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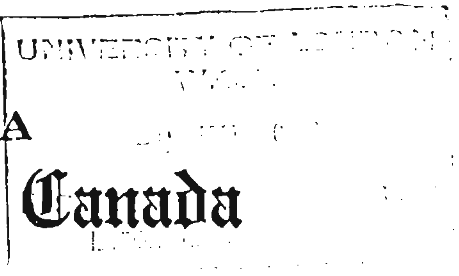

DOMINION OF CANADA

In the Supreme Court of Canada

(OTTAWA)

BETWEEN:

ANGUS WILLIAM ROBERTSON,
(Defendant in the Superior Court
Appellant in the Court of King's Bench)

APPELLANT

—and—

ETHEL QUINLAN ET AL.,
(Plaintiffs in the Superior Court
Respondents in the Court of King's Bench)

RESPONDENTS

—and—

CAPITAL TRUST CORPORATION LIMITED,
(Defendant in the Superior Court)

—and—

DAME CATHERINE RYAN ET AL.,

MIS-EN-CAUSE.

Factum of Respondent Margaret Quinlan

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B. The Appellant did acquire from the Estate of late Hugh Quinlan 400 shares of Fuller Gravel Limited, and the acquisition of said shares is illegal, null and void.

C. The Respondents were duly qualified and had the necessary interest to bring their action against the Appellant.

D. The Respondents' objections to the admission of verbal evidence of the alleged transfer of shares by the trustees to the Appellant A. W. Robertson is well founded in law.

E. The alleged transfer of the said shares was a civil and not a commercial transaction and did not fall under the first paragraph of Art. 1233 of the Civil Code.

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30

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MIS-EN-CAUSE.

Factum of Respondent Margaret Quinlan

40

This appeal is from the judgment of the Court of Appeals, Tellier, C. J. and Howard, Rivard, Bond and St. Germain, JJ., rendered on the 29th of December 1932, confirming unanimously the judgment of Martineau, J. in the Superior Court, rendered on the 6th day of February 1931.

PART I.

STATEMENT OF THE FACTS.

A. SUMMARY OF PROCEEDINGS AND JUDGMENTS.

This appeal is one between Appellant Angus William Robertson and the Respondents. Originally there were two Defendants, viz—The present Appellant and Capital Trust Corporation Limited. The latter, although bound by the judgments both in the Superior Court and in the Court of Appeals has not appealed to the Court of King's Bench from the first judgment, and consequently there is chose jugée between Capital Trust Corporation and Respondents in respect to the trial judgment and also to the judgment of the Court of Appeal.

10

The Respondents are two of the daughters of the late Hugh Quinlan, in his lifetime General Contractor of the City of Westmount, who died on June the 26th 1927, and they are two of the universal legatees in usufruct.

20

The Defendants have been named by the said Hugh Quinlan in his will, the testamentory executors, trustees and joint administrators of his estate.

The Respondents have asked in their action that the defendants Angus William Robertson and Capital Trust Corporation Limited be dismissed from their function as joint-executors, trustees and administrators of the estate of their late father, said Hugh Quinlan, and that they be condemned to render their accounts to the Respondents.

30

The Respondents also prayed for the annulment of certain transfers of shares made by the defendants and more particularly the annulment of the sale or transfer that has been made to defendant Robertson of said shares. Coupled with this demand of annulment, respondents prayed that defendants be condemned to pay to the estate the profits and dividends that have accrued since the death of Mr. Quinlan on those shares of which annulment is demanded.

40

Neither the dismissal nor the rendering of accounts have been granted; the transfers of shares have been annuled, the sales declared null and void, and the shares have been declared to be the absolute property of the Quinlan estate.

If defendant Robertson fails to return said shares, he is condemned to pay the value thereof; in the Superior Court, the judgment de-

clares that all profits and dividends paid since the death of Hugh Quinlan on said shares are the property of the estate. Defendants are condemned to pay the costs of the trial, personally, with the exception of the enquete and hearing costs which are to be paid one-third by defendants es qualite and the other two-thirds by each of the defendants personally, each for one-third.

Respondents have not appealed against the judgment of the Superior Court, and they do not appeal from the judgment of the Court of Appeals. It must be noted that a few days after the judgment of the Superior Court, defendant-appellant Robertson resigned as testamentory executor, trustee and administrator of the Quinlan estate in accordance with the advice given him by the trial judge in his notes, in case he would appeal the judgment and the respondent would not.

10

(NOTES OF THE TRIAL JUDGE, JOINT CASE, Vol. 8, pp. 806).

20

In appeal, as already stated, the first judgment was unanimously confirmed, but without costs of appeal, St. Germain J. being dissident on the question of costs. Joint Case, Vol. 8, p. 807 and following.

Proceeding to render the judgment in the Court of Appeals, the Court, in its second 'Considérant', declares that, without changing the 'jugé' of the judgment a quo, has the right to make modifications thereto that will precise its meaning.

30

In this judgment, the shares are declared to be the property of the Quinlan estate, and only in the case that the appellant returns them all as a whole, will he be entitled to receive the $270,000.00 paid for them (C. C. 1149). On the contrary, if the appellant does not return the totality of the shares, he has to pay the totality in the sum fixed as their value, which the Court of Appeals has declared to be the same amount as in the Court below.

40

The first Court had declared the profits and dividends earned since the death of the late Hugh Quinlan to be the property of the Quinlan estate, whilst the judgment a quo has decided that it shall be the dividends and bonuses instead, and for this reason alone have the respondents been condemned to pay their costs of appeal.

With those precisions, the two judgments below stand alike, practically word for word, at least in the jugés themselves.

B. THE WILL. POWERS AND DUTIES OF THE TRUSTEES.

In order to properly follow the argument, one must start by reading the will which is the foundation of this case; it has been made before Notaries Biron & Poirier, and it bears the date of the 14th of April 1926.

The will names Mrs. Quinlan as particular legatee in usufruct, and the eight children of the Testator universal legatees in usufruct.

10 The grand-children and the great-grand-children will divide the capital of the estate "par tête", after the death of the last of the eight children of the Testator.

The will, exhibit P-1, with the declaration, can be found at pages 229 and following of volume 6 of the joint case, and the above mentioned donations are to be found in Article 5, sub-paragraphs A. D. & E.

Article 4 creates the trust;

20 'I give and bequeath the residue of my estate, without any exception in trust jointly to my friend and partner Angus William Robertson, Esq., General Contractor, presently residing in the City of Westmount, civic number 480 Roslyn Avenue, and Capital Trust Corporation Limited, Corporative body, duly constituted, having its said office at the City of Ottawa in the Province of Ontario, appointing them jointly my Trustees and testamentary executors with the seizin and possession of all the said residue of my estate, moveable and immoveable immediately after my decease.'

30

It seems that Mr. Quinlan had two things in his mind; he makes the defendants his trustees, and on top of that he constitutes them the administrators of his estate.

Sub-paragraph A of Article 4 reads as follows:—

"Power...to convert into money all such portions of my property and estate moveable and immoveable, as are not herein specially bequeathed, and that they may deem inadvisable to retain as investments as and when they think best, and for such prices and terms and conditions as they may see fit."

40

Sub-paragraph D:

"To continue, discontinue or wind up any business contract or transaction pending at the time of my death".

We shall see the importance of this paragraph upon examining the acts of Mr. Robertson and the spirit which seems to have guided them.

Sub-paragraph E:

"To act and represent my estate as a Shareholder in any joint-stock Company or Corporation in which my estate may hold stock in the way of applying for authority to increase or reduce the capital stock of such Company or Corporation or of obtaining increased powers to subscribe for any new or additional stock proposed to be issued by any Company or Corporation in which my estate may hold stock and to agree to any proposed amalgamation or reorganization in any such Company or Corporation and generally to deal with any and all shares of stocks and bonds belonging to my estate in the fullest and most unrestricted manner, without any personal responsibility, on the part of my executors and trustees other than the responsibility imposed by law to administer with the care of a prudent administrator."

These two sub-paragraphs, D and E, have in our opinion, a great importance, inasmuch as they flatly contradict certain allegations of the defence and certain insinuations of Mr. Robertson in his evidence on discovery, to the effect that since a few months before his death, Mr. Quinlan already thought of leaving those Companies, and that he, Mr. Quinlan, had expressed the desire that his estate should not remain in hazardous enterprises.

Plea of Defendant Robertson, Par. 46; vol. 1; Joint case pages 92-93.

Plea of Capital Trust, par. 58; vol. 1; page 23.

Robertson's deposition on discovery, vol. 1, pp. 167, line 9 and on.

Vol. 1 pp. 170, lines 36 and following

Vol. 1 pp. 171 " 12 & 43 and following

Vol. 1 pp. 172 " 1 and following; 27 and following

Vol. 1 pp. 173 " 1 and following

Vol. 2 pp. 389 " 38 and following

Vol. 2 pp. 390 " 1 and following.

The preceeding quotations clearly show that the Testator desired that his Trustees should continue the affairs of these Companies and should represent his estate in the Companies that were already organized and in those that could be amalgamated with the ones already in existence.

The Trust created is not a gratuitous one; the Executors are paid for their services (Sub-paragraph J).

10 It is on article 14 that the Defendants base the whole of their plea; it reads as follows—

> "I wish and desire that the Honourable J. L. Perron be and should continue to be the legal adviser and advocate of my estate."

When they are accused of certain illegal acts, they at once summon Mr. Perron to their assistance and say "We have done it because Mr. Perron ordered us to do it; We have done it because Mr. Perron has authorized us to do it. We have done it because Mr. Perron recommended it."

20

The Testator desires that Mr. Perron be and continue to be the legal adviser and advocate of his estate. He does not constitute him the financial director, nor the particular adviser on questions of administration, or on questions of investments; he expresses the desire that the honourable Mr. Perron should continue to be what he was before to him, viz, his legal adviser, and the will simply adds: "and Advocate of my estate."

30

Therefore, whenever we shall find in the administration of this estate that Mr. Perron has given the executors his advice as a lawyer, naturally we shall be guided by it, but beyond that, we respectfully submit that this Honourable Court shoud disregard such advice.

We might say now, in any event, that the Honourable Mr. Perron never advised the defendants in the sense alleged in their plea and in their evidence.

40 A Trust is of the nature of a deposit according to our Civil Code (Article 981B, C. C.). Trustees are merely depositories (Prefontaine vs Dillon, 33 B. R. page 314, Lamothe, J.).

The Trustee is bound to take possession of the estate, and it is his duty to preserve and remit to the Legatees in toto the trust that he has received. (Mignault, vol. 5, pp. 151 to 171).

The Trustee is bound to act as a prudent administrator (en bon père de famille 981K C. C.).

When Trustees are named jointly, they are bound jointly and severally 981M C. C.).

They are liable to the contrainte par corps as a result of what they owe in connection with their administration (981N. C. C.).

10 According to the will, they have the power to sell, but we humbly submit that they exercised this power contrary to the interests of the estate and beyond the powers conferred upon them by law.

Halsbury, Laws of England, Vol. 28, pp. 117 and following:

> "A Trustee must take all reasonable and proper measures to obtain possession of the Trust property if it is outstanding... and to get in all deeds and funds due to the Trust estate and to
> 20 preserve it and secure it from loss or risk of loss...He must put his own interest entirely out of the question."

He must never put himself in a position where his personal interest could come in conflict with the interests of the trust.

It is the theory of the mandate, and more so, of the Trust, because the Trustee is not merely an administrator, but a depository, bound to remit in its fullness the Trust which he has received.

30 Halsbury at No. 261, continues:—

> "He must not make any use of his position as Trustee for his own interests or private advantage, nor may he enter into engagements in which he has or may have a personal interest which conflicts or probably may conflict with the interests of those whom he is bound to protect.".

These articles of our code, together with Halsbury's comments, of the English law on Trustees, will give us the general theory applica-
40 ble in our case; now, if we add to them article 1484 of our Civil Code, which forbids the mandatory to buy anything that he has under his administration, that, in our opinion, covers the position of defendant Robertson in this case.

Our contention is that Mr. Robertson is illegally, irregularly and unduly in possession of part of the Quinlan estate.

PART II.

