4-7, 1947

In the Privy Council

No. of 1944

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

BETWEEN

ETHEL QUINLAN (Wife of John Kelly),

(PLAINTIFF) APPELLANT,

and

ANGUS WILLIAM ROBERTSON,
CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA,

(DEFENDANT) RESPONDENTS,

and BETWEEN

KATHERINE KELLY (Wife of Raymond Shaughnessy),

(INTERVENANT) APPELLANT,

and

ANGUS WILLIAM ROBERTSON,
CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA,

(CONTESTANT) RESPONDENTS.

RECORD OF PROCEEDINGS

VOL. X. — EXHIBITS JUDGMENT OF COURT OF APPEAL & REASONS FOR JUDGMENT AND PROCEEDINGS ON APPEAL TO PRIVY COUNCIL

BLAKE & REDDEN,
for Appellants.

LAWRENCE JONES & COMPANY,
for Respondent Robertson,

CHARLES RUSSELL & COMPANY,
for Respondents Capital Trust Corporation Limited, and General Trust of Canada.

UNIVERSITY OF LONDON
W.C.1.
26 OCT 1956
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LEGAL STUDIES
44910

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In the Privy Council

No. of 1944

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

BETWEEN

ETHEL QUINLAN (Wife of John Kelly),

(PLAINTIFF) APPELLANT,

and

20

ANGUS WILLIAM ROBERTSON,
CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA,

(DEFENDANT) RESPONDENTS,

and BETWEEN

KATHERINE KELLY (Wife of Raymond Shaughnessy),
30

(INTERVENANT) APPELLANT,

and

ANGUS WILLIAM ROBERTSON,
CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA,

(CONTESTANT) RESPONDENTS.

40

RECORD OF PROCEEDINGS

VOL. X. — EXHIBITS JUDGMENT OF COURT OF APPEAL & REASONS FOR JUDGMENT AND PROCEEDINGS ON APPEAL TO PRIVY COUNCIL

Nos 1916 - 1915 - 1935 - 1930

Canada — Province de Québec — District de Montreal

Cour du Banc du Roi

(EN APPEL)

En appel d'un Jugement de la Cour Supérieure, rendu par l'Honorable Juge Gibsone, le 26 avril 1940.

10

A. W. ROBERTSON,

entrepreneur général, de la cité de Westmount, district de Montréal,

(Défendeur en Cour Inférieure),

APPELANT,

— vs —

DAME ETHEL QUINLAN & vir,

de la cité de Westmount, district de Montréal, épouse commune en biens de John Thomas Kelly, gérant général, du même lieu, et le dit John Thomas Kelly, partie aux présentes pour autoriser sa dite épouse,

20

INTIMÉS,

— et —

CAPITAL TRUST CORPORATION LIMITED & al,

une corporation légalement constituée, ayant son principal bureau d'affaires dans la cité d'Ottawa, province d'Ontario tant personnellement qu'en sa qualité de fiduciaire et d'exécutrice testamentaire de feu Hugh Quinlan, en son vivant entrepreneur général, de la cité de Westmount, district de Montréal, aux termes du testament de ce dernier, passé devant Mtre Eugène Poirier, notaire, le 14 avril 1926,

MIS-EN-CAUSE,

— et —

WILLIAM QUINLAN et al,

30

gérant général, de la cité de Westmount, district de Montréal; KATHLEEN QUINLAN, de la cité de Westmount, district de Montréal, épouse séparée de biens de ERNEST LEDOUX, du même lieu, comptable, et le dit Ernest Ledoux, partie aux présentes pour autoriser son épouse; ANN QUINLAN, fille majeure et usant de ses droits; EDWARD QUINLAN, entrepreneur général; HELEN QUINLAN, fille majeure et usant de ses droits; tous trois de la dite cité de Westmount, district de Montréal; THERESE QUINLAN, de la cité de Westmount, district de Montréal, épouse commune en biens, par contrat de mariage, de HARRY DUNLOP, courtier, du même lieu, et le dit Harry Dunlop, partie aux présentes, pour autoriser son épouse; QUINLAN ROBERTSON & JANIN LIMITED une corporation incorporée par lettres patentes, le 21 mars 1925, ayant son principal siège d'affaires en la cité de Montréal, district de Montréal, maintenant connue sous le nom de ROBERTSON & JANIN LIMITED, en vertu de lettres patentes supplémentaires émises le 18 février 1928; ONTARIO AMIESITE LIMITED, une corporation légalement constituée, ayant sa principale place d'affaires dans la cité de Toronto, province d'Ontario; FULLER GRAVEL COMPANY LIMITED, une corporation légalement constituée, ayant son principal bureau d'affaires dans la ville d'Ivanhoe, province d'Ontario;

(Mise-en-cause en Cour Inférieure),

MIS-EN-CAUSE,

40

— et —

CAPITAL TRUST CORPORATION LIMITED & al,

une corporation ci-dessus décrite, et TRUST GENERAL DU CANADA, une corporation ayant son principal siège d'affaires dans la cité de Montréal, district de Montréal, toutes deux agissant en leur qualité de fiduciaires (trustees) et d'exécutrices testamentaires, en vertu du testament de feu Hugh Quinlan, en son vivant entrepreneur général, de la cité de Westmount, district de Montréal,

(Intervenantes devant la Cour Suprême),

MISES-EN-CAUSE,

— et —

DAME MARGARET QUINLAN & vir et al,

de la cité et du district de Montréal, épouse séparée de biens de JACQUES DESAULNIERS, avocat et conseil du Roi, du même lieu, et le dit Jacques Desaulniers, tant personnellement que pour autoriser sa dite épouse aux présentes; — WILLIAM A. QUINLAN, gérant de la cité de Westmount, district

de Montréal; **KATHLEEN VERONICA QUINLAN**, épouse séparée de biens de **ERNEST LEDOUX**, tous deux de la cité de Westmount, district de Montréal, et le dit Ernest Ledoux, partie aux présentes pour autoriser sa dite épouse à toutes fins que de droit; — **ANNE AUGUSTA QUINLAN**, fille majeure et usant de ses droits, de la cité de Montréal, district de Montréal; **MARY THERESA QUINLAN**, épouse commune en biens de **JOHN HENRY DUNLOP**, tous deux de la cité de Westmount, district de Montréal, et le dit John Henry Dunlop, comme chef de la communauté de biens et pour autoriser sa dite épouse, à toutes fins que de droit; — **EDWARD HUGH QUINLAN** de la cité de Montréal, district de Montréal; **HELEN HILDA QUINLAN**, de la cité de Montréal, dit district et le dit **JOHN HENRY DUNLOP**, en sa qualité de tuteur, à son enfant mineur, John Stuart Dunlop, et le dit **ERNEST LEDOUX**, en sa qualité de tuteur de ses enfants mineurs: Francis, David et Mary Thérésa Ledoux, et **HUGH CHS LEDOUX**, de la cité de Westmount, district de Montréal; — **CAPITAL TRUST CORPORATION LIMITED**, une corporation ayant son principal siège d'affaires, pour la province de Québec, dans la cité de Montréal, district de Montréal, et **TRUST GENERAL DU CANADA**, une corporation ayant son principal siège d'affaires dans la dite cité de Montréal, dit district; ces deux dernières en leur qualité d'exécutrices testamentaires et de fiduciaires (trustees) en vertu du testament de feu Hugh Quinlan; — **KATHERINE KELLY**, de la cité de Montréal, district de Montréal, épouse séparée de biens de Raymond Shaughnessy, du même lieu, et ce dernier partie aux présentes, pour autoriser sa dite épouse; **EDOUARD MASSON**, avocat, de la cité et du district de Montréal — **HENRI MASSON-LORANGER**, avocat, de la dite cité de Montréal; **AGENOR H. TANNER**, avocat et Conseil du Roi, de la cité de Montréal, district de Montréal; — et **L'HONORABLE J. L. ST-JACQUES**, de la cité d'Outremont, district de Montréal, l'un des honorables juges de la Cour du Banc du Roi, de la province de Québec.

10

(Défendeurs additionnels
en Cour Inférieure),

MIS-EN-CAUSE,

A. W. ROBERTSON,

entrepreneur général, de la cité de Westmount, district de Montréal,

(Défendeur sur l'action principale et
contestant sur l'intervention),

20

APPELANT,

— et —

DAME CATHERINE KELLY & VIR,

de la cité de Montréal-Ouest, district de Montréal, épouse séparée de biens de Raymond Shaughnessy, du même lieu, et ce dernier partie aux présentes, pour autoriser sa dite épouse,

(Intervenante en Cour inférieure),

INTIMÉE,

— et —

DAME ETHEL QUINLAN & vir,

de la cité de Westmount, district de Montréal, épouse commune en biens de John Thomas Kelly, gérant général, du même lieu, et le dit John Thomas Kelly, partie aux présentes pour autoriser sa dite épouse,

30

(Demanderesse en Cour inférieure),

MISE-EN-CAUSE,

— et —

CAPITAL TRUST CORPORATION LIMITED,

une corporation légalement constituée, ayant son principal bureau d'affaires tant personnellement qu'en sa qualité de fiduciaire et d'exécutrice testamentaire de feu Hugh Quinlan, en son vivant entrepreneur général, de la cité de Westmount, district de Montréal, aux termes du testament de ce dernier, passé devant Mtre Eugène Poirier, notaire, le 14 avril 1926,

(Défenderesses en Cour Inférieure),

MISES-EN-CAUSE,

40

— et —

WILLIAM QUINLAN et al,

gérant général, de la cité de Westmount, district de Montréal. **KAKTHLEEN QUINLAN**, des cité et district de Montréal, épouse séparée de biens de **ERNEST LEDOUX**, du même lieu, comptable, et le dit Ernest Ledoux, partie aux présentes, pour autoriser son épouse; **ANN QUINLAN**, fille majeure et usant de ses droits; **EDWARD QUINLAN**, entrepreneur général; **HELEN QUINLAN**, fille majeure et usant de ses droits; tous trois de la dite cité de Westmount, district de Montréal; **THERESE QUINLAN**, de la cité et du district de Montréal, épouse commune en biens par contrat de mariage, de **HARRY DUNLOP**, courtier, du même lieu et le dit Harry Dunlop, partie aux présentes, pour autoriser son épouse; **QUINLAN ROBERTSON & JANIN LIMITED**, une corporation incorporée par lettres patentes, le 21 mars 1925, ayant son principal siège d'affaires en la cité de Montréal, district de Montréal, maintenant connue sous le nom de **ROBERTSON & JANIN LIMITED**, en vertu de lettres patentes supplémentaires émises le 18 février 1928; **ONTARIO AMIESITE LIMITED**, une corporation légalement constituée, ayant sa principale place d'affaires dans la cité de Toronto, province d'Ontario; **FULLER GRAVEL LIMITED**, une corporation légalement constituée, ayant son principal bureau d'affaires dans la ville d'Ivanhoe, province d'Ontario,

(Mis-en-cause en Cour Inférieure),

MISE-EN-CAUSE,

— et —

CAPITAL TRUST CORPORATION LIMITED & al,

une corporation ci-dessus décrite et TRUST GENERAL DU CANADA, une corporation ayant son principal siège d'affaires dans la cité de Montréal, district de Montréal, toutes deux agissant en leur qualité de fiduciaires (trustees) et d'exécutrices testamentaires, en vertu du testament de feu Hugh Quinlan, en son vivant entrepreneur général, de la cité de Westmount, district de Montréal,

(Intervenantes devant la Cour Suprême),

MISES-EN-CAUSE,

— et —

DAME MARGARET QUINLAN & vir et al,

de la cité et du district de Montréal, épouse séparée de biens de JACQUES DESAULNIERS, avocat et conseil du Roi, du même lieu, et le dit Jacques Desaulniers, tant personnellement que pour autoriser sa dite épouse aux présentes; — WILLIAM A. QUINLAN, gérant de la cité de Westmount, district de Montréal; KATHLEEN VERONICA QUINLAN, épouse séparée de biens de ERNEST LEDOUX, tous deux de la cité de Montréal, district de Montréal, et le dit Ernest Ledoux, partie aux présentes pour autoriser sa dite épouse à toutes fins que de droit; — ANNE AUGUSTA QUINLAN, fille majeure et usant de ses droits, de la cité de Montréal, district de Montréal; MARY THERESA QUINLAN, épouse commune en biens de JOHN HENRY DUNLOP, tous deux de la cité de Westmount, district de Montréal, et le dit John Henry Dunlop, comme chef de la communauté de biens et pour autoriser sa dite épouse. à toutes fins que de droit: — EDWARD HUGH QUINLAN de la cité de Montréal, district de Montréal; HELEN HILDA QUINLAN, de la cité de Montréal, dit district; et le dit JOHN HENRY DUNLOP, en sa qualité de tuteur, à son enfant mineur, John Stuart-Dunlop; et le dit ERNEST LEDOUX, en sa qualité de tuteur à ses enfants mineurs: Francis. David et Mary Theresa Ledoux, et HUGH CHS. LEDOUX, de la cité de Montréal, dit district; CAPITAL TRUST CORPORATION LIMITED, une corporation ayant son principal siège d'affaires pour la province de Québec, dans la cité de Montréal, district de Montréal, et TRUST GENERAL DU CANADA, une corporation ayant son principal siège d'affaires dans la cité de Montréal, dit district; ces deux dernières en leur qualité d'exécutrices testamentaires et de fiduciaires (trustees) en vertu du testament de feu Hugh Quinlan; KATHERINE KELLY, de la cité de Montréal-Ouest, district de Montréal, épouse séparée de biens de Raymond Shaughnessy, du même lieu. et ce dernier partie aux présentes. pour autoriser sa dite épouse; EDOUARD MASSON, avocat, de la cité et du district de Montréal; HENRI MASSON LORANGER, avocat, de la dite cité de Montréal; AGENOR H. TANNER. avocat et Conseil du Roi, de la cité de Montréal, district de Montréal; et L'HONORABLE JUGE J. L. ST-JACQUES, de la cité d'Outremont, district de Montréal, l'un des honorables juges de la Cour du Banc du Roi de la province de Québec,

(Défendeurs additionnels
en Cour Inférieure),

MIS-EN-CAUSE,

DAME ETHEL QUINLAN & vir,

of the City of Westmount, District of Montreal, wife common as to property of JOHN THOMAS KELLY, General Manager, of the same place, and the said John Thomas Kelly to authorize his said wife for all legal purposes,

(Demanderesse en Cour inférieure),

APPELANTE,

— et —

A. W. ROBERTSON,

General Contractor of the City of Westmount, District of Montreal,

(Défendeur en Cour Inférieure),

INTIMÉ,

— et —

CAPITAL TRUST CORPORATION LIMITED,

a body politic and corporate, having its head office and chief place of business in the City of Ottawa, in the Province of Ontario, and also having its principal place of business for the Province of Quebec in the city of Montreal, and GENERAL TRUST OF CANADA, a body politic and corporate, having its head office and chief place of business in the City and District of Montreal, acting herein both personally as well as in their quality of testamentary executors and trustees under the Last Will and Testament of the late Hugh Quinlan, in his lifetime General Contractor. of the City of Westmount, in the District of Montreal, in accordance with the terms of the said Will received before Me. Eugene Poirier, N.P. and colleague on the 14th of April, 1926.

(Défendeesse en Cour Inférieure),

MISE-EN-CAUSE,

— et —

QUINLAN ROBERTSON & JANIN LIMITED & al,

a body politic and incorporated by Letters Patent of the 21st. of March, 1925. having its principal place of business in the City and District of Montreal, now known under the name ROBERTSON & JANIN LIMITED by virtue of Supplementary Letters Patent granted on the 18th. of February. 1928; ONTARIO AMIESITE LIMITED, a body politic and corporate having its principal place of business

in the City of Toronto, in the Province of Ontario; FULLER GRAVEL COMPANY, LIMITED, a body politic and corporate having its principal place of business in the Town of Ivanhoe, in the Province of Ontario; WILLIAM A. QUINLAN, Manager, of the City of Westmount, district of Montreal; KATHLEEN VERONICA QUINLAN, wife separate as to property of Ernest Ledoux, both of the City of Montreal, and tho said ERNEST LEDOUX for the purpose of authorizing his said wife for all legal purposes; ANN AUGUSTA QUINLAN, Spinster, of the said City and District of Montreal; MARY THERESA QUINLAN, wife common as to property of JOHN HENRY DUNLOP, both of the city of Westmount, district of Montreal, and the said John Henry Dunlop as head of the said community of property and to authorize his said wife for all legal purposes; EDWARD HUGH QUINLAN, of the said City and District of Montreal; HELEN HILDA QUINLAN, of the said City and District of Montreal; and the said JOHN HENRY DUNLOP in his quality of tutor to his minor child John Stuart Dunlop; and the said ERNEST LEDOUX in his quality of tutor to his minor children Frances, David and Mary Theresa Ledoux, and HUGH CHARLES LEDOUX, of the City and District of Montreal,

MISES-EN-CAUSE,

— et —

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DAME MARGARET QUINLAN & vir et al,

of the City and District of Montreal, wife separate as to property of JACQUES DESAULNIERS, Advocate and King's Counsel, of the same place, and the said Jacques Desaulniers as well personally as to authorize his said wife for all legal purposes; WILLIAM A. QUINLAN, Manager, of the City of Westmount, District of Montreal; KATHLEEN VERONICA QUINLAN, wife separate as to property of ERNEST LEDOUX, both of the City of Montreal, and the said Ernest Ledoux for the purpose of authorizing his said wife for all legal purposes; ANN AUGUSTA QUINLAN, Spinster, of the said City and District of Montreal; MARY THERESA QUINLAN, wife common as to property of JOHN HENRY DUNLOP, both of the City of Westmount, District of Montreal, and the said John Henry Dunlop as head of the said community of property and to authorize his said wife for all legal purposes; EDWARD HUGH QUINLAN, of the said City and District of Montreal; HELEN HILDA QUINLAN, of the said City and District of Montreal; and the said JOHN HENRY DUNLOP in his quality of tutor to his minor child John Stuart Dunlop; and the said ERNEST LEDOUX in his quality of tutor to his minor children Frances, David and Mary Theresa Ledoux; and HUGH CHARLES LEDOUX, of the City and District of Montreal; KATHERINE KELLY, of the City of Montreal West, District of Montreal, wife separate as to property of Raymond Shaughnessy, of the same place, and the latter to authorize his said wife to these presents; EDOUARD MASSON, Advocate of the City and District of Montreal; HENRI MASSON-LORANGER Advocate, of the said City of Montreal; AGENOR H. TANNER Advocate and King's Counsel, of the City of Montreal, District, of Montreal, and the HONOURABLE J. L. SAINT JACQUES, of the City of Montreal, District of Montreal, one of the Honourable Justices of the Court of King's Bench of the Province of Quebec,

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(Parties additionnelles
en Cour Supérieure),

MIS-EN-CAUSE,

— et —

CAPITAL TRUST CORPORATION LIMITED & al,

a body politic and corporate, having its head office and chief place of business in the City of Ottawa, in the Province of Ontario, and also having its principal place of business for the Province of Quebec in the City of Montreal, acting herein personally as well as in its quality of testamentary executor and trustee under the Last Will and Testament of the late Hugh Quinlan, in his lifetime General Contractor, of the City of Westmount, in the district of Montreal, in accordance with the terms of the said Will received before Me. Eugene Poirier, N.P., and colleague on the 14th of April, 1926,

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(Intervenantes devant la Cour Suprême
et défendeurs additionnels),

MISES-EN-CAUSE,

CAPITAL TRUST CORPORATION LIMITED & al,

a body politic and corporate, having its head office and chief place of business in the City of Ottawa, in the Province of Ontario, and also having its principal place of business for the Province of Quebec in the city of Montreal, and GENERAL TRUST OF CANADA, a body politic and corporate, having its head office and chief place of business in the City and District of Montreal, acting herein both personally as well as in their quality of testamentary executors and trustees under the Last Will and Testament of the late Hugh Quinlan, in his lifetime General Contractor, of the City of Westmount, in the District of Montreal, in accordance with the terms of the said Will received before Me. Eugene Poirier, N.P. and colleague on the 14th of April, 1926.

40

(Contestantes sur l'intervention
en Cour Supérieure),

APPELANTES,

— et —

DAME CATHERINE KELLY & VIR,

of the City of Montreal West, in the District of Montreal, wife separate as to property of RAYMOND SHAUGHNESSY, of the same place, and the latter to authorize his wife for all legal purposes,

(Intervenante par reprise d'instance
en Cour Supérieure),

INTIMÉE,

— et —

DAME ETHEL QUINLAN & vir,

of the City of Westmount, District of Montreal, wife common as to property of JOHN THOMAS KELLY, General Manager, of the same place, and the said John Thomas Kelly to authorize his said wife for all legal purposes,

(Demanderesse et demanderesse incidente en Cour Supérieure),

MISE-EN-CAUSE,

— et —

A. W. ROBERTSON,

10

General Contractor of the City of Westmount, District of Montreal,

(Défendeur sur l'action principale et contestant sur l'intervention),

MIS-EN-CAUSE,

— et —

QUINLAN ROBERTSON & JANIN LIMITED & al,

a body politic and incorporated by Letters Patent of the 21st. of March, 1925, having its principal place of business in the City and District of Montreal, now known under the name ROBERTSON & JANIN LIMITED by virtue of Supplementary Letters Patent granted on the 18th. of February, 1928; ONTARIO AMIESITE LIMITED, a body politic and corporate having its principal place of business in the City of Toronto, in the Province of Ontario; FULLER GRAVEL COMPANY, LIMITED, a body politic and corporate having its pricipal place of business in the Town of Ivanhoe, in the Province of Ontario,

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(Mis-en-cause en Cour Supérieure),

MIS-EN-CAUSE,

— et —

DAME MARGARET QUINLAN & vir et al,

of the City and District of Montreal, wife separate as to property of JACQUES DESAULNIERS, Advocate and King's Counsel, of tho same place, and the said Jacques Desaulniers as well personally as to authorize his said wife for all legal purposes; WILLIAM A. QUINLAN, Manager, of the City of Westmount, District of Montreal; KATHLEEN VERONICA QUINLAN, wife separate as to property of ERNEST LEDOUX, both of the City of Montreal, and the said Ernest Ledoux for the purpose of authorizing his said wife for all legal purposes; ANN AUGUSTA QUINLAN, Spinster, of the said City and District of Montreal; MARY THERESA QUINLAN, wife common as to property of JOHN HENRY DUNLOP, both of the City of Westmount, District of Montreal, and the said John Henry Dunlop as head of the said community of property and to authorize his said wife for all legal purposes; EDWARD HUGH QUINLAN, of the said City and District of Montreal; HELEN HILDA QUINLAN, of the said City and District of Montreal; and the said JOHN HENRY DUNLOP in his quality of tutor to his minor child John Stuart Dunlop; and the said ERNEST LEDOUX in his quality of tutor to his minor children Frances, David and Mary Theresa Ledoux; and HUGH CHARLES LEDOUX, of the City and District of Montreal; KATHERINE KELLY, of the City of Montreal West, District of Montreal, wife separate as to property of Raymond Shaughnessy, of the same place, and the latter to authorize his said wife to these presents; EDOUARD MASSON, Advocate of the City and District of Montreal; HENRI MASSON-LORANGER, Advocate, of the said City of Montreal; AGENOR H. TANNER, Advocate and King's Counsel, of the City of Montreal, District, of Montreal, and the HONOURABLE J. L. SAINT-JACQUES, of the City of Montreal, District of Montreal, one of the Honourable Justices of the Court of King's Bench of the Province of Quebec,

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(Parties additionnelles devant la Cour Supérieure),

MIS-EN-CAUSE,

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DOSSIER CONJOINT

VOL. V — 2ème PARTIE

EXHIBIT D-R-64 OF INTERVENANTS AT ENQUETE

Final Agreement, acquittance & discharge between Estate H. Quinlan & Angus Wm. Robertson, Esq.

