THE CANADIAN BAR REVIEW

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CASE AND COMMENT

TRUSTS—APPORTIONMENT—LIFE TENANT AND REMAINDERMAN—DIVIDENDS.—The judgment of Clauson J. in *Re Winterstoke's Will Trusts, Gunn* v. *Richardson*,[1] deals with a situation which has been the subject of several decisions in England and reaches a result which, in many respects, seems contrary to those earlier decisions. Some of the earlier decisions had reached results which seemed open to serious criticism from the standpoint of the general principle of keeping an even hand between life tenant and remainderman, and it is particularly interesting to observe that the present decision of Clauson J. appears to be inconsistent with another decision of his own some three years earlier.[2]

The problem before the court concerned the apportionment of the sale price of securities sold in the course of administration by a trustee after the death of a life tenant. The securities were sold at a time when part of the dividends had accrued but had not become payable.[3] Under such circumstances, while the purchaser would receive the dividend, undoubtedly the

[1] [1937] 4 All E.R. 63.

[2] *Re Walker*, [1934] W.N. 104.

[3] The English cases do not make the same clear differentiation between stocks and bonds to which we are accustomed in this country. Quite frequently in speaking of "stocks", the courts have in mind "debenture stock" equivalent to bonds carrying a fixed rate of interest. Similarly "dividends" is used to cover this interest rate. As will appear, it seems to be important to make this differentiation. In one case the interest rate is fixed and is merely a matter of mathematical calculation. In the case of "stock", possible dividends may enter into a quoted price as a mere speculative possibility.

purchase price received by the trustee was enhanced by an amount based on a proportion of the dividend. The personal representatives of the deceased life tenant asked that the trustees should pay from the proceeds of this sale an apportioned part of this enhanced price, which would represent the apportionable dividend from the previous dividend date last preceding the death of the life tenant to the date of the death of the life tenant. Claims of this nature have been made from time to time by life tenants, and while decisions have stated that as an abstract principle, an equity of this nature might be administered in favour of a life tenant, the cases have almost unanimously denied apportionment since the decision of Kindersley V.C. in *Scholefield* v. *Redfern*.[4] The early cases were discussed in *Bulkeley* v. *Stephens*,[5] which has usually been taken as establishing the modern rule. In that case, the problem of shares sold *cum dividend* after the death of a life tenant, was considered by Stirling J., and he indicated that the general rule in such cases forbade apportionment on the ground that it would create too great a burden in the administration of estates, and secondly there had been no case up to that time, 1896, in which such apportionment had been allowed. The following language from a recent English text book on Trusts indicates the position taken by the cases.

> If a trustee, in changing trustee investments, sells stocks or shares just before dividend day, then a price will be paid which neccessarily includes some allowance for accrued interest. Nevertheless the sum received is placed exclusively to capital. Exactly the same rule applies where the trustee buys stocks or shares just before dividend day; here again the purchase-money is drawn exclusively from capital, although the trustees have in fact bought a right to a dividend which will very shortly be payable. The rule, which seems an unsatisfactory one, is now of general application, and it applies even though the contract note separately specifies how much is paid or received on account of accrued interest.[6]

On the ground that the rule forbidding apportionment was based on the difficulty of ascertaining just what part of the enhanced sale price (or purchase price if the trustee purchased shares between dividend dates) was due to the fact of the sale being made between dividend dates, it was argued before Clauson J. in 1934 in *Re Walker*[7] that the rule had no application where such difficulty did not exist. In that case a trustee sold

[4] (1863), 2 Dr. & Sm. 173. See also *Freman* v. *Whitbred* (1865), L.R. 1 Eq. 266.

[5] [1896] 2 Ch. 241.

[6] KEETON, LAW OF TRUSTS (2nd ed., 1937) pp. 261 - 2.