STATEMENT OF THE POINTS IN ISSUE.

The Respondent Margaret Quinlan respectfully submits that the judgment appealed from is well founded for the following reasons:

10 A. The transfer of shares in Quinlan, Robertson & Janin Limited, Amiesite Asphalt Limited and Ontario Amiesite Limited to the appellant A. W. Robertson is illegal, null and void.

B. The Appellant did acquire from the Estate of late Hugh Quinlan 400 shares of Fuller Gravel Limited, and the acquisition of said shares is illegal, null and void.

C. The Respondents were duly qualified and had the necessary interest to bring their action against the Appellant.

20

D. The Respondents' objections to the admission of verbal evidence of the alleged transfer of shares by the trustees to the Appellant A. W. Robertson is well founded in law.

E. The alleged transfer of the said shares was a civil and not a commercial transaction and did not fall under the first paragraph of Art. 1233 of the Civil Code.

30 F. The Court of King's Bench had the power to precise the meaning of the judgment of the Superior Court.

PART III.

ARGUMENT.

A

40 *The transfer of shares in Quinlan, Robertson & Janin Limited, Amiesite Asphalt Limited and Ontario Amiesite Limited to the appellant A. W. Robertson is illegal, null and void.*

Respondent's contention is that Mr. Robertson has illegally acquired shares belonging to Mr. Quinlan in those three Companies. They are 1151 shares of Quinlan, Robertson & Janin Limited, 250 shares of Amiesite Asphalt Limited, and 200 shares of Ontario Amiesite Limited. The

origin of the transaction appears in written documents which are far more precise than the verbal evidence produced and which leave no doubt as to the intention of appellant on the whole matter. The Court will find in PC 15 and PC 18, Joint case volume 6, pages 373 and following and vol. 7, pages 525 and following a series of letters which establish in a very complete way the genesis of the operation. This correspondence shows how Mr. Robertson pretends to have become the owner of these shares and the futility of his contention.

10 Mr. Quinlan died on June the 26th 1927. On July the 22nd, Robertson writes to the Capital Trust his co-executor the following letter:

"July 22nd 1927"

Capital Trust Corporation
10 Metcalfe Street.
Ottawa, Ont.

Dear Sirs,

20 Re Estate Hugh Quinlan

All Quinlan, Robertson and Janin Limited stock, as well as all Amiesite stock that once stood in Hugh Quinlan's name were transferred to me before his death, except 200 shares of Ontario Amiesite Limited, which Mr. Leamy inadvertently overlooked. These shares constituted what I was to obtain Two hundred and fifty thousand dollars for as explained to you and Dr. Connolly by Mr. Perron. Therefore, you are not interested in the numbers. The Ontario Amiesite, as you will see by the enclosed, is now be-
30 ing financed by my personal guarantee. Hugh Quinlan, with myself, and three others had guaranteed the bank up to seventy thousand and when we reached our limit, Hugh Quinlan was too ill to discuss such matters, and as he and I were really the guarantors, I decided I might as well be responsible alone. He had previously expressed as a wish, to be out of all those affairs."

The A. W. Robertson Limited certificates are numbered as follows:

Certificate No. 2—925 shares
40 4— 1 share
9—510 shares
13—150 shares

"One-half of three shares Nos 7-10 and 11, making a total of 1587½ shares."

Yours truly,

"A. W. Robertson."

"You are not interested in the numbers".

This was in answer to a letter of the Capital Trust asking him the number of shares and certificates in Quinlan Robertson & Janin Limited, and Robertson answers "It does not interest you to know about the number of shares or certificates held by Mr. Quinlan. This has been explained to your Mr. Parent and to your Mr. Connolly by Mr. Perron, and that should be enough." And so, in the very first letter of Robertson to the Capital Trust one can see that he already wanted his co-executor
10 to believe that he knows with certainty that Mr. Quinlan did not want to stay interested in those concerns, that he wanted to get out of them, although we have just seen that Mr. Quinlan had clearly indicated in his will, shortly before he died, what his desire was. He wished his executor to continue the operations as before.

So, Robertson in this letter, gives to his co-executor the numbers of the certificates of A. W. Robertson Limited, but refuses to give them in Quinlan, Robertson & Janin Limited, Amiesite Asphalt Limited and
20 Ontario Amiesite Limited.

P. C. 15 joint case. Vol. 6 page 373.

The second letter is equally important; it is dated August the 19th 1927, and written by Robertson to Dr. Connolly, the General Manager of the Capital Trust and reads as follows—

"Today, Mr. Janin suggested a purchaser for the shares of the late Hugh Quinlan held in Quinlan, Robertson & Janin Limi-
30 ted, and the paving Companies. The price is to be two hundred and fifty thousand dollars—one half cash, and the balance in one year at 6 percent. The stock is to remain in your custody until fully paid; or if they will furnish collateral, that is acceptable to us, we shall transfer the stock at once. The collateral will have to be gilt edged stocks on which we have quite a margin or else Dominion Government or Provincial bonds which have a present value of at least ten per cent more than the $125,000.00 second payment. If this proposition meets with your approval, kindly write to me, and I shall consumate the transaction at once. As you know, four years
40 ago, Hugh Quinlan would have sold the interests in question for one quarter of this amount."

Yours truly,

"A. W. Robertson."

In the first place, and in the preceding letter he says "This belongs to me, I bought it" and then on August the 19th "Mr. Janin suggested a purchaser". Mr. Janin has in mind a purchaser and the price is $250,000. Both Mr. Janin and Mr. Robertson are in Montreal, while the Capital Trust is located in Ottawa. What is odd, Mr. Janin proposes a purchaser, and Mr. Robertson is ready to consumate the transaction at once.

10 "As you know four years ago, Hugh Quinlan would have sold the interests in question for one quarter of this amount." Robertson wishes them to believe that four years before, according to a valuation based on the prevailing state of affairs at that time, the partners had fixed a value four times below that set in this letter. He wished the Capital Trust to believe that this was a profitable transaction for the estate. But Robertson knew very well that the valuation to which he was alluding had no longer any effect in 1927, as the whole appears by the agreement between Messrs Quinlan, Robertson & Janin, and filed in the case as exhibit C-4 or DR-3, volume 5, page 167, clause 3, since the agreement provides for
20 a new valuation of the shares at each general meeting of the Company, which had not been done. Robertson himself admits it in his letter of September 26th 1928 (PC 15 joint case volume 6, page 396 in fine) when he writes to the Capital Trust—"You perceive that the June 11th 1925 agreement remained in force for virtually a year".

On August the 23rd, the Capital Trust answers Robertson's letter of the 19th; they say—

"Yours of the 19th instant has been duly received, in which
30 you state that Mr. Janin suggested a purchaser for the shares of the late Hugh Quinlan held in Quinlan Robertson & Janin for the price of $250,000. The price stated is we recollect in accordance with the arrangement made with you by the late Hugh Quinlan himself, prior to his death, and that you have a written agreement or letter to that effect; this being the case it seems to us that the executor should carry out the arrangement made by the late Hugh Quinlan and we are prepared to dispose of his holdings in accordance with the arrangement made by Mr. Quinlan himself."
40

"In regard to your suggestion, that one half of the amount be paid in cash and the balance at one year with six percent interest provided there are gilt edged security, such as Dominion of Canada or Provincial bonds, it seems to us to be quite satisfactory an arrangement. We would appreciate it if you would let us

have the letter or written agreement by Mr. Quinlan to complete our files in this matter."

Yours very truly,

Capital Trust Corporation

per E. L. Parent
Estates Manager."

10

PC 15 joint case volume 6, pages 374 and 375.

We are now at the 23rd of August and Mr. Quinlan is dead since June the 26th. Then we put the question; When did the Capital Trust come into possession of the "arrangement made by Mr. Quinlan"—never.

Nevertheless, the transaction was completed. It is not surprising that the learned Trial Judge declared in his judgment, joint case, vol. 8, pages 785-786—

20

"Considering that the Capital Trust should never have sustained the validity of these sales".

"Considering that for these reasons the Capital Trust should personally pay its costs."

"Condemns the Capital Trust to personally pay its costs."

The next day, the 24th of August, Robertson writes to the Capital

30 Trust—he has not got the letter from Mr. Quinlan; he writes as follows

"My recollection is that the Hon. J. L. Perron dictated a letter re Quinlan, Robertson & Janin Ltd shares. The Amiesite Companies were included, one of the latter is a considerable liability. You will recollect the stock of the latter is still in Mr. Quinlan's name but the purchaser will have to assume the liability associated with the ownership of the stock in question. Mr. Quinlan was on a bank guarantee too. Mr. Perron will require to advise us

40 as to the form required to have Mr. Quinlan's name removed from the before mentioned guarantee. Mr. Perron will not likely be here this week."

Yours truly,

"A. W. Robertson."

Note that the Capital Trust, answering Robertson's letter had not mentioned the Paving Companies, Amiesite Asphalt and Ontario Amiesite, as Mr. Robertson had intimated in his letter.

The Capital Trust had written him—

> "We think that you have a title, and we should like to see it."

10 Hence, Robertson's reply—"My recollection is that The Hon. J. L. Perron dictated a letter."

Mr. Robertson pretended to assume a logical standpoint which was non-existent in fact, for that day, strange as it may seem, he writes two letters to the Capital Trust, the one just quoted—in which he remembers that Mr. Perron has dictated a letter, and another, of like date, in which he includes a copy of a letter, but not of any signed by Mr. Quinlan, but under his own signature, which letter is the foundation of the two pleas 20 in this case.

First follows the second letter, dated August 24th 1927:—

> "Herewith enclosed please find a copy of my letter dated June the 20th 1927 to Mr. Quinlan, re; purchase of his stock Quinlan, Robertson & Janin Limited and the Amiesite Companies."
>
> "Yours truly"
>
> 30 "A. W. Robertson."

And now follows the enclosed letter:—

"June 20th 1927"

"Mr. Hugh Quinlan.
357 Kensington Avenue
Westmount. Que.

"Dear Hugh,

40 "This will acknowledge your transfer of the following stock to me:—

1151 shares Quinlan, Robertson & Janin Ltd.
50 " Amiesite Asphalt Limited.
200 " Ontario Amiesite Limited.
200 " Amiesite Asphalt Limited H. Dunlop.

which stocks represent all your holdings in the above Companies. I have agreed to obtain for your the sum of Two hundred and fifty thousand dollars ($250,000) for the above mentioned securities, payable one half cash on the day of the sale, and one half within one year from this date, which latter half will bear interest at six percent. Should your health permit you to attend to business within one year from this date, I agree to return all the above mentioned stocks to you on the return to me of the monies I have paid you thereon including interest at six percent."

10

Yours truly,

"A. W. Robertson."

"AWR/"

We respectfully draw the attention of the Court to the fact that this enclosed letter is only a copy, and we fail to understand why the Capital Trust contented itself with accepting a copy as such when Robertson was supposed to have the original since he was sending copies in August 1927.

20

Exhibit DR 1, joint case, vol. 6, pages 286-287.

We respectfully submit that a sale to Robertson should never have been made by the Capital Trust based on the enclosed letter copy only. Even if the Capital Trust had had the original of that letter, we contend it would have been insufficient title to complete the transaction since it did not bear Mr. Quinlan's signature.

30

Nevertheless, two days after this letter of August the 24th, the Capital Trust writes a letter to the Hon. J. L. Perron worded as follows:—

"We beg to enclose herewith copy of the letter received from A. W. Robertson, dated the 24th instant, enclosing copy of letter dated June 20th 1927 addressed to the late Hugh Quinlan; also a copy of a letter from Mr. Robertson, dated the 24th instant.

"If you do not see anything that would prevent the executors from making a sale of the late Hugh Quinlan's interests in the following Companies:—

40

1151 shares Quinlan, Robertson & Janin Ltd.
50 " Amiesite Asphalt Limited.
200 " Ontario Amiesite Asphalt Ltd.
200 " Amiesite Asphalt Limited in the name of H. Dunlop.

with a clause in the agreement releasing the late Mr. Quinlan's guarantee to the bank of the loan referred to in the copies of attached correspondence, you will kindly get in touch with Mr. Robertson at the first opportunity and arrange to prepare the said documents so as to enable the executors to complete the transaction as soon as possible."

