

The People of the State of New York - - - *Appellants*

*v.*

Heirs of the late John M. Phillips and others - - - *Respondents*

FROM

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

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 18TH JULY, 1939

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*Present at the Hearing:*

LORD ATKIN  
LORD THANKERTON  
LORD RUSSELL OF KILLOWEN  
LORD WRIGHT  
LORD ROMER

[*Delivered by* LORD ATKIN]

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This is an appeal from the Court of King's Bench (Appeal Side), Quebec, confirming a judgment of the Superior Court (Mercier J.) in favour of the defendants, the present respondents. The action arises in unusual circumstances. The plaintiffs are the People of the State of New York and they sue the defendants, the heirs of the late John M. Phillips, for damages for an alleged conspiracy between Phillips, one Connolly and one Seely to cheat and defraud the City of New York over the construction of sewers in the Borough of Queens in the City of New York. The plaintiffs right of action is based upon sections 1222, 1224, 1225, 1226 and 1229 of the Civil Practice Act of the State of New York, article 76, the effect of which appears to be to vest in the People of the State any action which a public corporation in the State would have for wrongful dealing with its funds, and to secure that such action shall be commenced by the Attorney-General of the State. The jurisdiction of the Courts of Quebec is derived from the fact that the plaintiffs found that Phillips before his death had deposited over \$300,000 with the Montreal Safe Deposit Co., a sum which they allege to be part of the proceeds of the fraud, though for this purpose that is irrelevant. They seized this sum by means of a conservatory attachment, and thereby under Quebec procedure founded jurisdiction in the Quebec Courts to

entertain the present action. No question as to the right of suit falls to be determined by their Lordships in the view they take of this case: for in their opinion there have been concurrent findings of fact in favour of the defendants by the two Courts in Quebec, and nothing is to be found in the conduct of the proceedings or in the judgments of the Courts to induce the Board to depart from its usual rule in such a case not to interfere with such concurrent findings. It is only necessary to state in outline the nature of the case before the Quebec Courts. Connolly was President of the Borough of Queens and as such had large powers over contracts for the borough both in determining specifications and in rejecting all tenders. He could only accept a tender which was not the lowest with the approval of a special board of the city. Seely was an assistant engineer in the employ of the city in charge of sewers in the Borough of Queens. Phillips was originally a salesman of the Lock Joint Company, one of whose activities was the manufacture of concrete sewers. It appeared that at the time in question there were two forms of concrete sewers, monolithic where the sewer was cast in the trench in which it was to lie, and precast sewers which were cast by the side of the trench and then lowered into it. The Lock Joint Company specialised in the latter type. Phillips at the beginning of the history was, as stated, a salesman on commission. Later he bought the sewers from the Lock Joint Company and resold them to the contractors: and at a later stage he acquired from the company the plant necessary to produce the precast sewers in this borough, manufactured them himself and therefore sold his own product to the contractors. The substance of the conspiracy alleged was that Phillips induced Connolly to specify the lock joint type of sewers for sewer contracts in the borough, that in concert with Phillips Connolly took care that tenders only of contractors friendly to Phillips should be accepted, that in concert with Seely Connolly procured that the specifications should contain such onerous conditions as to the other, the monolithic type, as to put it out of competition, and that all this was done to enable Phillips to charge the contractors and to procure the city to pay to the contractors extortionate prices for the sewers, as was alleged, six or eight times as much as was charged for similar sewers in similar conditions in other parts of New York and elsewhere. In 1927 an inquiry was ordered by the Governor of New York into the affairs of the Borough of Queens, and as a result in July, 1928, an indictment was found against Connolly, Seely and Phillips for a conspiracy to defraud the city. Phillips died before arraignment: Connolly and Seely were tried and convicted. They were sentenced to fine and imprisonment: and their conviction was affirmed by the Appellate Division and by the Court of Appeals of New York State.

The issue in this case was substantially the same as in the criminal proceedings in New York. The evidence had, of course, to be given afresh. Most of the witnesses were examined on commission in New York. The evidence was

therefore not identical with that given in the criminal proceedings, and different counsel appeared for the parties. It was not, of course, suggested that the civil issue was determined by the conviction in New York of Phillips's alleged co-conspirators.

Mercier J., the trial Judge, considered afresh the whole of the evidence. The only complaint made of his judgment in point of law is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill-founded. The proposition of the learned Judge has been laid down time and again in the Courts of this country: and it appears to be just and in strict accordance with the law. On the survey of the whole of the facts the learned Judge was unable to find that the conspiracy was proved. It is unnecessary to consider in detail the learned Judge's comments on the facts. With some it might be difficult to agree: in particular their Lordships are clearly of opinion that no inference hostile to the plaintiffs' case could be drawn from the fact that they did not call as their witnesses the two convicts Connolly and Seely. But the judgment as a whole is obviously directed to the right issues, and represents the Judge's judicial view of the facts. He says, as he was entitled to, that he was unfavourably impressed by the evidence of four of the plaintiffs' witnesses whom he names: and on the whole concludes that the case is not made out. The judgments of the members of the Court of Appeal are similarly directed to the facts: and each of them comes to the conclusion that the case was not proved. Mr. Geoffrion, for the plaintiffs, in his forcible argument, contended that in this or that particular they had formed a mistaken view of the evidence. But in turn they directed their minds to the right issue, they pointed out some respects in which the evidence did not bear out the pleaded case, and they dwelt upon the difficulties that arose from what they thought to be established, viz., that the so-called extortionate prices must have been known to many other persons in the employ of the city or the contractors other than the alleged parties to the fraudulent conspiracy. Their judgments are based on fact and cannot be impugned in point of law. In the words of the judgment of the Board in *Moung Tha Hnyeen v. Moung Pan Nyo* (1900) L.R. 27, I.A., at p. 167, cited in the judgment of the Board delivered by Lord Dunedin in *Robins v. National Trust Co.* [1927] A.C. 515, at p. 518, "There has been nothing to show that there has been a miscarriage of justice or that any principles of law or of procedure have been violated in the Courts below." In these circumstances their Lordships feel bound to adhere to what Lord Dunedin in the case just cited calls "the rule of conduct which the Board has laid down for itself," viz., not to interfere with concurrent findings of two Courts on pure questions of fact. The reasons for the rule are very obvious: and it may be remembered that the reasons apply with added force where

the findings concurrently acquit a party accused of a crime, and where the claim is against a dead man's estate. It need only be observed in conclusion, as will be manifest from what has been said, that their Lordships have not felt at liberty to discuss the facts so as to determine whether the conclusion is right or wrong. In accordance with their rule the appeal on fact has proved to be unavailable. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.



THE  
MUSEUM OF  
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In the Privy Council.

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DELIVERED BY LORD ATKIN

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