

In the Privy Council.

No. 1 of 1939.

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

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BETWEEN

THE PEOPLE OF THE STATE OF NEW YORK  
(PLAINTIFFS IN THE SUPERIOR COURT) (APPELLANTS  
IN THE COURT OF KING'S BENCH) - - - - *Appellants*

AND

HEIRS OF THE LATE JOHN M. PHILLIPS (DEFENDANTS  
IN THE SUPERIOR COURT) (RESPONDENTS IN THE COURT  
OF KING'S BENCH)

AND

THE CROWN TRUST COMPANY ET AL ES-QUAL,  
FOR THE HEIRS OF THE LATE FRANCIS PHILLIPS  
(DEFENDANTS SEVERING IN THEIR DEFENCE IN THE  
SUPERIOR COURT) (RESPONDENTS IN THE COURT OF  
KING'S BENCH) - - - - - *Respondents*

AND

THE MONTREAL SAFE DEPOSIT COMPANY (TIERCE-  
SAISIE IN ALL COURTS) - - - - - *Tierce-Saisie*

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CASE FOR THE RESPONDENTS, THE CROWN  
TRUST COMPANY ET AL ES-QUAL.

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1. This is an appeal from a unanimous judgment of the Court of King's Bench, (Appeal Side), of the Province of Quebec (Bernier, Letourneau, Hall, Walsh and St. Jacques, JJ.) rendered on June 29th, 1938, dismissing the appeal of the Appellants from the judgment of the Superior Court (late Mercier, J.), rendered on November 23rd, 1934, dismissing the Appellants' action, with costs.

RECORD.  
Proceedings,  
p. 254.

Vol. 12,  
pp. 5510-  
5557.

RESPONDENT'S CASE

- RECORD.**
- Vol. 1, p. 2. 2. On July 8th, 1928, the Appellants, as Plaintiffs brought action against the Respondents who were sued collectively as the heirs of the late John M. Phillips, who died on July 3rd, 1928, to recover \$3,405,449.02, the difference between an alleged fair market price for sewer pipe sold to divers contractors constructing sewers in the Borough of Queens, one of the five Boroughs of the City of New York, and the price at which it is alleged to have been sold, claiming that Phillips had entered into a conspiracy with Connolly, the Borough President, Seeley, an assistant engineer in the service of the Borough, "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, through its duly constituted officers, to pay large sums of money for work done and equipment supplied to construct pipe sewers in the said Borough of Queens, in excess of the fair, reasonable and proper cost thereof." 10
- Vol. 1, p. 3. 1. 27.
- Vol. 1, p. 33. 1. 20. 3. On July 9th 1928, by means of a Writ of Seizure before Judgment there was seised the sum of \$312,000 in United States currency then lying in a deposit box in the Montreal Safe Deposit Company in the name of Francis Phillips, a son of the late John M. Phillips. These moneys by agreement were handed to and are still held by the Tierce-Saisie.
- Vol. 1, p. 66. 1. 40.
- Vol. 1, p. 58. 1. 3. 4. On April 18th 1929, this Respondent was appointed by the Superior Court Curator to the said Francis Phillips, then a minor. 20
- Vol. 1, p. 59. 5. On April 22nd 1929, an Order was made authorising this Respondent "to appear in the present suit to intervene therein and sever in the defence to be made for and on behalf of the emancipated minor Francis (Frank) Phillips from the other heirs of the late John M. Phillips."
6. On April 23rd 1929, this Respondent entered an appearance on behalf of Francis Phillips. This Respondent will contend that until this date Francis Phillips, not having, as a minor, the free exercise of his rights was not validly made a party to this action. 30
- Article 78 of the Code of Civil Procedure of the Province of Quebec reads as follows :—
- " 78. No person can be a party to an action either as claimant or defendant in any form whatever unless he has the free exercise of his rights saving where special provisions apply.
- Those who have not the free exercise of their rights must be represented, assisted, or authorised in the manner prescribed by the laws which regulate their peculiar status or capacity."
- Vol. 1, p. 60. 1. 33. Vol. 1, p. 61. 1. 5. 7. On June 26th 1929, Francis Phillips was killed in an aeroplane accident and on October 9th, 1929, this Respondent was duly appointed Curator to the minor Elizabeth Ellen Baines Widow of Francis Phillips and of their infant daughter Helen Francis. 40

8. This Respondent was further authorised by Order dated November 13th 1929, to take up the defence of the Widow and child of Francis Phillips en reprise d'instance. RECORD.