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(SEAL)

IN THE YEAR ONE THOUSAND NINE HUNDRED AND THIRTY- FOUR, on this twenty-first day of the month of December.

Before Me ROGER BIRON, the undersigned, Notary in and for the province of Quebec, residing and having his place of business in the City of Montreal,

20

APPEARED.—

CAPITAL TRUST CORPORATION LIMITED, a body politic and corporate, having its principal place of business in the City of Ottawa, Province of Ontario, and having a place of business in the City of Montreal, District of Montreal, herein acting and represented by Mr. RODRIGUE LAGIMODIERE, its Montreal Office Manager, duly authorized to these presents under Power of Attorney dated at the City of Ottawa, Province of Ontario, on the sixth day of December instant (1934) duly issued under the authority of By-Law No. 47 of the said Corporation and attached hereto and signed, NE VARIETUR, by the parties, with and in the presence of the undersigned Notary;

30

AND

GENERAL TRUST OF CANADA, a body politic and corporate having its principal place of business in the City of Montreal, District of Montreal, herein acting and represented by Mr. RENE MORIN, its General-Manager, and M. ERNEST GUIMONT, one of its Director, duly authorized hereto in virtue of By-Law No. 41 of the said Corporation, a certified copy whereof is attached hereto and signed NE VARIETUR by the parties with and in the presence of the undersigned Notary.

40

Both appearers acting in their quality of Executors and Trustees of the Estate of the late HUGH QUINLAN in his lifetime of the City of Westmount; having been appointed:

a).—The said CAPITAL TRUST CORPORATION LIMITED, by virtue of the Last Will and Testament of the said late HUGH QUINLAN, executed before Me EDOUARD BIRON, Notary at Montreal, and Colleague, on the fourteenth day of the month of April nineteen hunded and twenty-six, registered at Monteral on the twenty-fourth day of March nineteen hundred
10 and twenty-eight, under No. 173295; and

b).—General Trust of Canada by virtue of a deed executed before Me ROGER BIRON, the undersigned Notary, on the nineteenth day of February nineteen hundred and thirty-one, registered at Montreal the twenty-second day of November nineteen hundred and thirty-three, under No. 343630.

WHICH, said appearers, have declared as follows:—

20

WHEREAS an action was instituted against the CAPITAL TRUST CORPORATION LIMITED and ANGUS-WILLIAM ROBERTSON, the then Testamentry-Executors and Trustees appointed under the aforesaid Last Will and Testament, the said action having been instituted by dame MARGARET QUINLAN, wife separate as to property of JACQUES DESAULNIERS, K.C., jointly with her sister, dame ETHEL QUINLAN, wife separate as to property of JOHN-THOMAS KELLY;

30

WHEREAS in the said action the plaintiffs prayed amongst other things:—

"a).—That the two Testamentary-Executors and Trustees, "to wit: CAPITAL TRUST CORPORATION LIMITED and "A. W. ROBERTSON, be dismissed and removed from office;

"b).—That the said Testamentary-Executors and Trustees "be condemned to render an account of their administration and,
40 "in default thereof to pay to herself and to her sister, Ethel Quin-"lan, each the sum of $500,000.00;

"c).—That the inventory prepared by the Testamentary-"Executors and Trustees be declared illegal, fraudulent and be "annulled;

"d).—That the transfer to A. W. ROBERTSON of shares "belonging to the late HUGH QUINLAN in the three companies, "to wit: QUINLAN, ROBERTSON & JANIN LTD., AMIE-

"SITE ASPHALT LTD AND FULLER GRAVEL CO LTD.
"be annulled and the said A. W. ROBERTSON condemned to "return these shares to the Estate, or to pay the value thereof; "namely ONE MILLION THREE HUNDRED THOUSAND "DOLLARS ($1,300,000.00);

10 "e).—That all the shares of the following companies, to "wit: ONTARIO AMIESITE ASPHALT LTD, McCURBAN "ASPHALT LTD., QUINLAN, ROBERTSON & JANIN (London, Engl.), CROOKSTON QUARRIES LTD and CANADIAN "AMIESITE LTD, be declared to belong to the estate of the late "HUGH QUINLAN, and be returned to the said Estate, failing "which the Testamentary-Executors and Trustees be condemned "to pay an additional sum of $1,000,000.00;

20 "f).—And finally that all the profits made and dividends "paid by all these companies, since the death of the late HUGH "QUINLAN, be declared to be the property of the said Estate;"

WHEREAS by judgment delivered by M. Justice MARTINEAU, on the sixth day af February nineteen hundred and thirty-one, the above action was dismissed in toto; as regards the CAPITAL TRUST CORPORATION, LIMITED, save as to certain costs, and was maintained in part as to A. W. ROBERTSON, in the manner hereafter explained, to wit:

30

(a) The said judgment declared non existent or annulled the transfer to the said A. W. ROBERTSON of the following shares: ELEVEN HUNDRED AND FIFTY-ONE (1151) shares of "QUINLAN, ROBERTSON & JANIN, LTD", TWO HUNDRED AND FIFTY (250) shares of "AMIESITE ASPHALT LTD", TWO HUNDRED (200) shares of "ONTARIO AMIESITE ASPHALT LTD" and FOUR HUNDRED (400) shares of "FULLER GRAVEL CO. LTD";

40 (b) The said judgment ordered the said A. W. ROBERTSON to return the above shares to the said Estate or to pay the value thereof, which was fixed as follows as to the shares of "QUINLAN, ROBERTSON & JANIN LTD" the sum of TWO HUNDRED AND SEVENTY-TWO THOUSAND, NINE HUNDRED AND TWENTY-EIGHT DOLLARS ($272,928.00); as to the shares of "AMIESITE ASPHALT LTD" the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00); as to the shares of "ONTARIO AMIESITE ASPHALT LTD" no value; as to the shares of "FULLER GRAVEL CO. LTD" the sum of THIRTY-SIX THOUSAND DOLLARS ($36,000.00);

(c) The said judgment declared that all the profits made and dividends declared since the death of the late HUGH QUINLAN upon the above mentioned shares, belonged to the Estate;

(d) But authorized the said A. W. ROBERTSON to retain these shares, profits and dividends, so long as he would not be reimbursed of the price he had actually paid for them to wit: TWENTY THOUSAND DOLLARS ($20,000.00) for the shares of "FULLER GRAVEL CO. LTD" and TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00) for the other shares enumerated in the present paragraph;

WHEREAS the said A. W. ROBERTSON, after the said judgment, availing himself of the right granted to him under the Will of the late HUGH QUINLAN, resigned his office as Testamentary-Executor and Trustee and appointed as his successor the GENERAL TRUST OF CANADA and then appealed, in his personal capacity, from the judgment above mentioned to the Court of King's Bench (Appeal Side) of the Province of Quebec;

WHEREAS the said Testamentary-Executors and Trustees were not parties to the said appeal, nor represented therein;

WHEREAS the said Court of Appeals, although confirming in substance the judgment of the trial Judge, modified said judgment on various points, to wit:

(a) It held the value of the shares, which the said A. W. ROBERTSON was ordered to return should be fixed as of the date of the action instead of as of the date of the month of December nineteen hundred and twenty-seven;

(b) It held that the Estate was only entitled to the dividends declared and paid during the period beginning at the death of the late HUGH QUINLAN;

(c) And finally it held that all the shares of the three companies above mentioned to wit: "QUINLAN ROBERTSON & JANIN LTD", "AMIESITE ASPHALT LTD", and "ONTARIO AMIESITE LTD should be considered as one unit and that the said A. W. ROBERTSON had to deliver every one of these shares or to pay the entire value of all of them;

WHEREAS the said judgment, however, again reserved to the said A. W. ROBERTSON the right to satisfy the condemnation by returning the shares in question on being reimbursed the price, instead of paying the value thereof, and furthermore allowed the said A. W. ROBERTSON to retain all these shares together with the bonuses and dividends declared and paid thereon since
10 the death of the late HUGH QUINLAN until reimbursement, with interest of the price he had actually paid to wit: a total sum of TWO HUNDRED AND SEVENTY THOUSAND DOLLARS ($270,000.00);

WHEREAS the said A. W. ROBERTSON then took an appeal to the Supreme Court of Canada, from the judgment of the Court of King's Bench;

20 WHEREAS the testamentary-executors and trustees to wit: the CAPITAL TRUST CORPORATION LTD and the GENERAL TRUST OF CANADA upon the suggestion of the Court, intervened in the said appeal, before the Supreme Court of Canada;

WHEREAS, on the thirty-first of January last (1934), the appeal above mentioned was still pending before the Supreme Court of Canada;

30 WHEREAS on the said date of the thirty-first of January last (1934), all the parties interested in the said action and appeals, save and except dame ETHEL QUINLAN, wife separate as to property of JOHN-THOMAS KELLY, being desirous to put an end to the above case as well as to all further litigation which might arise from the facts therein disclosed and generally from all causes whatsoever signed a deed of agreement before Mtre R. Papineau-Couture Notary under No. 7827 of the minutes of the said Notary;

40 WHEREAS by the said deed of the thirty-first of January last (1934) it was agreed enacted and covenanted amongst other things that Mr. A. W. ROBERTSON would purchase and repurchase as far as may be necessary all the shares mentioned in the herein before mentioned judgments and would pay therefore and additional price of FIFTY THOUSAND DOLLARS ($50,000.00); the whole in accordance with the terms, clauses and stipulations and subject to the conditions contained in the said agreement;

WHEREAS it was specifically stipulated in the said agreement, as follows:—

"6.—The present agreement of settlement, transaction, "renunciation, sale and discharge, notwithstanding the fact that "the parties hereto have signed it this day, will only come into "effect and become binding on the said parties after the same "shall have been submitted to the Supreme Court of Canada at "its February session, and provided the said Court, before which
10 "the litigation between the parties hereto is still pending, see no "objection to the party of the third part carrying it into effect "or grants acts thereof, and should the Court decide otherwise "then the said agreement shall be null and void and deemed never "to have been entered into."

WHEREAS on the sixth day of June last (1934), the said Supreme Court of Canada did grant acte of the foregoing Agreement in terms of said judgment

20 THESE DECLARATIONS being made the appearers, acting as aforesaid, acknowledged to have received, at the execution of these presents, the said sum of FIFTY THOUSAND DOLLARS ($50,000.00), being the consideration of the deed of agreement above related, dated the thirty-first of January last (1934), plus all interest accrued on the said sum from the sixteenth of November last (1934), up to the Nineteen of December instant (1934).

30 The appearers, in consideration of the payment of the said sum of FIFTY THOUSAND DOLLARS ($50,000.00) and interest, hereby agree to, and do hereby sell, re-sell, transfer, retransfer and retrocede to Mr. ANGUS WILLIAM ROBERTSON, so far as may be necessary, in full ownership, all the shares above described, together with all the profits, bonuses or dividends paid or declared in connection with and upon the said shares from the death of the said late HUGH QUINLAN, as well as all profits earned and accrued upon the said shares or on account of the said shares which have not been declared, whether as
40 bonuses, dividends or otherwise.

And, for the same consideration, the appearers further desist from the judgment above mentioned and renounce to, give up and abandon all the rights, claim and pretensions of whatever nature or description which may belong to them under the said above mentioned judgments or which may be vested in them under the said judgments without any exception, reserve or restriction;

The appearers do also, always for the same consideration, further renounce to all and every right,, claim, action, conten-

tion of whatever nature and description which may belong to them or be vested in them or in any one of them against or in favour of the said Mr. ANGUS WILLIAM ROBERTSON, and reciprocally from whatever source, origin or cause now existing. And without restricting the generality of the above terms, the appearers expressly renounce to all and every right, claim, action
10 contention of whatever nature or description which may belong to them or to be vested in them against or in favour of the said Mr. ANGUS-WILLIAM ROBERTSON and reciprocally arising from any of the facts disclosed in the evidence adduced in the above case, or from the administration or management of the Estate of the late HUGH QUINLAN, by the said Mr. ANGUS WILLIAM ROBERTSON as Testamentary-Executor or Trustee, or from the dealings, connections, or operations of the said Mr. ANGUS WILLIAM ROBERTSON with the said late HUGH QUINLAN as co-partner, co-shareholder, co-associate or other-
20 wise, or from the dealings, connections or operations of the said Mr. ANGUS WILLIAM ROBERTSON, acting jointly with the said late HUGH QUINLAN with third parties, or from the personal acts or deeds of the said Mr. ANGUS WILLIAM ROBERTSON, in whatever capacity, circumstances or time.

The appearers further declared that under the Last Will and Testament of the late HUGH QUINLAN above related they are vested with full Power to sell, exchange, convey, hypothecate,
30 pledge or otherwise alienate the whole or any part of the property or assets at any time forming part of his succession; and also that they are vested with full power to compromise, settle and adjust or waive any and every claim and demand belonging to or against the succession and, as Trustees are also empowered to act by virtue of the provisions of the Civil Code.

INTERVENTION.—

To these persents came and intervened:—

40

ANGUS WILLIAM ROBERTSON, Esquire, general-contractor, residing in the City of Westmount, at civic number 480 Roslyn avenue.

WHO, after due reading of the present deed, has declared to give his express consent to its execution and to accept the transfer in his favor of the shares described at length in the present deed.

The parties declare that the above sum of FIFTY THOUSAND DOLARS ($50,000.00) and interest, as aforesaid is paid by the said A. W. Robertson to the said testamentary executors and trustees, in compliance with and subject to the terms, clauses, stipulations and conditions of the said deed of agreement of the 31st of January 1934, and in full satisfaction of all obligations
10 assumed by the said A. W. Robertson, under the deed aforesaid, a final discharge whereof is hereby granted to the said A. W. Robertson.

WHEREOF ACTE :—

DONE AND PASSED in the said City of Montreal, on the date firstly above mentioned, under the number THREE THOUSAND EIGHT HUNDRED AND EIGHTY-TWO of the original deeds of the undersigned Notary.
20

And, after due reading hereof the parties have signed with and in the presence of the Notay.

(SIGNED) A. W. ROBERTSON
(") GENERAL TRUST OF CANADA
RENE MORIN, General Manager
ERNEST GUIMONT, Director
(") R. LAGIMODIERE
30 (") ROGER BIRON, Notary.

TRUE COPY of the original hereof, remaining of record in my office.

(Signed) Roger Biron, N.P.

EXHIBIT D-R-58 OF INTERVENANTS AT ENQUETE
40

Deed of Deposit by Angus-Wm. Robertson.

(SEAL)

IN THE YEAR ONE THOUSAND NINE HUNDRED AND THIRTY-FIVE, on this thirty-first day of the month of January.

Before Me ROGER BIRON, the undersigned Notary Pu-

blic for the Province of Quebec, residing and having its place of business in the City of Montreal.

CAME AND APPEARED

ANGUS-WILLIAM ROBERTSON, Esquire, General-
10 Contractor, residing in the City of Westmount, at civic Number 480 Roslyn Avenue.

WHO requested the undersigned Notary to receive and deposit, to be recorded as one of his minutes, the foregoing and annexed documents:

1o.—A written Agreement under private seal, sous seing privé, dated the twenty-ninth day of January Nineteen hundred and thirty-five, between the Honourable J. L. St-Jacques, one of
20 the Judges of the Court of King's Bench; Jacques Desaulniers, K.C.; Edouard Masson, Barrister; and Henri Masson-Loranger, Solicitor, and signed by Jacques Desaulniers,—by Lucien Desaulniers, procureur,—Henri Masson Loranger,—and Edouard Masson, In Re Case No A-36664 S.C. Montreal;

2o.—A deed of Agreement between Estate Hugh Quinlan et al, and Angus-William Robertson, executed before Me R. Papineau Couture, Notary at Montreal, the thirty-first of January
30 Nineteen hundred and thirty-four, bearing the Number 7827 of his Repertory.

3o—A Discharge In Re: No A-36660 Superior Court for the District of Montreal, Dame Margaret Quinlan et vir et al, Demandeurs, vs A. W. Robertson & al, Défendeurs, et Catherine Ryan et al, Mis en cause, dated the Twenty-seventh day of June Nineteen hundred and thirty-four, and signed by Justice J. L. St-Jacques.

4o.—A Discharge In Re: No. 436660 Superior Court for the
40 District of Montreal, Dame M. Quinlan & Vir, et al, demandeurs, vs A. W. Robertson et al, Defendeurs, et C. Ryan & al, Mis en cause, dated the Third day of July Nineteen hundred and thirty-four, signed by Edouard Mascson,

5o.—A letter dated the Fifth of July last (1934), addressed to Mtre L. E. Beaulieu, K.C., and signed by Mtre Jacques Desaulniers.

6o.—A deed of Ratification of the Agreement executed before Mtre R. Papineau Couture, Notary, between Dame Mar-

garet Quinlan & Vir, William-A. Quinlan & al, Trust Corporation Ltd et al, and Augus William Robertson, signed by Mrs. Margaret Quinlan, and by Mtre Jacques Desaulniers, personally and to authorize his wife, the said Dame Margaret Quinlan, at Palma de Mallonca, Spain, and duly authenticated by George-Thomas Sawand, British Pro-Consul at Palma de Mallonca, Spain, on the Sixth
10 day of July last (1934).

7o.—A discharge In Re: No A-36664 Superior Court for the District of Montreal, by Dame Margaret Quinlan, wife of Mr. Jacques Desaulniers, and Dame Ethel Quinlan, wife of Mr. John Thomas Kelly, both duly authorized by their respective husband, against the Capital Trust Corporation and Mr. Angus-William Robertson, for the sum of TWO HUNDRED AND FIFTY DOLLARS ($250.00) paid unto Mr. Henri Masson Loranger, Barrister, the twenty-ninth day of August Last (1934), and signed
20 by the said Henri-Masson Loranger, in January instant 1935.

And the said Notary had deposited the said documents, in his said records, as one of his minutes, in order that authentic copies may be delivered thereof and for all purposes by law required; the said documents having been certified correct by the said Appearer and annexed as aforesaid, to the original hereto, after having been signed, NE VARIETUR, by the said Appearer, and the undersigned Notary.

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WHEREOF ACTE:—

THUS DONE AND PASSED at the said City of Montreal, on the date firstly above written, under the Number THREE THOUSAND NINE HUNDRED AND EIGHT of the original deeds of the undersigned Notary.

And after due reading hereof, the appearer has signed with and in the presence of the Notary.

40

(SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

TRUE COPY of the original hereof, remaining of record in my office.

(Signed) Roger Biron, Notary.

Montreal, 29th of January, 1934.

We, the undersigned: the Honourable J.-L. St-Jacques, one of the judges of the Court of King's Bench; Jacques Desaulniers, K.C.; Edouard Masson, Barrister; and Henri Masson-Loranger, Solicitor, hereby declare:—

10

1o.—We have taken communication of the deed of transaction and settlement executed this 29th day of January, 1934, between Dame Margaret Quinlan, William A. Quinlan et al, Capital Trust Corporation et al, and A. W. Robertson, whereby the parties have settled the case instituted under No. A-36664 of the records of the Superior Court for the district of Montreal, by Dame Margaret Quinlan and Ethel Quinlan against A. W. Robertson, and Capital Trust Corporation, and which is now pending before the Supreme Court of Canada, and, more particularly, of clause I relating to the payment of costs, disbursements and counsel's fees, due to the various barristers who have acted for the said Dame Margaret Quinlan, before the various courts.

20

2o.—We declare that the amounts coming to us, for costs, disbursements and fees, are as follows:—

The Hon. J.-L. St-Jacques	$ 2,225.
Mr. Edouard Deslauriers	$27,500.
Mr. Edouard Masson	$10,000.
Mr. Henri Masson Loranger	250.

30

3o.—We agree to give to the said A. W. Robertson, upon remittance of the sums coming to each of us, under the preceding clause, a full, complete and final discharge, for all claims, or recourses whatever which we may have, in connection with the said case, before all the courts.

AND WE HAVE SIGNED: (Signed) Jacques Desaulniers
par Lucien Desaulniers, procureur.

40

(Signed) Edouard Masson (Signed) Henri Masson Loranger

MONTREAL, 29th January, 1934.

I, the undersigned, A. W. Robertson hereby oblige and bind myself to pay upon the settlement of the said case of Margaret Quinlan et al, vs myself et al, bearing No. 36664 C.S.M. the aforesaid disbursemnts, costs and fees as follows:—

The Honourable J. L. St-Jacques	$ 2,225.
Mr. Jacques Desaulniers, K.C.	$27,500.
Mr. Edouard Masson, Lawyer	$10,000.
Mr. Henri Masson-Loranger, Solicitor	250.

AND I HAVE SIGNED.

10

Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

20 (SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

TRUE COPY

(Signed) Roger Biron, Notary.
(SEAL)

BEFORE Mtre R. PAPINEAU-COUTURE, Notary Public for the Province of Quebec, residing in the City of Outremont,
30 and practising in the City and District of Montreal.

APPEARED.—

DAME MARGARET QUINLAN, of the City of Montreal, wife separate as to property of Jacques Desaulniers, K.C., Barrister, of the same place, hereinacting and represented by LUCIEN DESAULNIERS, Commercial Traveller, by virtue of Power of Attorney executed before J. H. Courtois, N. P., on the 25th day of January, 1934, and the said JACQUES DESAUL-
40 NIERS, K.C., to authorize his said wife to these presents, also acting and represented by the said Lucien Desaulniers, by virtue of Power of Attorney executed before J. H. Courtois, N.P., on the 25th day of January, 1934, being minute numbers 2119 and 2122.

PARTY OF THE FIRST PART.

— AND —

WILLIAM A. QUINLAN, Manager of the City of Westmount: KATHLEEN VERONICA QUINLAN, wife separate as

to property of Ernest Ledoux, Agent, of the City of Montreal, and the said ERNEST LEDOUX to authorize his wife hereto; ANNE AUGUSTA QUINLAN, spinster, of the City of Montreal, herein acting and represented by LUCIEN DESAULNIERS, Commercial Traveller, of the City of Montreal, by virtue of Power of Attorney executed by the said Anne Augusta Quinlan before J.
10 H. Courtois, N.P., on the 25th day of January, 1934, under minute number 2123; MARY THERESA QUINLAN, wife common as to property of JOHN HENRY DUNLOP, Bond Salesman, of the City of Westmount, and the said JOHN HENRY DUNLOP, personally and to authorize his wife to these presents; EDWARD HUGH QUINLAN, Gentleman, of the City of Montreal; HELEN HILDA QUINLAN, spinster, of the City of Montreal and the said JOHN HENRY DUNLOP, hereinabove described, in his quality of Tutor to his minor child JOHN STUART DUNLOP; and the said ERNEST LEDOUX, hereinabove described, in his
20 quality of Tutor all his minor children, namely, HUGH, FRANCIS, DAVID and MARY THERESA LEDOUX,

PARTY OF THE SECOND PART.

AND

CAPITAL TRUST CORPORATION, LIMITED, a body politic and corporate, having its principal place of business in the City of Ottawa, Province of Ontario, and having a place of business
30 in the City of Montreal, District of Montreal, hereinacting and represented by EMMANUEL LUDGER PARENT, Assistant General Manager, duly authorized to these presents under Power of Attorney dated at the City of Ottawa, Province of Ontario, on the twenty-ninth day of January instant (1934), duly issued under the authority of By-Law No. 47 of said Corporation and attached hereto and signed "NE VARIETUR" by the parties to form part hereof; and GENERAL TRUST OF CANADA, a body politic and corporate having its principal place of business in the City of Montreal, District of Montreal, herein acting and repre-
40 sented by BEAUDRY-LEMAN, one of its Directors and RENE MORIN, its Secretary and General Manager, duly authorized hereto in virtue of By-Law No. 41 of said Corporation, a certified copy whereof is attached hereto and signed "Ne VARIETUR" by the parties to form part hereof, said CAPITAL TRUST CORPORATION LIMITED, and GENERAL TRUST OF CANADA, herein acting in their quality of Executors and Trustees of the Estate of the late Hugh Quinlan, by virtue of his Last Will and Testament of the 14th day of April 1926, executed before Edouard

Biron, N.P., and Colleague, and duly registered at Montreal on the 24th day of March, 1928, under No. 173295,

PARTY OF THE THIRD PART

AND

ANGUS WILLIAM ROBERTSON, Contractor, of the
10 City of Westmount in the District of Montreal,

PARTY OF THE FOURTH PART.