[7] [1934] W.N. 104.

some £30,000 of India 5½% stock and received therefor £34,000. The statement of the sale of what were described on the stock exchange as "short dated accrued interest bonds", set out the value of the shares listed at 108½ and contained a further item which read, "accrued interest January 15th to May 24th, 129 days, £616". It was urged that this £616 belonged to the life tenant as income, the shares having been sold during the life tenant's life. Clauson J. refused to allow this apportionment, stating that ever since *Scholefield* v. *Redfern*[8] the rule had been followed which refused to apportion the sale price. He admitted that the sale price was liable to appreciation or depreciation commensurable with the nearness or remoteness of the date of the payment of interest, but in spite of the fact that there seemed no difficulty in the facts before him, he followed the general rule. The decision has been criticized[9] and it is submitted that the result is inconsistent with the general principle governing apportionments between life tenants and remaindermen. In *Re Winterstoke*, Clauson J. does not refer to his earlier decision, but as the parties had definitely ascertained the sum which represented the apportionable part of the income, he merely stated that it should be apportioned between life tenant and remainder man. He refused, however, to say that a trustee who did not apportion would be guilty of a breach of trust, but contented himself with stating that

> When the question has been raised, and when there is no difficulty in ascertaining the figure which would be payable to the executors of the tenant for life, it would be perfectly proper for the trustees to deal with the matter in the way I have indicated, that is to say, by accounting to the executors of the tenant for life for the apportioned dividend.

This language leaves the general situation uncertain. It surely cannot be left to the trustee's discretion to make the apportionment, and apparently the guiding feature is the comparative ease of ascertaining the exact amount of the enhanced price which represents accrued dividend or interest. Apparently, in connection with stocks in this country, any fluctuation of the quoted price between dividend days will not be attributed by the courts to the possibility of a dividend being declared. On the other hand, where a dividend is actually declared before the actual purchase, but is payable after the sale, there seems no

[8] (1863), 2 Dr. & Sm. 173.
[9] See a comment in 50 L.Q.R. 319.

reason why such dividend should not be treated as income.[10] Further, the practice in this country of including accrued interest on bonds and debentures as a separate item in the sale price, would seem to indicate that such interest should be apportioned, and that the decision of *Re Walker*[11] should not be followed.

In the cases which discuss this question of apportionment, it is pointed out that a similar problem arises where a trustee, in accordance with his powers, purchases stock between dividend days. If the date of purchase is close to the next dividend day, the argument has been that the amount which the trustee pays is increased by an amount proportioned to the dividend earned, and that to allow a life tenant to receive all of this dividend when declared is not fair to the remainderman. The English courts have refused to consider this situation as one in which they will apportion for the same reason given in the sale cases, namely, difficulty.[12] If, however, the purchase is that of bonds at a price plus the amount of interest accrued, or of stock on which a dividend has been declared but it is not yet payable, their would seem to be no difficulty, and to allow the life tenant to receive the full amount of the interest or dividend when actually received by the trustee seems to work an unnecessary hardship on the remainderman.

A more difficult case arises where a trustee buys bonds at a premium or a discount. This situation was discussed by Middleton J.A. in *Re Armstrong*.[13] In that case he had to consider a purchase of bonds at a discount. Taking the view that the amount paid was less than the amount that would be repaid at the maturity of the bonds, he held that such difference was part of the earnings of the investment and that the life tenant should be paid the actual yield and that this should be accomplished by transferring from uninvested capital to the revenue account, from year to year, necessary amounts to make up to the life tenant the actual yield on the bonds. The writer has been unable to find any English case which takes this view and it has been subjected to criticism in this country.[14]

[10] This appears to have been done in *In re Sir Robert Peel's Settled Estates*, [1910] 1 Ch. 389, where the situation before the court was similar to the Canadian practice and where the stock was sold for a certain price *plus* the dividend.

[11] [1934] W.N. 104.

[12] See *Freman* v. *Whitbred* (1865), L.R. 1 Eq. 266; In *re Clarke* (1881), 18 Ch. D. 160.

[13] (1924), 55 O.L.R. 639.

[14] See an article by Kinnear, *The Administration of Trust Funds* (1936), 6 Fort. L.J. 87.

It would appear, however, to be substantially correct, save that it is doubtful whether a life tenant should actually be paid during the currency of the bond this so-called actual yield. It is true that the bond may, at maturity, produce more than the amount paid by the trustee, but it is by no means certain. Therefore, prior to such realization it seems difficult to say that the life tenant should actually receive more than the amount paid to the trustee. On this basis one may respectfully query the suggestion of Middleton J.A. that a trustee commits a breach of trust by investing all his capital in bonds purchased at a discount. His view is that a trustee must keep free capital in order to pay the life tenant. It is submitted that the question only arises at the maturity date of the bonds, when an adjustment and apportionment may be necessary.

Conversely, if the trustee purchases bonds at a premium, *Re Armstrong* indicates that they are, to a certain extent, wasting assets and that a life tenant should not be paid all of the interest received on the bonds, but that the trustee should retain such an amount as is necessary to amortize, on the maturity of the bonds, the amount of the premiums paid.