Yours very truly,

10 Capital Trust Corporation

per E. L. Parent, L. A.
Estate Manager."

The Hon. J. L. Perron does not answer this letter, but on April the 29th of the following year (DR 48, vol. 7, page 459) he writes to Robertson an extremely important letter in which it is clearly, shown that the Quinlan Estate, in Mr. Perron's opinion, was still the owner of those shares as at that date, April 29th 1928.

20

From the 26th of August to the 4th of October, there is nothing very important in the correspondence; but on October the 4th 1927, we find a letter, addressed by the Hon. J. L. Perron (PC18 joint case, vol. 7, pages 525-526) which reads as follows—

"October 4th 1927"

"Dear Mr. Robertson,

30 After our conversation with respect to the Ontario Amiesite stock, I have been thinking over this matter, and I believe the proper way to clean up the matter is the following—

Apparently the stock belongs to the individual who are shareholders of Quinlan, Robertson & Janin Limited, but the money has been furnished by Quinlan, Robertson & Janin Limited, and the Ontario Amiesite Company is heavily indebted to Quinlan, Robertson & Janin Limited and the Bank of Toronto.

40 Quinlan, Robertson & Janin Limited will have to take care of the Bank of Toronto.

At the present time, not only the stock has no value, but it is even a liability.

If this meets with your approval, and with Trust approval, I would suggest that the stock be handed over to Quinlan, Robert-

son & Janin Limited, which in turn will undertake to keep the estate of Mr. Quinlan, yourself personally and Mr. Janin, free from all claims."

Yours very truly,

J. L. Perron."

On October the 12th, Robertson writes to the Capital Trust (PC 18, joint case, vol. 7, page 526):

10

"Enclosed please find a copy of letter from the Hon. J. L. Perron re Ontario Amiesite Stock standing in H. Quinlan's name. You have seen the statements of the Ontario Amiesite since its inception, so know there had never been anything but deficits there. If you approve, we shall have the stock in question transferred to Quinlan, Robertson & Janin Limited under the conditions enumerated in the Hon. J. L. Perron's letter."

20

On October 29th, Robertson sends to the Capital Trust the certificate for 200 shares of Ontario Amiesite in the name of Mr. Quinlan, asking them to endorse it and stating that he will endorse it himself and will make the transfer of which Mr. Perron spoke.

PC 18, Vol. 7, page 527.

On November the 9th the Capital Trust endorses the certificate and sends it to Robertson—

30

"Endorsed by us to Quinlan, Robertson & Janin" according to the instructions of Hon. J. L. Perron.

PC 18, vol. 7, pages 528-529.

But as a matter of fact, the Capital Trust has endorsed the certificate in blank:

See photostat Exhibit P-2 at Enquete.

40

Joint Case, Vol. 6, page 253.

And we will show later how and when Robertson instead of filling in the blank with the name of Quinlan, Robertson & Janin Limited, who in consideration of the transfer were to discharge the pretended guarantees at the bank, completed this blank with his own personal name in typewritten form (See same exhibit).

On November the 11th, Robertson acknowledges receipt to the Capital Trust of the certificate thus endorsed and assures them that on Mr. Janin's return from England, Quinlan, Robertson & Janin Limited—"will furnish the letter suggested by Mr. Perron."

PC 15, joint case, vol. 6, page 379.

10 Robertson's endorsation of the certificate to his own personal name happens on November the 16th—five days only after he had written to the Capital Trust that he would be transferring it to Quinlan, Robertson & Janin Limited—allowing only necessary time to send the certificate to the Company's office in Toronto.

DR 14, Minutes of Ontario Amiesite of November 16th 1927 joint case, vol. 6, page 280.

P-5 (Photostat) Nov. 16th, joint case, vol. 6, pp. 147.

20 Deposition of A. J. M. Petrie, joint case, vol. 4, pp. 693, lines 1 to 6 and pp. 704 lines 18 and following and 38 and following.

The Court will kindly note that as at the 16th of November 1927 no amount had been disbursed by Robertson and that it is only on December the 29th 1927 that the first $125,000 were sent to the Capital Trust, allegedly for fifty percent of the transaction involved in the letter of June 20th 1927, exhibit DR-1. We beg to add that if the letter of June the 20th had conferred on Robertson the legitimate right to purchase, which is denied, surely, on November the 16th, Robertson was still
30 without that right, by reason of the wording of the letter providing for "One-half cash on the date of the sale."

We might add that Robertson neglected to comply with the terms of the letter providing for the release of Bank liabilities on the part of the Quinlan estate. Only on September 27th 1928, when he was already threatened with a law-suit, on October 23rd 1928, three days before he received the writ in this case, and on November 16th 1928—long after he had been sued, did Robertson relieve the estate of its liability to the Bank. So that the estate now deprived of the certificates continued to
40 remain liable to the bank some sixteen months after the decease of Mr. Quinlan.

The preceeding facts are all established by the following exhibits:—

Vol. 7, PC-18, page 529 Letter Sept. 27th 1928 from Bank of Toronto to Capital Trust.

page 542 Letter April 10th 1929 Bank of Toronto to Capital Trust.

page 530 Letter Oct. 23rd 1928 from Wood Meen & Paterson to A. W. Robertson (At pp. 531 line 21).

10 page 533 Letter Nov. 5th 1928 from A. W. Robertson to W. G. Wood.

page 536 Letter Nov. 9th 1928 from Wood Meen & Paterson to Capital Trust.

page 539 Letter from Fidelity Insurance of Canada to Executors Estate Quinlan.

Vol. 5, PC. 34, page 116 lines 37 and following.

20 page 118 lines 22 and following.

During this time, what had happened to the two other Companies, viz—Quinlan, Robertson & Janin Limited and Amiesite Asphalt Limited, both mentioned in the letter of June 20th 1927 (DR 1) which Companies were subject to the same conditions of sale as the Ontario Amiesite, if the letter DR-1 were to be held valid and binding on the Estate, which is denied?

On June the 22nd 1927, four days before the death of Mr. Quin-
30 lan, Robertson managed to have all the 1151 shares of Quinlan, Robertson & Janin Limited and the 250 shares of Amiesite Asphalt Limited transferred to himself under the following questionable circumstances, viz—On that date, two meetings are held in the offices of the Companies 702 Sherbrooke Street, West, at which only two persons are present—Mr. Robertson and Mr. Janin. The hours set for the said meetings was —11 o'clock for Quinlan Robertson & Janin Limited, and 12 noon for Amiesite Asphalt Limited.

40 The two resolutions of the meetings are filed as P-13 and P-25 and are to be found in Vol. 6, pp. 277, 278, 279 and 280.

At the first meeting there is a formal transfer of shares by Mr. Quinlan of his 1151 shares in Quinlan, Robertson & Janin Limited in favor of A. W. Robertson. The motion to that effect is adopted unanimously. Coupled with this the minutes indicate alleged resignation of Mr. Quinlan as Vice President and Director, which is also adopted una-

nimously. However, on that date Mr. Quinlan is at home dying and furthermore is not compos mentis as declared by the learned Trial Judge in his notes, joint case, vol. 8, pp. 793, line 14.

Similar procedure transpired at the second meeting, viz—resignation of Mr. Quinlan, transfer of his 250 shares in Amiesite Asphalt Limited as follows—50 shares are transferred by Mr. Quinlan presumably, and 200 shares by J. H. Dunlop as holder for Mr. Quinlan—but no authorization from Quinlan to Dunlop appears in the record.

10

In general we find that the record shows no proof of either the resignation of Mr. Quinlan or his authorization to the transfer of shares. A. J. M. Petrie, who drafted the minutes, tells us that Mr. Quinlan had not authorized him either verbally or by writing to offer his resignation. Petrie's evidence is of the utmost importance and will be found in the following exhibits.

Vol. 4, page 691 lines 40 and following
692 lines one and following
699 the whole page
700 the whole page
701-702-703—the whole page.

20

Furthermore, it was Robertson alone who ordered Petrie to enter Mr. Quinlan's resignation. (pp. 702, line 26). It was also Robertson who ordered him to send the notice of meeting, as of the 18th of June, declaring to Petrie on the 18th that the shares were to be transferred, although the letter DR-1 bears the date of the 20th (page 700, line 32).

30

In addition Petrie swears that he is doubtful whether these meetings have actually been held. (pages 701-702).

Furthermore Robertson personally ordered Petrie to fill in the blanks on Mr. Quinlan's certificates with the name 'Robertson'. (Vol. 4, pp. 704 lines 36 and following).

And as regards the certificate of Ontario Amiesite, witness knew of the instructions of Hon. J. L. Perron to fill in the blank with the name of Quinlan, Robertson & Janin Limited, but swears that Robertson ordered him to substitute the name of 'Robertson'.

40

(Pp. 704, in fine and 705 lines 1 & 2).

Following what transpired at the Company's offices on Sherbrooke Street, Montreal, and at Toronto, we will now show the actual

conditions prevailing at the home of Mr. Quinlan on Kensington Avenue, where he was incapable of transacting any business for over a year and was lying sick and at the point of death.

From the date of his will, April 1926, Mr. Quinlan's physical condition necessitated the constant attendance of day and night nurses, but within a week of his death four nurses had to be in attendance.

(See evidence of Miss McArthur, Vol. 3, pp. 554, line 38). The following Nurses attended him, viz — Miss McArthur. Miss Kerr, Miss Clarke and Miss Beauchamp; the two first from April 1926 to June 26th 1927 date of death, and the two others within the few days preceeding his demise.

Miss McArthur testified at pp. 555, vol. 3:—

"Mr. Quinlan was always a very sick man, and at times he was more seriously ill. He took heart attacks and he was always in a serious condition."

Page 557, line 15, Vol. 3.

On the 18th, although very sick, he went for a drive in his car, aided by one of his sons, Miss McArthur and his Chauffeur. Miss McArthur had received instructions to give him morphine to sustain him, which she did before leaving.

Vol. 3, pp. 557, lines 28 and following.

This was the last occasion on which Mr. Quinlan was outside his home prior to his death.

After the 18th "He was in a very serious condition"; Vol. 3, pp. 558, line 20.

On the 18th, coming back from his outing "He was very tired and very weak. His condition was worse on Sunday the 19th. On Monday his condition continued to be worse." The same relapse continued to grow worse in succeeding days. "His mind was becoming befogged on Tuesday and Wednesday and it increased until the end."

The Court will note that Tuesday was the 21st (See pp. 558):

"Q.—When did he fall into coma?

"A.—It was gradual. I think it was starting from Monday (the 20th). His mind was becoming weaker." (page 558).

Miss McArthur was on day duty in the month of June, (Page 556, line 42).

Miss Kerr, the next witness, was on night duty in June. (page 551 line 21).

Miss Kerr confirms entirely Miss McArthur's evidence. (Page 561 and following) "Saturday, Sunday and Monday he was worse. Tuesday he was much worse."

10

(Vol. 3, page 561, lines 47 and following). After the outing of the 18th, Mr. Quinlan never left his bed again.

(Page 562, line 45.)

After Saturday and Sunday, the 18th and 19th, Miss Kerr was unable to get any response to talk with her patient. (Page 563, line 44) "Tuesday night was a very bad night". Mr. Quinlan did not know Miss Kerr save at brief intervals after Tuesday. (Page 564, line 50).

20

From Wednesday morning, on, Mr. Quinlan was unable to ask his nurse for anything. (Page 564, line 17).

Miss Clarke, the third nurse was in attendance during the three or four last days of his illness.

"Q.—You did not speak to him at all?
"A.—Not any more than one would speak to a baby who was unconscious."

30

(Page 583, line 12.)

Doctor Hackett testified for the Defence, stating that in 1925 Mr. Quinlan had to stay in his room at intervals. (Vol. 4, page 658, line 34 and following). He made nineteen visits in May (Page 658, line 10) In June "His mental condition was good up to the 22nd," when Mr. Quinlan began to be "very dull" (Page 659 line 40). "On the 24th, 25th and 26th he was practically unconscious." (Page 659).

40

"Mr. Beaulieu:—

"Q.—During the month of May was he able to transact business?
"A.—Yes.