The said parties declared before me as follows:—

WHEREAS the party of the first part, acting jointly with her sister, Dame Ethel Quinlan, wife separate as to property of John Thomas Kelly, instituted an action against the then testamentary executors and trustees appointed under the Will of her
20 late father, Hugh Quinlan to wit: The Capital Trust Corporation and A. W. Robertson above described whereby she prayed amongst other things;

(a) That the two testamentary-executors and trustees, to wit: Capital Trust Corporation Limited, and A. W. Robertson, be dismissed and removed from office;

(b) That the said testamentary executors and trustees be
30 condemned to render an account of their administration and, in default thereof to pay to herself and to her sister, Ethel Quinlan, each the sum of $500,000.00;

(c) That the inventory prepared by the testamentary executors and trustees be declared illegal, fraudulent and be annulled;

(d) That the transfer to A. W. Robertson of shares belonging to the late Hugh Quinlan in the three companies, to wit:
40 "Quinlan, Robertson & Janin, Ltd.", "Amiesite Asphalt Ltd." and "Fuller Gravel Co. Ltd.", be annulled and the said A. W. Robertson condemned to return these shares to the estate, or to pay the value thereof; namely ONE MILLION THREE HUNDRED THOUSAND DOLLARS ($1,300,000.00);

(e) That all the shares of the following companies, to wit: "Ontario Amiesite Asphalt Ltd", "McCurban Asphalt Ltd", "Quinlan, Robertson & Janin (London, Engl.)", "Crookston Quarries Ltd" and "Canadian Amiesite Ltd" be declared to be-

long to the estate of the late Hugh Quinlan, and be returned to the said estate, failing which the testamentary executors and trustees be condemned to pay an additional sum of $1,000,000.00;

(f) And finally that all the profits made and dividends paid by all these companies, since the death of the late Hugh
10 Quinlan, be declared to be the property of the said estate;

WHEREAS by judgment delivered by Mr. Justice Martineau on the 6th of February 1931, the above action was dismissed in toto, as regards the Capital Trust Corporation Limited, save as to certain costs, and was maintained in part as to A. W. Robertson in the manner hereafter explained, to wit:—

(a) The said judgment declared non existent or annulled the transfer to the said A. W. Robertson of the folllowing shares:
20 1151 shares of "Quinlan, Robertson & Janin Ltd", 250 shares of "Amiesite Asphalt Ltd", 200 shares of "Ontario Amiesite Asphalt Ltd" and 400 shares of "Fuller Gravel Co. Ltd";

(b) The said judgment ordered the said A. W. Robertson to return the above shares to the said estate or to pay the value thereof, which was fixed as follows as to the shares of "Quinlan, Robertson & Janin Ltd", the sum of $272,928.00; as to the shares of "Amiesite Asphalt Ltd", the sum of $100,000.00; as to the shares
30 of "Ontario Amiesite Asphalt Ltd" no value; as to the shares of "Fuller Gravel Co. Ltd" the sum of $36,000.00;

(c) The said judgment declared that all the profits made and dividends declared since the death of the late Hugh Quinlan, upon the above-mentioned shares, belonged to the estate;

(d) But authorized the said A. W. Robertson to retain these shares, profits and dividends, so long as he would not be reimbursed of the price he had actually paid for them to wit:
40 $20,000.00 for the shares of "Fuller Gravel Co. Ltd", and $250,-000..00 for the other shares enumerated in the present paragraph;

WHEREAS the said A. W. Robertson, after the said judgment, availing himself of the right granted to him under the Will of the late Hugh Quinlan, resigned his office of testamentary-executor and trustee and appointed as his successor the General Trust of Canada and then appealed, in his personal capacity, from the judgment above mentioned to the Court of King's Bench (Appeal Side) of the Province of Quebec;

WHEREAS the said testamentary executors and trustees were not parties to the said appeal, nor represented therein;

WHEREAS the said Court of Appeals, although confirming in substance the judgment of the trial Judge, modified said 10 judgment on various points, to wit:

(a) It held the value of the shares, which the said A. W. Robertson was ordered to return, should be fixed as of the date of the action instead of as of the date of the month of December 1927;

(b) It held that the estate was only entitled to the dividends declared and paid during the period beginning at the death of the late Hugh Quinlan;

20 (c) And finally it held that all the shares of the three companies above mentioned, to wit: "Quinlan, Robertson & Janin, Ltd", "Amiesite Asphalt Ltd", and "Ontario Amiesite Ltd", should be considered as one unit and that the said A. W. Robertson had to deliver every one of these shares or pay the entire value of all of them;

WHEREAS the said judgment, however, again reserved to the said A. W. Robertson the right to satisfy the condemnation 30 by returning the shares in question on being reimbursed the price, instead of paying the value thereof, and furthermore allowed the said A. W. Robertson to retain all these shares together with the bonuses and dividends declared and paid thereon since the death of the late Hugh Quinlan until reimbursement, with interest, of the price he had actually paid, to wit: a total sum of $270,000.00.

WHEREAS the said A. W. Robertson has taken an appeal to the Supreme Court of Canada from the Judgment of the Court of King's Bench, and the said appeal is now pending;

40

WHEREAS the testamentary-executors and trustees, to wit: Capital Trust Corporation, Limited, and the General Trust of Canada, upon the suggestion of the Court, have intervened in the appeal now pending before the Supreme Court of Canada, and are parties to said appeal;

WHEREAS all the parties to the present agreement realize that the ultimate outcome of the appeal now pending is uncertain, more particularly as to certain points now in issue;

WHEREAS the parties of the first part and of the second and third part realize that, should the judgment of the Court of King's Bench be confirmed, A. W. Robertson would still be entitled and might be able to return the shares in dispute to the estate and that these shares, being minority shares, would not under the present circumstances, be worth the price which was 10 paid for them by A. W. Robertson, to wit: $270,000.00 which price would have to be reimbursed to said Robertson with interest, in order that the estate recover them;

WHEREAS all the parties are desirous to put an end, not only to the case which is now pending, but to all further litigation which might arise from the facts therein disclosed and generally from all causes whatsoever now existing;

WHEREAS under the Will of the late Hugh Quinlan, the 20 party of the third part is vested with full power to sell, exchange, convey, hypothecate, pledge or otherwise alienate the whole or any part of the property or assets at any time forming part of his succession; and is also vested with full power to compromise, settle and adjust or waive any and every claim and demand belonging to or against the succession and, as Trustees, is also empowered to act by virtue of the provisions of the Civil Code;

IT IS NOW THEREFORE agreed, enacted and covenanted as 30 follows:—

1.—The party of the fourth part hereby elects to keep all the shares mentioned in the judgments above mentioned and, with this end in view, the said party of the fourth part agrees to purchase, re-purchase and does hereby purchase and re-purchase, so far as may be necessary, all the shares above mentioned, for and in consideration of an additional price of $50,000.00 to be paid upon the execution of these presents, and he further agrees to pay all such sums as may be necessary to pay and satisfy all claims for 40 taxable Court costs and for all extra judicial costs, disbursements and Counsel fees due to the Honourable J. L. St. Jacques, now one of His Majesty's Judges of the Court of King's Bench, Mr. Jacques Desaulniers, K.C., Mr. Edouard Masson, Barrister, and Mr. Henri Masson-Loranger, Solicitors, being all the Counsel, attorneys and solicitors who have represented the Respondent, Margaret Quinlan, and an additional sum of $4,025.00 to Mr. Agénor H. Tanner, K.C., of the City of Montreal. Out of the said sum of $4.025.00, there shall be paid in full all the costs and disbursements which might be taxed against the said A. W. Robertson in favour

of the said Agénor H. Tanner, K.C., in connection with the above case, and the balance shall be applied in satisfaction of the claims which the said Agénor H. Tanner, K.C., may have for Court costs, disbursements and Counsel fees against Respondent, Margaret Quinlan. And said Respondent, Margaret Quinlan, hereby declares that the said Agenor H. Tanner, K.C., ceased to represent her and
10 act for her after the judgment of the Superior Court of the 6th of February, 1931.

2.—In consideration of the foregoing, the party of the third part agrees to sell, re-sell, transfer, re-transfer and retrocede to the said party of the fourth part, so far as may be necessary, in full ownership, all the shares above described together with all the profits, bonuses or dividends paid or declared in connection with and upon the said shares from the death of the late Hugh Quinlan; as well as all profits earned and accrued upon the said
20 shares or on account of the said shares which have not been declared, whether as bonuses, dividends or otherwise.

3.—The parties of the first and of the second part hereby concur in the said sale, re-sale, transfer, re-transfer or retrocession as far as may be necessary, ratifying and confirming the same without any reserve, exception or restriction whatsoever.

4. The parties of the first, second and third part, for the
30 same consideration, further desist from the judgments above mentioned and renounce to, give up and abandon all the rights, claims and pretensions of whatever nature or description which may belong to them under the said above mentioned judgments or which may be vested in them under the said judgments without any exception, reserve or restrictions;

5.—The parties of the first, second, third and fourth part always, for the same consideration, further renounce to all and every right, claim, action, contention of whatever nature and
40 description which may belong to them or be vested in them or in anyone of them against or in favour of the said A. W. Robertson and reciprocally from whatever source, origin or cause now existing. And without restriction the generality of the above terms, the said parties of the first, second, third and fourth part expressly renounce to all and every right, claim, action, contention of whatever nature or description which may belong to them or to be vested in them against or in favour of the said A. W. Robertson and reciprocadly arising from any of the facts disclosed in the evidence adduced in the above case, or from the administration

or management of the estate of the late Hugh Quinlan, by the said A. W. Robertson as testamentary-executor or trustee, or from the dealings, connections or operations of the said A. W. Robertson with the said late Hugh Quinlan as co-partner co-shareholder, co-associate or otherwise, or from the dealings, connections or operations of the said A. W. Robertson acting jointly with the said
10 late Hugh Quinlan with third parties, or from the personal acts or deeds of the said A. W. Robertson, in whatever capacity, circumstances or time;

6.—The present agreement of settlement, transaction, renunciation, sale and discharge, notwithstanding the fact that the parties hereto have signed it this day, will only come into effect and become binding on the said parties after the same shall have been submitted to the Supreme Court of Canada at its February session, and provided the said Court, before which the litigation
20 between the parties hereto is still pending, see no objection to the party of the third part carrying it into effect or grants acte thereof, and should the said Court decide otherwise, then the said agreement shall be null and void and deemed never to have been entered into.

WHEREOF ACTE:—

THUS DONE AND PASSED at the City of Montreal, on
30 the thirty-first day of the month of January nineteen hundred and thirty-four and of record in the office of the undersigned Notary under his minute number SEVEN THOUSAND EIGHT HUNDRED AND TWENTY-SEVEN.

And atfer due reading herof the said parties have signed with and in the presence of the undersigned Notary.

(SIGNED) MARGARET QUINLAN
(") JACQUES DESAULNIERS
40 personellement et pour autoriser
la dite MARGARET QUINLAN

VRAIE COPIE, sauf les signatures qui ne sont pas rapportées.

(Signé) Beaulieu, Gouin, Mercier, Tellier
Avocats de A. W. Robertson

(L.S.)

I, George Thomas Sawand, British Pro-Consul, certify that the above signatures are those of Margaret Quinlan and Jacques Desaulniers & were made before me, this sixth day of July 1934 in the British Vice-Consulate, Palma de Mallonca, Spain.

(Signed) G. T. Sawand, Pro-Consul

10

Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

(SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary,

20

TRUE COPY
(Signed) Roger Biron, Notary.

PROVINCE DE QUEBEC)
DISTRICT DE MONTREAL) COUR SUPERIEURE
No. A-36660)

30

DAME MARGARET QUINLAN & VIR & al.,

Demandeurs,

— vs —

A. W. ROBERTSON & AL

Défendeurs,

— et —

CATHERINE RYAN & AL.,

Mis-en-cause.

40

Je, soussigné, reconnais avoir reçu de Monsieur A. W. Robertson, par chèque, à l'ordre de Mtre L. E. Beaulieu, et endossé par ce dernier à mon ordre, la somme de DEUX MILLE DEUX CENT VINGT-CINQ DOLLARS ($2,225.00), étant le montant intégral des frais et honoraires me revenant dans la cause susdite pour services professionnels rendus, tant en Cour Supérieure qu'en Cour d'Appel, et par les présentes, je donne quittance générale et finale de tout ce qui me revient pour les raisons susdites.

La somme de $2,225.00 m'est payée en vertu du contrat d'arrangement intervenu devant Mtre R. Papineau-Couture, N.P., le 31 janvier 1934, dans lequel Monsieur et Madame Jacques Desaulniers que je représentais dans la cause sus-mentionnée, ont comparu par leur procureur, Monsieur Lucien Desaulniers, en vertu de procurations passées devant Mtre J. H. Courtois, N.P., le 25
10 janvier 1934, et comportant, entr'autres clauses, un engagement exprès de la part de Monsieur et Madame Jacques Desaulniers de ratifier le contrat d'arrangement sus-mentionné.

En conséquence, je m'engage à remettre et restituer à Monsieur A. W. Robertson la somme reçue ce jour, advenant le cas où Monsieur et Madame Jacques Desaulniers refuseraient de signer un acte de ratification des actes faits par leur procureur Monsieur Lucien Desaulniers, en rapport avec le contrat d'arrangement ci-dessus.
20

MONTREAL, ce 27 juin, 1934.

(Signé) J. L. St-Jacques

Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

30

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

(SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

TRUE COPY

(Signed) Roger Biron, Notary.

40

(SEAL)

PROVINCE DE QUEBEC
DISTRICT DE MONTREAL
No. A-36660 COUR SUPERIEURE

DAME MARGARET QUINLAN & VIR & al.,
Demandeurs

10

— vs —

A. W. ROBERTSON et al,
défendeurs

— et —

CATHERINE RYAN & AL
mis-en-cause.

20

Je soussigné reconnais avoir reçu de Monsieur A. W. Robertson, par chèque, à l'ordre de Mtre L. E. Beaulieu, et endossé par ce dernier à mon ordre, la somme de DIX MILLE DOLLARS ($10,000.00), étant le montant intégral des déboursés, frais et honoraires me revenant dans la cause susdite, pour services professionnels devant la Cour Supérieure, la Cour d'Appel, et la Cour Suprême, et généralement pour tous services professionnels quelconques rendus en rapport avec l'affaire ci-dessus et, par les présentes, je donne quittance générale et finale de tout ce qui peut me revenir, et m'être dû, par la dit Monsieur A. W. Robertson;

30

La somme de DIX MILLE DOLLARS ($10,000.00) m'est payée en vertu du contrat d'arrangement intervenu devant Mtre R. Papineau-Couture, N.P. le 31 janvier 1934, et complété par l'écrit sous seing privé que j'ai signé le 29 du même mois. Dans l'affaire d'arrangement ci-dessus, Monsieur et Madame Jacques Desaulniers que je représentais dans la cause sus-mentionnée ont comparu par leur procureur, Monsieur Lucien Desaulniers, en vertu de procurations passées devant Mtre J. H. Courtois, N.P., le 25 janvier 1934, et comportant entr'autres clauses, un engagement

40

exprès de la part de Monsieur et Madame Jacques Desaulniers de ratifier le contrat d'arrangement sus-mentionné;

En conséquence, je m'engage à remettre et restituer à Monsieur A. W. Robertson la somme reçue ce jour, advenant le cas où Monsieur et Madame Jacques Desaulniers refuseraient de signer un acte de ratification des actes faits par leur procureur Monsieur Lucien Desaulniers, en rapport avec le contrat d'arrangement ci-dessus.

FAIT EN DOUBLE A MONTREAL, ce 3 juillet 1934.

(Signé) EDOUARD MASSON

Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

10

(SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

TRUE COPY

(Signed) Roger Biron, Notary.

(SEAL)

20

Palma de Mallonca
5 juillet 1934.

Mtre L. E. Beaulieu, C.R.
511 Place d'Armes
Montréal.

Cher M. Beaulieu

R. Quinlan v. Robertson

30

J'accuse réception de votre lettre du 22 juin 1934 m'incluant une copie certifiée par vous même, de l'acte d'arrangement de cette affaire, ainsi que le projet d'acte de ratification.

Ma femme et moi, nous avons signé les deux en bonne et due forme, nos signatures étant naturellement sujettes au paiement des $44,000. de frais comme suit:—

$ 2225.00 à L'Hon. Juge St-Jacques
$27500.00 " Jacques Desaulniers
$10000.00 " Edouard Masson
$ 250.00 " Mtre Loranger

40

et $ 4025.00 pour le bénéfice de Mtre A. H. Tanner, C.R., suivant la teneur de l'acte d'arrangement.

Vous remerciant

Je demeure votre dévoué
(Signé) Jacques Desaulniers

Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

10

(SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

TRUE COPY

(Signed) Roger Biron, Notary.

(SEAL)

20

ACTE DE RATIFICATION DU CONTRAT INTERVENU DEVANT MTRE R. PAPINEAU-COUTURE NOTAIRE A MONTREAL ENTRE DAME MARGARET QUINLAN & VIR, WILLIAM A. QUINLAN & AL, CAPITAL TRUST CORPORATION LTD & AL, et ANGUS WILLIAM ROBERTSON.

Nous soussignés, dame Margaret Quinlan, épouse séparée de biens de Mtre Jacques Desaulniers, avocat, tous deux des cité et district de Montréal, et actuellement de passage à Palma de Mallonca, Espagne,— le dit Mtre Jacques Desaulniers agissant tant personnellement que pour autoriser sa dite épouse,—reconnaissons que nous avons pris connaissance du contrat passé devant Mtre R. Papineau-Couture, N.P., le 31 janvier 1934, et portant le numéro 7827 des minutes du notaire susdit, et auquel nous avons comparu, par l'intermédiaire de notre procureur, Mtre Lucien Desaulniers, et dont copie sous seing privé, dûment signée et paraphée par nous, est annexée au présent écrit, et, par les présentes, nous acceptons, confirmons et approuvons toues les conventions contenues dans l'acte sus-mentionné, suivant leur forme et teneur, sans réserves, ni restrictions, et nous ratifions, en autant que besoin peut être, ce qui a été fait en notre nom, par notre susdit procureur Mtre Lucien Dessaulniers, en vertu du susdit contrat.

30

40

EN FOI DE QUOI NOUS AVONS SIGNE:—

(Signé) MARGARET QUINLAN,
tant personnellement que pour autoriser la dite Margaret Quinlan

(L.S.) I, GEORGE THOMAS SAWAND, British Pro-Consul at Palma de Mallonca, certify that the above signatures are those of Margaret Quinlan and Jacques Desaulniers and were made before me this sixth day of July 1934, in the British Vice-Consulate, Palma de Mallonca, Spain.

10 (Signed) G. T. SAWAND, Pro. Consul

Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

20 (SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

TRUE COPY

(Signed) Roger Biron, Notary.

(SEAL)

---

30 MONTREAL, January 1935.

The undersigned, Mr. Henri-Masson Loranger, of the City of Montreal, hereby acknowledges having received from Mr. Angus William Robertson, contractor of the City of Montreal, the sum of $250.00 by cheque to the order of said Henri Masson Loranger, in satisfaction of all claims for Court costs and for all extra-judicial costs, disbursements and Counsel's fees in connection with the case instituted under number A-36664 of the
40 record of the Superior Court, for the district of Montreal, by Dame Margaret Quinlan, wife separate as to property of the said Mr. Jacques Desaulniers, and Dame Ethel Quinlan, wife separate as to property of Mr. John Thomas Kelly, both duly authorized by their respective husband against the Capital Trust Corporation and the said Mr. Angus William Robertson, as well personally as in their capacity of testamentary executors and trustees, appointed under the will of the late Hugh Quinlan; said sum being for all proceedings before the Supreme Court of Canada.

The said sum of $250.00 is paid in conformity with and in execution of a deed of agreement passed before Mr. R. Papineau-Couture, N.P., on the 31st of January 1934, between the Estate Hugh Quinlan & al., and Mr. Angus William Robertson, and bearing No. 7837 of the minutes of said notary, as supplemented by a private writing bearing date of the 29th of January 1934,
10 signed by the said Mr. Jacques Desaulniers, K.C., acting through Mr. Lucien Desaulniers, his attorney and by others, and fixing to the amount of $250.00, the sum payable to the said Mr. Henri Masson Loranger, under the said agreement of the 31st of January 1934.

Payé vers le 29 août 1934.

(Signed Henri Masson Loranger

20 Annexed to the original deed bearing the No. 3908 of the repertory of Me ROGER BIRON, Notary at Montreal, after having been signed, NE VARIETUR, by the parties to said deed, with and in the presence of the Notary.

At Montreal, on this thirty-first day of the month of January nineteen hundred and thirty-five.

(SIGNED) A. W. ROBERTSON
(") ROGER BIRON, Notary.

30

TRUE COPY

(Signed) Roger Biron, Notary.

(SEAL)

40

Part IV — JUDGMENTS, etc.

10

Superior Court
Ditrict of Montreal
No. 36,664

Dame Ethel Quinlan et vir,
Plaintiffs.

—vs—

20 A. W. Robertson et al.,
Defendants.

&

The Capital Trust Corporation et al.,
Intervenants in the Supreme Court.

&

The said Dame Ethel Quinlan Kelly et vir,
30 Plaintiffs on an Incidental Demand,

—vs—

The said A. W. Robertson et al.,
Defendants on Incidental Demand.

JUDGMENT OF THE SUPERIOR COURT UPON THE MERITS OF THE PRINCIPAL ACTION AND UPON THE MERITS OF THE INCIDENTAL DEMAND.
40

Montreal 26th, April 1940.

PRESENT: MR. JUSTICE GIBSONE.