9. On December 11th, 1929, this Respondent, as such Curator, filed a separate defence wherein (*inter alia*) it was admitted that Francis Phillips had rented in his own name a safety deposit box from the Tierce-Saisie at Montreal, but denied (which was admitted by the other Respondents) that the property therein contained was the property of the late John M. Phillips and asserted that it belonged to Francis Phillips. Vol. 1, pp. 62-63.

10 The question of the ownership of this property is the subject of litigation now pending in the Courts of the Province of Quebec.

10. On October 5th 1932, this Respondent was duly authorised to continue the defence of this action in the name of Elizabeth Ellen Baines, who had married Clarence L. Paulsen on February 6th 1932, and attained the age of 21 years on March 12th 1932.

11. The issues between the parties are fully set forth in the pleadings, which are of great length. The Declaration of the Appellants was filed on January 29th 1929 and comprises 33 printed pages. The Defence of this Respondent was filed on December 11th 1929. There was an Answer and a Replication. Vol. 1, pp. 2-33. Vol. 1, p. 63. Vol. 1, p. 36. Vol. 1, p. 64.

12. The general charge of conspiracy is pleaded in paragraph 9 of the Declaration as follows:— Vol. 1, p. 3, l. 21.

“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, 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.” 30

13. The details of the alleged conspiracy, which the Appellants contend constitute overt acts establishing its existence are contained in paragraphs 10 to 19 of the Declaration and may be summarised as follows:— Vol. 1, pp. 3-7.

(1) That the City of New York specifications were so prepared as to permit of the use of a precast pipe as sold by John M. Phillips as an alternative to the monolithic type of sewer. 40

(2) That tenders by contractors unfavourable to John M. Phillips were rejected by Connolly, the President of the Borough of

RECORD.

Queens, in the City of New York, in favour of tenders at excessive and exorbitant prices of contractors favourable to John M. Phillips and

(3) That on December 8th 1924, the specifications for the monolithic type of construction were altered so as to prevent contractors using the monolithic type from competing on a fair and competitive basis against those using the precast type of sewer.

Vol. 1, pp. 7-29. 14. The details of the damage alleged to have been suffered by the City of New York by reason of this conspiracy are set out in paragraphs 20 to 33 of the Declaration. 10

Vol. 1, p. 62 15. By its Defence on this branch of the case this Respondent denied the conspiracy and alleged :

(i) That John M. Phillips was instrumental in introducing into the Borough of Queens many new and improved methods and material for the construction of sewers ;

(ii) That the work was particularly hazardous for a supplier of material because of the wet and shifting nature of the soil, the great depth between the surface of the ground, and the level of the sea at which the pipes were laid ;

(iii) That the plans and specifications for work and material 20 were prepared by competent engineers with the approval of the governing bodies of the Borough of Queens and the City of New York ;

(iv) that the work was performed under the supervision of the City engineers ;

(v) That the pipe supplied by Phillips was of better quality, higher class and better suited to the peculiarities of conditions in the Borough of Queens than that of any other pipe available.

Vol. 12, pp. 5558-5559. 16. At no time did the Appellants or the City of New York, which the Appellants purport to represent, have any contractual relationship with 30 John M. Phillips. The contractors referred to in the Declaration are not parties to the action and it is formally admitted that the contracts under which the City of New York paid the prices challenged in this action were validly entered into and are still subsisting. The only prices fixed in these contracts are for completed sewers.

Vol. 1, p. 81. 17. The hearing of this action began in New York under Rogatory Commission on January 19th 1931. The Commissioner allowed all questions and the production of all documents reserving the question of the admissibility of such questions and documents to the Superior Court. The Respondents submitted their objections in the Courts below. As the 40 Superior Court and the Court of King's Bench (Appeal Side) did not find it necessary to adjudicate upon these objections this Respondent desires to reserve its right, if necessary, to renew them.

18. On November 23rd 1934, the Superior Court dismissed the Appellants' action with costs. The Trial Judge, the late Mercier, J., held

Vol. 12, p. 5557.

10 " Que cette Cour . . . 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 frauduleuse 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. . . ."

Vol. 12, p. 5555.

19. The Appellants appealed to the Court of King's Bench (Appeal Side) (Bernier, Letourneau, Hall, Walsh and St. Jacques JJ.) which unanimously confirmed the Judgment of the Superior Court and dismissed the Appellants' Appeal with costs.

