

*Privy Council Appeal No. 37 of 1930.*

Charles E. Campbell - - - - - *Appellant*

*v.*

The National Trust Company, Limited, executors of E. A. Wall-  
berg, deceased - - - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1930.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD HANWORTH.

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

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In this case the appellant, Campbell, sued one Wallberg and a company called the Lake St. John Power and Paper Company Limited (hereinafter called the Lake Company), in the Supreme Court of Ontario, for certain relief, his claim being founded upon an alleged verbal agreement by Wallberg to pay commission.

At the trial of the action before McEvoy, J., the facts as stated in the next fourteen paragraphs were established.

On the 6th April, 1926, Wallberg became the purchaser at public auction of a lease from the Government of the Province of Quebec of large timber areas suitable for the manufacture of pulp and paper. The lease was, in fact, taken in the name of the Leaside Engineering Company, Limited, the stock in which was owned by Wallberg. As he admitted in his evidence, it would "be fair to say that when we speak of the Leaside Engineering Company we mean Mr. Wallberg and *vice versa*."

The fact that Wallberg had purchased these areas was well known, and reached the ears of Campbell. Campbell, who lived at Vancouver, was at Montreal in April, 1926. There he met an intimate friend, Lester J. Clarke. Clarke was the President of the Newspaper and Magazine Paper Corporation of the State of New York (hereinafter called the Corporation). He was a large buyer of news-print, his monthly purchases amounting in value to between \$2,000,000 and \$3,000,000.

Campbell and Clarke had a conversation together, after which they proceeded to Ottawa. From thence Campbell telephoned to Wallberg in Toronto, and made an appointment to see him at his office there on the following morning.

Clarke and Campbell then travelled to a hotel in Toronto. Campbell attended his appointment with Wallberg, leaving Clarke at the hotel.

What passed between Campbell and Wallberg, according to Campbell's evidence, appears from the following questions and answers :—

“ A. I went into his office, introduced myself to him, told him who I was, and told him that I was the man who made the appointment over the telephone.

“ Q. Did you tell him what your business was? A. Yes, I told him who I was and what business I was in.

“ Q. And that you were the man who made the appointment over the telephone? A. Yes, sir. Then I spoke to Mr. Wallberg about the limits he had acquired. I asked him if he had acquired these limits in the Lake St. John region, and he said he had. I asked him was he putting up a mill, and he said yes, he was putting up a mill. I asked him would he be interested in selling the output of the mill, and he was very much interested in that.

“ Q. What did he say to that? A. He said he was interested.

“ Q. And what was said then? A. And then I asked Mr. Wallberg would he pay me a commission if I could put him in touch with a party who was capable of buying the output. He wanted to know who the party was, and I refrained from giving him the name at that point.

“ Q. Why? A. Because I wanted to be sure that I was going to get the commission if it resulted in a contract.”

“ Q. As far as you can remember, tell me everything you said? A. I said, ‘ Mr. Wallberg, I am out to make some money. If I introduce you to this party, and it results in a sale or contract, will you pay me a commission?’ And he said, ‘ I will.’ ”

Campbell then, according to his evidence, took Wallberg to the hotel, and having introduced him and Clarke to each other, left them together to talk over the business.

Wallberg denied flatly that there had been any promise or even mention of a commission. His statement in the witness-box was this :—“ I say that there was never a word or syllable or intimation of any kind that he was looking for or asking for a commission or gain, in any way, from me.”

The trial Judge, however, assisted by the demeanour of the witnesses, preferred the evidence of Campbell to that of Wallberg.

He made two important findings of fact, viz. : (1) that Wallberg agreed to pay Campbell a commission for introducing to him a man (Clarke) who was able to buy the output of Wallberg's plant, if the introduction led to the making of a sale or contract for sale ; and (2) that the contract hereinafter mentioned flowed from Campbell's introduction of Clarke to Wallberg.

After negotiation between Clarke and Wallberg (in which Campbell took no part), a contract was executed bearing date the 29th December, 1926. The parties to the contract were the Lake Company and the Corporation.

The Lake Company is a company in which the Leaside Engineering Company owned the controlling interest, and to which the lease had been transferred.

The contract was for a term of ten years from the 1st January, 1928, and provided for the purchase by the Corporation of the entire output of two paper-making machines, the estimated capacity of which was approximately 60,000 tons of news-print per annum. The price in any calendar year was to be the price to be fixed for that year by three other named Canadian paper manufacturers, subject to certain maximum prices.