THE COURT &c.,

SEEING that the Plaintiffs by their action as amended and re-amended, set out and allege to the effect following to wit:

That Hugh Quinlan, Contractor, in his lifetime of the City of Westmount, departed this life the 26th June, 1927, leaving his last Will and Testament passed before Mtre Edouard Biron and colleague Notaries of Montreal, the same of the date 14th April 1926;

10 That, by his said Will, the testator appointed the defendants Angus W. Robertson and the Capital Trust Corporation the Executors of his Will and the Trustees of his Estate, for the execution of the provisions of the said Will and of the trusts thereby created;

That, at his decease, the said decedent left surviving him: his widow, Dame Catherine Ryan, and eight children issue of his marriage with his said widow; and that the Plaintiffs Dame Ethel Quinlan Kelly and Dame Margaret Quinlan Desaulniers are two
20 of such children;

That, as to the details and particulars of the Trusts created and the modes of realization and administration of the Estate, the Plaintiffs refer to the document itself, namely the said Will, but in general the dispositions were that the whole Estate was entrusted to the said Executor-Trustees with most ample powers for realization, administration and partition, their charge and powers to continue until the full and complete execution of the Trust; and
30 that in general, the income and capital of the Estate were to be disposed of in the manner following namely: that during the lifetime of the widow the income of the Estate was to be applied to pay to her a named annuity and was to be applied also to pay certain annual allowances to some of the children, the balance of the income during his period was to be added to capital, and thereafter to form part thereof; that, from the death of the widow, the capital of the Estate was to be kept intact, and the net income was to be divided equally among the testator's children who should be either living or represented by children; then, upon the decease
40 of the last surviving child of the testator, the capital be divided equally per capita among the then surviving grandchildren of the testator;

That the Defendants, the Executor-Trustees, accepted the office or charge, and took over the possession of the assets of the Estate;

AND Plaintiffs allege that the Defendants the Executor-Trustees, have been negligent wasteful and incompetent in the

conduct of their said charge that they have thereby incurred the penalty of ouster, or removal, from the said office and charge, the Plaintiffs allege different matters upon which are based their complaints and imputations of blame; the Plaintiffs pray that the said Defendants be ousted from their said office and charge, with costs against the said Executor-Trustees personally; and that
10 they be condemned also to render to the Plaintiffs and other interested parties the account of their administration the whole as provided by law; the interested parties other than the Plaintiffs being the mis-en-cause or added Deefndants in the present action;

AND the Plaintiffs further allege that wrongfully, in contravention of law and for his own profit and advantage, the Defendant A. W. Robertson, one of the Trustees, himself, either alone or with the connivance of the other Trustee the Defendant the Capital Trust Corporation, contrived to have transferred to him,
20 or to his name, divers shares and securities, the property of the said decedent or of his estate, to wit the shares which had belonged to the late Hugh Quinlan in the companies: Quinlan, Robertson & Janin Ltd., Amiesite Asphalt Co. Ltd., Ontario Amiesite Ltd., and Fuller Gravel Co. Ltd.; the Plaintiffs by their action demand that the transfers of the said shares to the Defendant Robertson be annulled and declared null, that he be condemned to return the same to the Estate as represented by those who are to be the Trustees thereof, and, in default of so doing,
30 that he be condemned to pay the value thereof with issues and profits all of which estimated by Plaintiffs to be of the value of $1,350,000.;

AND the Plaintiffs make allegations also with respect to other securities and interests of the decedent, such as Crookston Quarries etc., but for the reason to be mentioned, such matters ceased to be an issue in the present suit, and do not call for exposition or adjudication in the present judgment;

40 The whole with costs against the Defendant Robertson personally, and with costs against other parties in case only of contestation by them;

SEEING that the Defendants appeared separately, and defended separately, but that the Defences were similar in practically all respects:

Each of these Defendants by Defence denied that there had been, on the part of the Trustees any neglect or mis-management,

that, on the contrary, all had been attended to with care and competency; that with respect to the Quinlan-Robertson-Janin the Amiesite-Asphalt the Ontario-Asphalt shares, these had been sold by the decedent during his lifetime to the Defendant Robertson, and the sale had been carried out by the Trustees; each alleged that the Trustees were and had always been ready to render ac-
10 count each denied the allegations of the action as to the other securities; each prayed for the dismissal of the action as to such Defendant with costs;

SEEING that the Plaintiffs, by their Answer to those Defences, denied specially that the shares mentioned had been sold and transferred by the decedent to the Defendant Robertson, and they persisted in the allegations and in the conclusions of their action;

20 SEEING that, after Proof and Hearing on the Merits before this Court, judgment was rendered herein on the 6th February 1931; and by the said judgment it was adjuged in substance as follows:

on the issue between the Plaintiffs and the Executor-Trustees es-quality:

1.—That the allegations of neglect, mismanagement, incom-
30 petency, were not proved to an extent sufficient to justify removal from office; 2.—that these Defendants were not obliged then to render account, their turn of office not having expired; as to these two issues, the Plaintiffs' action was dismissed;
on the issue between the Plaintiffs and the Defendant Robertson personally, that such Defendant had not made proof that he had acquired the Quinlan-Robertson-Janin, the Amiesite-Asphalt and the Ontario-Asphalt shares from the decedent during his lifetime, that such shares in law formed part of the decedent' estate at the time of his decease, that the acquisition this Defendant had made
40 of them had been made after the decease and at a time when himself was a trustee that such acquisition was illegal and void under C.C. 1484; also that the price he had paid for them was insufficient; he was condemend to return them, or, in default, to pay as the value thereof the sum of $372,928, less however the sum of $250,000. which he had already paid as for them, thus an additional sum in respect to these shares of $122,928.;

As to the Fuller-Gravel shares, that of the total of 1,000 of these shares which had belonged to the decedent, and after his

death to the Estate, this Defendant had, in contravention of C.C. 1484, acquired 400 of these shares at the price of $50. per share, that the value thereof was $90. per share, (this Defendant having sold them at that price) and he, being no longer able to return them, was condemned to pay to the Estate the difference between the price he should have paid and the price he did pay, namely on
10 the 400 shares at $40. per share, the sum of $16,000.;

As to the costs, that judgment made division of them in the manner hereinafter to be mentioned;

It appears that, following the rendering of this judgment, the Defendant Robertson resigned as Executor-Trustee, and that the General Trust of Canada was appointed in his place; from this time therefore the Executor-Trustees of the Hugh Quinlan Estate were the Capital Trust Corporation and the General Trust of
20 Canada;

SEEING that from this judgment appeal was instituted by the Defendant Robertson personally, but no other appeal having been instituted, such judgment remained final on the issue above related between the Plaintiffs and the Executor-Trustees es quality;

The Court of King's Bench, being seized of the above appeal,
30 rendered judgment thereupon, on the 30th December 1932; by this judgment the judgment in first instance was varied in some respects namely as to the dividends or bonuses on the shares subsequent to the decease but otherwise the judgment in first instance was confirmed;

It appears that from the judgment of the Court of King's Bench of 30th December 1932 the Defendant Robertson appealed to the Supreme Court of Canada;

40 It appears that while the parties were in that Court, and after it had been part heard, a settlement was reached between the Defendant Robertson and one of the Plaintiffs to wit Dame Margaret Quinlan Desaulniers; by virtue of that agreement, Dame Margaret Desaulniers ceased to be a Respondent in that Court, or a plaintiff in the case; such agreement is set out in the deed of the 31st January 1934, before Papineau-Couture Notary;

The same deed record a settlement, declared to be of the whole issue raised by the action, namely the said deed sets out

an agreement between the Executor-Trustees acting as for the Estate, and Robertson, whereby, in consideration of payment by Robertson of some $45,000. in costs, and the payment of an additional sum of $50,000. toward the price of the shares in question (namely $50,000 in addition to the $250,000. already paid for the group of shares and the $20,000. paid for the 400 Fuller Gravel 10 shares at the price $50. per share)—which amounts Robertson bound himself to pay—the Executor-Trustees by the said deed sold or re-sold (if that was the better term) all those shares to him;

This deed of agreement is of the date 31st January 1934; the Plaintiff Dame Ethel Quinlan was not a party to it; she persisted in the action, more particularly she persisted as Respondent to uphold the judgment of the Court of King's Bench of 30th December 1932; the deed in question did not as to her, put an end to the litigation; judgment on the appeal 20 was rendered by the Supreme Court on the 6th June 1934;

The effect of that judgment was to say that the verbal evidence that Robertson had tendered to prove a sale to him by Quinlan of the group of shares for the price $250,000. should not have been refused admittance to the record; in consequence the appeal was allowed, with costs against Dame Ethel Kelly, and the case remitted back to this Court for retrial of the issues remaining to be decided;

30

It appears that after return of the record to this Court from the Supreme Court, on application being made therefor, leave was granted to the Defendant Robertson to file a Supplementary Defence to the action; by the Supplementary Defence the Defendant Robertson alleged the said deed of 31st January, alleged that record thereof had been granted by the Supreme Court, alleged that he had actually paid all that he had agreed and undertaken to pay under that deed, including the said sum of $50,000. as in full and complete payment of the said shares, and he alleged 40 that, by reason thereof, the claims set up in the action were unfounded, that for these additional reasons, and without prejudice to his Defence already filed, he prayed for the dismissal of the action namely as to that part thereof which was directed against himself personally;

It appears that, in Answer to this Supplementary Defence, the Plaintiff contested the same, and also asked for the annulment and declaration of nullity of that deed; it appears that the Plaintiff made this demand by means of an Incidental Demand

(C.P. 215); and, for the purposes of that Incidental Demand, by writ of summons, called into the case all parties interested in the said deed of 31st January 1934;

It appears that of the parties summoned on this Incidental Demand one interest only, namely Dame Margaret Desaulniers et
10 vir contested the demand of nullity, and the issue so raised must be the subject of a separate judgment; the issue of the Incidental Demand as between the Plaintiff Mrs. Kelly and the Defendant Robertson, will be dealt with in the present judgment;

It appears also that the Plaintiff being thereto ordered by this Court, summoned also, to the issue raised by her Incidental Demand, her daughter Katherine Kelly, then a minor, she being a grandchild of the testator, and a cestui que trust, and it appears that the tutor of the said minor, having been summoned as for
20 her, he filed on her behalf an Intervention for the protection of his pupil's rights, including protection against the effects of the said deed of 31st December 1934;

It appears that the said Intervention was contested separately; by the Defendant Robertson, by the Executor-Trustees and by Dame Margaret Quinlan Desaulniers et vir, but the Intervention being a separate proceeding, judgment on those matters must be by a separate judgment;

30

It appears also that the parties to the Incidental Demand, other than the Plaintiff Dame Kelly and the Defendant Robertson, and Dame Desaulniers et vir, gave consent that the present, the enquête on the main case, namely the present enquête, be common to the issue of their contestation of the Incidental Demand; and thereto Dame Desaulniers et vir were represented throughout;

It appears also that the parties to the Intervention, namely the Intervenant, the Plaintiff, the Defendant, Dame Margaret
40 Desaulniers et vir, and the Executor-Trustees gave consent that the enquête on the main case, namely the present enquête, be common to the issues on the Intervention, and, all such parties were represented throughout;

SEEING that, in accordance with the Order of Reference of the Supreme Court, the present case having come up for trial, (enquête) and hearing, and all the parties being present or represented, the Defendant Robertson did thereupon tender what evidence verbal or documentary which he desired to submit, or

which he desired to be taken into account, in the present litigation, in addition to what already formed part of the record, also that all what was so tendered, was heard and admitted to the record, (though a part thereof admitted under reserve of objection made thereto on behalf of the Plaintiff; and in answer, or rebuttal, to such evidence there was admitted also all tendered on
10 behalf of the Plaintiff, (though some thereof under reserve of objection made thereto on behalf of the Defendant), and Counsel of all parties being heard, the matters now call for judgment;

ADJUDICATING UPON THE PLAINTIFF'S INCIDENTAL DEMAND:

SEEING that the Defendant by his Supplementary Defence alleges and sets up that by deed passed before R. Papineau-Couture, N.P., the 31st January 1934, and which he files of re-
20 cord, it was, by the parties thereto, agreed and determined as follows: that in consideration of the payment of $50,000. in cash to the Estate, and the payment of certain costs, the Executor-Trustees on behalf of the Estate declared to be paid for, and completely settled, all claims which the Estate might have against the Defendant Robertson in respect of the matters set out in the Plaintiffs action that the said agreement of the Executor-Trustees was, in the said deed, concurred in and agreed to by all of the children and by all of the then living grandchildren of the testator,
30 —except only the Plaintiff Dame Ethel Quinlan Kelly—, and the said Defendant alleges in his said Supplementary Defence that the said deed became and was legal and binding upon the Estate and by reason thereof it became binding also upon the Plaintiff Dame Ethel Quinlan Kelly; that for this additional reason her action is now unfounded, and Defendant, for this additional reason, prays for the dismissal thereof;

SEEING that the Plaintiff, by her Incidental Demand, alleges that the deed so invoked by the Defendant is illegal, null
40 and of no effect both as against the Estate Quinlan and against her, and she prays that it be so declared by this Court;

CONSIDERING that the Plaintiff's Incidental Demand is well founded for the following reasons to wit:

1.—The agreement contained in the deed being one in the nature of Transaction, is governed as to its legality, by the articles C.C. 1918, 1919, 1920; it is certain that the legality thereof is dependant upon whether those effecting it had the capacity to dispose of the things which were the objects of the Transaction; it

is certain that under the dispositions of the Will, neither the then living children, nor the then living grandchildren, of the testator, had the capacity to dispose of the things which the said deed purports to dispose of; it is certain that their consents are of no validating effect whatsoever, and that they themselves had and have no capacity to bind the Estate;

10

2.—The recourse being exercised by the Plaintiff, being a right proper to herself, was one which could not be diminished, or defeated, by any act of the Executor-Trustees, nor by any act of the other cestuis que trust under the Will; more particularly the Plaintiff's right to continue this action was expressly declared by the Supreme Court in its judgment of 6th June 1934;

CONSIDERING therefore that, as against the Estate Hugh Quinlan, and as against the Plaintiff Dame Ethel Quinlan, the said deed of 31st January 1934 is of no validity or effect;

20

DOTH MAINTAIN Plaintiff's Incidental Demand and doth declare to be null and of no effect against the Estate Quinlan and null and of no effect against he Plaintiff the said deed of 31st January 1934, with costs against the Defendant Robertson;

ADJUDICATING UPON THE MERITS OF THE ACTION:

30

SEEING that from and after the judgment of this Court of the 6th February 1931, and by reason thereof, all issues raised by the action which were directed against the Executor-Trustees in their quality as such, and which sought from them a rendering of an account, or which alleged in effect against them neglect in the protection of property belonging to the Estate, or neglect to collect amount due to the Estate, were excluded from the present action, and postponed until the Executor-Trustees come to render their account at the termination of their charge;

40

SEEING that the sole matters remaining thereafter in issue are those concerning certain company shares, which formed part of the Estate and which as it is alleged were wrongfully and illegally obtained or acquired by the Defendant Robertson, for his own profit and advantage, as also the return of the same, or the restitution to be made therefor, by Robertson to the Estate;

SEEING that, although mention was made both in the pleadings and also during the trial, of certain other shares or

securities nevertheless the issue became confined to the following specific items: *first* a group consisting of 1151 shares of Quinlan-Robertson & Janin Ltd., 250 shares of Amiesite Asphalt Ltd., and 200 shares of Ontario Amiesite Ltd. and *secondly* of 1000 shares of Fuller Gravel Co. Ltd;

10 As to the Quinlan-Robertson-Janin, the Amiesite-Asphalt and the Ontario-Amiesite shares, they are mentioned as a group because of the contention put forward by the Defendant, in his Defence, that he acquired them as a group and for a lump sum, from the decedent himself before his death namely he alleges that he acquired them on the 20th June 1927 for the block sum of $250,000.;

As to the Fuller-Gravel shares they were acquired by the said Defendant from the Estate some months after the death;

20

CONSIDERING that, as to the Quinlan-Robertson-Janin shares, it appears from the proof of record that for some time prior to his death Hugh Quinlan was the owner, and the registered owner of 1151 shares in this Company; that Quinlan departed this life on 26th June 1927; that on 18th July 1927, an inventory of his estate was made by and on behalf of the Executor-Trustees, and in that inventory the said 1151 shares were entered as belonging to the Estate; that in the Declarations to the
30 Succession Duties Office of the Province, declarations made under oath by the officers of the Capital Trust Corporation (the other trustee) declarations dated the 29th July 1927 and the 17th September 1927, these shares were declared to constitute part of the Estate; that succession duties upon these shares were paid to the Province, — as part of the estate of the decedent—, the Defendant Robertson taking part not only in the payment of the succession duty but also in the discussion with the Succession Duties Office of the value which should be put upon those shares for succession duties purposes; that, as at the date 31st De-
40 cember 1927, (according to the examination and report of the Estate's Auditors) the books of the Estate showed these shares to be the property of the Estate, and the Estate's Auditors' report of 8th August 1928 was to the same effect;

It appears also that on 21st May 1927 the decedent entrusted to the Defendant Robertson the scrip representing these shares, such scrip being indorsed in blank by the said Quinlan, that the said scrip was handed by Robertson to Leamy the secretary of A. W. Robertson Ltd, (a company owned as to one half

thereof by Quinlan), and in the receipt given by Leamy to Robertson it was stated that the scrip was the property of Quinlan and it was being put in the company's vault for safekeeping;

It appears in a letter of 19th August 1927 that Robertson suggested to his co-executor the Capital Trust Co., the sale of
10 these shares to a possible buyer of whom Mr. Janin knew;

It appears also that on 31st December 1927 the Capital Trust Co. received from their co-executor, the Defendant Robertson, the sum of $125,000. as 50% payment of the shares of the three companies Quinlan-Robertson-Janin, Amiesite-Asphalt and Ontario-Amiesite, on 21st January 1928 they received from him $3,750. as for six months interest on this $125,000., and on 28th January 1928 they received from him the sum of $125,000. as and for the remaining 50% of the price of these shares; There does
20 not appear in the record any writing, or any exchange of correspondence, between Robertson and the Capital Trust Co. as to this sale — there is no explanation why the six months interest was claimed— but apparently was claimed and paid in order to give to the transaction the appearance of a sale six months earlier in date namely which brought it back to approximately the date of the decease;

It appears in a statement sent by the Capital Trust Co. to
30 one of the Plaintiffs towards the end of August 1928 information to the effect that these Quinlan-Robertson-Janin shares were sold in 1928 for $250,000., the name of the buyer was not given; it appears that this was the first information the Plaintiffs had that the shares had been sold;

In the defence of the Defendant Robertson filed in the month of November 1928 the allegation that he had acquired the group—including these of Quinlan-Robertson-Janin—from the decedent himself, namely on the 20th June 1927, that he had
40 been the owner thereof since that date, that the shares had not formed part of Quinlan's estate at the time of his death; the allegation particularized that Robertson on that date had presented to Quinlan a letter, and in exchange Quinlan had delivered the scrip to Robertson, that the exchange of scrip for letter was the proof and execution of the sale;

It appears also from the Minute Book of the Company that under the date 22nd June 1927 Robertson had had transferred into his name these shares; it appears certain that the trans-

for he caused to be made was made in breach of trust and contrary to the terms on which he had received the scrip from Quinlan on the 21st May 1927; also that Quinlan could have had no knowledge of this transfer;

When the parties came to trial the evidence the Defendant Robertson tendered was the following namely that on the 20th June 1927 he, accompanied by Leamy, saw Quinlan who was then sick in bed, that only those three were present, that at Robertson's request Leamy read out to Quinlan the letter in question, and Quinlan having heard it read, said that is all right; neither Robertson nor Leamy say anything about the scrip having been then delivered to Robertson—although that act on Quinlan's part was specially pleaded—; The Plaintiffs deny that the alleged incident occurred, and they deny that the letter, according to its terms, would or could have the effect of transferring ownership in the shares to Robertson;

It appears from the evidence that the 'letter' in question was never delivered to Quinlan, but always remained in Robertson's possession; it emerged from Robertsons possession on the 6th December 1927; until that date its existence was somewhat uncertain; Parent of the Capital Trust is supposed to have seen a copy of it on the 9th or 18th July 1927, but this can hardly be so, for on the 29th July he declared under oath that these shares were part of the Estate; a copy is supposed to have been sent him about the 20th August, but, again on the 17th September his sworn declaration states that these shares are part of the Estate; the 'letter' in question was a matter of discussion on the 25th September 1927,—it had been mislaid and at that date had not been found—, those present being Robertson Parent and J. L. Perron K.C., and it appears from Perrons letter of 26th September that this 'letter' was represented to be a letter from Quinlan to Robertson—not as a letter from Robertson to Quinlan—;

CONSIDERING that the question, as to whether Robertson and Leamy actually visited the Quinlan house and saw Quinlan on the 20th June, is a question of fact and that the testimony of Robertson and of Leamy is contradicted by testimony and also by circumstances and probabilities of fact; that in law it was incumbent upon Robertson to prove his allegation by reasonable and sufficient preponderance, that in the judgment of this Court he has not done so; this Court does now declare that the proof of such interview has not been made, and that for the purposes of this suit it is declared and decided that such interview did not take place as alleged;

a) Vol. 1, p. 35, para. 7.

c) Vol. 2, p. 453 -
a) Vol. 2, p. 450 -
a) Vol. 8, p. 699 -
b) Vol. 4, p. 774 -
b) Vol. 2, p 453 -
d) Vol. 7, p. 408 -
e)
f) Vol. 7, p. 417 -
g) Vol. 6, p. 391, 392, 393, 394, 395,
h) Letter P.C. 23, not printed -

a) Vol 9 - pp. 106, line 45, 109, 110 to line 25

b) Vol. 9 - pp. 97, line 45, 98, lines 1 to 30, p 100, line 35
p. 101

c) Vol. 9 - pp. 118, 119, 120, 121 - 122,

CONSIDERING for those same reasons that it is now declared and decided that the 'letter' was not on that date or at any time read to Hugh Quinlan;

CONSIDERING that in law the reading of a paper memorandum or note, whatever the form, without delivery of the same, and the reader withholding and keeping the same in his own possession, is and remains a verbal act on his part, and such paper, whatever the form in which drafted, does not constitute a letter properly so-called to the other party;

10

CONSIDERING that even if true that the document was read to Quinlan in the manner above mentioned and that thereto he replied vica voce 'that is all right', the combination of the two acts would have constituted an oral understanding, or agreement, between the parties;

20

CONSIDERING that the document, which the Defendant Robertson cites as a title to the shares, on the true construction and meaning thereof, does not constitute a title or a transfer of title in the shares to Robertson;

CONSIDERING that it appears that he Defendant Robertson did not at any time during the lifetime of the decedent acquire these shares from him, but that it was solely from the Estate that he acquired them namely on or about 31st December 1927 as aforesaid;

30

CONSIDERING that by reason of C.C. 1484 the said acquisition was, and the same is by this judgment declared to have been, illegal null and of no effect, and it is declared that the Defendant Robertson is in law bound, either to return the said shares, or to make restitution therefor, according to what, in the circumstances now appearing, to justice may appertain;

40

CONSIDERING as to the shares of Amiesite-Asphalt, the contention of the Defendant Robertson that he acquired and became owner of those shares by reason of the 'letter' and the events said to have taken place on the 20th June 1927, and that, for the reasons hereinabove given, it is declared that Robertson did not at any time acquire title to these shares from the decedent;

These shares appear to have been omitted from the 'inventory' made about 18th July 1927, omitted also from the Succession Duties Declarations, and from the list of assets as on the

31st December 1927; it does not appear why they were omitted while the Quinlan-Robertson-Janin shares were there included;

It does appear that as of the date 22nd June 1927, Robertson caused to be entered in the Minute Book of the Company that these shares were transferred to him;

And it does appear that the $250,000. paid in December 1927 and January 1928 were paid as the price of the group including these Amiesite-Asphalt shares;

CONSIDERING that it appears that the Defendant Robertson did not at any time during the lifetime of the decedent acquire these shares from him, but that it was solely from the Estate that he acquired them, namely on or about 31st December 1927 as aforesaid;

CONSIDERING that by reason of C.C. 1484 the said acquisition was, and the same is by this judgment declared to have been illegal null and of no effect, and it is declared that the said Defendant Robertson is in law bound either to return the said shares, or to make restitution therefor, according to what, in the circumstances now appearing to justice may appertain;

CONSIDERING, as to the 1000 shares of Fuller Gravel Co. Ltd., that it appears that these shares were in the name of the decedent at the time of his death; they were not included in the group alleged to have been sold by Quinlan himself to Robertson on the 20th June 1927;

It appears that about the month of August or September 1927, on the recommendation of Robertson, the Capital Trust Co. gave his consent that they be sold by the Estate at $50. per share;

It appears that shortly thereafter the Defendant Robertson reported to the Capital Trust Co. that he had sold these shares to persons whose names he gave, namely Tummon 600 shares, Rayner 200 shares and McCord 200 shares;

In the judgment of this Court it appears that none of the said reported sales were genuine and bona fide sales, but they were fictitious sales in the sense that the whole purpose was, by means of persons interposed, to have the said shares to become the property of the Defendant Robertson;

It appears that after reporting to the Capital Trust Co. the aforesaid sales, Robertson with ihs own moneys paid the price of all such shares, the amount being remitted to the Capital Trust Co. as far for the Estate; it appears that subsequenly Tummon, Rayner and McCord each received 50 of the shares (which that individual was supposed to have bought) and each repaid to Robertson the $50. per share which he had paid for them to the
10 Estate, but all the rest of the 1,000 shares to wit 850 thereof remained in the hands of Robertson, as the owner thereof; it appears that subsequently Robertson sold these 850 shares, (along with other of these shares which he himself owned), for the price of $90. per share; and it appears sufficiently that at the time Robertson brought about the fictitous sales to Tummon, Rayner and McCord he foresaw a profitable re-sale of the shares;

