment of such of them as were assigned is formally admitted by the Appellants.

Vol. XII,  
 p. 5558, l. 29,  
 to p. 5559,  
 l. 5.  
 Vol. XII,  
 p. 5559, l. 17,  
 to l. 33 ;  
 p. 5559, l. 46  
 to p. 5560,  
 l. 7.

The following are extracts from such Admission :—

“ The Appellants . . . . admit :—

“ (B) That each of the contracts . . . was entered into by  
 “ and on behalf of the City of New York and of the said Borough of  
 “ Queens after due compliance with the provisions of the Charter of  
 “ the City of New York (Exhibit P-19) relating to contracts, as more  
 20 “ fully set forth in Chapter 10 of the said Charter, and without limiting  
 “ the generality of the foregoing the said contracts and each of them  
 “ were and was founded on proper and adequate resolutions of all the  
 “ said municipal authorities legally passed on sealed bids or proposals  
 “ made in compliance with public notices duly advertised in the City  
 “ Record and corporation newspapers for the period of time required  
 “ by law ; that the contractors’ bid and the contracts were properly  
 “ signed and executed by all parties in strict compliance with all the laws  
 “ and regulations applicable to the City of New York ; that security  
 “ for the faithful performance of each of the said contracts in the manner  
 30 “ prescribed and required by ordinance was given and maintained in  
 “ each instance and the adequacy and sufficiency of the said security,  
 “ in addition to the justification and acknowledgment thereof, was  
 “ approved by the comptroller ; that all such bids or proposals were  
 “ publicly opened by the officer or officers advertising for the same in the  
 “ presence of the Comptroller and the bidders and otherwise in due  
 “ compliance with all formalities provided by the Charter of the City  
 “ of New York relating thereto.”

Vol. XII  
 p. 5558 l. 29.

40 “ (D) That Exhibits C-90, 91, 92, 93, 116, 117 and 118, being  
 “ assignments of the contracts therein referred to, are in all respects  
 “ proper and legal, duly made in conformity with all statutes, regu-  
 “ lations, laws and by-laws of the City of New York and the said Borough  
 “ of Queens after due compliance with the provisions of the Charter of  
 “ the City of New York (Exhibit P-19) and without limiting the  
 “ generality of the foregoing that the said assignments and each of them  
 “ are in every way legal as to form and execution, that security and  
 “ sureties in the manner prescribed and required by ordinance was given

Vol. XII  
 p. 5559 l. 17.