"Q.—Would the same answer apply to the first part of June—up to but excluding the twenty second?
"A.—Yes.

"BY THE COURT:

"Q.—Even on the Sunday the Monday and the Tuesday?
"A.—He began to get quite dull on the Tuesday afternoon.

10 "BY MR. BEAULIEU (CONTINUING).

"Q.—On the afternoon of the 22nd?
"A.—Yes." (Vol. 4, page 660, lines 10 and following).

Dr Hackett had clearly said Tuesday afternoon, and the Court will kindly note that Tuesday was the 21st and not the 22nd.

One of the Plaintiff's, Margaret Quinlan, spoke to her father for the last time on Sunday the 19th. Vol. 3, page 576, line 14.

20

Having told her father about certain business, Mr. Quinlan told her to see him on the Monday, the 20th; but on the 20th, the day nurse Miss McArthur, informed her she could not speak to her father because he was too ill and could not discuss business. Page 576, line 33.

From Sunday, the 19th, on, Mr. Quinlan was unable to have speech with his daughter. Page 576 lines 27 and following.

30 On Wednesday the 22nd, the witness's mother telephoned her that Mr. Quinlan was dying, asking her to immediately come to the house. Page 576, line 35.

Witness went to her father's house where she met Dr. Hackett and Mr. Robertson. Robertson asked to see Mr. Quinlan on business, but Dr. Hackett would not permit the interview, and Robertson thereupon telephoned to the Hon. J. L. Perron, telling him that it was useless to come to Kensington Avenue as Mr. Quinlan could not see them. Page 576 and 577, Vol. 3.

40

This transpired at 11 a. m. on Wednesday the 22nd.

Margaret Quinlan has not been contradicted.

In view of the above proof, are we not right in claiming that on the 20th of June and even one or two days previous Mr. Quinlan was not competant to transact business especially matters requiring careful de-

cision. We even think that he was but partially compos mentis on the Monday, the 20th. In any case, as we have said before, the learned Trial Judge declared in his notes that Mr. Quinlan had ceased to be compos mentis on Wednesday the 22nd.

But in the Month of May, Mr. Quinlan had still sufficient strength to do an important act, viz—dictate to his son William Quinlan the memorandum filed as P-66, which is reproduced in vol. 6 of the joint case page 282 in photographic form.

10

At pages 584 and following of Vol. 3, William Quinlan explains the origin of this exhibit, which bears the date of the 21st of May 1927; it is in the witness's handwriting and reads as follows—

"No. 9 Amiesite DUNLOP		200)	Dep.
"No. 5 Amiesite H. Q.		49)	in
"No 1 Amiesite H. Q.		1)	A. W. R. Box.
"Q. R. J.	H. Q.	1)	Dep. in A. W. R."
"Q. R. J.	H. Q.	1150)	box.

20

"May 21/27"

The witness swears that the information contained in this exhibit, was given to him by his father Mr. Quinlan. He explains that the word 'Dep.' means deposited, and the letters 'A. W. R.' means Angus William Robertson, the appellant. So then on the 21st of May 1927 Mr. Quinlan had his son prepare this memorandum establishing the whereabouts of above securities as being in Robertson's box.

30

As the learned Trial Judge says in his notes, Vol. 8, page 796—"The note that Mr. Quinlan asked his son to take down is but a memorandum that was to remind him or to inform his heirs of the whereabouts of the shares in question." It should be noted that these certificates thus deposited in Robertson's safe deposit box of May the 21st or before were in blank form, since Robertson instructed Petrie to fill in the blank with Robertson's name on the 22nd June only, on the occasion of the Company's meeting heretofore referred to.

40

It is important to know when Mr. Quinlan actually endorsed these certificates in blank in order to entrust them to his testamentory executor Mr. Robertson. The two pleas together with their particulars say—"On or about June the 20th 1927." Robertson examined on discovery says the same thing. Of course the date of the delivery had to coincide with the letter of June the 20th 1927. Exhibit DR-1.

We quote from Robertson's particulars, Vol. 1, page 56-D:—

"The said agreement (The letter of June 20th 1927, DR-1) was signed by A. W. Robertson, the defendant, and by him DELIVERED to Hugh Quinlan, who IN TURN, delivered to the said defendant Robertson his certificate for said shares, endorsed in blank." Vol. 1, page 56-C:— "The said agreement was dated the 20th of June 1927." In his examination on discovery, Robertson swore that the certificates were endorsed by Mr. Quinlan about one week before he died, which brings us to about
10 the 19th or 20th of June. Joint case vol. 2, pp. 269 line 28, and pp. 265 to 271 passim.

Our contention is that the ertificates endorsed by Mr. Quinlan were so endorsed on or before the 21st of May 1927, and our authority for it is the following:

(1) The memorandum P-66, filed by William Quinlan and dated May 21st 1927. Vol. 6, page 282.

20

(2) Miss Kerr's evidence. This witness was present when Mr. Quinlan signed the certificates, or some of them. The certificates in photographic form bear the following quotations, viz:—

P -9	1	share	Amiesite....	Joint case,	vol. 5, pp. 37.
P-10	49	"	"	"	vol. 5, pp. 127.
P-11	200	"	"	"	vol. 5, pp. 128.
P-26	1150	"	Quinlan Robertson & Janin Limited	"	vol. 5, pp. 164.
P-27	1	"	do	"	vol. 5, pp. 165.

30

Miss Kerr saw Mr. Quinlan sign in the month of May, she knows that it could not be in June because she was in night duty in June and remembers that the signature was given immediately after a noon meal.

Joint case, vol. 3:

Page 566 lines 49-50
Page 569 " 33
Page 642 " 30
Page 642 " 41
Page 644 " 9
Page 645 " 35
Page 645 " 14

40

(3) Robertson's own evidence: against the catagorical evidence of Miss Kerr and exhibit P-66, filed by William Quinlan, Robertson

found himself obliged to rehash his previous testimony finally admitting that the certificates had been endorsed "about the last week in May".

Joint case, vol. 4, page 792 lines 42-43.

But then, since the certificates were endorsed in blank in the month of May, what of his plea to the effect that the certificates were transferred to him in discharge of the obligations contained in the letter of June 20th 1927 (DR-1)? Mr. Quinlan would have transferred them before he had anything in his hands to protect his own interest, which is very unlikely. It is important to know exactly what certificates Mr. Quinlan endorsed and how many he endorsed. A sensation was created at the enquete over that proof; as we have said, Miss Kerr—one of the nurses—witnessed Mr. Quinlan's signature. In a general way she says—"In the month of May Robertson comes to Mr. Quinlan's house an he asks Miss Kerr to witness Mr. Quinlan's signature, he tells her it concerns shares of the Company (Joint case, vol. 3, page 566). They proceed to Mr. Quinlan's bedroom. Mr. Quinlan signs and Miss Kerr signs after him as witness."

The four certificates produced at enquete in photographic form are shown to her, they are P-9—1 share Amiesite; P-10, 49 shares Amiesite; P-26, 1150 shares Quinlan Robertson & Janin Limited; and P-27, one share Quinlan, Robertson & Janin Limited. But as soon as she examines them she declares—"I signed two." Joint case, volume 3, page 569 line 13. She repeats the same thing at line 25.

"BY THE COURT:—

Q.—And that was all?
A.—Yes, your Lordship.
Q.—You are sure?
A.—Yes. I witnessed Mr. Quinlan's two.
Q.—And you signed twice?
A.—I signed twice in May.

BY MR. MASSON:—

Q.—You did not sign four?
A.—No. I signed two.
A.—I do not see where they get four. I would like to see the originals. Vol. 3, page 569.

Mr. Masson "Then, we will suspend her examination on this until two o'clock".

His Lordship to the Witness—"If you are coming back at two o'clock, I wish you would not speak to any one, or let anyone speak to

you, about this case, without any exception whatever. No one should approach you to make you remember better, or anything of the kind. Keep aloof from anybody."

CONTINUING AFTER THE RECESS—The original certificates were shown to Miss Kerr.

Q.—Did you sign those four share certificates as a Witness?

A.—I signed two. I witnessed two. That is all I know I signed.

10

Q.—Will you look at the four certificates now before you, and say whether you signed them all or only two of them?

A.—I know I only signed two.

BY MR. BEAULIEU:—

Q.—Which of the four?

A.—That is a very hard question.

BY MR. MASSON:—

20

Q.—To the best of your knowledge?

A.—I did not sign any on the date marked on them. And I only signed two. (Joint case vol. 3, pp. 641 passim.)

A.—I signed two in the month of May. I witnessed Mr. Quinlan's signature.

Q.—Did you ever sign any after that?

A.—Never, or before that. When I was on day duty I signed two. Joint case, vol. 3, pp. 642.

Q.—Did Mr. Quinlan signed more than two papers in May when you were witness?

30

A.—I did not see him sign more than two.

At this point of her testimony, Mr. Beaulieu exhibited to the witness the four documents, after shuffling them. The witness recognized her signature twice on the same document, viz — No. 1 Amiesite — one share; she also recognizes her signature on No. 4 Quinlan, Robertson & Janin Limited—one share; but she definitely denies it being her signature on the third certificate No. 8 Quinlan, Robertson & Janin Limited, 1150 shares.

40

The fourth certificate No. 5 Amiesite—49 shares, was not shown to her by Mr. Beaulieu, and we might add that she also had refused to recognize this certificate when questioned by Mr. Masson as also No. 8—Quinlan, Robertson & Janin Limited, 1150 shares at the same time.

In any event, she swears that she only signed two and there is no reason why the Court should doubt her testimony since it has been proven that she was correct as to the question of the date.

It is true that Mr. Hazen, the handwriting expert, testified that the four signatures were of the same person but we submit that his examination was but superficial as appears by certain questions put to the witness by the learned Trial Judge (Vol. 4, pp. 768).

Deschenes v. Langlois, 15 B. R. 388.

We respectfully submit that the evidence given by the expert can not destroy that of Miss Kerr, even if Miss Kerr were not corroborated on the point, but she is, as a matter of fact, corroborated in the proof, as we will now proceed to establish in quoting part of Robertson's examination on discovery. When questioned concerning the manner in which he took possession of the share certificates, Mr. Robertson has testified as follows.—

Q.—How many share certificates were handed over to you that day?
A.—I think three.
Q.—Which ones?
A.—One for 50 shares of Amiesite and Dunlop's 200 shares and the Quinlan, Robertson & Janin Limited certificate." (Joint case, vol. 2, pp. 270, lines 40 and following).

As Dunlop's certificate for 200 shares bears the signature of L. N. Leamy as witness, and not that of Miss Kerr (vol. 5, pp. 128, exhibit P-11) it follows that according to Robertson himself, two certificates only were handed over to him by Mr. Quinlan in Miss Kerr's presence, and so, she is again corroborated.

The question is—were they the two certificates described by Robertson in the above citation. This is more than doubtful.

If this Honourable Court believes that Miss Kerr is correct it follows that her signature and that of Mr. Quinlan must have been forged on two of these certificates.

In taking possession of the certificates in circumstances described on his examination on discovery, the good faith of Mr. Robertson is open to question.

We will now quote from the record in support of this contention —Joint case, vol. 1, page 114, vol. 2, pp. 265, and following.

"Q.—You cannot say whether it (the certificate) bore the signature of Mr. Quinlan on the back or not, is that right?

"A.—From memory, I cannot say whether it did or not, but I would say it must have born his signature.

"Q.—Was there any other name on the back of the certificate at the time it was handed over to you, apart from the name of Mr. Quinlan, if that name was there?

"A.—I do not remember.

"Q.—I am speaking now of 50 shares of Amiesite Asphalt Ltd.?

"A.—I have no recollection of any certificate ever being handed to me by Mr. Quinlan or any one for him that did not bear his signature if he transferred it to me.

"Q.—Apart from that, did it bear any other name or was it endorsed in blank?

"A.— It would be endorsed, his name would be written on the back of the sheet if he transferred it to me or were transferring it to me, but he would not put in my name if that is what you mean.

"Q.—Your name was not put in?

"A.—I do not know, as I do not remember now."