CONSIDERING that it thus appears that of the 1000
20 shares sold to Tummon, Rayner and McCord, 850 were in reality sold to persons interposed for Robertson, and such sales were by reason of C.C. 1484 illegal null and of no effect, and this Court doth now so declare;

CONSIDERING therefore that to the extent of the said 850 shares the transfer into Robertson's name was illegal and null, and that the said Robertson is, in law, bound either to return the said shares to the Estate, or to make restitution thereof according to what, in the circumstances now appearing, to justice
30 may appertain;

CONSIDERING therefore that by reason of a consent or an acquiescence induced by Robertson, and given on the date 31st December 1927, by the Capital Trust Co, Robertson became, as of that date, the acknowledged transferee and buyer of the shares: 1151 of Quinlan-Robertson-Janin, 250 Amiesite-Asphalt, and 200 Ontario-Amiesite; that the said transfer and sale is now declared to be illegal null and of no effect by reason of article 1484 C.C.; that Robertson is obliged in law to make return or restitution
40 therefor;

CONSIDERING that it appears that, since the said date, 31st December 1927, the said Defendant Robertson has continuously refused to acknowledge any rights to the Estate; has continuously affirmed himself to be the owner of all such shares, and to have had the full and free disposal thereof at all times; more particularly in the case of the *Quinlan-Robertson-Janin Company;* it appears that, by reason of his possession of these shares, the said Robertson with the other shareholder was able to dispose of the assets and business of that company in the way they pleased, this

during the period of some twelve years, and in the opinion of this Court, it would not constitute a re-establishment of rights, which was practicable or equitable or juridical, now to condemn and order return of the said 1151 shares; in the opinion of this Court the juridical and proper re-establishment of the rights of the Quinlan Estate must consist in the valuation of the said shares as
10 of that date 31st December 1927, and condemnation of the Defendant Robertson to pay that amount with interest from the service of the present action;

In the case of the *Amiesite-Asphalt* shares it appears that, about the month of September 1928, the Defendant Robertson sold those shares, and thereafter the same were entirely out of his control with impossibly that he could return them; but similarly and for similar reasons, in the opinion of this Court, the re-establishment of the rights, to which the Quinlan Estate is entitled, requires
20 that the Defendant Robertson be condemned to pay to the Estate the value which those shares bore on the date 31st December 1927, together with interest from the date of the service of the action;

With respect to the shares of the *Ontario-Amiesite Co.* it is testified to, without contradiction, that the said shares are now in Robertson's possession with ability on his part to return them by actual delivery; and it is testified to, also without contradiction, that the said shares had no real value on the date 31st December
30 1927; the Defendant Robertson will be condemned to return them to the Estate in kind;

Coming to the valuation to be placed on the *Quinlan-Robertson-Janin* shares, this Court finds that the valuations, contained in the Balance Sheets of the Company, constitute a basis which cannot fairly be objected to by Robertson, as these valuations were made by the Company's own officers, found to be borne out in the Company's books by the Company's own Auditors, and approved by the Company's Directors of whom Robert-
40 son was the chief; the value of the assets as on the date 31st March 1927 show a net value per share of (approximately) $207.; the value of the assets as of the date 31st March 1928 show a net value per share of (approximately) $249. per share; in the circumstances shown this Court adopts as the fair valuation, as at the date 31st December, 1927, $227. per share, making the valuation of the 1151 shares $261,277.; it appears that these figures are reached after providing (entered as a liability on the Balance Sheet) for the payment of a dividend, declared but not yet paid, of $84,947.54, of which the portion payable to the Quinlan 1151

shares was to be $28,314.60; this Court therefore places upon the 1151 shares as the value, on the date 31st December 1927, the $261,277. plus the $28,314.60 namely the total value of $289,591.60;

As to the valuation to be placed upon the *Amiesite-Asphalt*: it appears, from the Balance Sheets of this Company, that the
10 assets, as at the date 31st March 1927, showed a value per share of (approximately) $265. per share, similarly, as at the date 31st March 1928, the assets showed a value (approximately) $434. per share; it appears that in September 1928 Robertson sold all the shares, including these 250 Quinlan Estate shares, for approximately $608. per share, in the circumstances shown, this Court finds as the valuation, on the date 31st December 1927, $400. per share; thus a valuation of $100,000 for the 250 Quinlan Estate shares; this Court finds the re-tablishment of rights to the Quinlan Estate requires; that the Defendgant Robertson be condemn-
20 ed to pay to it for these Amiesite-Asphalt shares, the sum of $100,-000. with interest from the date of service of the action;

With respect to the 850 Fuller-Gravel shares it appears that the Defendant Robertson, having paid to the Estate at different times as the price thereof $50. per share, on the 23rd May 1928 received payment for them at the price of $90. per share; thus from that date he had in hand the sum of $34,000. which he was not entitled to have at the expense of the Estate Quinlan, and
30 he must be condemned to repay that sum to the Estate with interest from the date of the service of the action;

Under the terms of the deed of 31st January 1934 the Defendant Robertson bound himself to pay to the Estate the sum of $50,000. as part payment of above mentioned shares, and it appears, from the agreement of 21st December 1934, before R. Biron N.P., that the said Robertson actually paid the said sum to the Estate together with all interest thereon up to the 19th December 1934; the deed of 31st January 1934 is by the present
40 judgment annulled and declared to be null and of no effect against the Estate, and if no other circumstances existed, there would be occasion for the return of the $50,000. thus paid, but, in the circumstances here, the Defendant Robertson, entitled to the reimbursement of that sum of $50,000., is declared to be and was on the date 21st December 1934, the debtor of the Estate of an amount much in excess of that $50,000. thus though entitled to reimbursement of the amount, he may only be credited for that amount in reduction of the larger amount which he then owed — the claim to factual reimbursement if made, being denied by reason of legal compensation under C.C. 1188;

CONSIDERING therefore that, as against the Defendant Robertson personaly the present action is well founded;

DOTH MAINTAIN the action against him;

DOTH DECLARE to be illegal null and of no effect the
10 acquisition made by him from the Estate as above mentioned on the date 31st December 1927 of the 1151 shares of Quinlan, Robertson & Janin Limited, of the 250 shares of Amiesite Asphalt Limited, and of the 200 shares of Ontario Amiesite Limited; and doth declare the said Defendant to be bound and obliged to pay to the said Estate: in respect of the 1151 shares of Quinlan, Robertson & Janin Limited the sum of $289,591, and in respect of the 250 Amiesite Asphalt Limited shares the sum of $100,000. and to return to the Estate the scrip for the 200 Ontario Amiesite Limited shares;
20

DOTH DECLARE the sales of shares of Fuller Gravel Limited to Tummon, Rayner and McCord to have been—to the extent of 850 shares—made in contravention of article C.C. 1484; doth declare the said sales to that extent to be illegal and without effect as against the Estate; Doth declare that the sum of $34,000. received by this Defendant on the 23rd May, 1928, in part payment of these shares, to have been received for the account of the Estate, with obligation of his part to pay over that
30 sum to the Estate;

DOTH DECLARE that from the above sums amounting as they do to $423,591., there is to be credited to this Defendant, and consequently deducted from that sum, the amounts which he paid to the Estate on account thereof to wit $125,000. on 31st December 1927, $3,750, on 21st January and $125,000. on 28th January 1928, a total of $253,750., and that the balance due by the Defendant at the date of the institution of the present action was the sum of $169,841.;
40

DOTH CONDEMN the Defendant A. W. Robertson to pay unto the Estate Hugh Quinlan, as represented by the Executor-Trustees thereof, the sum of ($169,841.) One Hundred and Sixty Nine Thousand Eight Hundred and Forty One Dollars, with interest from the date of the service of this action upon him, but credit to be given in reduction of this condemnation, as at the date 19th December 1934, for the sum of ($50,000) Fifty Thousand Dollars, paid on that date to the said Executor-Trustees;

DOTH AUTHORIZE ORDER AND CONDEMN the Executor-Trustees of the Estate, namely The Capital Trust Corporation and the General Trust of Canada, Defendants herein, to receive from the said Defendant the said amount so to be paid by him, the amounts so received thereafter to form part of the assets of the Estate;

10

DOTH CONDEMN the said Defendant Robertson to pay to the Plaintiff her costs upon the present retrial; and seeing that in the judgment of 6th February 1931 there was condemnation to costs as follows: the costs of the enquête as to one third part thereof were put at the charge of the Defendant Robertson personally, one other third part to the charge of the Capital Trust Corporation personally, and the remaining third part to the charge of the Estate, the Capital Trust's costs of contestation put at their own charge, and the Plaintiffs' costs as well his own costs put at the charge of the Defendant Robertson; and seeing that it appears that under the deed of 31st January 1934 provision was made for the payment of those costs, and that it further appears that they have since been paid, this Court doth now justify those payment and doth confirm and repeat those condemnations as they were made in the said judgment of 6th February 1931 .

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(Signed) G. F. Gibsone,
Judge of the Superior Court.

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JUDGMENT OF THE SUPERIOR COURT UPON THE MERITS OF THE INTERVENTION AND THIS CONTESTATION THEREOF.

Montreal 26th April 1940.

Present: Mr. Justice GIBSONE.

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The Court & C.

Seeing that the present action, as originally instituted, was one whereby the Plaintiffs thereto brought suit against the Executor-Trustee under the will of the late Hugh Quinlan, and by the said action sought ouster against the said Executor-Trustees with rendering of an account, and sought also against one of those Executor-Trustees to wit A. W. Robertson, that for the reason, as it was alleged, that he had illegally and wrongfully procured for

his own personal profit and advantage the possession of certain assets of the Estate, that this Defendant be condemned to return such assets to the Estate, or to pay the true value thereof;

Seeing that, by judgment of this Court, upon the merits of the action, the same rendered on the 6th February 1931, the con-
10 clusions aforesaid against the Executor-Trustees es quality were refused, and the claims as to them dismissed no appeal having been instituted against this part of the judgment these adjudications remained res judicata as between the Plaintiffs and the Executor-Trustees es quality;

It appears that by the same judgment of the 6th February 1931, certain pretended acquisitions, of assets of the Estate by the defendant Robertson, were annulled and declared null, and the said Robertson condemned to make restitution to the Estate
20 of the true value of those assets, deduction being made of what he had actually paid as purchase price for the same;

It appears that the said Robertson appealed against the said judgment to the Court of King's Bench, and to the Supreme Court of Canada;

It appears that, while the said appeal was pending before the Supreme Court as aforesaid, a settlement was made between
30 different interested parties, the settlement was put in the form of a notarial deed passed before R. Papineau-Couture, N.P. under the date 31st January 1934, the parties to the deed being Dame Margaret Quinlan Desaulniers one of the Plaintiffs, the Defendant Robertson, the Executor-Trustees, and the then living members of the Quinlan family,—except only Dame Ethel Quinlan Kelly the present and remaining Plaintiffs;

It appears that one particular stipulation of the deed, and one to which all parties to it agreed, was that in consideration of
40 the sum of $50,000. and of certain costs, all to be paid by the Defendant Robertson, the Executor-Trustees, with the consent and approval those of the Quinlan family thereto taking part, gave and granted on behalf of the Estate a full and complete discharge from all that was claimed from Robertson by the action, as well as other discharges not here in question;

It appears that the Plaintiffs Dame Ethel Quinlan Kelly, not being a party to that agreement, or to the deed, continued the litigation against Robertson, and in due course judgment was rendered by the Supreme Court upon the appeal;

It appears that the appeal of Robertson was maintained, and the case sent back to this Court for re-trial;

It appears that on reaching this Court, the said Robertson filed a Supplementary Defence, whereby he invoked the deed of 31st January aforesaid, as a juridical act which finally discharged 10 him from all the charges and liabilities set up against him in the action as instituted, and for this additional reason he asked for the dismissal of the action, which as above stated was being continued by Dame Ethel Quinlan Kelly as sole remaining Plaintiff;

It appears that, by her answer to this Supplementary Defence, the said Dame Ethel Quinlan Kelly pleaded that the said deed was illegal and null, and she prayed that it be annulled and declared null and of no effect either as against her or as against 20 the Estate Hugh Quinlan;

It appears that, in order to pursue that demand before the Court, the Plaintiff was obliged by way of an Incidental Demand C.P. 215, and to summon on that issue all those who were parties to the said deed, and it appears that the Plaintiff did summon such parties;

It appears also that, on demand made thereto by one of the interests to wit by Dame Margaret Quinlan Desaulniers, the Plain- 30 tiff was required to summon, also, her own daughter Katherine Kelly, a minor, Katherine Kelly being a granddaughter of the testator, and a beneficiary under the will;

It appears that the said Katherine Kelly was duly summoned though her Tutor J. T. Kelly; it appears that the said Tutor did not plead to the Incidental Demand, but filed an Intervention in the case, and by that Intervention alleged not only many matters which were in the action as originally instituted, but also new matters all with conclusions against the Defendant Robertson per- 40 sonally, and the Intervention also concluded that the deed of 31st January be declared to be null and of no effect;

It appears that the Defendant Robertson made contestation of this Intervention *first* by an Exception to the form, the effect of which was to ask excision from the Intervention of all what was outside of the scope of the original action; it appears that, by its judgment of the 26th June 1936, the Court of King's Bench struck out from that Intervention the allegations complained of, and in the result the only conclusion left remaining in the Inter-

vention was that which asked that the deed of 31st January 1934 be annulled and be declared to be null and of no effect;

It appears that the Defendant Robertson, then contested on the merits the said Intervention as so reduced, and, alleging in effect that the deed was in all respects legal and binding upon the
10 Estate, he prayed for the dismissal of the Intervention with costs;

CONSIDERING that in consequence of the judgment of the Court of King's Bench, rendered the 26th June 1936 upon the Exception to the Form filed by the said Defendant Robertson, the sole conclusion left remaining in the said Intervention was one which prayed that the deed of 31st january 1934 be annulled, and declared null and of no effect against the Estate Quinlan;

20 CONSIDERING that the validity of the said deed as against the Estate Quinlan, as a settlement of the matters claimed by the action, and as a bar to further proceedings therein, is dependant upon the powers and capacity of those upon whose consents it is based, namely it is based upon the consents of: 1o—children and grandchildren of the testator namely of those who were the living representative of seven of the eight stirpes of his descendants, and 2o—upon the consent of the Executor-Trustees of the Estate;

30 CONSIDERING that the agreement and settlement set out in that deed being in the nature of a transaction C.C. 1918 it is essential to the validity of such contract that the parties consenting thereto have capacity to dispose of the things which are the objects of it, and considering that, under the terms of the Will, neither the children of the testator nor either at the time of that deed, nor even yet, any of the grandchildren, had or have any rights of ownership in the assets of the Estate, and that at the date of the said deed none of those parties had capacity to dispose of the things which were the objects of the transaction, such
40 participation as any or all of them may have assumed to take, in disposing of the matters and rights claimed for the estate by the action, was without legal effects thereto. in no way bound the estate Quinlan and in no way bound the said Katherine Kelly;

CONSIDERING therefore that the said deed was and is invalid and of no effect as against the Estate Quinlan, or as against the Intervenant es quality or as against the said Katherine Kelly whom he represented;

As to the consent to the said deed by the Executor-Trustees, considering that the rights being exercised by the Plaintiffs in the institution of the action and the right being exercised by Dame Ethel Quinlan Kelly, in continuing the action were rights proper to such parties, rights which could not be taken from them, or from either of them, by the Executor-Trustees, even by acts
10 performed by such Executor-Trustees in good faith and without collusion—, that for that reason such consents as the said Executor-Trustees may have given in the said deed were unauthorized illegal and did not bind the Estate or the minor Katherine Kelly;

CONSIDERING also that by the final judgment of the Supreme Court the said deed was in effect considered, and disposed of, as of no binding effect against the Estate or against the Plaintiff Dame Ethel Quinlan Kelly;

20 DOTH maintain the Intervention of the Intervenant J. T. Kelly, as continued by her with the authorization and assistance of her husband Raymond Shaughnessy;

DOTH DECLARE to be null and of no effect as against the Estate Quinlan and as against the said Katherine Kelly the said deed of 31st January 1934: and

As to the Contestation of the said Intervention by the De-
30 fendant Robertson, doth dismiss such Contestation with costs.

(Signed) G. F. Gibsone,
Judge of the Superior Court.

JUDGMENT OF THE SUPERIOR COURT UPON THE MERITS OF THE INTERVENTION AND THE CONTESTATION OF CAPITAL TRUST CORP. et al.

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Montreal, 26th April 1940.

PRESENT: Mr. Justice GIBSONE.

The Court &c.,

Seeing that the present action, as originally instituted, was one whereby the Plaintiffs thereto brought suit against the Executor-Trustees under the will of the late Hugh Quinlan, and by

the said action sought ouster against the said Executor-Trustees with rendering of an account, and sought also against one of those Executor-Trustees, to wit A. W. Robertson, that for the reason, as it was alleged, that he had illegally and wrongfully procured for his own personal profit and advantage possession of certain assets of the Estate, that this Defendant be condemned to return
10 such assets to the Estate or to pay the true value thereof;

Seeing that by judgment of this Court, upon the merits of the action, the same rendered on the 6th February 1931, the conclusions aforesaid against the Executor-Trustees es quality were refused and the claims as to them dismissed; no appeal having been instituted against this part of the judgment, these adjudications remained res judicata between the Plaintiffs and the Executor Trustees es quality;

20 It appears that, by the same judgment of the 6th February 1931, certain presténded acquisitions of assets of the Estate, by the Defendant Robertson, were annuled and declared null, and the said Robertson condemned to make restitution to the Estate of the true value of those assets, deduction being made of what he had actually paid as purchase price for the same;

It appears that the said Robertson appealed against the said judgment, to the Court of King's Bench and to the Supreme Court
30 of Canada;

It appears that while the said appeal was pending before the Supreme Court as aforesaid, a settlement was made between different interested parties, the settlement was put in the form of a notarial deed passed before R. Papineau Couture N.P. under the date 31st January 1934, the parties to the deed being Dame Margaret Quinlan Desaulniers one of the Plaintiffs, the Defendant Robertson, the Executor-Trustees, and the then living members of the Quinlan family, except only Dame Ethel Quinlan Kelly
40 the present and remaining Plaintiff;

It appears that one particular stipulation of the deed, and one to which all parties to it agreed, was that in consideration of the sum of $50,000. and of certain costs, all to be paid by the Defendant Robertson, the Executor-Trustees, with the consent and approval those of the Quinlan family thereto taking part, gave and granted, on behalf of the Estate, a full and complete discharge from all that was claimed from Robertson by the action, as well as other discharges not here in question;

It appears that the Plaintiff Dame Ethel Quinlan Kelly, one being a party to that agreement or to the deed, continued the litigation against Robertson, and in due course judgment was rendered by the Supreme Court upon the appeal;

It appears that the appeal of Robertson was maintained, and
10 the case sent back to this Court for re-trial;

It appears that on reaching this Court, the said Robertson filed a Supplementary Defence whereby he invoked the deed of 31st January 1934, aforesaid, as a juridical act which finally discharged him form all the charges and liabilities set up against him in the action as instituted and, for this additionl reason, he asked for the dismissal of the action, which as above stated, was being continued by Dame Ethel Quinlan Kelly as sole remaining Plaintiff;
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It appears that by her answer to this Supplementary Defence the said Dame Ethel Quinlan Kelly pleaded that the said deed was illegal and null, and she prayed that it be annulled and declared null and of no effect either as against her or as against the Estate Hugh Quinlan;

It appears that, in order to pursue that demand before the Court, the Plaintiff was obliged to proceed by way of an Inciden-
30 tal Demand C.P. 215, and to summon on that issue all those who were parties to the said deed, and it appears that the Plaintiff did summon such parties;

It appears also that, on demand made thereto by one of the interests to wit by Dame Margaret Quinlan Desaulniers, the Plaintiff was required to summon, also her own daughter Katherine Kelly, a minor,—Katherine Kelly being a granddaughter of the testator and a beneficiary under the will;

40 It appears that the said Katherine Kelly was duly summoned through her Tutor J. T. Kelly; it appears that the said Tutor did not plead to the Incidental Demand, but filed an Intervention in the case, and by that Intervention alleged, not only many matters which were in the action as originally instituted, but also new matters, all with conclusions against the Defendant Robertson personally, and the Intervention also concluded that the deed of 31st January 1934 be declared to be null and of no effect.

It appears that the Defendant Robertson made contestation of this Intervention *first* by an Exception to the Form, the effect

of which was to ask excision from the Intervention of all what was outside of the scope of the original action;

It appears that, by its judgment of 26th June 1936, the Court of King's Bench struck out from that Intervention the allegations complained of, and in the result the only conclusion left re-
10 maining was that which asked that the deed of 31st January 1934 be annulled and be declared to be null and of no effect;

But it appears that prior to the judgment of 26th June 1936 the Capital Trust Corporation and the General Trust of Canada in their quality of Executors and Trustees of the Estate Quinlan contested the said Intervention, they pleaded to and joined issue with all of the allegations of the intervention, and prayed for the dismissal thereof;

20 It appears that the conclusions and demands contained in the said Intervention were three only namely:

1. That the deed of 31st January 1934 be declared illegal, null and of no effect;

2. That the Defendant Robertson, for the reasons set out in the Intervention, be condemned to the Estate the sum of some $828,750.

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3. That the Defendant Robertson be condemned to deliver to the Estate certain shares in the company Amiesite Asphalt of America, or pay the value thereof, with reserve of all other recourses in the way of accounting etc against the Defendant Robertson; as to costs the conclusion was with costs against the Defendant Robertson, and against any other party who might contest the Intervention;

Thus it appears that there were no conclusion against the
40 Executor-Trustees; themselves were not in any way put in jeopardy, only the interests of the Estate would be affected if the conclusions of the Intervention were granted, even in entirety;

It appears that imputations of blame made against them with the view of showing that the agreement contained in the deed of 31st January 1934 was an improvident one for the Estate;

It appears that it is in the declared quality of Executors and Trustees that they contest the Intervention, and with the intention of pleading at the charge and risk of the Estate;

CONSIDERING that, to the extent to which their contestation consists of a defence of the Defendant Robertson and an attempt to protect him from the conclusions of the Intervention, this Contestation filed by the Executor-Trustees, as in that quality, is made without right they are not authorized to use their quality to further the interests of the Defendant Robertson;

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CONSIDERING that, to the extent that this Contestation is made and put forward, in quality of representants of the Estate, and at the risk and charge of the Estate, for the purpose of defending these contestants form imputations of blame against themselves personally, the same is not the authorized recourse, for their own protection is other that such a contestation, and is to be undertaken at their own charge; To the extent that their Contestation is in defence of the validity of the deed which they signed on behalf of the Estate, they have quality to plead in that quality, and as to this feature of their Contestation, the following considerations apply namely:

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CONSIDERING that the agreement and settlement set out in that deed were of the nature of transaction C.C. 1918 . . . and that it was essential to the validity of such contract that the parties hereto had capacity to dispose of the things which were the objects of it; and considering that under the terms of the will neither the children of the testator, nor any of the grandchildren had then, or have now, rights of ownerships in the Estate or capacity to dispose of the things which were the objects of that transaction, it follows that such participation as any, or all of them, may have assumed to take, in disposing of the matters and rights claimed for the Estate by the action, was without legal effect thereto, in no way bound the Estate as such, and in no way prevented continuation of the action;

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CONSIDERING that, for these reasons the said deed was unauthorized, null and of no effect as against the Estate, (though such effect as it may have, if any, among those who were parties to it, is not a question on this Intervention).