- Record. " and obtained in each instance and the adequacy and sufficiency of the  
" said security, in addition to the justification and acknowledgment  
" thereof, was approved by the Comptroller and all other administrative  
" and executive officers of the Government of the City of New York  
" and the Borough of Queens, one of the Boroughs of the said City of  
" New York."
- Vol. XII.  
p. 5559. l. 46. " (c) That all notices to bidders required to be given by or on behalf  
" of the City of New York and of the said Borough of Queens, relating  
" to the contracts referred to as Exhibits in sub-paragraph (A) herein-  
" above, were made and given after due compliance with the provisions 10  
" of the Charter of the City of New York (Exhibit P-19) and without  
" limiting the generality of the foregoing the said notices and each of  
" them was made in strict compliance with all laws, by-laws and resolu-  
" tions of any kind whatsoever required thereby to be complied with."
- Vol. I,  
p. 2 ll. 17-20;  
p. 29 l. 37 to  
p. 32 l. 11. 12. Although it would appear from the allegations of the Declaration  
that any claim which may exist would belong to the Municipal Corporation  
of the City of New York, the proceedings are in the name of the Appellants,  
The People of the State of New York who, in support of this action, rely upon  
the sections of the Civil Practice Act of the State of New York which are  
set forth in the Declaration. 20
- Vol. I,  
p. 62 to p. 63,  
l. 30. 13. On the 11th of December, 1929, one Francis Phillips, a minor,  
represented by the other Respondent herein, The Crown Trust Company,  
filed a separate defence denying the right of the Appellants to the relief  
claimed but alleging ownership of the monies under attachment. The  
Vol. I,  
p. 62, l. 28;  
p. 64, l. 11. Appellants, by their Declaration, had previously alleged that these monies  
were the property of the late John M. Phillips and the present Respondents  
Vol. I,  
p. 32,  
ll. 22-23;  
28-29; 31-34. had admitted the truth and correctness of the allegations.
- Vol. I,  
p. 51,  
ll. 15-19. 14. The hearings begun in New York under Rogatory Commission  
before Mr. De Coursey Fales on the 19th of January, 1931, continued until  
Vol. I,  
p. 81, l. 41. the 11th of February and later from the 14th of September until the 18th of 30  
Index, p. 5  
to p. 17a. September, 1931. Forty-four witnesses were examined on behalf of the  
Appellants. Their evidence was very extensive and was made over the  
repeated objections of the Respondents. During the said examinations the  
Index, p. 17  
to p. 79. Appellants saw fit to produce some Two hundred and forty-six exhibits.  
Index, p. 81  
to p. 83. At the Trial before the Superior Court, the Appellants filed nineteen addi-  
tional exhibits and six additional witnesses were examined.
- Index, p. 80  
to p. 81. 15. The Respondents produced ten cashier's cheques through Appellants'  
witness, Cassidy, and at the Trial only six witnesses were examined and  
twelve exhibits produced. Respondents were satisfied that their defences  
had been fully established by cross-examination of the Appellants' own 40  
witnesses and by reason of the formal admissions of record.
- Vol. XII,  
p. 5510 to  
p. 5557. 16. The judgment of the Superior Court dismissed the Appellants'  
action on the 23rd November, 1934.

17. The reasons for the judgment of the Superior Court will be found in the judgment of the Trial Judge, Mercier, J. Having decided to dismiss the Appellants' action the learned Trial Judge made no findings regarding the amount of the damages claimed.

Record.  
Vol. XII,  
p. 5548 to  
p. 5557.  
Vol. XII,  
p. 5556, l. 38.

18. The following passages from the "Considerants" of the judgment of the learned Trial Judge may usefully be quoted :—

Vol. XII,  
p. 5548 to  
p. 5557.

10 "CONSIDERANT que cette Cour, après s'être évertuée, ainsi  
" qu'il est dit ci-dessus, à découvrir, dans la preuve des demandeurs,  
" l'établissement de la conspiration que les demandeurs reprochent au  
" dit John M. Phillips et dont ils veulent tenir responsables ses héritiers,  
" doit déclarer et déclare qu'elle n'a pu, malgré toute l'attention qu'elle  
" a donnée à l'analyse de la preuve, trouver, dans cette preuve, les  
" éléments voulus qui la justifieraient de décréter que la conspiration  
" en question a été bien et dûment établie par les demandeurs, mais que  
" le tribunal est, au contraire, obligé de déclarer et de décréter que les  
" demandeurs ont entièrement failli d'établir cette conspiration fraudu-  
" leuse et dolosive, laquelle, si elle avait été prouvée, aurait ouvert la  
" porte à l'action en dommages-intérêts qu'ils intentent présentement  
" contre les héritiers de la succession de feu John M. Phillips, sauf à  
20 " déterminer, ensuite, la quantum des dommages soufferts par les  
" demandeurs.

Vol. XII,  
p. 5548 to  
p. 5557.  
Vol. XII,  
p. 5555, l. 28.

"CONSIDERANT, d'abondant, que la lecture et l'analyse des  
" Factums des demandeurs, n'a pu, non plus, convaincre le tribunal que  
" les demandeurs ont établi la prétendue conspiration qu'ils reprochent  
" au nommé John M. Phillips et que, partant, les héritiers ne peuvent  
" être tenus responsables des conséquences d'une conspiration que  
" ces demandeurs n'ont pu prouver.