Vol. 1, page 114:

"Q.—A few days before Mr. Quinlan died, you received a share certificate, which, according to you, had the signature of Mr. Quinlan on the back of it?

"A.—Yes.

"Q.—You went to Mr. Quinlan's house together with Mr. Leamy that time?

"A.—I have forgotten, I think so, I have just forgotten the details of it."

(Vol. 2, page 265 lines 1 and following and lines 37 and following):—

"Q.—Who were present beside Mr. Leamy and yourself?

"A.—I do not know.

"Q.—Who handed the certificate to you?

"A.—I thought it was Mr. Leamy, but I have forgotten.

"Q.—And you were in Mr. Quinlan's residence at the time the certificate was handed to you?

"A.—Or I got the certificates. I have just forgotten where I got them.

"Q.—You said a moment ago it was given to you in Mr. Quinlan's residence?

"A.—That is my recollection.

"Q.—So, according to your recollection, the share certificate was given to you in Mr. Quinlan's residence?

"A.—Given to me sometime anyway.

"Q.—I am not speaking about, the time, I am speaking as to the place?

"A.—I have forgotten where it was given to me.

"Q.—But, according to your recollection, it was in Mr. Quinlan's residence?

"A.—I have never thought of the incident since, so I have not it in my mind.

10 "Q.—Do you remember having said a moment ago that according to your recollection it was in Mr. Quinlan's residence?

"A.—That was my recollection.

"Q.—Is it still your recollection?

"A.—Yes.

"Q.—Was there anyone else present at that time?

"A.—I do not remember.

"Q.—Were the nurses present?

"A.—I do not remember that.

"Q.—Were you with Mr Leamy that day when you saw Mr. Quinlan?

20 "A.—That is my recollection.

"Q.—So, when you spoke to Mr. Quinlan that day you were with Mr. Leamy?

"A.—I would say so but I have forgotten the incident.

"Q.—According to your recollection you received the share certifiate in Mr. Quinlan's house?

"A.—I am not clear on it. I told you that at the beginning. I am not clear just how I got the share certificate.

"A.—....I am not at all certain just how I came into the

30 certificate at all.

"Q.—Are you sure Mr. Quinlan gave the certificate to Mr. Leamy?

"A.—No, I am not, but I am sure Mr. Quinlan endorsed the certificate.

"Q.—Were you present when it was endorsed?

"A.—Sure.

"Q.—You were present when it was endorsed?

"A.—That is my recollection.

"Q.—Is it your recollection, or are you sure it was signed in

40 your presence?

"A.—My recollection.

"Q.—So you are not sure?

"A.—I have not a clear recollection of it.

"Q.—Are you positive Mr. Quinlan's share certificates had not been endorsed a long time before you went to see him?

"A.—Yes, absolutely certain. About a week before Mr. Quinlan died.

"Q.—How many share certificates were handed over to you that day?

"A.—I think three.

"Q.—Which ones?

"A.—One for 50 shares of Amiesite, and Dunlop's two hundred and the Quinlan, Robertson & Janin Limited's certificate.

Joint case, vol. 2, pages 266 and following:—

10

"Q.—The dates of the endorsements on the share certificates would show when they were handed over to you?

"A.—No. I would not say that. They would have to go back to the auditor, it might take a day or two to get them endorsed, that does not apply to the Ontario Amiesite because it would have to go to Toronto.

"Q.—When did you hand them in? (to be transferred)?

"A.—The transfer dates would be within a day or two, I handed them in to the office, and they were transferred there.

20

"Q.—Within a day or two after you received them from Mr. Leamy?

"A.—Yes, that is my recollection.

We apologize for quoting unduly at length but think these answers coming from Robertson throw considerable light on the transfer dealings.

Robertson's hesitating testimony and falsehoods have to be coupled with the correspondence exchanged in the beginning of his administration with The Capital Trust. The last letter quoted was that of November 11th 1927.

30

Between November 1927 and September 1928 there is a very important fact uncovered. As we have seen, the shares are in his name since June the 22nd 1927. What then does he do—he goes to the Collector of Revenue for the Province of Quebec, and as an Executor of the Estate he declares that the 1151 shares of Quinlan, Robertson & Janin Limited are still the property of the Quinlan Estate; he discusses with the office of the Collector the value of these shares, which is, after many months of correspondence, finally fixed at $185.00 per share; he pays, out of the monies of the estate the duty on the assessed price of these shares viz— on $212,935.00, and although he pretends in his plea that this has been done through an error on the part of the Capital Trust, he does not see to it that the estate is refunded such monies disbursed as assessment.

40

It is to be noted moreover, that although he made his declaration as to Quinlan, Robertson & Janin Limited shares, he does not include in it the shares of Amiesite Asphalt and Ontario Amiesite. Since the let-

ter of June the 20th comprised the three Companies, they should have been treated as a unit.

Joint-case, Vol. 7, pp. 457 (Photostat) P-76 First declaration to Revenue Office.

Vol. 7, pages 472, 473, 475, 477, 478, 479, 480, 481 PC-5, correspondence with Revenue Office.

10 Vol. 7, pp. 413 DC-8. Declaration to Revenue Office.

Vol. 6, pp. 309, 312, P-2 with the declaration, inventory sent to the Heirs.

Vol. 3, pp. 653, 654, 655. Deposition of Anatole Lazure, Chief of Succession Office, and especially at pp. 655 lines 39 and following.

20 Vol. 1, pp. 147 line 28. Deposition of Robertson.

Vol. 1, pp. 92, amended plea of Robertson, paragraph 44.

All these facts had happened, the pretended sales had been made to Robertson, and nevertheless, Robertson had not yet paid one cent for these shares. Suddenly there appears two letters from Robertson to the Capital Trust, both bearing the same date—Dec. 29th 1927—In the first one (Joint case PC-5, Vol. 7, pp. 479 line 27 & following) he says:—

30 "...So far as Quinlan Robertson & Janin Limited is concerned, you know neither you nor I can get anyone to buy it and pay any reasonable sum for it."

And in the other letter (Joint case, vol. 6, PC-15, pp. 380), of the same date, he sends $125,000 to the Capital Trust as representing half of the purchase price!

The Capital Trust acknowledges receipt on the 31st, but asks Robertson to pay $3750.00 representing interest during six months (from June 20th to December 29th) which amount Robertson pays. (Joint
40 case, vol. 6, PC-15 pages 381-382) and what is strange, the Capital Trust demands this interest, not to Robertson personally, but to Quinlan, Robertson & Janin Limited whose name the account bears. (Vol. 6, PC-15, page 380 lines 35 and following). Robertson answers (PC-15, vol. 6, page 382 lines 22 and following) "I shall endeavour to collect the $3750.00 interest account which you have billed me for the Hugh Quinlan's Estate"

which shows how much Robertson wished the Capital Trust to ignore that he personally was the purchaser.

On January the 4th, many days after this payment of $125,000 was received, there is still some discussion between the Succession Duty Office and the Executors on the valuation of the Quinlan, Robertson & Janin Limited shares, still supposed to belong to the Quinlan Estate. (Joint-case, vol. 7, PC-5, page 481, line 15).

10 On January the 28th 1928, Robertson sends a further remittance of $125,000 (Vol. 6, PC-15 pp. 385).

All these dealings are consumated without the Capital Trust having in its possession the letter of June the 20th 1927 (DR-1). Nevertheless everything is tranquil, until on the 24th of July 1928 one of the Plaintiffs commences correspondence with The Capital Trust which terminated on September 20th 1928 by the plaintiffs' refusal to accept the inventory sent to them and the rendering of pretended accounting. (Vol. 8, PC-14 pages 641 and following). Whereupon The Capital Trust, fear-
20 ing legal action, seek to obtain possession of the famous letter.

We beg to draw the attention of the Court to the fact that up to September 1928, the Heirs had been kept in complete ignorance of the affairs of the estate; they knew nothing of the transfer of shares, not even after receiving the inventory of the assets of the estate, which had been reluctantly sent to one of the plaintiffs. (Exhibit P-2, vol. 6, pp. 309; see notes of the learned Trial Judge vol. 8, pp. 790, lines 1 and following), they knew nothing until one of the plaintiffs received a docu-
30 ment purporting to be an accounting and which is filed as exhibit P-4, vol. 6, pp. 297. At page 301 can be found the following words at the bottom of this document:—"Quinlan Robertson & Janin Limited sold in 1928 for $250,000". No mention whatever was made of the Amiesite Companies.

See paragraphs 61-62 of the declaration, vol. 1, pages 9 & 10.

It had then become urgent to locate the letter of 20th of June 1927, D. R. 1, and on September the 25th 1928, the Capital Trust writes
40 to Robertson the following letter:—

"Dear Sir,

Herewith me enclose copy of your letter dated June the 20th 1927, addresed to Mr. Hugh Quinlan, and which you handled us on August 24th 1927.

The Hon. Mr. Perron recommended this morning that our Corporation should have the original of this letter on file, so will you kindly ask Mr. Leamy to find this letter which must have been left in your office."

(Vol. 6, DC-15, pp. 391.)

Robertson's answer is of the same date:—

10

"I have not been able to find the original letter referred to by Mr. Parent this morning, when he, Hon. Mr. Perron, W. A. Quinlan and myself had the long conference, but on August the 26th 1927, you wrote to Hon. J. L. Perron re the matter of my disposing of the stock enumerated in the letter in question, and everything was approved, and I proceeded to sell the stock with what result you will find in subsequent correspondence to you."

Vol. 6, PC-15, page 393.

20

It thus appears that there had been a long conference that day relative to the affairs of the estate, and it had been decided that the original of the letter supposedly written by Robertson had to be located. This was more than fifteen months after the death of Mr. Quinlan.

The next day, September 6th 1928, The Hon. Mr. Perron wrote a rather strange letter to the two Executors, so strange in fact that Mr. Beaulieu felt the necessity of explaining it during the course of Mr. Robertson's evidence.

30

At the commencement of that letter, Mr. Perron said:—

"Following our conference of yesterday morning I beg to remind you of the decisions which were adopted at that conference:

1st. Try, if possible, to find the original of the letter of the 20th of June 1927 from the late Mr. Quinlan to Mr. A. W. Robertson." (PC-15, pp. 394, vol. 6.).

40

The Court will notice that Robertson, while declaring that there does not exist any other letter than his own of the 20th of June, tries to establish that the Hon. Mr. Perron had simply made a mistake in speaking of a letter from Mr. Quinlan to himself (Robertson). Vol. 4, pp. 821 lines 35 and following.

But what appears to be stranger still, and to complete this incident, we find in the month of October 1930, in Mr. Perron's record filed

in Court by Miss King, a letter from Robertson, dated October 29th 1930, where Robertson advises Messrs Perron, Vallee and Perron that the letter "which Mr. Quinlan has signed" is in the hands of the Capital Trust! But this supposed letter from Mr. Quinlan was never filed. (Vol. 8, P-78, pp. 697 line 30).

We readily understand that the Hon. Mr. Perron, even if he were mistaken, as Mr. Robertson contended afterwards, was perfectly right in urging the Executors to find Robertson's letter to Mr. Quinlan: the sale
10 had been made and the supposed letter of Robertson was not even in the Capital Trust's file. Now that part of the Estate has passed into the hands of Mr. Robertson, do your utmost to find the original, for this is your only salvation, it is the only document on which you can possibly rely to establish some kind of a plea that you were justified in selling the shares.

On the same day, September the 26th, we have another letter from Robertson to The Capital Trust:—

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> "I have not been able to locate the original of letter of June 20th 1927...But the Hon. J. L. Perron and L. N. Leamy can both make affidavits to that effect for they saw the letter; and I showed it to Dr. Connolly on his first visit to this office after Mr. Quinlan's death. I shall continue to hunt for the letter in question, but you search all your files, for you got all Mr. Quinlan's papers in his house, bank vault, and everything here that Mr. Leamy knew belonged to him." Vol. 6, PC-15 pp. 395-396.

30 It is only on December the 6th 1928, eighteen months after the death of the Testator, eighteen months after the transfer to Robertson, twelve months after the payment, and two and a half months after the service of the writ in this case, that for the first time the letter of June the 20th 1927 appears in the Capital Trust's files.