The situation of bonds purchased at a premium or discount is mentioned to show how far the Canadian courts appear to have gone in the way of achieving impartiality of a trustee as between life tenant and remainderman. The English courts, on the attitude expressed in *Bulkeley* v. *Stephens*, might refuse to enter into these difficulties. On the other hand, in accordance with *Re Winterstoke*, if the problem reduces itself to one of mathematical calculation rather than speculation as to the possible elements which enter into the increase or decrease of prices of stocks or bonds, there would seem to be no difference between the English and Canadian attitude.

C. A. W.

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LABOUR LAW — PICKETING — CONSPIRACY TO INJURE — JUSTIFICATION.—In a previous number of the REVIEW,[1] the writer had occasion to comment on the decisions of Donovan J. in the two Manitoba cases of *Allied Amusements Ltd.* v. *Reaney*,[2] and *Kershaw Theatres Ltd.* v. *Reaney*.[3] The conclusions of the Manitoba Court of Appeal[4] in affirming those decisions reveal

[1] (1937), 15 Can. Bar Rev. 10.
[2] [1936] 2 W.W.R. 129.
[3] [1936] 2 W.W.R. 129, 138.
[4] [1937] 3 W.W.R. 193.

a hiatus between the reasoning and the results. None the less, the judgment of Trueman J.A. evidences a very careful consideration of the law relating to picketing on the civil side and gives definite assurance of a closer judicial attention to basic social issues implicit in the adjustment of employer-employee relations.

A fuller statement of the facts in the decision of the Manitoba Court of Appeal brings out that the motion picture projectionists employed by Allied Amusements, Limited, were members of a trade union affiliated with the All-Canadian Congress of Labour. The Canadian Theatrical Federation, a rival trade union, sought to organize all theatre employees in Winnipeg under its jurisdiction and planned to extend its operations to the theatres of Allied Amusements, Limited. The latter also employed an orchestra in two of its theatres, the musicians being non-union men. The Winnipeg Musicians Association joined with the Canadian Theatrical Federation in the unionization campaign because of its interest in having union conditions prevail with respect to the orchestra. The picketing that was carried on was admittedly peaceful.[5] Trueman J.A. appears to have discarded one of the grounds upon which Donovan J., at the trial, proceeded, namely, that members of a trade union have no justification in picketing premises where none of their fellow members are employed,[6] because he states :

> A strike, lock-out or other overt form of labour dispute in itself commands public attention and makes known to the public that there is warfare between the *employer* and *employees* over wages, hours or other conditions of labour. The announcements by placard carried by pickets that the employer is unfair to union labour or does not pay union wages, therefore, conveys the same information to the public that the strike or like overt act makes known, and which must be made known if other workmen are to be induced not to break the strike.[7]

It would seem then, that "picketing without a strike is no more unlawful than a strike without picketing".[8]

If the picketing was peaceful and was also permissible notwithstanding the absence of an employment relationship between the plaintiff and the picketers, what was the defendants' vice?

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[5] *Ibid.*, 198.

[6] See (1937), 15 Can. Bar Rev. 10, 12, 13. The theory adopted was than an employment relation must have existed between the employer and the picketers to prevent even peaceful picketing from being an unlawful conspiracy to injure.

[7] [1937] 3 W.W.R. 193, 207, 208.

[8] *Exchange Bakery* v. *Rifkin*, (1927), 245 N.Y. 260, 263.

Canadian Courts have long proceeded under section 501 of the *Criminal Code* in determining picketing controversies. The relevant portions of the section, as amended in 1934[9] read :

> Everyone is guilty of an offence . . . . . who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,—
>
> (f) besets or watches the . . . . . place where such other person . . . . . carries on business. . . . .
>
> (g) Attending at or near or approaching to such . . . . . place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