The due performance of the Corporation's obligations was, by a document dated the 12th January, 1927, guaranteed by William Randolph Hearst, who was, in fact, taking the paper under the contract ; his giving such guarantee was one of the terms of the contract.

Campbell learned that this contract had been made a month or so after its date ; and on the 14th February, 1927, he wrote from Montreal a letter to Wallberg which ran thus :—

" You will remember that in April, 1926, after a conversation in your Office, you agreed that if a sale of news-print paper from your proposed mill was made to the Company represented by Mr. Lester J. Clarke, I would be remunerated for my services in bringing you and Mr. Clarke together. I then introduced you to Mr. Clarke at the King Edward Hotel.

" I am now informed that you have completed an arrangement by which the output of the mill you are building at Lake St. John is sold to Mr. Clarke's Company, and I am, of course, now entitled to be remunerated for my services as agreed.

" It so happens that my present arrangements will keep me in Montreal and Ottawa for a few days, after which I expect to return to the West, and it would be very convenient for me to settle this matter finally while I am in the East.

" I should be glad to take this matter up with you personally or by letter. If an interview is desired I could arrange to go to Toronto at any date within the next few days if you will advise me care of the Mount Royal Hotel, Montreal.

" My view is that the matter should be definitely settled before I return to the west, and I shall be obliged if you will deal with it accordingly, letting me hear from you by return mail."

No satisfactory reply having been received, the writ in this action was issued on the 5th April, 1927. No paper had at that time been turned out of the Lake Company, nor had any been turned out at the time of the trial.

At this stage it is important to observe that the relief claimed by Campbell in his action was a judgment against both Wallberg and the Lake Company for a sum of \$1,200,000, being 3 per cent. on \$40,000,000. This last-mentioned sum was alleged to be at the least the price which would be paid for the news-print contracted to be manufactured, sold and delivered under the contract. Alternatively, the same amount was claimed against both as a reasonable and proper remuneration. A claim was also made to relief by way of declaration that Campbell was entitled to be paid commission from time to time as news-print was sold and delivered under the contract and for accounts.

The Trial Judge gave judgment against both defendants for commission at the rate of 1 per cent. upon the purchase price of the news-print sold and delivered under the contract. It is not easy to see how he arrived at the figure of 1 per cent. Evidence had been given that 3 per cent. was the usual rate of commission payable to brokers upon the sale of news-print. The learned Judge pointed out that such brokers themselves negotiated the sales and did not merely find a prospective purchaser and introduce him. It would seem as if he had started by taking the brokers' 3 per cent. and had then, in view of the lesser work done by a person who was merely an introducer, cut it down in the case of such a person to 1 per cent. Their Lordships find it difficult to attribute any other meaning to the following passage in his judgment.

"Upon the evidence as to the rate of commission, I conclude that a commission of 1 per cent. upon the actual news-print sold and delivered by Wallberg and the St. John Company to the Newspaper and Magazine Paper Corporation under the contract (exhibit 1) ought to be paid to the plaintiff by the defendants."

The formal judgment as drawn up is in the following terms :

"1. This Court doth declare that the plaintiff is entitled to a commission at the rate of one per centum upon the purchase price of news-print sold and delivered under the contract dated the 29th day of December 1926 and made between the defendant Lake St. John Power and Paper Company Limited and Newspaper and Magazine Paper Corporation at the price fixed by the terms of the said contract and doth order and adjudge the same accordingly.

"2. And this Court doth further declare that if by any default or connivance of the defendants or either of them the proper deliveries of news-print are not made pursuant to the said contract the plaintiff is entitled to damages for loss of commission at the rate of one per centum upon the sums which would have been the price of such news-print had it been delivered and doth order and adjudge the same accordingly.

"3. This Court doth further order and adjudge that it be referred to the Master of this Court at Toronto from time to time at the plaintiff's request to take an account and state what amount at the time of the taking of the said account is due and owing the plaintiff from the defendants as commission under the said contract and if default or connivance of the defendants or either of them is found by the said Master to ascertain and state what amount if any the plaintiff is entitled to receive from the defendant as damages for loss of commission which the plaintiff would

have been entitled to recover from the defendants but for the default or connivance of the defendants or either of them.