Vol. 8, pp. 699, PC-33, Letter from Dr. Connolly to A. W. Robertson, which reads as follows.—

> "December 6th 1928"

40

> "Dear Mr. Robertson,
>
> This will acknowledge receipt from you of the original of the letter written by you to Mr. Hugh Quinlan on June the 20th 1927, acknowledging transfer to you of the following stocks, and setting out further the price and conditions of purchase of the same:—

1151 shares Quinlan Robertson & Janin Limited
50 shares Amiesite Asphalt Limited
200 shares Ontario Amiesite Limited
200 shares Amiesite Asphalt Limited (H. Dunlop)

This letter will be at your disposal should you require the same."

"Yours sincerely,

10

B. G. CONNOLLY,
Managing Director"

The appellant has tried to establish that he, Hon. Mr. Perron and Mr. Janin had already conferred regarding the price to be paid for the Quinlan shares, and had fixed that price at the sum of $250,000. Mr. Perron had drafted the tentative letter to Mr. Quinlan, and this draft had been used by Mr. Robertson on June the 20th to make his offer to Mr. Quinlan. If we are to take as the truth Mr. Robertson's evidence, he and Mr. Leamy went to Mr. Quinlan's house, entered his bedroom, and then and there read this supposed letter to the Testator. We do not wish to comment for the moment on this way of proceeding. Here is a man on his deathbed, they knew it perfectly, mortally stricken, and still they had to go to him. They did, according to their evidence, Leamy read the letter, which he says he had typewritten himself in accordance with the draft prepared by the Hon. Mr. Perron, and of which a supposed duplicate remained in the files of Mr. Perron and has been filed as exhibit DR-2. But, by comparing DR-1 and DR-2 we ascertain that it is not a duplicate—Another error! Mr. Quinlan answered what? We do not know. Both the Superior Court and the Court of Appeals have maintained Respondent's objections to this proof, and we shall try to supprot this view in the last part of the present factum.

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30

What we know, at this time Robertson evinced a growing anxiety; and was working with frantic haste. Mr. Quinlan having ceased to be compos mentis, the meetings of 22nd of June were called, the transfer of the shares had to be made. Why this haste? Why this anxiety? Robertson, Testamentary Executor, with power to sell, exercises this power, not in favor of a third party, as he had tried to make the Capital Trust believe, but of himself personnally. Having been unable to accomplish it before Mr. Quinlan's death, he lost no time in consumating it thereafter. The price involved—even were it a fair price is immaterial because everything is illegal at its source.

40

Ingpen "on executors", pages 244-245, says:—

"The Trustees is absolutely precluded from buying the Trust property."

"The rule is now universal, that however fair the transaction, the cestui que Trust is at liberty to set aside the sale and take back the property."

10 Respondents financial expert, Mr. Robert Schurman, has given evidence at pages 599 and following vol. 3, and 707 and following of volume 4, of the joint case. He is 53 years old, the head of R. Schurman & Company, and is a Chartered Accountant since 1902. He has examined the financial statements of Quinlan, Robertson & Janin Limited, from 1922 to 1928 inclusive. Those statements are filed as follows:—PC-10, Vol. 5, pp. 15 and following and P-23, vol. 7, page 580. For 1927, Mr. Schurman has found the value of each share of Quinlan Robertson & Janin Limited to be $208.07, (vol. 3, page 600, line 33.) For 1928 it is $249.00 (Page 601, line 18). We already know that for income tax purposes it 20 had been fixed in 1927 at $185.00 per share. Mr. Schurman does not take into account the goodwill of the Company (Page 602, vol. 3, line 31). 1151 shares at $208.07 equals $239,488.57 for the shares of Quinlan, Robertson & Janin Ltd. alone. If we add to this $28,314.60 being dividends unpaid but coming to Mr. Quinlan as Mr. Schurman explains at page 610, that makes $267,803.17 for the shares belonging to Mr. Quinlan as at the 31st of March 1927.

The same reasoning applied as at the 31st of March 1928 with 30 $249.00 as a basis for each share would equal $314,913.60 for the 1151 shares. (See pp. 611 line 8, vol. 3,)

Mr. Schurman also examined the statements of Amiesite Asphalt Limited for the years 1927 and 1928. His calculation gives $265.68 per share for 1927, and $434.25 per share for 1928. The financial statements of Amiesite Asphalt are filed as P-17, vol. 8, pp. 661 and following and P-55, vol. 6, pp. 266 and following.

The valuations are based on the financial statements themselves, 40 and Mr. Petrie, Robertson's expert, had to agree with Mr. Schurman as to its exactness. The Court will find in exhibit P-68, vol. 6, pp. 275 a summary of the work done by Mr. Schurman in tabulated statements.

We might add that as far as Amiesite Asphalt Limited is concerned, this Company has been sold in 1928 by Robertson a very few days before the present action was taken, for the enormous sum of $750,000, of which Mr. Robertson got one-third, viz—$250,000. (See Robertson's ex-

amination on discovery, vol. 1, pp. 108, line 18). It is true that another Company—The Macurban Asphalt Limited, was comprised in the sale, but it is found that the value of Macurban Asphalt Limited is $158,518.70 taking as a basis the financial statement of that Company, filed as exhibit P-19, vol. 8, pp. 666 and following, there remains $592,000. as the price of Amiesite Asphalt alone, which figure corresponds to the value given by Mr. Schurman. Concerning Macurban Asphalt Company Limited, we might state that this Company was organized on April the 27th 1927, two months before Mr. Quinlan's death; it was financed then by Quinlan Ro-
10 bertson & Janin Limited and Amiesite Asphalt Limited as this honorable Court will see by the financial statements of the latter named Companies. Macurban Asphalt had the same offices, the same staff, the same telephone as the two others and nevertheless, Mr. Quinlan was deliberately excluded from this Company, he was given no shares in it, although his money had financed it for one-third, and this in the month of April 1927, at a time when Mr. Quinlan had not yet endorsed, even in blank, his certificates in the two other kindred Companies.

20 Deposition of Mr. Spellane, Vol. 3, pp. 532, line 46.

Deposition of Robertson, on discovery, Vol. 2,:—

Page 222, lines 15 and following
223 " 16 " "
228 " 30 " "
232 " 30 " "
365 " 34 and following
366 " 15 and following
30 Page 367, lines 20 and following
368 " 8 " "
369
373
376, lines 20 and following

We now close the argument on facts concerning this first group of transfers by stating that contrary to appellant's contention, the Hon. Mr. Perron never approved, at least by writing, the sales that were later made to Robertson, as the whole appears from the learned Trial Judge's
40 notes. Vol. 8, pp. 798, lines 25 & following and vol. 8, pp. 804, lines 35 and following.

We therefore submit respectfully that all proof tending to establish verbally that the Hon. Mr. Perron advised and approved those sales should be dismissed from the record as illegal and contrary to article 1235 of the Civil Code.

B

The Appellant did acquire from the Estate of late Hugh Quinlan 400 shares of Fuller Gravel Limited, and the acquisition of said shares is illegal, null and void.

At the date of his death, Mr. Quinlan owned 1000 preferred and 499 common shares in Fuller Gravel Ltd. Appellant owned the same number, but held control through two or three shares standing in the name of his brother and brother-in-law. We contend that Robertson has illegally acquired 550 of these 1000 shares (preferred), owned by Mr. Quinlan or his estate, viz—400 directly from the estate, and 150 by intermediates, in the person of one W. E. Tummon. Appellant also illegally acquired a certain number of common shares, forming part of the 499 above mentioned, but of which we need not here refer to as they were bonus to the preferred stock.

Here again the best witness is the correspondence exchanged with the co-executor the Capital Trust Corporation Limited, which will be found in volumes 6 & 7, quoted as exhibits PC-25 vol. 7, page 462 and following; and PC-26, vol. 6, pages 315 and following.

On August the first 1927, more than a month after Mr. Quinlan's death, Robertson writes to the Capital Trust in care of Dr. Connolly the following letter:—

> "At your earliest convenience, I wish you and the Hon. J. L. Perron would investigate the Fuller Gravel Limited, with a view of naming a price on the late Hugh Quinlan's shares.... The property is now operating on a profitable basis, and it should be less difficult to sell 50% of it than at anytime since we began business. All I ask, is that I be sold 2% of the stock, so that I shall not lose control. My idea is to endeavour to sell it to some people who would have a direct interest in promoting the sale of gravel and sand...It is real cut-throat business. A month ago it looked as though the whole business would be disrupted. We could not sell on past performance, for we have never earned a dividend after providing for depreciation. Therefor, we should not discuss the past unless we are compelled to show statements and then we will not let them peddle the latter".

On the 18th of August, Robertson sends to the Capital Trust the share certificates owned by the Quinlan Estate and on the 19th, he intimates to his co-executor, that if the estate can get $50,000. for Mr. Quinlan's half interest, they would be fortunate. On the 22nd, the Capital

Trust receives from the Hon. J. L. Perron a letter in which he says that he agrees with Mr. Robertson that if the estate can get $50,000., it should dispose of its holdings.

On the 25th of August, Robertson writes to The Capital Trust, stating in part:—

> "Yesterday, I had two of the prospective purchasers of the Fuller Gravel stock here, and I am sorry to say that they virtually asked me to relieve them of future payment if, after they paid the first 25%, they were unable to meet the subsequent payments. Apparently, it is difficult to dispose of stock of this type."

10

On August the 30th, Mr. Robertson becomes impatient; he telephones and write to the Capital Trust in Ottawa, advising them of the imminent sale of 200 preferred shares. He demands all the certificates. He says he has communicated with Mr. Perron, who approves the sale.

20

On September the 1st, he definitely advises the Trust Company that those 200 shares are sold, but does not mention the name of the purchaser.

On September the 2nd, he sends to The Trust Company a cheque of $10,000 representing the value realized for the 200 shares. The cheque is signed by W. E. Tummon, made to the order of Robertson and endorsed by him. This amount constituted the total sum Tummon will ever pay, although we shall later see him in possession of 550 shares. Moreover, we shall see later how this amount of $10,000 was advanced by Robertson to Tummon for the deal.

30

On September the 6th The Capital Trust acknowledges receipt of the cheque in the following terms:—

> "We beg to acknowledge your letter of the 2nd instant, enclosing cheque of W. E. Tummon for $10,000, which you state is in payment of 200 shares preferred and one hundred shares common stock of Fuller Gravel Limited."

40

We might say at once that Tummon is a friend of Robertson's and an employee of Fuller Gravel Limited.

On September the 8th, Robertson sends a cheque to the Capital Trust in the amount of $2500., on account of ten thousand dollars worth of the shares.

The cheque is signed by G. W. Rayner, the chief salesman of Fuller Gravel, made to the order of Robertson and endorsed by him. As Rayner has only paid one-quarter on account, he does not get delivery of the certificates, but Robertson requests and receives them personally from the Trust Company.

On October the 12th, another similar sale takes place; a man named McCord acquires ten thousand dollars worth of shares but only pays $2500 on account. His cheque is to the order of Robertson who endorses
10 it to the Executors of the Estate as in the previous cases, and again Robertson requests and receives the certificate direct instead of McCord.

On October the 28th Dr. Connolly, the manager of the Capital Trust writes to Robertson stating that he has a purchaser for a big proportion of the remaining shares, Robertson does not answer this letter, whereupon Dr. Connolly wires him to the same effect on November the 1st. Robertson still declines to reply, when suddenly on November the 14th, he writes the following letter to the Capital Trust:—

20 "Dear Sirs,

Enclosed please find MY CHEQUE for FIVE THOUSAND DOLLARS in payment of one-quarter of the remaining stocks held by the late Hugh Quinlan in Fuller Gravel Limited. I shall see that notes for the balance are duly forwarded to you.

Yours truly,

30 A. W. ROBERTSON"

Volume 6, joint case, page 344.

From this date on The Capital Trust get no further remittance on these deals that was not Robertson's money, viz:—

$5000 on December the 16th (Vol. 6, pp. 349)

$10000 on January 5th 1928 (Vol. 6, pp. 350).