Vol. XII,  
p. 5555, l. 46.

30 "CONSIDERANT qu'il s'en suit que si le tribunal est d'opinion  
" que les demandeurs ont failli d'établir la base fondamentale de leur  
" action, comme il le déclare ci-dessus, il n'y a pas lieu, partant, de  
" s'occuper davantage du quantum des dommages réclamés par leur  
" présente action."

Vol. XII,  
p. 5556, l. 35.

19. From the decision of the Superior Court for the Province of Quebec the Appellants appealed to the Court of King's Bench, Appeal Side.

Proceedings  
p. 1.

20. By judgment of the Court of King's Bench (Bernier, Letourneau, Hall, Walsh and St. Jacques, JJ.) rendered on the 29th day of June, 1938, the judgment of the Superior Court was unanimously confirmed and the Appellants' Appeal was dismissed with costs.

Proceedings,  
p. 254, p. 255  
to p. 287.

40 21. The arguments addressed to the Court of King's Bench will be found in the Factums of the parties in that Court which are reproduced in the Record.

Proceedings,  
p. 5 to p. 64;  
p. 65 to  
p. 126, l. 21 ;  
p. 126A to  
p. 246 ; p. 251  
to p. 253,  
l. 24.

22. The reasons for judgment of the learned Judges constituting the Court of King's Bench, Appeal Side, will be found in their Notes.

Proceedings,  
p. 255 to  
p. 287.

Proceedings,  
p. 260, l. 32  
to p. 277.

23. Mr. Justice Hall's Notes show the careful consideration he gave to each of the points raised by the Appellants and the specific findings adverse to the contention of the Appellants made by him in respect of each thereof. He said in part :—

Proceedings,  
p. 274, l. 41.

“ There being, therefore, no direct evidence of conspiracy, and the pretended overt acts being insufficient to justify an inference of concerted actions, I concur with the learned Trial Judge in the opinion that the appellants have failed to establish the basis of their action.”

And again :—

Proceedings,  
p. 277, l. 44.

“ It is sufficient to say that, as above indicated, the present record 10 does not disclose any satisfactory proof of the alleged conspiracy or of the unfair prices.”

Proceedings,  
p. 278, l. 1.

24. Mr. Justice Walsh concurred with Mr. Justice Hall without giving any additional reasons.

Mr. Justice Bernier, in his reasons, also confirmed the findings of the Trial Judge, and in respect of the creditability of the witnesses whose testimony was unfavourably commented upon by the Trial Judge he had this to say :—

Proceedings,  
p. 255 to  
p. 258.

“ J'ai lu et relu avec attention les témoignages de ces quatre 20 témoins, Paulsen, Weaver, Purcell et Sigretto.

“ On y voit qu'ils cherchent à incriminer John M. Phillips, en alléguant que certaines sommes d'argent lui auraient été données, à l'occasion de quelques contrats ; toutefois, l'animosité avec laquelle ils ont rendu leur témoignage, les aveux de corruption que quelqu'un d'entre eux aurait pratiquée à l'égard de certains hauts personnages dans la vie publique et municipale, l'ignorance d'un autre, sur les faits qu'il aurait dû savoir, démontrent que le Tribunal de première instance avait raison de dire qu'il fallait prendre leurs témoignages comme très suspects.”

Dealing with the fact that Connolly and Seeley had been found guilty 30 of conspiracy in the State of New York, he had this to say :—

Proceedings,  
p. 257, l. 47.

“ . . . cette Cour doit examiner la preuve qui vient devant elle au sujet de Phillips, et la décider, quant à lui, en regard de nos lois civiles ; car il s'agit uniquement d'une action civile en dommages-intérêts, dont la base est un prétendu acte dommageable causé aux demandeurs, au moyen d'une conspiration criminelle à laquelle aurait pris part Phillips, et qui aurait pour sanction, un jugement ordonnant le paiement, ou le remboursement du dommage causé.