" 4. And this Court doth further order and adjudge that the plaintiff do recover from the defendants the amount found due from time to time by the said Master forthwith after the confirmation of the said Master's report or reports.

" 5. And this Court doth further order and adjudge that the defendants do pay the plaintiff his costs of this action forthwith after taxation thereof."

All parties appealed from this judgment, the one side claiming that the action should have been dismissed and that in any event the amount allowed was excessive; the other claiming that the commission should have been allowed at 3 per cent.

At the hearing before the Appellate Division of the Supreme Court of Ontario, counsel for Campbell elected to proceed against Wallberg alone, and the action against the Lake Company was dismissed accordingly. Before the Appellate Division had delivered judgment on the appeals, Wallberg died; and his executor, the present respondent was, by order to continue proceedings, joined in his stead.

The judgments on the appeals were delivered on the 23rd April, 1929.

Mulock, C.J.O., was of opinion that the plaintiff was entitled to remuneration for his services on a *quantum meruit*, that the amount depended on the value to Wallberg of the contract of the 29th December, 1926, that there was no evidence which enabled the Court to determine the amount of the remuneration, and that there should be a reference to a jury to find the amount.

Magee, J.A., upon the assumption that the Trial Judge was right in finding an agreement for remuneration, expressed himself as concurring with Middleton, J.A., as did also Grant, J.A.

The principal judgment was delivered by Middleton, J.A. He would, had he been the Trial Judge, have disbelieved Campbell's story, and dismissed his claim; but he felt unable to say that there was such clear proof of error, as to justify a reversal of the Trial Judge's findings. He, however, took the view (relying upon the terms of the letter of the 14th February, 1927) that Campbell was not entitled to commission, as awarded to him at the trial: but was entitled to suitable financial reward for the introduction of Clarke. He fixed the amount at \$10,000 as "an exceedingly generous remuneration for the services rendered by Campbell in introducing a prospective purchaser."

The order of the Appellate Division as entered runs, in its operative part, thus:—

"(1) This Court doth order and adjudge that the plaintiff do recover from the defendant the National Trust Company Limited as executor of the estate and effects of E. A. Wallberg, deceased, the sum of \$10,000, such sum to be levied out of the property which was of the said E. A. Wallberg at the time of his death in the hands of the said defendant the National Trust Company Limited as his executor as aforesaid to be administered

“(2) And this Court doth further order and adjudge that this action as against the defendant Lake St. John Power and Paper Company Limited be and the same is dismissed.

“(3) And this Court doth further order and adjudge that the defendant Lake St. John Power and Paper Company Limited do recover from the plaintiff its costs of this action.

“(4) And this Court doth further order that there be no costs of this action to the plaintiff or to the defendant the National Trust Company Limited executor of the estate of E. A. Wallberg, deceased.

“3. And this Court doth further order that there be no costs of this Appeal to the plaintiff or to the defendant the National Trust Company Limited, executor of the Estate of E. A. Wallberg, deceased.

“1. And this Court doth further order and adjudge that the defendant the Lake St. John Power and Paper Company Limited do recover from the plaintiff its costs of this appeal and of the plaintiff's cross-appeal forthwith after taxation thereof.”

In their Lordships' opinion the findings of fact of the Trial Judge should be accepted without reserve. But even with a full acceptance of those findings their Lordships find it impossible to justify the judgment which was pronounced at the trial.

The verbal agreement between Campbell and Wallberg stipulated for the payment of “a commission,” but there was no indication of the amount thereof, or how such amount was to be ascertained. Nor does the evidence contain any suggestion that there existed any custom applicable to the present case, by reference to which the amount of commission could be ascertained. In these circumstances the contract can only mean that Campbell shall be paid a proper lump sum in remuneration for his services in introducing Clarke. It is no objection to this view that a commission frequently, or even commonly, takes the form of a percentage. The word “commission” may quite properly, both from a legal and commercial point of view, be employed as denoting a lump sum which represents no percentage on anything, as, for instance, an agreement to pay a commission of £500.

The appeal by Wallberg from the judgment at the trial was accordingly fully justified.