40 Appellant has thus paid $20,000 representing 400 shares. There is not any longer a question of intermediaries. It is Robertson's own money. Nevertheless, Robertson causes those 400 shares to be endorsed in blank by the same W. E. Tummon to whom he had already advanced ten thousand dollars for the first 200 shares. He wants to leave the Capital Trust under the impression that Tummon is now the owner of 600 shares.

Volume 6, page 350.

On March the 26th 1928, the 400 shares in question and 150 shares out of the 200 that Tummon was supposed to have paid for with the $10,-000 cheque, forming a total of 550 shares, are transferred to A. W. Robertson.

Joint case P-49, Vol. 5, pp. 213 and

10 Joint case P-51, Vol. 7, pp. 517.

Tummon's evidence corroborates the whole of this proof, and is to be found at pages 682 and following, and 836 and following of Volume 4, in the joint case.

He swears in part: He is the manager of Fuller Gravel Ltd. (Joint case, Vol. 4, pp. 682, line 42.)

20 "A.—My recollection is that at first there were to be 600 shares of the preferred transferred to me" Volume 4, pages 683, line 20.

"A.—Of the 600, I was to keep 200 myself".

"A.—200 shares were to stand in my name, and I had a friend whom I was to try to induce to take 200."

"A.—The other 200 were to stand in my name until Mr. Miller a Contractor was to take the shares".

30 Q.—So there were 200 shares destined to be yours?
A.—Yes, 200 of the preferred shares were to be mine, 200 were to stand in my name, and to go to this friend of mine if I could persuade him to take the shares.
A.—First, in regard to the 200 shares I was to take myself; at the time I could not finance them. Mr. Robertson was to assist me in the financing, but I was to assume the full obligation for the 200 shares. After my agreeing to take the 200 shares as my own, my health at the time was not good....Mr. Robertson agreed that I should keep whatever portion of the 200 shares I felt like keeping
40 then and could pay for, and that he would take the balance and hold them, and if my health improved and I wished any portion of those shares, I was to have them from him at the same price.
Q.—How many shares did you keep?
A.—Fifty preferred shares.
Q.—Have you your cheques?
A.—I have not, I did not bring them—but I could get them.

Q.—I understand those cheques were to the order of Mr. Robertson?

A.—To the order of Mr. Robertson—yes.

Q.—You know the Fuller Gravel Limited was sold to a merger in May 1928?

A.—Yes.

BY THE COURT:—

Q.—When did the question of merger first come up?

10 A.—I would think on in March, perhaps some time late in March.

We beg to draw the attention of this Court to the fact that the transfer from Tummon to Robertson took place on the 26th of March.

Q.—What happened to the other shares?

A.—As I previously mentioned, the 200 shares or one block of the 200 preferred shares which stood in my name, I was to endeavour to get a friend...He did not buy it...after they were

20 kept about six months in my name, Mr. Robertson, who had financed them in the first place, took them over—that is as far as I know.

Page 688, vol. 4, lines 15 and following.

Q.—And what about the other 200?

A.—The other 200 were for Mr. Miller, OR SOME CONTRACTOR, who we thought could contribute something towards

30 the success of Fulled Gravel.

Q.—Were the shares destined for Mr. Miller taken by him?

A.—No.

Q.—Did you see him about it?

A.—No. I never had any conversation with Mr. Miller in regard to the shares.

Vol. 4, Page 688, in fine.

Q.—What finally happened to those shares?

40 A.—Those shares I think went back to Mr. Robertson, he had paid for them, and they were being held in my name for Mr. Miller to take up. I believe he had paid for them. I believe he had undertaken or had agreed to take them up.

CROSS-QUESTIONED BY MR. TANNER, K.C.:—

Q.—You transferred 550 preferred shares to Mr. Robertson?

A.—Yes.

Page 689, vol. 4, line 10 and following.

A.—In reference to the shares of the Fuller Gravel Company, I gave a cheque of ten thousand dollars in the first place THAT I BORROWED IN ORDER TO PAY FOR THE 200 SHARES; then Mr. Robertson took them when I could not carry them.

Q.—From whom did you borrow the money for the $10,000?

A.—From Mr. Robertson.

10 Q.—The shares stood in the name of Robertson?

A.—No sir. They were shares that came to me, but which Robertson took in payment of $7,500 of the $10,000 I owed him, as I had already paid him in cash $2,500.

Q.—Did you keep those shares for the $2,500?

A.—Yes, until I went to Mr. Robertson and explained the condition of my health, and he personally agreed to take those shares in payment of the money.

20 Vol. 4, Page 839.

This evidence can be condensed as follows —

(1) Robertson disbursed $30,000 of his own money for 600 shares of Fuller Gravel, of which;

(2) $20,000 for 400 shares his own cheques.

(3) $10,000 for 200 shares, his own money.

30 (4) The 600 shares were issued by Robertson in the name of Tummon who immediately had endorsed them in blank.

(5) Tummon kept 50 shares for which he paid Robertson $2,500.

(6) Robertson received from Tummon 550 of those shares on the 26th of March 1928.

(7) None of the 400 shares paid by Robertson, with his own
40 money, were sold nor even offered to the two mysterious persons to whom referred.

As to the $2,500 paid by Tummon to Robertson, this is what happened—$1,000 was paid on the 5th of September 1927, three days after Robertson had sent the first cheque of $10,000 loaned to Tummon for the 200 shares. It is to be noted that instead of making one certificate for 200 shares in the name of Tummon, Robertson caused two certificated

to be issued, one for 150 shares (No. 5), Vol. 7, Exhibit P-51) and the other for 50 shares (No. 4), Vol. 7, Exhibit P-51). Our contention is that at the time Robertson had already in his mind leaving but 50 shares to Tummon: the same process of leaving 50 shares to Raynor and 50 to McCord was followed.

Another $1000 was paid by Tummon on December 29th 1927, and finally $500 on the 28th of March 1928, which is two days after the transfer to Robertson of the 550 shares. Tummon had not even enough money to pay for his shares when he bought them.

DR 11, Vol. 7, pp. 521-522.

Also, Vol. 7, pp. 593, letter from Robertson.

As early as April the 27th 1928, we see Robertson trying to sell Fuller Gravel to the merger, but it appears that the shareholders knew nothing about it.

DR 45, Vol. 7, pp. 593.

P-37, Vol. 7, pp. 599.

On May the 15th, Robertson writes to Stewart, his friend, and the man of the merger:—

> "...If you buy, you have what poor Hugh Quinlan used to say is the biggest and best gravel deposit he ever saw. He liked it so well that he actually spent all his last working Summer there; and if he were alive, I would not sell it for any money" P-43, Vol. 7, pp. 604-605.

On May the 21st, Robertson wires to The Capital Trust from the King Edward Hotel in Toronto, where he is:—

> "If you will forward 4 certificates you hold of Fuller Gravel to my address, King Edward Hotel, Toronto, I will return certificates on day balance due on them." Vol. 6, Page 352.

The same day, the Capital Trust sends him the 4 certificates in the name of Raynor and McCord, endorsed in blank by these gentlemen, and on which they each owe $7500; the next day, 22nd of May, Robertson receives from Stewart and the merger, a cheque for $180,000 to his order as the price of the original Hugh Quinlan and Angus Robertson shares, he deposits that cheque at his bank at Montreal on the next day. (P-45,

Vol. 8, pp. 627, photostat.) The same day, the merger people ratify the purchase of Fuller Gravel for $180,000.

P-46, Vol. 8, pp. 627-628.

On May 24th, Robertson writes to the Capital Trust in the following terms:—

10

"I enclose MY CHEQUE for $15,000 in full payment for the above mentioned shares of stock. Would you kindly advise G. S. McCord and George W. Raynor each of the receipt of half the amount I have paid you in this transaction. You can then bill each with his share of accrued interest." Vol. 6, page 355.

We respectfully submit that this is one of the crudest transactions of them all. Both the Superior Court and the Court of Appeals relied on article 1484 C. C. and on the general principles to condemn Robertson, after finding that as Executor he had absolutely no right to acquire any part of the estate. As Robertson had made a profit of $40 on each of the Quinlan shares, they condemned him either to return the shares to the estate or pay $16,000 representing the profit illegitimately made by him.

20

Cook v. Collingridge 1 Jacobs 607.

In this case, Lord Chancellor Eldon speaks as follows:—

"I cannot say that this was such a sale as should have been made. The valuation was not proper...and it does not rest there, for if Mr. Cook, the executor, was to be buyer, he ought to have consulted his cestue que trusts as to whom should be the valuers ...it is so difficult for a trustee to put his own interest entirely out of the question that the Court will not enquire whether it has been done or not, but at once says that such a transaction can not stand...The cestui que trust will be entitled to an account of the profits and to have the stock sold...All the parties meant well, but it is a sale by one of the executors to one of themselves."

30

National Trustees Company of Australasia Ltd v. General Finance Company of Australasia Ltd. L. R. 1905. Appeals cases pp. 373 and following:—

40

"The Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune, but public policy requires that he should be the person to suffer."

10 Appeal Cases, Carter v. Molson, pp. 664.

Lewin's Law of Trusts, 12th edition, pp. 302, 568 to 571, 1095, 1150.

De Bussche v. Alt. C. A. 288, 8 Chancery Div. 286.

C

10 *The Respondents were duly qualified and had the necessary interest to bring their action against the Appellant.*

GARCONNET. Précis de Procédure Civile, tome I, No. 92:

Aujourd'hui qu'il n'y a plus, comme en droit Romain, de règles précises et étroites sur le nombre, la nature et l'objet des actions, le droit d'agir appartient à quiconque est lésé dans un intérêt légitime.

20 BIOCHE. Dictionnaire de procédure civile, verbo action page 168, No. 70:

L'héritier ou le créancier a qualité pour exercer les droits et actions de son auteur ou débiteur.

GLASSON. Précis de Procédure Civile, tome I, page 75:

Dès qu'un droit est atteint ou même menacé, la faculté d'agir existe.

30

D

The Respondents' objections to the admission of verbal evidence of the alleged transfer of shares by the trustees to the Appellant A. W. Robertson is well founded in law.

Both the Superior Court and the Court of Appeals have maintained Respondents objections to the admission of verbal evidence of the alleged transfer of stock by the Testator. The two Courts below have decided that there could be found no beginning of proof in writing in the evidence warranting the introduction of verbal testimony. We respectfully submit that the defendant has failed to establish any beginning of proof in writing (commencement de preuve par écrit).

40

In the present case, it is submitted that the existence of a stock certificate originally bearing a power or authority to transfer, signed in

blank by the testator does not constitute such a "commencement de preuve par écrit", but such a signature in blank merely indicates that the testator thought of effecting a transfer of the stock, but at what time, under what conditions and for what consideration? Nothing appears and there is no indication of his intentions in these important respects. Beyond the signing of a certificate in blank, it can not be said that there is any indication of the possibility that a transfer was actually made.

10 It is not sufficient for such a writing to show *the possibility* of the alleged contract: it must do more than this, it must be of such a nature as to persuade the Court that there is a clear *probability* of the truth of the facts upon which the alleged contract is based.

Langelier, Preuve, No 574, says:

"L'écrit doit rendre vraisemblable le fait à prouver. Il n'est pas nécessaire que l'écrit le prouve, car, s'il le prouvait, ce ne serait plus un commencement de preuve mais une preuve complète qu'il constituerait. Il n'est pas nécessaire, non plus, qu'il le fasse présumer, car, alors encore, il rendrait la preuve par témoins inutile.

20

"No 575. Mais il ne suffit pas, d'un autre côté, qu'il montre la possibilité du fait à prouver; il faut qu'il établisse la probabilité de son existence.

Under article 1347 of Code Napoléon, above cited, the following decision of the Court of Cassation is noted in Fuzier-Herman, Code Civil Annoté, Article 1347, No 193:

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"Une lettre missive, parlant vaguement d'une cession qui aurait été consentie par l'auteur de la lettre et son copropriétaire à qui elle est adressée, sans faire mention d'aucun prix, ne peut être considérée comme commencement de preuve par écrit de l'existence d'une vente parfaite entre les parties; cet acte manque, en effet, de deux éléments nécessaires: le prix et le consentement du copropriétaire. Cass. 30 Déc. 1839 (S. 40, l. 139, P. 40, l. 99, D. p. 40, l. 75, D. Rép. Vo Oblig. n. 4800-1)"

40 "Dans tous les cas l'écrit qu'on *invoque doit parler précisément* du fait qu'il s'agit de prouver; et il ne suffit pas, s'il ne parle que d'un fait étranger, duquel, par induction, on prétendrait tirer la vérité de celui dont il s'agit: cour de Revision, Laliberty v. Roy, R. J. Q., 11 C. S., p. 18."