“ On peut se demander quel serait le verdict rendu par un jury, soit devant la Cour Criminelle, soit devant nos Cours civiles, et si 40 cette cause, telle qu'elle est, avait été portée devant des jurés ; après la lecture et l'analyse de toute la preuve produite au dossier, un verdict de nonculpabilité en matière criminelle, ou de rejet de l'action en matière civile, aurait été, dans mon opinion, bien fondé.”



25. Mr. Justice Letourneau, after alluding to the legal objections to the action, further stated that he did not find sufficient proof of a conspiracy, remarking “ . . . la plupart des circonstances invoquées comme overt acts, s’expliquent autrement que par une conspiration ; qu’elles n’impliquent pas en tout cas celle sur laquelle se fonde la demande.” The learned Judge stated that he concurred in the reasons given by his colleagues.

Proceedings,  
p. 259 to  
p. 260, l. 28.

26. Mr. Justice St. Jacques also alluded to the legal difficulties in the way of the Appellants, and being also of the opinion that the Appellants had failed to prove the necessary allegations of their action, he concurred  
10 with his colleagues in holding that the action was properly dismissed on that ground even if it were assumed to be well founded in law.

Proceedings,  
p. 278, l. 17,  
to p. 287.

As to the evidence of the witnesses criticized by the Trial Judge, he had this to say :—

Proceedings,  
p. 284, l. 12.

“ La Cour supérieure a, avec raison, exprimé des doutes sérieux  
“ sur la crédibilité de certains de ces témoins. Il suffit de lire attentive-  
“ ment les témoignages de Sigretto, Purcell et particulièrement de  
“ Paulsen, pour se rendre compte de l’animosité qui existait entre eux  
“ et Phillips.

20 “ Paulsen, remarquablement intelligent bien que parfait illettré, ne  
“ peut pas s’empêcher de laisser voir, d’une façon claire, le sentiment  
“ d’inimitié qu’il entretient à l’égard de Phillips. Ce Danois, implanté  
“ aux Etats-Unis, et qui paraît avoir réussi merveilleusement à se  
“ familiariser avec les moeurs des entrepreneurs véreux, admet avoir  
“ cherché et réussi à corrompre les officiers municipaux d’autres  
“ Etats, et je ne puis blâmer la Cour supérieure d’avoir hésité à ajouter foi  
“ à tout son témoignage.

30 “ Sigretto, déçu dès 1917, n’a pas non plus pu s’empêcher de mani-  
“ fester les mauvais souvenirs qu’il n’aurait pas cru Phillips, même  
“ sous serment, je me dispenserai de dire la même chose de son propre  
“ témoignage, bien que je concours entièrement dans ce qu’en a dit la  
“ Cour supérieure.”

27. The Respondents will contend that the unanimous judgment of the Court of King’s Bench (Appeal Side) is well founded in fact and in law and should be affirmed for the reasons set forth in the Notes of Judgment of the learned Judges of the said Court and for the reasons contained in the Facts of the present Respondents before that Court.

Proceedings,  
p. 254.  
Proceedings,  
p. 255 to  
p. 287.  
p. 65 to  
p. 126, l. 21 ;  
p. 126A to  
p. 246.

28. The Respondents submitted in the Courts below that their objec-  
tions to the nature and legality of the Appellants’ evidence taken by Rogatory  
Commission should be maintained. As the Trial Judge and the Court of  
40 Appeals did not expressly adjudicate upon the said objections the Respon-  
dents consider it advisable that they should be renewed here and they do  
hereby renew them and declare that they proceed under express reserve  
thereof with the request that they be maintained and that the evidence of the  
Appellants in connection with which they were made be rejected.

Proceedings,  
p. 134, l. 24.

Record.  
Vol. XII,  
p. 5548 to  
p. 5557.  
Proceedings,  
p. 254 ;  
p. 255 to  
p. 287.