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CONSIDERING also that the Supreme Court by its judgment of 6th June 1934 virtually declared that the said deed was not binding nor effective against the Estate;

CONSIDERING therefore that the Contestation made by the aforesaid Executors and Trustees is unfounded;

DOTH DISMISS the said Contestation with costs, and condemn the said Capital Trust Corporation Limited and the General Trust of Canada themselves to those costs.

(Signed) G. F. Gibsone,
Judge of the Superior Court.

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JUDGMENT OF THE SUPERIOR COURT UPON THE MERITS OF THE INTERVENTION AND THE CONTESTATION THEREOF BY DE DESAULNIERS

Montreal, 26th April 1940.

PRESENT: Mr. Justice Gibsone.

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Seeing that the present action, as originally instituted, was one whereby the Plaintiffs thereto brought suit against the Executor-Trustees under the will of the late Hugh Quinlan, and, by the said action, sought ouster against the said Executor-Trustees with rendering of an account, and sought also against one of those Executor-Trustees, to wit A. W. Robertson, that for the reason, as it was alleged, that he had illegally and wrongfully procured, for his own personal profit and advantage, possession of certain assets
30 of the Estate, that this Defendant be condemned to return such assets to the Estate or to pay the true value thereof;

Seeing that, by judgment of this Court, upon the merits of the action, the same rendered on the 6th February 1931, the conclusions aforesaid against the Executor-Trustees es quality were refused and the claims as to them dismissed; no appeal having been instituted against this part of the judgment these adjudications remained res judicata between the Plaintiffs and the Executor-Trustees es quality;

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It appears that, by the same judgment of the 6th February 1931, certain pretended acquisitions of assets of the Estate, by the Defendant Robertson, were annulled and declared null, and the said Robertson condemned to make restitution to the Estate of the true value of those assets, deduction being made of what he had actually paid as purchase price for the same;

It appears that the said Robertson appealed against the said judgment to the Court of King's Bench and to the Superme Court of Canada;

It appears that while the said appeal was pending before the Suprem eCourt as aforesaid, a settlement was made beween different interested parties, the settlement was put in the form of a notarial deed passed before R. Papineau Couture N.P., under the date 31st January 1934, the parties to the deed being Dame Margaret Quinlan Desaulniers one of the Plaintiffs, the Defen-
10 dant Robertson, the Executor Trustees, and the then living members of the Quinlan family, except only Dame Ethel Quinlan Kelly the present and remaining Plaintiff;

It appears that one particular stipulation of the deed, and one to which all parties to it agreed, was that in consideration of the sum of $50,000. and of certain costs, all to be paid by the Defendant Robertson, the Executor-Trustees, with the consent and approval those of the Quinlan family thereto taking part, gave and granted, on behalf of the Estate, a full and complete dis-
20 charge from all that was claimed from Robertson by the action, as well as other discharges not here in question;

It appears that the Plaintiff Dame Ethel Quinlan Kelly, not being a party to that agreement, or to the deed, continued the litigation against Robertson, and in due course judgment was rendered by the Supreme Court upon the appeal;

It appears that the appeal of Robertson was maintained,
30 and the case sent back to this Court for re-trial;

It appears that on reaching this Court, the said Robertson filed a Supplementary Defence, whereby he invoked the deed of 31st January 1934 as aforesaid, as a juridical act which finally discharged him from all the charges and liabilities set up against him in the action as instituted, and, for this additional reason, he asked for the dismissal of the action, which as above stated was being continued by Dame Ethel Quinlan Kelly as sole remaining Plaintiff

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It appears that by her answer to this Supplementary Defence the said Dame Ethel Quinlan Kelly pleaded that the said deed was illegal and null, and she prayed that it be annulled and declared null and of no effect either as against her or as against the Estate Hugh Quinlan;

It appears that, in order to pursue that demand before the Court, the plaintiff was obliged to proceed by way of an Incidental Demand C.P. 215, and to summon on that issue all those who were parties to the said deed, and it appears that the Plaintiff did summon such parties;

It appears also that, on demand made thereto by one of the interests to wit by Dame Margaret Quinlan Desaulniers, the Plaintiff was required to summon, also, her own daughter Katherine Kelly, a minor, Katherine Kelly being a granddaughter of the testator and a beneficiary under the will;

10 It appears that the said Katherine Kelly was duly summoned through her tutor J. T. Kelly; it appears that the said tutor did not plead to the Incidental Demand, but filed an Intervention in the case, and by that intervention alleged not only many matters which were in the action as originally instituted, but also new matters all with conclusions against the Defendant Robertson personally, and the Intervention also concluded that the deed of 31st January 1934 be declared to be null and of no effect;

20 It appears that the Defendant Robertson made contestation of this Intervention *first* by an Exception to the Form, the effect of which was to ask excision from the Intervention of all what was outside of the scope of the original action;

It appears that, by its judgment of 26th June 1936, The Court of King's Bench struck out from that Intervention the allegations complained of, and in the result the only conclusion left remaining was that which asked that the deed of 31st January 1934 be annulled and be declared to be null and of no effect;

30 It appears that subsequent to the judgment of the Court of King's Bench of 26th June 1936, Dame Margaret Quinlan Desaulniers filed contestation to the said Intervention, and by her contestation alleged in substance that the said deed was regular and valid in all respects, that it was in the interest and to the advantage of the Estate, and she prayed that it be declared to be valid and binding as well with regard to the Estate as to herself;

CONSIDERING that the conclusion that the deed be de-
40 clared valid and binding in so far as concerned the said Dame Margaret Quinlan Desaulniers was not an issue raised by the Intervention, and is a matter for discussion between herself and the other signatories of the deed in question, it is not a matter for adjudication between her and the Intervenant;

CONSIDERING as to her demand that the said deed be declared valid and binding with regard to the Estate Quinlan, as a settlement of the matters claimed by the action, and as a bar to further proceedings therein, the said deed is dependant for its

validity upon the powers and capacity of those upon whose consents it is based; the said deed is based upon the consents of 1. the children and grandchildren of the testator namely those who were the living representatives of seven of the eight stirpes of his descendants, and 2. the consent of the Executor-Trustees of the Estate;

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CONSIDERING that the agreement and settlement set out in that deed being in the nature of a transaction C.C. 1918. . . It is essential to the validity of such contract that the parties consenting thereto have capacity to dispose of the things which are the objects of it; and Considering that, under the terms of the will, neither the children of the testator, nor, (either at the time of that deed, or even yet), any of the grandchildren had, or have, any rights of ownership in the assets of the Estate and that, at that date, none of these parties had capacity to dispose of the things which were the objects of the transactions, such participation as, any or all of them, may have assumed to take, in disposing of the matters and rights claimed for the Estate by the action, was without legal effect thereto, in no way bound the Estate as such, and in no way prevented continuation of the action;

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CONSIDERING that the rights being exercised by the Plaintiffs in the institution of the action, and the rights being exercised by Dame Ethel Quinlan Kelly as continuing Plaintiff, were and are rights personal to her; rights which could not be taken from her by the acts of the Executor-Trustees, even acts performed by such Executor-Trustees in good faith and without collusion, and that the declaration of settlement, contained in the said deed, of a nature to terminate the matters claimed for in the action, were unauthorized, illegal and of no effect against the Intervenant as representing the minor Katherine Kelly;

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CONSIDERING therefore that the said deed is invalid and of no effect as against the Intervenant, and that the Intervention is well founded;

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DOTH MAINTAIN the Intervention, and doth as to the contestation thereof by Dame Margaret Quinlan Desaulniers, dismiss the said Contestation with costs.

(Signed) G. F. Gibsone,
Judge of the Superior Court.

JUDGMENT OF THE SUPERIOR COURT UPON THE MERITS OF THE CONTESTATION OF THE INCIDENTAL DEMAND BY DAME MARGARET QUINLAN DESAULNIERS ET VIR.

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Montreal, 26th April 1940.

PRESENT: Mr. Justice GIBSONE.

The Court &c.,

Seeing that the present action, as originally instituted was one whereby the Plaintiffs thereto, Dame Ethel Quinlan Kelly and Dame Margaret Quinlan Desaulniers both of them daughters of the late Hugh Quinlan and beneficiaries under his will, instituted suit against the two Executor-Trustees under his will, and as to them asked that on account of blameworthy: acts and neglect of duty on the part of those executor trustees in the administration of the Estate, they be outsed from their charge and be condemned to render account, and by the said action asked also that for the reason, as it was alleged, that he had wrongfully and illegally procured possession, for his own personal profit and advantage of, divers assets of the Estate that the Defendant Robertson be condemned to return such assets to the Estate or pay the true value thereof

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Seeing that, by judgment of this Court upon the merits of this action, the same rendered on the 6th February 1931, the conclusions aforesaid against the Executor-Trustees es quality, were refused, and the claims as to them dismissed, and no appeal having been instituted against this part of the judgment such adjudications remained res judicata between the Plaintiffs and the Executor-Trustees es quality;

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It appears that, by that same judgment of 6th February 1931, certain pretended acquisitions of assets of the Estate, by the Defendant Robertson, were annulled and declared null, and the said Robertson condemned to make restitution of the Estate of the real value of those assets, deduction being made of what he had actually paid as purchase price for the same;

It appears that the said Robertson appealed against this judgment to the Court of King's Bench, and later to the Supreme Court of Canada;

It appears that while the said appeal was pending before the Supreme Court as aforesaid, a settlement was made between different interested parties, and the settlement or agreement was put in the form of a notarial deed, passed before R. Papineau Couture, N.P. under the date 31st January 1934 the parties to the deed being Dame Margaret Quinlan Desaulniers one of the Plain-
10 tiffs, the Defendant Robertson, the Executor-Trustees, and the then living members of the Quinlan family — except only the Plaintiff Dame Ethel Quinlan Kelly, the present, and only remaining Plaintiff;

It appears that one particular stipulation of the deed, and one to which all parties to it agreed, was that in consideration of sum of $50,000. and of certain costs all to be paid by the Defendant Robertson, the Executor-Trustees, with the consent and approval of those of the Quinlan Family thereto taking part, gave
20 and granted on behalf of the Estate a full and complete discharge from all that was claimed from Robertson by the action, as well as other discharges not here in question;

It appears that the Plaintiff Dame Ethel Quinlan Kelly, not being a party to the agreement or to that deed, continued the litigation against the said Robertson, and in due course judgment was rendered by the Supreme Court upon the appeal;

30 It appears that the appeal, of Robertson was maintained and the case sent back to this Court for re-trial;

It appears that on reaching this court the said Robertson filed an additional or Supplementary Defence, and, in this Supplementary Defence, he invoked the deed of 31st January 1934 aforesaid, as a juridical act which finally discharged him from all the charges and liabilities set up against him in the action as instituted, and for this additional reason he asked for the dismissal of the action, which as above stated, was being continued
40 by Dame Ethel Quinlan Kelly as sole remaining Plaintiff;

It appears that by her Answer to this Supplementary Defence the said Dame Ethel Quinlan pleaded that the said deed was illegal and null, and she prayed that it be annulled and declared null and of no effect either as against her or as against the Estate Hugh Quinlan;

It appears that in order to be able to pursue the said demand before the Court it was obligatory upon the Plaintiff that

she institute an Incidental Demand to that end C.P. 215, and to summon on that issue all those who were parties to that deed, namely among others the aforesaid Dame Margaret Quinlan Desaulniers;

It appears that the said Dame Margaret Desaulniers being duly summoned upon that issue, appeared and pleaded thereto by a Contestation and, by the same, alleged in substance as follows:

That the agreement or settlement was one within the powers of the Executor-Trustees, that it was advantageous to the Estate, that all interested parties, with the sole exception of the remaining Plaintiff Dame Ethel Quinlan Kelly, had agreed to the terms thereof, and the Contestant prayed that the said deed be declared to be valid and binding upon the Estate, and more particularly that it be declared valid insofar as the Contestant was concerned;

It appears that the Plaintiff denied the allegations of the Contestation and prayed for the dismissal thereof with costs;

CONSIDERING that the said deed in so far as it purported to effect a settlement of the Plaintiff's present action, was a contract in the nature of a transaction it was governed by the provisions of law more particularly by the articles C.C. 1918 1919 1920;

CONSIDERING that an essential to the validity of a contract of transaction is that the parties to it have the capacity to dispose of the things which are the objects of it;

CONSIDERING that neither the children of Hugh Quinlan nor those of his grandchildren who were parties to that deed had capacity under the will to dispose of any of the property of the Estate and therefore of any of the things which were the objects of the transaction; the assent of such parties gave no validitating effect to it;

CONSIDERING that with knowledge of this deed. the Supreme Court by its judgment of the 6th June 1934, expressly recognized and declared Plaintiff's right to continue her present action against the Defendant Robertson, and therefore the contention that the deed of 31st January 1934 is binding upon the Plaintiff is unfounded;

CONSIDERING that the Contestation of Dame Margaret Quinlan to this Incidental Demand is unfounded;

DOTH DISMISS the Contestation of Dame Margaret Quinlan Desaulniers with costs.

(Signed) G. F. Gibsone,
Judge of the Superior Court.

JUDGMENT OF THE SUPERIOR COURT

REASONS FOR JUDGMENT. GIBSONE JUDGE

10 Montreal 26th April 1940.

The case is now before this court for re-trial; It has been referred back here by a judgment of the Supreme Court of Canada.

The action was instituted in 1928; it came to trial before Martineau J., and judgment was rendered by him on 6th February, 1931. The plaintiffs were two of the legatees under the Will of the late Hugh Quinlan, and the action was directed as to some
20 of its issues against the Executor-trustees under the Will, and as to other of the issues against A. W. Robertson, personally, he being one of these Trustees. On the issue against Robertson personally, the Executor-trustees were parties in order that such judgment as would be rendered on that issue would be carried out in so far as it would devolve upon those Trustees to carry it out. From the judgment of the Superior Court of 6th February, 1931, Robertson, personally, appealed to the Court of King's Bench, and judgment was rendered on that appeal on the 30th
30 December 1932. The effect of this judgment was to modify in some details the judgment of the Superior Court but otherwise to confirm it, and the appeal was dismissed. Robertson appealed to the Supreme Court; its judgment was rendered on 6th June 1934, and by this judgment: the judgment of the Court of King's Bench was "reversed and set aside", the judgment of the Superior Court was "quashed in part as well as certain rulings made by the trial judge refusing the admission of oral evidence of the facts and circumstances hereinafter mentioned . ."; one of the respondents in the Supreme Court, Mrs. Desaulniers, with
40 the approval of that Court, withdraw from the case; and then it was: "ordered and adjudged that the remaining parties be sent "back to the Superior Court to complete the evidence already "taken by a further enquête and then secure a new adjudication "on the merits of the issues herein shown as remaining to be "decided between the respondent Ethel Quinlan (Mrs. Kelly) and "the appellant Robertson. . ."

I shall be obliged infra to deal in some detail with the different relevant matters, but, as an introductory note, it is

probably sufficient to say that the nature and purpose of the action, *as against the trustees,* was to charge maladministration against them, in consequence to ask that they be ousted from their charge, that they be condemned to render an account, and that the inventory which, they had prepared be annulled. I would think, though, that the principal purpose of the action was the issue directed *against the defendant Robertson personally* (with the trustees parties to this issue in order that the judgment to be rendered would be carried out by these trustees in so far as their participation in this was needed). This issue was to charge that Robertson had, in fact, had transferred into his personal name a number of company shares which had belonged to the testator Hugh Quinlan, that the means used to have the transfers made were illegal and fraudulent, and secondly and in any event those transfers were prohibited under C.C. 1484 and were illegal. The action sought to have Robertson condemned to return those shares to the estate, and in the event of his failure to return the shares, that he be condemned to pay the value of the same, alleged to be some $1,350,000.

The shares, theretofore the property of Quinlan, which Robertson had transferred into his name were these:
this group:

1151 shares in Quinlan, Robertson & Janin Limited
250 shares in Amiesite Asphalt Limited, and
200 shares in Ontario Amiesite Asphalt Limited

a group for which Robertson paid to the estate $250,000., *and secondly*: 1,000 preferred shares (carrying with them a bonus of 499 shares of common — as to which there will be no special mention hereafter, as they are included with the preferred shares) in the Fuller Gravel Company Limited for which Robertson paid to the estate $50,000.

The Plaintiffs allege the illegality of the transactions on the grounds stated, and they say also that the amounts paid by Robertson, as for those shares, were away below the value that the shares bore at the time. The Superior Court, by its judgment of 6th February 1931, declared the transfers to Robertson to have been illegal by reason of C.C. 1484, it condemned him to return them to the estate. In his default to return the group first mentioned supra he to pay the value thereof which value the Court estimated to be $372,928. (less however the $250,000, that Robertson had already paid to the estate as for them) thus an additional

sum of $122,928. for them; as to the shares in the Fuller Gravel Company, that judgment declared to be illegal under C.C. 1484 the acquisition by Robertson of 400 of these shares, and, as it was undoubted that he was then unable to return the shares, it condemned him to pay to the estate the amount for which he had sold them namely $90. per share, $36,000, for the 400 shares, (less however
10 the price he had aready paid to the estate for them $50, per share: $20,000) thus an additional sum in respect of them of $16,000. The result of the judgment of the Superior Court judgment, upon the issue against Robertson personally, was to condemn him to pay sums aggregating $138,928., plus certain dividends, in addition to the $270,000. which he had already paid as for them.

On the issue against the Trustees, the Superior Court refused Plaintiffs' demand for their ouster; it refused the demand for an accounting; and it refused the demand for the annulment
20 of the inventory of the Estate which they had made. On this issue, with regard to Robertson, the Superior Court accepted his representation that whatever he had done in the way of getting transfer of the shares he had done after getting the advice of Mr. Perron K.C., therefore that he should be considered to have been in good faith and not to have incurred destitution from office. After this judgment, Robertson resigned his office, and appointed in his place the General Trust of Canada, Thenceforth the Trustees are the Capital Trust Corporation and the General Trust of
30 Canada.

The Court of King's Bench, by its judgment rendered 30th December 1932, was unanimous that the acquisiton of the said shares by Robertson was illegal by reason of C.C. 1484, that Robertson had rightly been condemned to return them or the value thereof; the valuation of the Fuller Gravel shares was easy to calculate as supra, but, in the case of the group first mentioned, the companies concerned were all commercial undertakings the sum value of the assets of each fluctuated from time to time, there-
40 fore the intrinsic value of the shares fluctuated similarly, and the exact amount which Robertson should be condemned to pay, if he defaulted to return the shares, depended, in that measure, upon the date of the valuation.

The date adopted by the Superior Court for this valuation — brought out the figure $372,928; the Court of King's Bench was of the opinion that the date so decided upon was not the date that should have been adopted,—that a certain other date was the proper one for this valuation. A valuation, however, made on this

other date would have increased the figure $372,928; there had been no appeal or cross appeal by the Plaintiffs against that figure and the Court of Appeal was therefore without jurisdiction to change the date or increase the valuation, so the figure $372,928., remained.

10 The Court of Appeal made some verbal changes in the adjudications of the Superior Court—for the purpose of clarification, all intended to conserve the essential meaning—but it made one important modification with respect to Robertson's obligation to return dividends and such like distributions on the shares. Apparently this last mentioned modification was looked upon as Robertson's sole success in appeal, but it was considered sufficient to justify refusal of costs to the respondents, The Superior Court judgment was amended and modified as above, in other respects it was confirmed, and the appeal as above, in other respects it was
20 confirmed, and the appeal was dismissed without costs.

As stated supra, this judgment of the Court of King's Bench was "reversed and set aside". On the present re-trial, therefore, it may not be taken into account as an adjudication, nor even as a part-adjudication of the rights of the parties.

In the Supreme Court the adversaries at first were Robertson the Appellant, and the two Plaintfifs (Mrs. Kelly and Mrs.
30 Desaulniers) Respondents. While the case was still before that court, and prior to judgment rendered there, Mrs. Desaulniers, upon terms agreed upon between herself and Robertson, withdraw from the case. In that court's judgment Mrs. Desaulniers' withdrawal is specially mentioned This settlement between Robertson and Mrs. Desaulniers will be referred to in some detail infra; for the moment all that is necessary to say is that Mrs. Kelly had no part in it. Mrs. Kelly continued the case alone as Respondent; when judgment was rendered in the Supreme Court it was a judgment as between Robertson and Mrs. Kelly only; and Mrs.
40 Kelly's right, as sole remaining Plaintiff, to continue the case was declared in the judgment.

Hugh Quinlan's will had bequeathed an annuity to his widow, and, during her lifetime, certain allowances to children. After the death of the widow, the income of the estate was to be divided in equal shares among all the testator's children, the share in the income of children dying, to be taken by their children by representation, per stirpes. At the testator's death he had eight children, and all were surviving at the time of the institution of the present

action. The action was instituted by two only of these eight, namely as above stated, by Mrs. Kelly and Mrs. Desaulniers. To this action Robertson pleaded (inter alia), and he contended throughout, that in law these two plaintiffs did not possess the quality or status which would permit them to institute a demand of the nature of the present. The chief ground for this contention was
10 that the Pilaintiff's individual rights under the Will, consisting only of a share in the income, and for each during her lifetime only, without ownership by either Plaintiff of any portion of the capital of the estate, could not institute this action which essentially concerns the capital as such. In all the courts, this contention of Robertson was negatived; thus in the formal judgment of the Supreme Court:

> "7.—This Court doth further declare that Respondent
> 20 Ethel Quinlan, to the extent that she is entitled to a variable share in the net revenue of the estate of her father, has a sufficient interest and "status" to preserve intact the " "corpus" of the estate".

There can be no doubt, I think, as to the meaning of the words"preserve intact the "corpus" of the estate"; they are not restricted or qualified in any way, and it is not permissible to add any restriction to them now, and the Supreme Court must be supposed to have intende what was so clearly expressed. The word
30 "corpus" used alone would have referred to the totality of the estate, and when the additional qualifying word "intact" is added, the certainty becames even greater. The meaning of the words can only be, so it seems to me, that Mrs. Kelly, now by this action, in which she is the sole Plaintiff and in the exercise of her own right, has the "status" which enables her to demand, and if the facts to be proved justify it, to have performed that the totality of the shares in question be returned to the estate.

The introductory words "to the extent that" should there-
40 fore be given the meaning, and the equivalent to "by reason of the fact that", and this for the following reasons: 1.—The purely grammatical reason that they are introductive or conjunctive of the words that follow,—these latter being the ones used to give the reason why the right exists; the introductive words are separable from and separate from the sentence which declares the right; 2.—The rule of legal construction, for the right declared is of its nature an indivisible right; 3.— When the right is declared it is declared in unrestricted terms; and 4.—the situation of Mrs. Kelly was, and is, that she might, and may, become titular of the total

net income of the estate, namely if she were to survive the testator's other children and their issue. Mrs. Kelly is then from the date of the judgment of the Supreme Court the sole Plaintiff in the case, and with the status above declared.

The next matter, I think, is to ascertain the exact scope of 10 the present re-trial. The point of departure must, of course be the excerpt from the judgment of the Supreme Court:

> "6. And this Court did further order and adjudge that the remaining parties be sent back to the Superior Court *to complete the evidence already taken* by a further enquête, and then secure a *new adjudication* on the merits of the issues *herein shown as remaining to be decided* as between the respondent Dame Ethel Quinlan (Mrs. Kelly) and the appellant Robertson personally . . ." (the remaining part of 20 this paragraph enumerates certain topics as to which it is declared that oral evidence is legally admissible. Mention of these enumerated topics will be made infra)

The Supreme Court judgment does not state, in any explicit way, what are "the issues remaining to be decided" between the parties. The judgment does, as noted supra, declare what is Mrs. Kelly's Status, and, in its adjudication numbered 5, it specifies certain matters which it declares have become res judicata as 30 against her, thus:

> "5. This Court doth further declare that, seeing the acquiescence of the respondent Ethel Quinlan thereto and the acceptance thereof by the testamentary executors and trustees, it does not, and cannot, disturb that part of judgment of the Superior Court dismissing part of *respondent's conclusions to wit*:
>
> 40 1.—The prayer that the appellant A. W. Robertson and the Capital Trust Company be removed from office;
>
> 2.—The prayer that they be condemned to render an account;
>
> 3.—The prayer that the inventory be annulled;
>
> 4.—The various allegations of fraud against the appellant, as well as the allegation that the late Hugh

Quinlan was not of sound mind when the letter of the 20th of June 1927 was read to him; and that the said judgment of the Superior Cour, in respect to the dismissal of the above mentioned *conclusions,* is now *res judicata* between the parties"

10 This adjudication numbered 5 combined with the adjudication numbered 2:

"2. That the judgment of the Superior Court be, and the same was quashed in part as well as certain rulings made by the trial judge refusing the admission of oral evidence of the facts and circumstances hereinafter mentioned. . ."