Section 501 of the *Criminal Code* is similar to section 7 of the English Conspiracy and Protection of Property Act, 1875. The English Court of Appeal in interpreting that section decided in *Lyons* v. *Wilkins*[10] that the persuasion of persons not to work for the plaintiff was a "watching and besetting" which exceeded the bounds of "obtaining or communicating information". This meant that "peaceful picketing" and "obtaining or communicating information" were not co-extensive. The result, in England, was section 2 of the Trade Disputes Act, 1906, expressly permitting peaceful persuasion. In a further proceeding in the case of *Lyons* v. *Wilkins*,[11] section 7 of the Conspiracy and Protection of Property Act was interpreted, in respect to its provision that "watching and besetting" to constitute an offence must be done "wrongfully and without lawful authority", to mean that mere proof of the act of watching or besetting imported its wrongfulness. This interpretation was rejected in *Ward, Lock & Co.* v. *Operative Printers' Society*.[12] Moulton L.J., in this case, pointed out that section 7 of the Conspiracy and Protection of Property Act was not intended to affect civil remedies and in making offences of acts done "wrongfully and without lawful authority", it merely visited the sanction of criminal law upon acts which were civil wrongs or crimes independently of its provisions.[13] This is equally true in respect to section 501 of the Criminal Code, which is drafted in similar terms to those in section 7 of the English Conspiracy and Protection of Property Act, 1875. A criminal prosecution

[9] 24 & 25 Geo. V, c. 47, s. 12 (Dom.).
[10] [1896] 1 Ch. 811.
[11] [1899] 1 Ch. 255.
[12] (1906), 22 T.L.R. 327. The view taken in this case is supported strongly by Finkelman, *The Law of Picketing in Canada* (1937), 2 U. of Tor. L.J. 67, 88.
[13] *Op. cit.*, 329. See also *Fowler* v. *Kibble*, [1922] 1 Ch. 487.

for the offence of "watching and besetting", which is created by section 501 of the Criminal Code, must be founded on an act which, apart from that section, would be punishable as a tort or a crime. If a tort is established, the injured party can, of course, proceed civilly for damages as well.

Accordingly, it is patent that section 501 of the Criminal Code has no relevance for the civil side of the problem of picketing. In explaining this in his judgment, Trueman J.A. has made an invaluable contribution to the clarification of issues which had hitherto been confused. He says :

> I take it to be clear that picketing, or "watching and besetting", which is the legislative equivalent, conducted peaceably, that is, without violence and intimidation or other wrongful or illegal means, though for the purpose of compelling or inducing employers to employ none but union labour, is legal at common law, and that nothing in sec. 501 of the [*Criminal*] *Code* qualifies or overrides it. Clause (g) of sec. 501 is a proviso inserted *abundanti cautela* in qualification of the general enactment.[14]

In relation to a civil suit for damages and an injunction, the question in peaceful picketing becomes an inquiry to ascertain whether the defendants have committed a common law tort. Robson J.A., in the case at bar, concluded, from an acceptance of the trial judge's findings of fact, that the attempt to reduce the plaintiff's patronage was an unlawful act, the tort of civil conspiracy.[15] The essence of this wrong is said to lie in the intention to injure another's business, though the persons picketing may have in view the advancement of their own interests. It is in following this principle, which is really a confusion of conflicting principles,[16] that Trueman J.A. appears to have diverged from the path along which his judgment was leading him.[17]

The picketing of an employer's premises interferes with two expectancies; firstly, his expectancy that his customers will return to him, and secondly, his expectancy to retain the services of his employees and to obtain others when he needs them. These have been given a property basis by being protected by damages and injunctive relief, and accordingly

[14] [1937] 3 W.W.R. 193, 205, 206.

[15] *Ibid.*, 218.

[16] Finkelman, *The Law of Picketing in Canada* (1937), 2 U. of Tor. L.J. 67, 99.

[17] [1937] 3 W.W.R. 193, 208: "The employer says the placards injure his business and have that intention. The trade union's answer is that they may cause injury to your business and that they do not mind that they do, but that their purpose is to advance and protect their trade union interests, which cannot be done if the strike is veiled in silence and secrecy. These views, it is plain are not available to the defendants."