"Le fait d'avoir signé un écrit comportant l'obligation de payer un montant qui est laissé en blanc, n'est pas suffisant pour

faire admettre la preuve testimoniale quant au montant dû; Cour de Revision, Gauthier v. Rioux, R. J. Q., 19 C. S., p. 273.

Dorion, "Thèse sur l'admissibilité de la preuve par témoins," No 94, says:

"L'écrit doit rendre vraisemblable le fait allégué. *Il ne suffit pas qu'il en établisse simplement la possibilité, ce que l'on est porté à confondre, en pratique, avec la vraisemblance. Ainsi un acte qui constate l'existence d'une convention ne peut servir pour établir l'exécution de cette convention. Il ne démontre aucunement la possibilité du paiement...Il faut que l'écrit ait un rapport direct avec le fait qu'on veut prouver;* un écrit qui ferait allusion à une dette quelconque, sans qu'on pût en conclure qu'il s'agit de la dette réclamée, ne serait pas un commencement de preuve par écrit de cette dette.

"No 95: "L'appréciation de la valeur de la présomption créée par l'écrit ou l'aveu est laissée à la discrétion du juge. Suivant qu'il trouve cette présomption suffisante ou non pour établir la vraisemblance du fait à prouver, il doit admettre ou rejeter la preuve testimoniale. Mais la question de savoir si un écrit rentre ou non dans la catégorie de ceux qu'on admet pour former un commencement de preuve par écrit est une question de droit.

In fact, in the present case, the stock certificate with the signature in blank on the back gives no indication as to the nature of any contract for its alienation, nor, a fortiorari any details from which the possibility of such alienation could be inferred.

The possession by any person other than the testator of such a stock certificate is not sufficiently or clearly defined. On the contrary it is equivocal because the testator's intention might be to lend the certificate to a prête-nom or to pledge it for some definite purpose and many other cases short of actual sale can easily be imagined.

From the facts now placed before the Court, there is no balance of probability in favor of the existence of a definite transfer from the late Mr. Quinlan to his partner, the appellant, and of this, there can be no possible doubt whatever.

It is most significant that the appellant is attempting to validate the transfer to himself of the shares in question by invoking a resolution alleged to have been passed on June the 22nd by the Board of Directors purporting to sanction the transfer of the shares belonging to Mr. Quinlan to Robertson himself, whereas no such transfer had then

been executed, and all that was then in existence was the certificate containing the blank power to transfer on its back.

It, therefore, comes to this, that one party to an alleged contract of sale is attempting to furnish the proof of said contract through acts which are traceable to himself alone and not to the joint consent of the vendor and the transferee . In fact the appellant assumed to fill in his own name as transferee in the blank document without any considera-
10 tion having passed at that time from Mr. Robertson to Mr. Quinlan.

Appellant's Counsel argued that the declaration contained the beginning of proof in writing because paragraph 11 alleges that on or about the 22nd of June 1927, three days before the testator's death, defendant Robertson personally and for his own benefit, *acquired* a number of shares, etc.

This statement is to be read with paragraph 16 of the declaration which states that the Testator at the time of such transfer of shares
20 was in a physical and mental state which rendered him incapable of giving a valid consent. And it is moreover alleged that this pretended transfer was made fraudulently and illegally. It is thus clear that the declaration alleges a want of mutual consent. The plaintiff's position is that the minds of the party never met, and this conclusion is borne out by the fact that the signature of the testator was first obtained to the blank power of transfer in the month of May 1927 and that the blanks were filled in with the name of the appellant on or about the 22nd day of June 1927.

30 For the foregoing reasons, it is respectfully submitted that no commencement of proof in writing exists and that the proposed evidence was rightly excluded by the two Courts below.

E

The alleged transfer of the said shares was a civil and not a commercial transaction and did not fall under the first paragraph of Art. 1233 of the Civil Code.

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Appellant's Counsel have contended that the alleged transfer was a civil and not a commercial transaction, and did fall under the first paragraph of Article 1233 of the Civil Code.

In BONNER vs MORAY, 22 R. Jur. pages 402 and following, Hon. Mr. Justice Cross speaks as follows—"In general, the question whether a matter is commercial or not in relation to the rule of article 1233 C.

C. is to be determined more by the consideration whether the act is commercial by its nature than by the consideration whether the parties to it are or are not traders. I would say that the transfer in this case was not a commercial act or operation such as to be provable by parol evidence.

LACOUR, Précis de Droit Commercial, tome 1, page 26; No. 27:

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Le commerce consiste dans la circulation des produits de toute espèce, de la monnaie et des valeurs fiduciaires. Quiconque co-opère à cette circulation doit être réputé faire acte de commerce, sauf le producteur et le consommateur...mais il faut excepter celui qui a crée originairement le produit, et celui qui l'acquiert en dernier pour ses besoins personnels ou, plus exactement, pour se l'approprier définitivement. A cette notion proposée par Thaller, il manque un élément: l'intention de réaliser un bénéfice.

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IBID, No. 32:

L'acheteur doit se proposer de revendre la chose, il doit vouloir réaliser un bénéfice par la revente; le fait ultérieur de la revente est indifférent pour vérifier l'intention: les juges doivent se référer au moment même de l'achat.

IBID, No. 36:

Pour que la vente soit commerciale il faut que le vendeur revende la marchandise après l'avoir achetée avec le dessein de la revendre.

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FILIATRAULT vs GOLDIE, 2 B. R., pages 268 et 273 l'Hon. Juge en Chef Lacoste:

"Ces dernières ventes (ventes d'effets mobiliers entre non commerçants de même qu'entre un commerçant et une personne qui ne l'est pas) étant dans tous les cas réputées commerciales ...Quelque généraux que soient les termes de l'article 2260, je ne puis me convaincre que les transactions entre commerçants, en dehors des affaires de leur commerce, soient commerciales."

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BARIL vs REID MOTORS, 46 B. R., pages 174 et 176.

Comme le faisait remarquer le juge en chef Lacoste, il est malaisé de concevoir comme commerciales les transactions faites

entre les commerçants, mais en dehors des affaires de leur commerce particulier (l'hon. Juge Rivard).

VOIR AUSSI les autorities suivantes citées par l'Hon. Juge Rivard:

Charest vs Murphy, 3 B. R., page 376;

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Massé vs McEvilla, 4 B. R., page 197;

Labelle vs Ruttenberg, 30 B. R., page 114;

Forest vs Morin, 27 R. L., n. s., page 252;

Métivier vs Livinson, 13 C. S., page 39; jugé:

"La disposition de l'alinéa 4 de l'article 1235 C. C., n'est pas restrictive, et la mention qui y est faite de la vente au sujet de la prohibition de la preuve testimoniale n'est qu'indicative, la vente n'étant mentionnée que comme type du contrat commercial, mais cette disposition doit s'appliquer à tout autre contrat de même nature lorsqu'il n'y a eu ni arrhes ni commencement d'exécution."

20

Gray vs Hopital du Sacré-Coeur, 13, L. R., page 85, jugé:

"That the sale by a trader of an article in which he does not deal to a non trader is not a commercial matter within the meaning of Article 2260 of the Civil Code."

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While we contend that there never was any bona fide transaction between the testator and the appellant, we respectfully submit that the above judgments and authorities establish beyond the shadow of reasonable doubt that the transfer of a contractor's shares at his death to his Partner can not be considered as a commercial transaction within the meaning of our law, and therefore, should not be subject to verbal testimony. Both the lower Courts were correctly advised in maintaining our objections to the verbal proof, it not being a commercial transaction.

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Before closing we would like to add a few general and specific authorities on this subject:—

Civil Code: Article 1484 with commentories by Mignault, Vol. 7, page 43 and following.

Civil Code: Articles 981a to 981o.

LYON-CAEN et RENAULT, Traité de Droit Commercial, tome 4, page 157:

L'endossement en blanc ne vaut que comme procuration. La faculté d'en faire un endossement régulier suppose naturellement que le porteur a bien acquis la lettre (la même théorie s'applique aux actions de compagnie: Voir page 145) : autrement, si la signature n'avait été qu'à l'effet de donner pouvoir de toucher, l'inscription d'un endossement régulier pourrait constituer abus de con-
10 fiance.

LACOUR. Précis de Droit Commercial, page 690, No. 1178:

Il faut observer que si, en fait, un effet de commerce endossé en blanc circule comme un titre au porteur, il est cependant impossible, en droit, de l'assimiler à un pareil titre...Les titres à ordre, même après endossement en blanc, ne peuvent être traités comme de simples meubles corporels. Il résulte de là que même
20 dans ce cas, il est impossible d'en faire un don manuel, valable par le seul effet de la tradition.

F

The Court of King's Bench had the power to precise the meaning of the judgment of the Superior Court.

As previously stated, in the first pages of the present factum, the
30 Court of Appeals has the right to modify and precise the meaning of a dispositive of a judgment under appeal without infirming said judgment. Our Court of Appeals, as we have seen, has taken that view; we beg to add a few authorities in support thereof.

PELOQUIN v. BRUNET, 3 R. L., page 386. Held:

La Cour d'appel peut corriger une erreur cléricale qui s'est glissée dans le jugement de la Cour Supérieure tout en n'infirmant pas le jugement de telle cour.

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Beullac, Limitée v. Simard, 12 R. P., page 316. Held:

La Cour peut d'office corriger l'omission de fixer le délai dans lequel les défendeurs devront rendre compte. Notes: "sans pour cela mettre les frais d'appel à la charge de l'intimé."

(en Révision: Tait, Fortin & Charbonneau J. J. 1, Avril 1911).

DALLOZ R. P., Vo jugement No 603:

La Cour peut, tout en confirmant, procéder à la rectification d'erreurs matérielles contenues dans le jugement. (Req. 11 Mars 1856. D. P. 56.1.148).

DALLOZ R. P. Vo. Jugement No 611:

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Il ne faut pas confondre l'interprétation par un tribunal de sa propre sentence avec le procédé, désigné aussi sous le nom d'interprétation, et par lequel un autre tribunal cherche le sens du dispositif d'un jugement qui n'émane pas de lui en le rapprochant par exemple de ses motifs. Dans ce cas le juge saisi peut, sans excès de pouvoir, constater le sens et la portée d'une décision émanée d'une autre juridiction et dont il a à faire l'application. (Req. 7 juin 1893 D. P. 94.1.124.)

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On the whole, we respectfully submit that the judgment of the Court of Appeals is well founded, and we ask that it be maintained by this Honourable Court, the whole with costs against Appellant.

MONTREAL, July the 30th 1933.

JACQUES DESAULNIERS,
Attorney for Respondent,
Margaret Quinlan.

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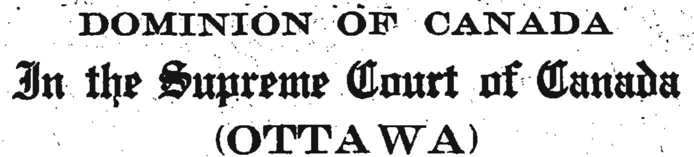
DOMINION OF CANADA

In the Supreme Court of Canada

(OTTAWA)

BETWEEN :

ANGUS WILLIAM ROBERTSON,
(Defendant in the Superior Court
Appellant in the Court of King's Bench)

APPELLANT

—and—

ETHEL QUINLAN ET AL.,
(Plaintiffs in the Superior Court
Respondents in the Court of King's Bench)

RESPONDENTS

—and—

CAPITAL TRUST CORPORATION LIMITED,
(Defendant in the Superior Court)

—and—

DAME CATHERINE RYAN ET AL.,

MIS-EN-CAUSE.

Factum of Respondent Margaret Quinlan

JACQUES DESAULNIERS K. C.,
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