20 would indicate, I think, that the "part" of the judgment of the Superior Court which is quashed is the judgment *in toto,* saving only those points which are so declared to have become *res judicata* against the Respondent Mrs. Kelly. (I do not see how it could be possible to contend now that the judgment of the 6th February 1931 is still *in esse* as an authoritative and binding valuation of the shares at the $372,928 and the $36,000., nor still to constitute a condemnation of Robertson to pay to the Estate the sum of $138,928, with order to the Trustees to receive this amount from Robertson. I think that all those adjudications of the Superior Court 30 are now quashed and set aside; a new adjudication on all these matters is called for on this re-trial)

It becomes necessary to advert to these matters of *res judicata.* In approaching this question I mention that what res judicata is, and to what exactly it applies, is ~~with~~ a matter of positive law and is set out in the Civil Code:

"1241. The authority of a final judgment (res judicata) is a presumption *juris et de jure*: it applies only to that 40 *which has been the object* of the judgment. . ."

The present action, as instituted, called for the adjudication of a number of issues, but there were two principal ones, clear and distinct independant of each other namely: *first* an issue between the Plaintiffs against the Trustees as such, which, on the allegations of mismanagement, neglect, incompetence it was sought that they be ousted, their inventory be declared illegal and of no effect, and that they be condemend to render an account: *second* an issue between the Plaintiffs and Robertson

personally, which sought condemnation against him to return certain shares to the estate or pay the value.

The items, 1, 2 and 3 of the Supreme Court adjudication numbered 5 were matters on the issue between the Plaintiffs and the Trustees as such. They were demands made in the conclusions of the action, they were demands definitely made, and, in the adjudications of the Superior Court judgment, they were definitely refused. The Plaintiffs did not appeal against these refusals, and since they were "objects" of the action and of the judgment, they have become res judicata between the Plaintiffs and the Trustees esquality, as is decreed by art. C.C. 1241.

But the two matters in the item 4 do not come at all in the same way. Neither the one nor the other was in the sense of C.C. 1241. an "object of the judgment"; indeed neither was an "object" of the action, but each was only a means of proof of alleged illegality.

The Supreme Court was misinformed or it is by oversight that adjudication 5 states that they were "part of respondent's conclusions", it is sufficient to refer to the conclusions of the action to see that they were not.

With respect to Robertson's good faith the following occurs in the Superior Court judgment:

> "Considérant que le défendeur a agi dans ces diverses circonstances de bonne foi, et sur l'avis de M. Perron qu'il avait le droit d'agir ainsi;
>
> Considérant, pour cette raison, que ces achats et transferts d'actions ne sont pas une cause de destitution;

The above is the only mention in the judgment with respect to Robertson's good faith, it is inserted there as a reason for not ousting him from his trusteeship, and it appears to concern only the issue between the Plaintiffs and the Trustees as such. The Plaintiffs did not institute an appeal in order to have those paragraphs reversed, and for these reasons I would think: that, in so far as those paragraphs were part of the refusal of ouster, the Plaintiffs were decided to leave that issue as it was determined by the first judgment; in so far as those paragraphs might be said to affect the claim for reimbursement of the shares, the Plaintiffs had judgment in their favour, namely, as above men-

tioned for some $139,000. They had asked for that condemnation for cumulative reasons, judgment was granted for one of those reasons. They could not complain, they had no juridical interest to appeal, and, if not, they had no right to appeal C.P. 113. Declaration of bad faith against Robertson was not an object "of their action, and it could not be a ground of appeal.

10

As to the mental condition of Hugh Quinlan on the date June 20th 1927, there is no mention of this either in the conclusions of the action or in the adjudications of the judgment with respect to it. There was no occasion to mention the topic in the judgment, for the trial judge had refused admission of evidence as to what Hugh Quinlan may have said or done in response to the alleged reading of that "letter" to him on that date.

Another reason, also peremptory in nature, suggests the
20 same conclusion. It is this that by the action, and by the whole conduct of the case so far, it is indisputable that the good or bad faith of Robertson, his faithfulness or breach of trust, are alleged to have, and must have, a direct and certain bearing upon the legality or illegality of those acts of his which are attacked, as also upon the measure of restitution to which he must be condemned, if he is to be condemned. It is not an end or purpose to convict him of these faults; the end and purpose is to have illegality declared and restitution made; his bad faith is an element to
30 prove illegality for *fraus omnia corrompit*. The Supreme Court sends the case back here for the evidence to be *completed* and for there to be a *new adjudication* of the issues remaining to be decided between these parties. At the date of the Supreme Court judgment 6th June 1934, it was impossible to foresee what evidence the record would finally contain on these issues between Mrs. Kelly and Robertson. It is impossible to suppose that the Supreme Court could, on that date, have intended to direct that, regardless of what evidence might finally constitute the record, the conclusion of the Superior Court must always be that Robertson
40 had been in good faith throughout the issues being re-tried.

If I am wrong in considering that on this re-trial it is open to Mrs. Kelly to adduce evidence and to address argument on the matters mentioned in the item 4, the remedy will be applied by some higher court.

Another question to be dealt with now is this that by the adjudication numbered 6 of the Supreme Court that court:

" . . did further order and adjudge that the remaining parties be sent back to the Superior Court to complete the evidence already taken by a further enquête, and then to secure a new adjudication on the merits of the issues herein shown as remaining to be decided between the respondent Dame Ethel Quinlan (Mrs. Kelly) and the appellant Ro-
10 bertson personally . . ."

In adjudication No. 4 that Court had just stated:

"... that this Court doth further declare, as a fact, that as far as the appellant Angus William Robertson and respondent Margaret Quinlan are concerned, they have settled their differences and have ended this litigation".

Who constitute the "remaining parties" referred to in the adju-
20 dication No. 6? I think it must be said they are the original parties to the action *minus* only Margaret Quinlan; more particularly, and this is the matter of importance, that the Trustees under Hugh Quinlan's Will continue to be parties. They continue to be Defendants, and continue to be subject to jurisdiction in the judgment which will be rendered on the re-trial. The issue directed against themselves, as Trustes, has been decided in their favour, and has become *resjudicata.* As to that issue, they need have no concern, but the issue against Robertson personally
30 in still *in esse,* as to it the need of the Trustees in the case is, that there be jurisdiction to adjudge them to receive from Robertson, as part of the Estate, whatever Robertson may be condemned to pay to the Estate as compensation or restitution in respect of the issue against him personally. If they were not Defendants for the purposes of that issue, the judgment rendered upon it, if adverse to Robertson, would not in strictness be executory. I cannot think that the Supreme Court could have intended that siuation to occur, and I conclude that the Trustees continue to be Defendants for the needs of the adjudication of the issue of Mrs.
40 Kelly against Robertson personally.

The Supreme Court adjudication no. 6 continues:

"... and that oral evidence be admitted, at such further enquête of the following facts and circumstances to wit: A. the answer given by the late Hugh Quinlan when the letter of June 20th 1927, was read to him; including, of course, the conduct, statements, communications and directions of the persons present when the letter was so read, and of the late Hugh Quinlan himself, and generally all relevant circumstances relating thereto;

B.—All the facts, circumstances, statements, and communications relating to the drafting of the said letter of June 20th 1927 including the conduct of all those who shared in the drafting of the said letter; and the whereabouts and safekeeping of the said letter;

10 C.—All the facts, circumstances, statements and communications relating to the visits of the Honourable J. L. Perron and of the present appelant to the late Hugh Quinlan, during the month of May, 1937, or thereabout, and to the endorsement of the four certificates of shares filed as exhibits P9, P10, P-26, and P-27; also to the Memorandum of the 21st May 1927, P-66; including the conduct of all the participants in these various events;

20 D.—Generally all facts, conditions and circumstances tending to show that the late Hugh Quinlan agreed, or disagreed, as the case may be, to the contents of the letter of June the 20th 1927;

The respondent would also bring new evidence of all facts, declarations and statements which might tend to rebut the evidence to be afforded as aforesaid by the appellant."

What precedes in these notes is intended to indicate what 30 matters came here from the Supreme Court, and with regard to them, what the task of this Court is.

I summarize the preceding pages:

1.—The record that comes here is the record as it became constituted at the first trial before this court;

2.—The judgment of the Court of King's Bench has been reversed and set aside;

40

3.—The judgment of the Superior Court of 6th February 1931, except the items 1, 2, and 3 of adjudication numbered 5 of the judgment of the Supreme Court, is quashed and set aside;

4.—The adjudications of the Superior Court, namely the items 1, 2, 3, supra, are now *res judicata;* they terminate the issue directed against the Trustees esquality;

5.—The Trustees remain parties to the case as Defendants in res-

pect of the issue between the Plaintiff and the Defendant Robertson pesonally;

6.—By reason of the withdrawal of Mrs. Desaulniers, Mrs. Ethel Quinlan remains alone the Plaintiff in the case; and she acting alone, and in the exercise of her own right, possesses status which
10 permits her in law to demand and to secure the conservation intact of the corpus, namely of the totality, of her father's estate;

7.—Oral evidence as to the matters enumerated in the Supreme Court adjudication number 6 is to be admitted;

8.—The issues to be tried anew are those of the original pleadings less however those items 1, 2, and 3, which are now *res judicata;*

20

After the record reached this Court, there was a delay during some months, and then the first proceeding was an application from Robertson for leave to file a Supplementary Plea. This being granted, he, on 11th January 1935, filed a Supplementary Plea which was to the following effect:

That since issue joined (i.e. prior to the judgment of 6th February 1931) the Defendant Robertson, by deed passed
30 before R. Papineau-Couture, N.P., the 31st January 1934, has purchased or re-purchased from the testamentary executors and trustees of the estate Quinlan all the shares which he was ordered to return or which he was order to pay to the estate, by the judgments herein of 6th February 1931 and 30th December 1932;

That by the said deed the said testamentary executors and trustees desisted form the said judgments, discontinued all proceedings, and renounced and abandoned all rights and
40 recourses of any kind whatsoever which resulted to them esquality by reason of the said judgment, as well as of all other claims they might have or pretend against the said defendant Robertson; That in consideration of the aforementioned discontinuances and renunciations, and as it is set out in the said deed of 31st January 1934, the Defendant Robertson agreed to pay, and actually did pay, to the said testamentary executors and trustees the sum of $50,000., in addition to the sum of $270,000. already paid, this as full and complete payment of the renunciations and discharges

granted him in the said deed; and this Defendant also says that he therein undertook to pay certain law costs, and that he has in fact paid and discharged the same;

That the testamentary executors and trustees possessed in law the capacity and authority to sell or re-sell the said shares, and to discontinue discharge and renounce as set out in the said deed, and that in addition thereto, all the stipulations in the said deed were approved ratified and confirmed by all the heirs and legatees of the late Hugh Quinlan, save only the present plaintiff dame Ethel Quinlan Kelly; that, in consequence, all of the said stipulations are valid, and are binding upon the estate Quinlan as also upon all interested therein, including the said Dame Ethel Quinlan Kelly;

This Defendant says that the agreement of the 31st January 1934 was by its terms made dependant upon *acte* thereof being granted by the Supreme Court, that in fact the Supreme Court by its judgment of 6th June 1934, admitted the said deed to form part of the record, and granted *acte* thereof;

The Defendant Robertson by this Supplementary Plea says that for the reasons above given, and without prejudice to the Defence already filed, the Plaintiff's action (the original action) is unfounded, and he prays for the dismissal thereof with costs;

The answer of the Plaintiff Mrs. Kelly to this Supplementary Plea was as follows:

The fact of the deed of 31st January 1934, as also of its production before the Supreme Court, and the mention of it made in the judgment of 6th June, 1934 is admitted; It is denied that the testamentary executors and trustees had capacity or authority to make the covenants set out in the said deed;

It is asserted, in respect of the matters included in the action, that such authority as the testamentary executors and trustees might have had under the Will was suspended, and that it was not within their power to exercise the same pending the final judgment of the courts; that, moreover, while the case was in appeal before the Supreme Court, to wit under date 6th September 1933, the said testamentary

executors and trustees esquality gave formal written notice to all the parties concerned in the litigation, that on behalf of the Estate they accepted the benefit and advantages accruing to the Estate from the judgments of 6th February 1931 and 30th December 1932;

10

That although the judgment of the Supreme Court did declare that, as between the plaintiff Dame Margaret Quinlan Desaulniers and the Defendant Robertson, the litigation *was at an end, it recogniezd, and thus declared,* the right of Dame Ethel Quinlan to continue the action as instituted, namely by referring the case back to the Superior Court to be tried anew;

That that which is referred back to the Superior Court does not include and may not include any issue as to the validity or effect of the said deed of 31st January 1934; that whereas the shares in question were valued by the judgment of the Superior Court at $408,928; and in the opinion of the Court of King's Bench, the value thereof was $415,956.25, with in each case an additional amount to equal the dividends and bonuses, (such dividends and bonuses so plaintiffs say being of the amount $36,565.84) the executors and trustees, by the said deed declare acceptance of the sum of $320,000. as the price therefor;

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The plaintiff says that her late co-plaintiff, Dame Margaret Quinlan Desaulniers, was induced to give her consent to the deed and to withdraw from the case by reason of a payment to her husband, Mtre Jacques Desaulniers, of the sum of $27,500.; that the consent of the other heirs was obtained in circumstances which would negative the legality of their consent namely: they were required to give a consent without time for reflection, they were refused communication of the deed unless and until they signed it; it was by a representation which was false that they were induced to consent, namely the representation that if Robertson continued to be condemned to return the shares, he would in fact return them, and he would thereby become entitled to receive back from the estate the $250,000. he had already paid, that what the estate would then have would be the shares, such shares representing a minority interest at the mercy of the majority interest—and the consequence would be the diminution of the Estate income by one third; that this representation was false because the executors and

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trustees knew that Robertson could not return the shares, seeing that he had sold them; that this fact was concealed from the heirs; That in respect of the shares now being referred to, the Defendant Robertson was indebted to the Estate in the sum of $535,065.84, and that he was indebted to it for divers other sums as brought to the attention and responsibility of the executors and trustees by this plaintiff, by a protest of the 17th October, 1933, Mtre N. Picard, N.P.; That the said deed of 31st January 1934 is illegal, null and void also for the reason that the officers who signed as on behalf of the trust companies, in so signing, were acting outside of the scope of their duties and powers, and in fact were without authority and without representative capacity;

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And the Plaintiff Dame Ethel Quinlan prays that the deed of 31st January, 1934 and the settlement agreement therein contained be declared null and void and be set aside, at all events in so far as she Dame Ethel Kelly is concerned, and that the Supplementary Plea of the Defendant Robertson be dismissed with costs;

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The Defendant Robertson's reply to this was a denial.

Robertson's Supplementary Plea having invoked this deed of 31st January 1934 against the plaintiff, and having urged it as an additional reason,—even as a peremptory reason—for the dismissal of the action as originally instituted, it was of course permissible for the plaintiff to attack the legality of that deed; she did so by her above Answer to the Supplemntary Plea. Properly to accomplish such an annulment, necessitated the summoning into the case of the other parties to the deed. On leave granted, the plaintiff summoned all the other parties to that deed on the issue of its nullity.

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A number of these new Defendants appeared. Only one interest pleaded, namely Dame Margaret Quinlan Desaulniers and her husband (Mtre Jacques Desaulniers), their joint defence being in substance as follows: THAT by the deed in question the testamentary executors and trustees, acting in virtue of the powers granted them by the Will, sold to the Defendant Robertson the shares in the different companies mentioned,—shares which Robertson contended that he had purchased from Hugh Quinlan during his lifetime—and for which Robertson had paid $270,000. to the Estate, this being, as Robertson alleged, the price agreed upon be-

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tween himself and Quinlan; that by the deed in question Robertson agreed to pay an additional sum of $50,000. for those shares, making the total to be paid for the same $320,000.; that the settlement was made while the case was before the Supreme Court, and after it had been part heard; that during the part hearing some of the judges, more particularly the Chief Justice, had expressed views which seemed to indicate that the judgment to be rendered might declare oral evidence to be legally admissible to prove the alleged sale by Quinlan to Robertson; that if a sale from Quinlan to Robertson were to be proved, the price would not exceed the $270,000. already paid, that it was in these circumstances that Dame Margaret Quinlan and her husband gave their approval to a settlement which would fix the price definitely at $320,000.;

And these Defendants said also that if, by the judgment to be rendered by the Supreme Court, the sale of the shares to Robertson were declared null and that he returned these shares to the estate, the Estate would have found itself the holder of a minority interest, of which Robertson held the majority interest, with the result that the revenue from the shares would be uncertain in amount, and the value of the shares belonging to the minority interest would be much depreciated; That the Plaintiff Dame Ethel Quinlan, alone of all the interested parties, refused concurrence in the said settlement;

These Defendants say that, under the terms of the Will, the testamentary executors and trustees were fully authorized to agree to the terms of the said deed, and that they, and also these Defendants did assent thereto in good faith; That these Defendants are entitled, at least as to themselves to have it declared that the said deed is valid and effective according to the terms thereof;

By their conclusions they ask that the deed of 31st Janaury 1934 be declared valid and legal in all respects, that in any case it be declared valid and legal in so far as these Defendants are concerned, and that the present summons to them be dismissed with costs;

The Plaintiff Mrs. Kelly answered the Desaulniers' Defence as follows:

By denial of all allegations of such defence which were incompatible with the allegations of Plaintiff's Answer to the Supplementary Plea of the Defendant Robertson (this being the issue upon which these defendants were summoned); By affirmation

that it was to the knowledge of the said two Defendants that the Defendant Robertson had parted with all the shares in question, and that he would not have been able to return them in kind to the Estate;

By affirming that the consent of the Defendants the Desaul-
10 niers consorts, was obtained from them in reality by means of the payments to Mtre Desaulniers, as is alleged in the Plaintiff's Answer to Robertson's Supplementary Plea; And the Plaintiff prays for the dismissal of the Desaulniers's Defence with costs.

The issue raised by the Supplementary Plea must dealt with before proceeding any further, because if it be well founded, all the grounds upon which the original action was based are made inexistent, namely by the consents and by the discharge which the executors and trustees assume to give to Robertson in that deed.
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The situation immediately preceding the deed was that the action had sought return or accounting to the Estate of a number of shares which, as it was alleged, Robertson had wrongfully had put in his name from the name of the decedent; the grounds of the action were that the transfer to Robertson's name was illegal and wrongful *both* by reason of the fact, as it was alleged, that the transfer had been brought about by deceit and misrepresentation on Robertson's part, *and also* because of C.C. 1484
30 which prohibits that a trustee acquire personally property from the trust. The Superior Court, for the reason of the prohibition of C.C. 1484, declared to be illegal and null these transfers of shares into Robertson's name, and ordered restitution. The Court of King's Bench unanimously confirmed, and Robertson appealed to the Supreme Court, The Executor-Trustees had taken no part in the hearing of the case in the Court of King's Bench. They were taking no part in the hearing before the Supreme Court, but after argument had commenced there, the Court suggested that they intervene, leave thereto was granted on 16th January
40 1934; under date 24th January 1934 they declared that "they submitted themselves to justice"; the deed in question was executed on 31st January 1934.

The deed purports to be an agreement between the Executor-Trustees of the Estate and Robertson; by way of introduction to the agreement the nature of the action is explained, the Superior Court and Court of Appeal judgments are related, then is declared the agreement arrived at namely; that in consideration of $50,000. which Robertson binds himself to pay in addition

to the $270,000. already paid, the Executor-Trustees sell or re-sell, in so far as may be necessary, the shares in question to Robertson; appear as parties to the deed seven of the children of the testator (Mrs. Kelly is the eight), and these seven "for the same consideration" as that agreed upon between the Executor-trustees and Robertson, renounce to all claims of every kind whatsoever
10 that as legatees, or as representatives otherwise of Hugh Quinlan, they might have or pretend to have against Robertson arising out of the business associations which Quinlan and Robertson may have had together. Two of these had children of their own (such being grandchildren of the testator) and the tutors representing the Dunlop child and the Ledoux children, in each case thereto authorized by a homologated deliberation of a family council, joined with the seven children to renounce all claims against Robertson.

20 What contractual obligations this deed may have created between Robertson and the children or grandchildren who were signatories, is not a question which comes under Robertson's Supplementary Plea. Such matters may come up later on for debate between Robertson and these individuals; they are not relevant here and now.

The essential matter raised by that plea, and now calling for consideration, is as to whether the contents of this deed operate
30 a settlement of the issues of the action,—issues which, but for that deed, would remain to be adjudicated between the Plaintiff Mrs. Kelly and the Defendant Robertson; in other words does this deed operate as a bar to all further proceedings upon the action.

There are only two sources from which such a setlement or bar could come: either from the consents given by the Trustees, or from the consents given by the children and grandchildren as set out in the deed.
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First: as to the consents given by the children and grandchildren: there can, I think, be no doubt but that the nature of the contract set out in the deed is that of transaction as known in our law, and that articles 1918-1920 of the Civil Code govern it:

1918: Transaction is a contract by which the parties terminate a law suit already begun, or prevent future litigation by means of concessions or reservations made by one or both of them.

1919. Those persons only can enter into the contract of transaction who have legal capacity to dispose of the things which are the object of it.

1920.—Transaction has between the parties to it the authority of a final judgment (res judicata).

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Reference to the terms of the Will makes quite evident that neither the children of the testator, nor his grandchildren, signatories of the deed had legal capacity to dispose of the things which are dealt with in the deed. Under the Will the Estate is to be kept under administration by the Trustees until the death of the last surviving child of the testator; the division will take place only then. Until that date the revenue is to be divided among the children or grandchildren as stated supra, the legatees in ownership are to be those grandchidren or great grand children who will be alive at the date of the death of the last surviving child of the testator. It must be evident, I think, that under the will the testator's seven children who signed the deed had not, and apparently never would have ownership, nor capacity to dispose of any part of the capital of the estate; evident also that the grandchildren who signed (by the intermediary of their tutors) had no rights ownership, nor of disposition and that they will never have any, unless they are surviving at the date of the death of the last of the testator's children. (Vide also IX of the Will). Those granchildren or great grandchildren who are alive on that date will inherit in ownership a share in the estate, but what fraction of the estate the share will be, will depend upon the number of them who will be then surviving.

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All these different individuals had capacity to enter into contractual relations with Robertson, each for himself or herself, but they had not, either individually or collectively, capacity to make a transaction of this lawsuit, nor to validate a transaction of it, purported to have been made by the Executor-trustees.