29. The said Respondents further submit that the concurrent findings of fact unanimously held by all the Judges in the Courts below are fully supported by evidence.

30. The Respondents further submit that, there being no manifest error to be pointed out, the effect of such concurrent findings of fact is absolute.

31. There is nothing in this case to create any exception to the rules laid down by the Judicial Committee in such cases as—

*St. Francis Hydro Electric Company vs. Rex* 1937 A.E.R., p. 541 (Privy Council) ;

*Paterson Steamships vs. Canada Co-operative Wheat Producers*, 10 59 K.B. 107 (P.C.) 1934 ;

*Luchmun Lal Chowdhry vs. Kanhya Lal Mowar* (1894), L.R. 22, Ind. App. 51 ;

*Robins and National Trust Company* (1927) A.C. 515.

Similar rules have been followed repeatedly by the Supreme Court of Canada in such cases as—

*Bird and Battagin*, 1938, S.C.R., at p. 71 ;

*Albert vs. Aluminium Company of Canada*, 1935, S.C.R., p. 640 ;

*Perusse vs. Stafford*, 1928, S.C.R., p. 416.

Record.  
Vol. XII,  
p. 5556, l. 6.  
Proceedings,  
p. 257, l. 23  
to l. 35,  
p. 284, l. 14  
to l. 34.  
p. 271, l. 7  
to l. 16.

32. The Respondents submit that the obvious bad faith and disreputable 20 character of some of the leading witnesses, upon whose testimony the Appellants depend for support of their claim, rendered them absolutely unworthy of belief and that the findings of the learned Judges in both of the Courts below to such effect is wholly justified.

33. The Respondents will contend further that, under the law of the Province of Quebec, there is no legal basis for Appellants' claim for damages in connection with valid and subsisting contracts regularly entered into between the City of New York and various sewer contractors who are not parties to these proceedings, which contracts the Appellants and the City of New York have not repudiated and could not repudiate ; that no claim for 30 damages exists under the legal system of the Province of Quebec in respect of avoidable contracts until such contracts have been avoided, cancelled or repudiated.

See *United Shoe Machinery Company vs. Brunet*, 1909, A.C. 148, Lord Atkinson, at p. 171 ; and

*N. S. Construction Company, Limited, vs. Quebec Streams Commission*, 1933, S.C.R., p. 222.

34. The Respondents refer also to the following Articles of the Civil Code of Quebec :—

“ 983. Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely.”

“ 993. Fraud is a cause of nullity when the artifices practised by one party or with his knowledge are such that the other party would not have contracted without them.

“ It is never presumed and must be proved.”

“ 1000. Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.”

10 “ 1139. By payment is meant not only the delivery of a sum of money in satisfaction of an obligation, but the performance of any thing to which the parties are respectively obliged.”

“ 1140. Every payment presupposes a debt ; what has been paid where there is no debt may be recovered.

“ There can be no recovery of what has been paid in voluntary discharge of a natural obligation.”

35. The Respondents further submit that the Appellants are without right to bring an action before the Courts of the Province of Quebec for and on behalf of the City of New York which would be required to sue in its own name. Article 81 of the Code of Civil Procedure is as follows :—

“ 81. A person cannot use the name of another to plead, except the Crown through its recognized officers.”

“ Tutors, curators and others representing persons who have not the free exercise of their rights, plead in their own name in their respective qualities.

“ Corporations plead in their corporate name.”

36. The Respondents submit that the form of action instituted herein, which is claimed to be authorized by the Statutes of the State of New York, is unknown to the legal system of the Province of Quebec and that it must be 30 declared unfounded.

See *Corporation Agencies Ltd. vs. Home Bank of Canada*, 1925, S.C.R. 706, at p. 722.

See also *Norwich Union Fire Ins. Soc. Ltd. vs. La Banque Canadienne Nationale*, 1934, S.C.R. 596, at pp. 604-605 ; and

*O'Connor and Wray*, 1930, S.C.R., p. 231.