Their Lordships, however, are unable to agree with the view as to amount, which prevailed in the Appellate Division. They appreciate that great difficulty exists in this case in assessing the amount, in view of the meagreness of the evidence directed to this point. No doubt the fact that Campbell's claim has throughout been a claim to a percentage on the news-print price, is responsible for this condition of affairs. The strictly logical course to adopt might well be (as the Chief Justice desired) to send the question of amount to be tried before a jury. The parties to this appeal, however, concurred in requesting their Lordships to abstain from this course; and to end the matter here by themselves fixing the amount of Campbell's remuneration. To this request their Lordships accede.

In their Lordships opinion, the remuneration should not be determined by reference to the labour of Campbell. Beyond

going to Toronto and introducing Clarke, his labour was nil. His work began and ended there. The remuneration should be determined by reference to the value to Wallberg of what it produced, viz., the contract of the 29th December, 1926. The Judges in the Appellate Division purport to act upon this view, but they appear to their Lordships gravely to underestimate the value of the contract to Wallberg. The contract was one of a very exceptional kind. It ensured for ten years the disposal of the Lake Company's entire output, and at prices prevailing in the trade from time to time. The total price payable to the Lake Company under the contract might well amount to \$40,000,000. Its performance was guaranteed by W. R. Hearst. It was made at a time when paper mills were not running full time. Clarke said that it was probably the largest paper contract that was ever made. Moreover, the mills had to be built, and finance had to be found. For this purpose, an issue was made of \$3,000,000 of the Lake Company's 6½ per cent. mortgage debentures. These were taken up by the Dominion Securities Corporation, Limited, and offered by that company for sale to the public. In a letter of the 3rd February, 1927, written by Wallberg as President of the Lake Company to the Dominion Securities Corporation, Limited, for the purpose of giving information as to the Lake Company, he states "the Company has contracted with one of the largest and financially strongest publishing interests in the United States for the sale for the term of ten years of the entire capacity output of the news-print paper mill now under construction"; and he estimates the annual net earnings of the Lake Company, based upon the existing price of news-print, after paying interest on \$5,000,000 first mortgage bonds at not less than \$1,025,000. These statements are repeated in the circular which was issued to the public and is dated the 18th February, 1927.

Their Lordships feel, no doubt, that for the purpose of procuring the necessary finance for the Lake Company, in the success of which Wallberg was vitally interested, the obtaining of the contract was a matter of extreme importance and of the utmost value. From every point of view it was a contract of the first magnitude.

In these circumstances, their Lordships are of opinion that the sum fixed by the Appellate Division should be materially increased; and that a proper remuneration to be paid to Campbell under his agreement with Wallberg would be the sum of \$50,000.

There remains for consideration the question of the costs of the various proceedings.

In regard to the costs of the action, by the order of the Appellate Division no costs thereof were given either to Campbell or to the executor of Wallberg. Their Lordships think that this is wrong. It is true that Campbell's claim as put forward was for a percentage remuneration, and was for a grossly exaggerated

sum. On the other hand Wallberg met the claim by a complete denial of Campbell's story, and resisted the claim by evidence which must be taken to have been false. Campbell should, their Lordships think, be given his costs of action.

In regard to the costs of Wallberg's appeal, and of Campbell's cross-appeal, the order of the Appellate Division gives no costs of the appeal either to Campbell or the executor of Wallberg. It appears to be silent as to the costs of both in regard to the cross-appeal by Campbell. Their Lordships think that the costs of Wallberg and his executor both of the appeal and cross-appeal ought to be paid by Campbell. While it was necessary and proper for Wallberg to appeal against a judgment which granted to Campbell relief to which he was in no way entitled, nothing can be said in favour of Campbell's appeal which appears to their Lordships to have had no justification. There should be a set-off in regard to the costs payable by the respective parties in relation to the proceedings in the courts of Ontario.

In the result this appeal should succeed and the order of the Appellate Division should be varied in the manner following:—