have become part of the twin aspects of the philosophy of individualism, that is freedom of competition and freedom of contract. The result has been that acts of persuasion in the course of peaceful picketing have been considered to be *prima facie* wrongful, and hence to require justification. But as Atkin L.J. remarked in *Ware and De Freville, Ltd.* v. *Motor Trade Association*,[18] "it appears . . . . . illogical to start with the assumption that an interruption of the power of a man to do as he pleases within the law is *prima facie* a legal wrong, which in every case must be justified. The true question is, was the power interrupted by an act which the law deems wrongful." In the case of peaceful picketing, Trueman J.A., in the instant case, showed clearly that peaceful picketing was lawful, even in the persuading of workers to abstain from working for the employer against whom they were directing their picketing activities.[19] If an employer is entitled to carry on his business without interference and if too, workers may picket in combination though loss result to another, the issue becomes one of conflicting powers. A court must then be exceedingly wary in expressing a preference.[20] If there is nothing more than the exercise of a claim to good-will and services of workers on one side, and peaceful picketing on the other, it is a case where economic rather than legal questions are involved.[21] From an economic viewpoint, there is as much to be said for protecting the members of a trade union from an open shop employer, as there is for protecting an employer against a trade union seeking to impose a closed shop upon him. A court which makes a choice here is exercising a purely legislative function. It is not desirable, nor is it possible to shut the judiciary off from legislative considerations. But the notions that a court may adopt here, if it decides to act, must be in line with the current *mores* of the community. Mr Justice Cardozo says that a judge "would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief".[22]

The Court, in the case at bar, has not regarded the questions involved as arising out of opposing powers. It has reverted to a consideration of them in terms of justification for the loss occasioned to the plaintiff because of the peaceful picketing of the defendants. In charging the defendants with liability, the

[18] [1921] 3 K.B. 40, 79.
[19] [1937] 3 W.W.R. 193, 205.
[20] *R.* v. *Baldassari*, [1931] O.R. 169.
[21] See *Stillwell Theatres* v. *Kaplan* (1932), 259 N.Y. 405, 409 for a statement of the attitude of the New York Court of Appeals on this matter.
[22] THE NATURE OF THE JUDICIAL PROCESS, 108.

Manitoba Court of Appeal attributed to them an intent to injure the plaintiff's business, the gist of the tort of civil conspiracy, but did not sustain the justification alleged, namely, serving self interest. This means, in effect, that admitting the intent to injure, the Court refused to believe that the ultimate motive of the defendants was to benefit themselves.[23] In the words of the late Mr. Justice Holmes, "the ground of decision really comes down to a proposition of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue."[24] The apparent conclusion is that whether an employer's claim to carry on his business without interference is considered in relation to an opposing claim to indulge in peaceful picketing, or in terms of justification for the peaceful picketing, for example, the advancement of the interests of the workers in better conditions of labour, in either case the interposition of a court decision is indicative of a preference of some one among many possible social and economic attitudes.

In *Kershaw Theatres, Ltd.* v. *Reaney*,[25] the plaintiff refused to renew a collective agreement with the Canadian Theatrical Federation and dismissed some of the members of the Federation from his employ to save part of the expense of operating his theatres. The defendants' picketing was furthered by the use of printed placards and posters containing allegations of unfairness and of endangering public safety by reducing the theatre staffs. Similar matters were published in a newspaper, the Winnipeg Typo News. What has been said above concerning the tort of conspiracy to injure is relevant here. It is merely necessary to add that Robson J.A. bears out the argument advanced when he says :

> I do noe see how it can be said that if an employer reduces staff for purposes of economy and violates no law or contract in so doing such employer has thereby been guilty of unfair treatment of employees.[26]

Brief mention may be made here of the decision recently handed down by the Manitoba Court of Appeal in *Hurtig* v.

[23] *Cf. Mogul Steamship Co.* v. *McGregor, Gow*, [1892] A.C. 25, where the justification of benefit to oneself was accepted in a case involving competition in business, though an intent to injure was established.

[24] *Privilege, Malice and Intent*, in Harvard Selected Essays on the Law of Torts, 162, 169.

[25] [1937] 3 W.W.R. 193, 198, 219.

[26] *Ibid.*, 222.

Reiss,[27] confirming the trial judge's award of damages and modifying the injunction granted by him by enjoining only illegal acts. The fur workers' union attempted to unionize the plaintiff's shop and, being rebuffed by the plaintiff, engaged in picketing. The evidence clearly reveals that it was conducted by such numbers of men, as to be intimidatory and a nuisance. The limits of peaceful picketing having been exceeded and specific torts having been committed, the problems involved in the discussion of peaceful picketing as affected by the tort of a conspiracy to injure, do not arise. The plaintiff was plainly entitled to the relief obtained.

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TRUSTS — DISCRETION OF A CORPORATE TRUSTEE. — The decision of the Ontario Court of Appeal in *Re Wilson*, [1937] O.R. 769, leaves several doubts in the mind. The result of the decision, unless it is offset by legislation, will be highly embarrassing to trust companies; it will apparently require branch offices of such companies, perhaps scattered throughout Canada, to refer all questions of discretion in administering estates for a resolution of the general board of directors. Resulting inconvenience, of course, is no test of the soundness of the decision; but strictly legal considerations also raise a doubt. And the more one considers the decision the more one wonders how far the *ratio decidendi* is to be applied in other cases.