37. The Respondents submit, moreover, that, on the 23rd of January, 1929, when the claim of the Appellants, as set out in the present action, was served, it had already become prescribed.

Articles 2261 (paragraph 2) and 2267 of the Civil Code are as follows :—

40 “ 2261. The following actions are prescribed by two years :—

“ (2) For damages resulting from offences or quasi-offences, whenever other provisions do not apply : ”

“ 2267. In all the cases mentioned in articles 2250, 2260, 2261 and 2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.”

38. The present Respondents therefore, respectfully submit that the judgment of the Court of King's Bench (Appeal Side) for Quebec is right and should be affirmed and that this Appeal should be dismissed with costs, for the following, amongst other

### REASONS.

1. Because there are unanimous concurrent findings of fact by the two Courts below, adverse to the Appellants, upon the 10 allegations of fact urged in support of their claim ;
2. Because the concurrent findings of the Courts below are fully supported by the evidence and there being no manifest error in arriving at the said concurrent findings they should be declared absolute ;
3. Because the evidence before the Trial Judge justified his conclusions ;
4. Because the alleged conspiracy upon which the Appellants' case is founded has not been proved ;
5. Because the conduct of Connolly and Seeley was in no way 20 improper and even if it had been, the late John M. Phillips— and in the instant case his heirs—could be charged with no responsibility in connection therewith ;
6. Because the contracts for the sale and purchase of precast concrete pipe and its manufacture were matters between the late John M. Phillips and certain individual contractors and they were at all material times right, proper and legal;
7. Because the cost of materials and labour to the contractors who undertook to construct the sewers and furnish surety bonds to guarantee the work and its completion for agreed 30 prices per completed foot of sewer was not a matter of concern to the City of New York ;
8. Because there is no proof that the cost of the sewers referred to in Appellants' Declaration was excessive or improper ;
9. Because there is no evidence that the City of New York suffered any loss which the Appellants are entitled to claim from the Respondents ;

10. Because any monies paid by the City of New York to the Contractors were merely those owing under valid subsisting contracts between the parties in proper fulfilment of the legal obligations of the said City as evidenced in valid contracts duly assumed and formally executed, the binding force of which has not been repudiated and could not now be repudiated and because the respective rights and obligations of the parties thereto must be governed thereby ;
- 10 11. Because the statutory provisions relied upon by the Appellants to sue on behalf of the City of New York could only operate in the Province of Quebec as enabling statutes to institute actions known to the legal system of that Province, which legal system does not recognize any action of the nature of those contemplated by the said statutory provisions ;
12. Because under the legal system of the Province of Quebec, an action in damages resulting from a delict or quasi-delict, is absolutely extinguished after two years and there is nothing alleged or proved in this case to prevent the application of this rule to the present case ;
- 20 13. Because the judgment of the Trial Judge, and of the Court of King's Bench (Appeal Side) are right for the reasons given in the judgments of the learned Judges in the said Courts and for the reasons contained in the Factums of the present Respondents before the Court of King's Bench (Appeal Side).

LOUIS S. ST. LAURENT.

HUGH E. O'DONNELL.

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# In the Privy Council.

No. 1 of 1939.

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*On Appeal from the Court of King's Bench  
(Appeal Side) Province of Quebec.*

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BETWEEN

THE PEOPLE OF THE STATE OF  
NEW YORK ... .. *Appellants*

AND

THE HEIRS OF THE LATE JOHN  
M. PHILLIPS,

AND

THE CROWN TRUST COMPANY ET  
AL, ES QUAL ... .. *Respondents*

AND

THE MONTREAL SAFE DEPOSIT  
COMPANY ... .. *Tierce-Saisi*

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CASE FOR THE RESPONDENTS,  
THE HEIRS OF THE LATE  
JOHN M. PHILLIPS.

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BLAKE & REDDEN,

17, Victoria Street, S.W.1.