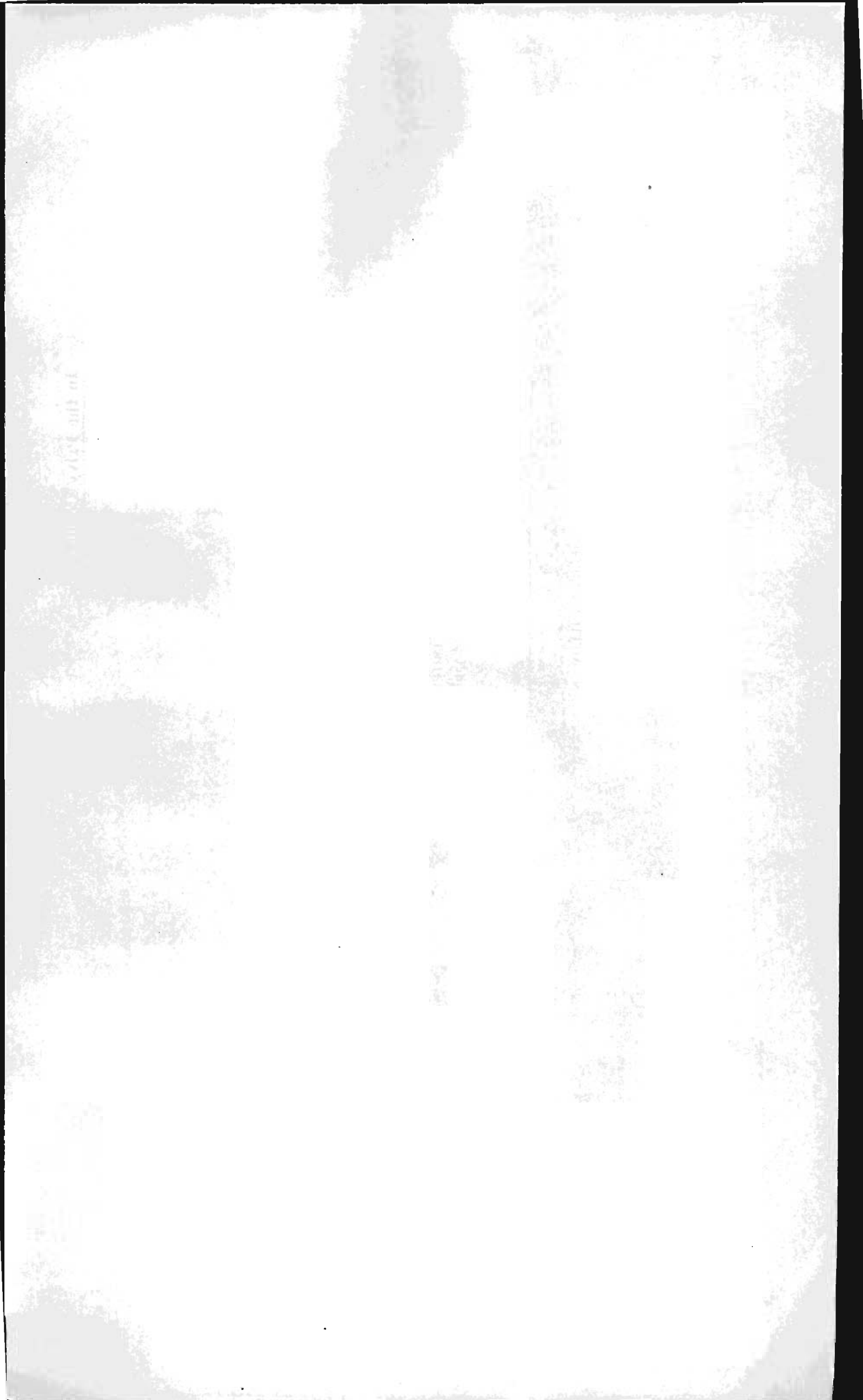
Sub-paragraph 1 of paragraph 2 should be varied by substituting for the figures \$10,000 the figures \$50,000.

Sub-paragraph 4 of paragraph 2 should be varied so as to provide that Campbell do recover from the estate of Wallberg his taxed costs of action.

Paragraph 3 should be varied so as to provide that Wallberg's executor do recover from Campbell the taxed costs of Wallberg and his executor of Wallberg's appeal and Campbell's cross-appeal, with a direction as to set-off in regard to the costs receivable by Campbell under sub-paragraph 4 of paragraph 2, and the costs payable by him under paragraph 3.

Their Lordships will humbly advise His Majesty accordingly. The respondent will pay the appellant's costs of the appeal.





In the Privy Council.

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CHARLES E. CAMPBELL

v.

THE NATIONAL TRUST COMPANY, LIMITED,  
EXECUTORS OF E. A. WALLBERG, DECEASED.

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DELIVERED BY LORD RUSSELL OF KILLOWEN

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