Proceedings, p. 254.

20. Mr. Justice Bernier in his Reasons confirms the finding of the Trial Judge and states:—

20 " J'ai lu et relu avec attention les témoignages de ces quatre témoins, Paulsen, Weaver, Purcell et Sigretto. Proceedings, p. 257.

" 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."

\* \* \* \* \*

30 " . . . 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.

40 " On peut se demander quel serait le verdict rendu par un jury, soit devant la Cour Criminelle, soit devant nos Cours civiles, et si 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."

## RECORD.

Proceedings,  
p. 260, l. 13.

21. Mr. Justice Letourneau states :—

“ Il y a là tout un mode d’opérer qui, pour n’être pas irréprochable n’en reste pas moins assez éloigné, ou en tout cas distinct, de la conspiration sur laquelle se prétendent fondés les appelants.

Tout ceci pour remarquer que 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.”

22. Mr. Justice Hall (with whom Mr. Justice Walsh concurred) having carefully considered the points raised by the Appellants says :—

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Proceedings,  
p. 274, l. 41.

“ There being, therefore, no direct evidence of conspiracy and the pretended overt acts being insufficient to justify the 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 concludes that :—

Proceedings,  
p. 277, l. 44.

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

23. Mr. Justice St. Jacques, dealing with the question of the credibility of the Appellants’ witnesses says :—

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Proceedings,  
p. 284, l. 14.

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

and agrees :—

Proceedings,  
p. 287, l. 21.

“ Arrivant comme la Cour supérieure à la conclusion que les demandeurs n’ont pas réussi à prouver les allégations fondamentales de leur action, je confirmerais le jugement et je rejetterais l’appel avec dépens.”

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Vol. 1,  
pp. 29–31.

24. Although it would appear from the Declaration that any alleged damage was sustained by the Municipal Corporation of the City of New York, this action is brought in the name of the People of the State of New York who rely upon sections 1222, 1224, 1226 and 1229 of Article 76, and Section 904 of Article 54 of the Civil Practice Act of the State of New York as entitling them to support this action. This Respondent contends that under the legal system of the Province of Quebec the Appellants as constituted have no right of action.

25. This Respondent further contends :

(a) That this form of action is unknown to the legal system of the Province of Quebec and cannot be maintained therein, and

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(b) That in any event on April 23rd 1929, when this Respondent entered an appearance on behalf of Francis Phillips, or on January 23rd 1929, when the Declaration of the Appellants was filed, the claim of the Appellants was already prescribed.

RECORD.

Articles 2261 and 2267 of the Civil Code are as follows :—

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

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

10 “ 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.”

26. This Respondent severing in its defence submits that the Judgments appealed from are right and should be confirmed and that the Appeal should be dismissed with costs for the following, amongst other

### REASONS

- (1) Because there are unanimous concurrent findings of fact that there was no conspiracy between John M. Phillips and others to defraud the City of New York.
- 20 (2) Because there is no proof that the City of New York has sustained any damage which the Appellants are entitled to claim from this Respondent.
- (3) Because any moneys paid by the City to the contractors who purchased pipes from Phillips were paid in fulfilment of valid existing contracts which have not been attacked or set aside.
- (4) Because the Appellants have no right of action under the legal system of the Province of Quebec.
- (5) Because any right of action which the Appellants may have had against this Respondent was absolutely extinguished after  
30 two years.
- (6) Because the Judgments of the Trial Judge and the Court of King's Bench (Appeal Side) are right for the reasons therein given.

JOHN T. HACKETT.

In the Privy Council.

No. 1 of 1939

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(APPEAL SIDE) CANADA.

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BETWEEN

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

AND

HEIRS OF THE LATE JOHN M. PHILLIPS

AND

THE CROWN TRUST COMPANY ET AL  
ES-QUAL, FOR THE HEIRS OF THE LATE  
FRANCIS PHILLIPS - - - - - *Respondents*

AND

THE MONTREAL SAFE DEPOSIT COMPANY  
*Tierce-Saunders*

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CASE FOR THE RESPONDENTS, THE  
CROWN TRUST COMPANY ET AL  
ES-QUAL.

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CHARLES RUSSELL & CO.,  
37, Norfolk Street,  
Strand, W.C.2.  
*Solicitors for the Respondents, The Crown Trust Company*