The facts were these. A will appointed a trust company executor and trustee, and authorized retention of any property "for so long as they deem it advisable". It also exonerated the company from any loss "occasioned by the exercising by them in good faith of the rights and powers hereby conferred . . . ." The general manager of the trust company received an offer for certain real property belonging to the estate, and rejected it without referring it to the board of directors. The property was not sold; and the necessary expenditures for taxes and repairs occasioned by retention made eventual loss inevitable. The beneficiaries after seven years claimed damages against the trust company for failure to realize the property earlier, and recovered on the ground that the trust company had been negligent, and had not exercised its discretion, inas-

[27] [1937] 3 W.W.R. 549, 558.

much as the manager's discretion was not the company's, which could only be exercised by the board of directors.

The Court treated this case as governed by previous authority showing that a trustee cannot delegate his discretion. Actually, however, it seems to be a case of first impression in many respects, and it may be questioned whether the authorities against delegation are of any assistance. On this branch of the case, the Court seems to have put action and inaction by a trustee on the same footing; a fallacy, it is submitted, which goes to the root of the decision. Admittedly, if the manager had exercised his supposed discretion in favour of selling, and had made a bad sale, the trust company would have been liable, because the loss would have been directly due to his unjustifiable act. But actually his unjustifiable conduct resulted in nothing being done; and the company's inaction, which was the only inaction that the beneficiaries could complain of, was due to the directors' conduct no less than the manager's. And the directors had the discretion. Admitting that the directors could not lawfully delegate their discretion to the manager, still the purported delegation resulted in his doing nothing, so the effect was the same as if there had never been any delegation.

That being so, the only ground for holding the company liable was that the directors never exercised any discretion, which they should have done. The whole decision indeed implies some such principle as that inaction cannot amount to exercise of a discretion. But is this idea sound? Take the case of an individual trustee, who has a discretion whether to sell or retain property. Can it be said that if the trustee bona fide believes that the state of the market makes it useless to try to sell for the time being, he is not entitled to remain quiescent, and is only exercising his discretion if he is rushing about seeking offers which he will reject as soon as received? Such a theory appears quiet unreasonable; there seems to be no ground whatever for saying that a trustee cannot exercise his discretion in favour of inaction, when action seems for the time being useless.

But, it may be said, there is a difference where the trustee is a corporation. An individual needs only to decide in his mind on a particular course; but a corporation decides through directors, and directors can only come to a decision through a resolution. An individual, it is said, may decide on inaction tacitly, but directors must pass a resolution not to sell or not to seek purchasers actively. However, a little consideration

shows what preposterous results such a principle would entail. Take the case where a corporate trustee has real estate to sell, for which it knows there is a constant and stable market, but a market which it considers too low. Must its directors keep meeting at intervals, and passing resolutions not to accept the market price, in order to constitute an exercise of their discretion against selling? If so how often must they do this? Yearly, monthly, weekly? Again, take the case where the property to be sold is stock, for which there is not only a constant market, but one that varies almost from minute to minute. Every bid in the stock exchange is equivalent to a bid for the trust property. Must then the directors pass a resolution at every tick of the exchange machines, in order to show that they are diligently exercising their discretion against conversion? If not, where is the line to be drawn?

Conceivably, the beneficiaries might frame their claim in a different way, and say: "The manager's duty was to refer this offer to the directors. He did not do so, and for this wrongful omission we claim damages." A good cause of action, however, requires not only a wrongful omission, but damage flowing from it. In this case it would seem necessary to show that the manager's default was the cause of the failure to sell. In other words, to show that a reference of the offer would have resulted in the directors' resolving in favour of sale. This certainly was not shown. Did the facts justify a presumption that the resolution would have been passed? The probabilities seem all the other way. The directors had such confidence in the manager that they left decisions to him which they should have reserved. Is not the probability that they would have been guided by his views, and would have refused to sell, even if he had referred the offer?

At the worst the trust company can only be charged with negligence and bad judgment in not realizing. But the will exonerated them from loss where they acted in good faith; this must mean that they were not to be liable for remaining inactive in good faith. But the court seems to have given no effect to the exoneration.

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