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Next as to the consents given by the Trustees: It is certain, I think, that according to the terms of the will the Trustees are invested with the most ample powers of disposal, of settlement, of compromise, or renunciation,—all powers necessary to make the settlement set out in the deed. This being so, the inquiry is narrowed to the question as to whether, in the circumstances, they had the full exercise of those powers or whether they were for some reason estopped or inhibited from the exercise of them. The situation at the time of the deed was that in a suit instituted by

two legatees against the Defendant Robertson, it had been declared that Robertson had illegally obtained possession of certain assets of the estate, and he had been condemned to return them or the value thereof. In the Court of King's Bench, and in the Supreme Court, the Trustees were in the case, to be parties to the judgment, to the extent only of being obliged to take notice of the
10 judgment to be rendered, and to receive from Robertson whatever he might be condemned to hand over to the Estate. They were not then participants in the litigation except in the passive way just mentioned. The litigation was between the Plaintiffs and Robertson. Did the powers that the Trustees possess under the will authorize them to step in between the Plaintiffs and the Defendant, authorize them to agree with Robertson upon a compromise of the Plaintiffs' claims, thereby make the compromise obligatory upon the Plaintiffs, and did it authorize them to deprive the Plaintiffs of the right to proceed further?
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I would sav that the right of the Trustees to act in that way would depend upon whether the action was the exercise of a right appertaining to the Plaintiffs themselves, or was the exercise of a right appertaining to the Trustees, the Plaintiffs acting in a mandatary or representative capacity for the Trustee. I believe the correct juridical answer to that question is that the Plaintiffs were acting undoubtedly in the exervice of a right appertaining to themselves and to each of them, and that it was
30 beyond the powers of the Trustees to hinder or obstruct them. It is not necessary to elaborate further, for the full and complete answer is set out in formal words in the judgment of the Supreme Court. This deed was before that Court long before its judgment was rendered, it was debated there, but the judgment declares definitely and finally that the:

> "respondent Ethel Quinlan has a sufficient interest and status to preserve intact the corpus of the estate".

40 This provision in the judgment makes it quite certain that the deed of 31st January 1934 does not operate a settlement of the suit, nor prevent the Plaintiff Mrs. Kelly from continuing the proceedings.

The Defendant's Supplementary Plea must therefore be dismissed.

Coming now to the Defence filed by the consorts Desaulniers, their conclusions are that the deed of 31st January 1934:

1. be declared legal and valid "à toutes fins que de droit", which of course is tantamount to saying that it constitute a settlement of the case, and a bar to further proceedings. For the reasons I have just given in dealing with the Defendant's Supplementary Plea, that demand must be dismissed. Secondly they ask that it be declared valid binding in so far as concerns themselves. This
10 conclusion concerns only what reciprocal undertakings may have been agreed to between the Desaulniers and Robertson; it does not enter into the present controversy and it must be left to those parties to settle between themselves if occasion arise.

The Desaulnier's Defence must be dismissed.

The matter next in order calling for attention is the Intervention filed on behalf of the Plaintiff's daughter Katherine Kelly. I mentioned supra that the Dunlop grandchild and the
20 Ledoux grandchildren of the testator were parties to the deed of 31st January 1934; Their tutors were among those summoned by the Plaintiff on the issue of the validity of that deed. It was at the request of Dame Desaulniers that the Plaintiff was required to summon also her own daughter into the case and thus have as parties in the case all the presently existing grandchildren of the testator. Katherine Kelly was then a minor; a tutor was appointed to her, and he on her behalf filed an Intervention. Later, when she became of age, she herself continued the Intervention, and
30 later still when she married, her husband joined with her in continuing it.

The occasion of the Intervention was the Plaintiff's Answer to Robertson's Supplementary Plea. The issue raised by that Supplementary Plea was as to whether the deed of 31st January 1934, settled and put an end to the action. Katherine Kelly was summoned on that issue, but her tutor did not merely file a pleading to that issue, he filed an Intervention, and by it he assumed on her behalf a role which was equivalent to that of an additional
40 Plaintiff in the original action. The Intervention in its original form included mostly all the grounds set out in the original action, but it included also a considerable amount of new matter: it included some new claims against Robertson, namely new matters in respect of which it was alleged he was indebted to the Estate, and as to which reimbursement was, by the Intervention, demanded against him.

I am inclined to think that his latter material was incorporated into the Intervention because the deed of 31st January

1934, by its terms, declared that it was to operate as a settlement not only of that lawsuit, but also of all other matters as to which the Estate might have any claim against Robertson. The new matter incorporated into the Intervention alleged in detail a number of claims which were not mentioned in the action; they were discovered only later; they amounted to hundreds of thousand
10 of dollars. If the deed of 31st January 1934 was to be declared valid, as was asked for by Robertson, these claims, all of them, would have been wiped out and renounced to without discussion or even inquiry. The Intervenant evidently judged this new matter to be pertinent to her demand that the deed be declared to be inoperative and null as against the Estate.

The Intervention was contested separately by Robertson by the Executor-Trustees, and by the consorts Desaulniers.

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Robertson's contestation of it began by an Exception to the Form the chief complaints of which were; the incorporation of this new matter, and the reiteration in the Intervention of matters which at the date of its filing had, as it was alleged, become *res-judicata* as between the parties to the original action. By judgment of the Court of King's Bench of 26th June 1936 this Exception to the Form was maintained, much the greater part of the Intervention, and all the conclusions of it except one, were struck out. The sole conclusion that the judgment of 26th June 1936 permitted to
30 remain in the Intervention, was that which asked that "the deed of . . . 31st January 1934 be declared illegal null and void . . . and be cancelled annulled and set aside . . . costs against the defendant Robertson in any event and against any other party who may contest the present intervention."

Before leaving this judgment of 26th June 1936, I must expressly say that it did not pass in any way upon the merits of the allegations which it deleted from the Intervention, but it deleted them because, if left there, they would have made the scope
40 of the Intervention more extensive than the scope of the action,—a situation which our law of procedure does not permit, as is stated by that judgment:

> CONSIDERING that the present Intervention is, for the greater part, irregular and illegal as seeking to revive issues finally determined between the parties prior to such Intervention, and, moreover, seeks to introduce new issued which are not part of the cause in its present state;

Considering that while such issued may give rise to an independant action on the part of the Intervenant, he cannot justify the present Intervention;

Subsequently to this judgment of 26th June 1936, and as a consequence of it, the Intervention, whatever may have been its original form and its original purposes, now became solely and exclusively an Intervention on the issue raised by Robertson's Supplementary Plea, namely as to the validity and effectiveness of the deed of 31st January 1934, as a settlement of all claims existing or which might exist against Robertson by the Estate. The sole question, as to which adjudication is asked, and therefore the sole question as to which the Court derives jurisdiction from this Intervention, is the nullification or declaration of nullity of the deed.

After his Exception to the Form had been maintained by the judgment of the 26th June 1936, Robertson pleaded to the merits of the Intervention in its reduced form. His pleading was in effect a denial of the allegations still remaining in the Intervention, and his prayer was that it be dismissed. I do not think it necessary to indicate here what were these issues of fact between the Intervenant and Robertson; all or practically all form part of the issues between the parties to the main action, and will be dealt with there. But the considerations of law applicable, and which would negative the validity and effectiveness of the deed of 31st January 1934, (and therefore would maintain the prayer of the Intervention) are the same as those urged against that deed in the contestation of defendant's Supplementary Plea. I have dealt with them supra. Those reasons of law are equally applicable here; the intervenant by reason of her interest in the estate is equally entitled to invoke them, and she has invoked them. The conclusion to be reached must be the same namely that that, in the circumstances in which they were with respect to those matters, the Executor-Trustees were without authority to make the settlements and renunciations which they purported to make by the said deed.

The (sole remaining) conclusion of the Intervention must therefore be granted, and the contestation of it by Robertson must be dismissed.

The consorts Desaulniers also contested this Intervention; their contestation was made after the judgment of 26th June 1936, and therefore had reference solely to the demand of nullity of the

deed. This is exactly the same question as met with in the adjudication of the contestaiton by these consorts of Plaintiff's Answer to Robertson's Supplementary Plea. The contestation here is word for word the same as their contestation of defendant's Answer to Robertson's Supplementary Plea. I must deal with the matter in the same way for the same reasons apply. The contestation of
10 the consorts Desaulniers must be dismissed.

The Executor-trustees also contested the Intervention. They did so, however, before the judgment of 26th June 1936 was rendered, and their contestation was to the Intervention in its original form. In its original form the Intervention was a lengthy document and its conclusions consisted in three demands. Much the greater part of it consisted of allegations of indebtedness on Robertson's part toward the Estate. There were a number of items. As to some of the items the allegation was that Robertson became
20 indebted toward the Estate in sums of money; as to other items that he became bound to divide with the Estate certain holdings of company shares. Two of the demands in the conclusions concerned these allegations: one demand was that Robertson be condemned to pay to the Estate the sum of $828,752., the other demand was that the transfer or account for certain shares of Canadian Amiesite Limited and of Amiesite Asphalt Limited of America.

I would think that in so far as allegations which concerned
30 and affected Robertson alone,—indebtedness due by him to the Estate—the Executor-trustees were not called upon to plead or to defend. I would think that the correct attitude on their part would have been a readiness to allow the Intervenant to prove that Robertson owed to the Estate, and a readiness to accept from Robertson, and as part of the Estate, whatever Robertson might be condemned to pay to them as representing it. But an oddity of their contestation of the intervention is that they take Robertson's side,—they contest and deny allegation which in no way concern themselves. It is partiality of this kind on their part
40 which is a complaint of the plaintiff in another part of the case. A similar proceeding by them had been expressly disapproved of in the judgment of 6th February 1931.

The third demand in the conclusions of the Intervention is for the annulment or declaration of nullity of the deed of 31st January, 1934. Among the allegations of fact concerning this matter are imputations of blame against the Executor-trustees; neglect, carelessness or other fault, and there are also allegations of reprehensible conduct such as the communication of incorrect

information, the withholding of information etc. In their quality of Executor-trustees they were undoubtedly, I think, entitled to defend the validity of a deed that they had signed. In so far as the propriety of their own conduct was an element of proof of the validity or non-validity of the deed, it was, I would think, a legitimate part of the inquiry, and one upon which the Executor-
10 trustees would be entitled to join issue and make proof, provided of course that the issue being fought was the validity or non-validity of the deed. If, for some reason, the validity of the deed was out of the question, I would say that the Executor-trustees were not entitled to engage the Estate in a contestation, the sole purpose of which was their own personal disculpation. For their personal disculpation their recourse was other than that. Now the situation was exactly that just mentioned, namely the validity of the deed of 31st January 1934, as against the Estate, was not an open question, either at the time of Robertson's Supplemen-
20 tary Plea, or at the time of the Intervention, or at the time of the Executor-trustees' contestation of the Intervention. The invalidity of that deed as against the Estate had been clearly indicated, if indeed not positively declared, by the judgment of the Supreme Court of 6th June 1934. The Supreme Court has granted *acte*, namely record, that the deed had been signed by the parties to it, the Court had assented that it be filled in the case, but with the express *caveat* as to its validity, and later in the judgment there is the declaration that the Plaintiff was entitled to continue
30 the original action, declaration of a right which could not have been made if the deed had been considered as valid against the estate. (Valid as between certain parties to it was a different matter).

The conclusion then to which I must come with respect to the Executor-trustees contestation is this; that in so far as it contests the allegations and conclusions against Robertson personally their contestation is without right; in so far as their contestation seeks to support the validity as against the Estate, of the deed of
40 31st January 1934, their contestation goes counter to the judgment of the Supreme Court, and is therefore unfounded; in so far as it may seek to disculpate themselves personally they are without right to engage the Estate in a contestation for their personal interest. Their contestation must be dismissed, and they they must themselves bear the costs.

The Supplementary Plea and the Intervention — the two proceedings added to the record after its return to this Court from the Supreme Court—are disposed of as supra. The task before

this Court, thereafter was, "to complete the evidence already taken by a further enquête, and then" make "a new adjudication on the merits of the issues . . . remaining to be decided as between" Mrs. Kelly the remaining Plaintiff and the Defendant Robertson.

10 This further enquête has been made, evidence has been adduced and exhibits filed by both parties, and the issues fully argued.

The issues raised by the action are the demands made, and expressly asked for in its conclusions. It is a Plaintiff's right to have adjudication upon the matters he submits, and it is his demand which confers upon the Court jurisdiction to adjudicate them. I will inquire in a moment what the issues between the Plaintiff and the Defendant are but I think I may begin by some 20 introductory matter as to which there is no contestation.

Hugh Quinlan died on 26th June 1927; he had been a contractor for a number of years, his business associates in latter years had been A. W. Robertson the Defendant, and Alban Janin; their business had been carried on by means of incorporated companies, of which there were a number,—all of them were private companies, in each case the sole shareholders, directors and officers were the three business associates themselves,—(except an 30 occasional share here and there being held temporarily in the name of an employee in order to qualify him to serve on the Board of Directors). Some of the principal companies were: Quinlan Robertson & Janin Limited in which, Quinlan owned 1151 shares out of a total of 3452 shares, Robertson and Janin each owned one half of the remainder; A. W. Robertson Limited of which Quinlan and Robertson each owned one half the shares; Amiesite Asphalt Limited of which Quinlan owned 50 shares in his own name and he held 200 shares in the name of his son in law Dunlop, thus in all 250 shares, Robertson also owned 250 shares and Janin owned 500 40 shares; Fuller Gravel Co. Ltd, in which Quinlan and Robertson each owned one half of the shares; each owned 1000 preferred and 500 common;

Hugh Quinlan's health failed him about December 1925; after that date he did not attend his office, though he seems to have kept in touch with his parners until about May 1927: it was in June of that year that the worst crisis came, and the end.

He had made his Will in April 1926; its terms are clear, and there are, I think, no differences of opinion as to its purport

and effect. At the date of his death his immediate family consisted of his widow and eight children; some of them unmarried and still living at home, others married and living elsewhere. After some particular legacies in favor of his widow, he left his entire estate to Executor-trustees for administration, by them or their successors, until the death of the last to survive of his children;
10 then the capital to be divided in ownership among his grandchildren or great grand-children who would be in existence on that date. He directed his Executor-trustees to pay to his widow during her lifetime an annuity of $24,000. payable monthly, also to pay a certain annuity to each child living away from the Mother's house; the balance of revenue to be capitalized until the death of the widow. From the death of the widow, the net revenue of the estate to be divided equally among all the children, those dying becoming represented by their children, and on the death of the testator's last surviving child, the partition of the capital to take place
20 as just stated.

The Executor-trustees named in the Will were A. W. Robertson and the Capital Trust Company. Certain dispositions of the Will have a special bearing upon this litigation are these namely:

> VI.—It is my desire that no inventory be made before Notary and that the inventory of my estate shall be made
> 30 in the form of commercial inventories . . .
>
> IX. . . . I further stipulate that none of my legatees or beneciaries shall have the right to cede, sell, pledge or transfer his respective share or right title and interest in my Estate in whole or in part until after the final division "partage" of the Estate has taken place, and then only as to such portion as has been remitted to him under the terms of this my present last Will and Testament.

40 Under disposition IV the fullest powers were granted to the Executor-trustees to enable them to administer, to realize upon, and generally to settle up the Estate and also all transactions, contracts or matters pending at the time of his decease. With respect to investments they were expressly restricted to trustee investments as limited by C.C. 981(o), but there was this special disposition with regard to: "any joint stock company or corporation in which my Estate may hold stock"; as to these, the Executor-trustees were authorized to represent the Estate as shareholder in these companies, to join in increasing the capital and to subscribe for additional shares, to join in reducing the capital or in the amalgamation, reorganization &c of any such company.

(In parenthesis I make this remark that the situation in which Hugh Quinlan was at the time the Will was made, April, 1926, a situation which was allowed to continue up to the time of his death, namely the joint ownership of the above companies by the three associates, rather strongly suggests that the testator entertained the expectation that the same situation would continue
10 after his death, and for such an eventuality he provided the Executor-trustees with the special powers which they would in such case need.)

On Hugh Quinlan's death, which occurred on 26th June, 1927, the Executor-trustees accepted their appointment. As appears from the evidence in the record they proceeded thereupon in the exercise of their powers. The way they exercised these powers, as well as many of their acts, are the subjects of the present controversy; they will call for mention or comment later on,
20 but the incidents which immediately preceded the action were these:

On 24th July 1928, Mrs. Ethel Kelly a daughter of the decedent, wrote to the Capital Trust Corpn. that "although it is now over a year since my father died, I have not been given any information regarding his estate". In her letter she asked for a copy of his Will and of the Inventory of the Estate. After some correspondence and delay, the Trust Company sent her, first an office copy,
30 and then an authentic copy of the Will, and a document which was said to be a copy of the Inventory of the Estate, Mrs. Kelly at once wrote back to say that she refused to accept the document sent her as the Inventory of her father's Estate, and she asked for a detail accounting from the date of the death to the 3rd September 1928. In reply to this the Trust company sent to her copy of a report made by P. C. Shannon & Co. said to be the auditors of the Estate, the report dated 8th August, 1928, and addressed to the Trustees. Annexed to this report, and forming part of it was a list of assets to be those of the Estate as of the date 31st
40 December, 1927, according to the books of the Estate. The Trust company in their covering letter advised Mrs. Kelly that each year a similar report would be sent to her. Mrs. Kelly wrote at once to refuse the documents as an accounting.

On receipt of Mrs. Kelly's request, the Capital Trust Company consulted Mr. J. L. Perron K.C. (whom in their letter to her they call the Solicitor of the Estate) as to what their course of action should be. Mr. Perron wrote in reply: "You are not obliged to furnish a copy of the Will to Mrs. Kelly, nor are you compelled to

supply her with a copy of the Inventory. The heirs have the right to obtain such copies from the notary at their own expense". A copy of Mrs. Kelly's letter, in which she refused to recognize as the inventory of the Estate the document sent her, was submitted to Perron for advice, and the advice he wrote back was: "I would advise you to completely ignore Mrs. Kelly's letter". A few days
10 later the Capital Trust Company again wrote for advice and in reply Perron wrote: "I do not think you need bother about her. The shortest way is to ignore her entirely."

At about the same date the Capital Trust company sent another copy of the Shannon report to Mrs. Desaulniers, who also was a daughter of the decedent. Mrs. Desaulniers answered at once that she did not accept it as a statement of the assets of her father's estate, nor as an accounting. This letter being referred to Mr. Perron, he wrote to the Trust Company: "You must expect
20 to receive several of those, and they need not alarm you".

Mrs. Kelly wrote to the same effect to Robertson the other trustee. The Capital Trust company communicated to him what Perron's advice was; it become adopted as their attitude toward Mrs. Kelly and Mrs. Desaulniers. Mrs. Kelly and Mrs. Desaulniers then as joint Plaintiffs took suit. The action was instituted in October 1928; it was directed against the Capital Trust Company and Robertson. They appeared separately the Trust Com-
30 pany by Messrs Campbell & Co., Robertson by Messrs. Beaulieu & Co.; they defended separately; both Defences were filed in November 1928. There followed different motions which had to do with pleadings etc., and these caused delays; beginning 21st October 1929 Robertson was examined on Discovery, the examination lasting until 18th December. The action was amended twice first on 28th February 1930, finally on 10th January 1931, the amendments made seem to have been chiefly in details of the conclusions, and to have affected Robertson alone. In each case he filed an Amended Defence; the Trust Company did not, its De-
40 fence as filed in November 1928 remained its Defence throughout. The set of pleadings Declarations, Defence, Answer and Reply all dated January 1931 constituted the issue between the Plaintiffs and Robertson.

I mentioned in an earlier part of these notes that the action consisted of two distinct issues, the one directed against he Executor-trustees, the other against Robertson personally. What was sought against the Executor-trustees was their ouster from the charge on the ground of culpable disregard for and sacrifice of the

interests of the Estate; what was sought from Robertson was the return to the Estate of certain of its assets, which he had obtained possession of, and in his default to return, payment of the value. Those were the two issues which the Defendants were called upon to meet in November 1928.

10 I think it must be quite evident that everything sought by the action—assuming that the allegations were well founded—was something that it was very much in the interest of the Estate to obtain: removal from office of custodians who were said to be negligent, disloyal, and even unfaithful, and the return and conservation of all the values belonging to the Estate. Every benefit that the action could bring was for the benefit of the Estate; if, on the contrary, the action was insufficiently proved or unfounded, the ill consequences, costs, &c., would fall upon the Plaintiffs personally, and not upon the Estate.
20

As I say the Defendants defended separately; each sought to repel the action and deny to the Estate all what the action sought in its interest.

The Capital Trust Company did not confine its Defence to matters which concerned either itself alone, or the Executor-trustees as such; it went out of its way and joined in all of the issues for the defence of Robertson personally. On account of its
30 obtrusion into these latter matters, the judgment of 6th February 1931 refused to it the costs of its Defense. Also some of its allegations were open to other criticism. As one example of these latter, there is that in para. 68 of its Defence where it affirms: "that it "has at all times been willing, and is now willing, to render ac-"counts of its administration as Executor of the Estate Hugh "Quinlan to the Plaintiffs and/or other parties entitled thereto "at the expense of those parties and at all reasonable times". In view of the correspondence upon this subject immediately prior to the action, to the legal direction from Perron which was adopt-
40 ed by the Executor-trustees, the affirmation in para. 68 was knowingly false. To a Court or judge reading the para. 68, and being uninformed of the above cited correspondence, the affirmation was clearly of a nature to deceive. Known to be false, as indeed it was, for what purpose was it inserted in the Defence, if not for the purpose of deceiving the Court?

I say that each Defendant defended separately, and by different law firms, but the correspondence exchanged between the law offices concerned, printed pp. 686-697, shows this that it was

really J. L. Perron K.C. who was Counsel for both these Defendants against the Estate. It was he, as Counsel for Robertson, who commissioned Beaulieu & Co. to appear for Robertson, vide: his letter of 2nd November 1928; Mr. Beaulieu K.C., in his letter p. 694 expressly says "... vu que M. Robertson est, en définitive, votre client. . ." vide: also letter Perron to Robertson p. 691. It
10 does not appear from the file from which these letters are culled that Campbell & Co. were commissioned by Perron to defend for the Capital Trust Company, but it does appear that they submitted to him the defence they had prepared and made the changes in it that he suggested. After approving a draft for the Capital Trust Company's Defence, Perron, in his letter of 13th November, sends a copy of it to Beaulieu & Co. and in this letter suggests that Mr. Beaulieu and he should meet on the following day when "nous pourrions peut-être préparer le nôtre" "le nôtre" is of course Robertson's Defence to the action. On a number of other matters
20 of pleading Beaulieu & Co. write to Perron for instructions or advice, clearly indicating Perron to be Robertson's real Counsel and themselves to be acting under his instructions.

J. L. Perron K.C. was thus taking an active professional part as Counsel for Robertson; he was not less acting as Counsel for the Trust Company; his efforts and Counsel were directed to defeat all that the action was seeking for the benefit of the Estate. He never appeared in Court for the Defendant, his name was not
30 mentioned in that connection but he was the veritable Counsel of both. I am obliged to mention this circumstance, and I will be obliged to refer to others later on, because one of the contentions of the Defendant Robertson is that the interest in which Perron was acting, throughout the matters to be here dealt with, was the Estate, and only the Estate. In the defence against the present action it is certain that the interest he was acting for and actively working for was Robertson's. Other occasions will be met with later on.

40 It is admitted that the issue against the Executor-trustees has been disposed of so far as the present action is concerned; that it has become *res judicata* namely: that on the present proceedings the Executor-trustees may not be ousted, that they may not be condemned to render an account, that the 'inventory' they made may not be annulled. At the same time it must be said that on the first hearing, as on the present one, the evidence tendered, by whatever interest, was tendered, not with respect to one issue or to another, but to the issues generally; all what was admitted became part of the general mass of evidence in the case; I would say

therefore that the whole or any part of that mass may be referred to for the elucidation of any of the relevant matters.

The action was instituted in order to remedy a state of affairs which, in the opinion of the Plaintiffs, imperilled the interests of the Estate. What had caused their distrust and their anxiey came partly from the three documents sent to them in August and September by the Trust Company, and partly from the facts, then finally made clear to them, that they were to be completely ignored in all matters relative to the settlement or the administration of the Estate, and the sole information they would be permitted to receive would be, each year, a copy of the report of the Auditors of the Estate.

The three documents they had received were:

1.—A copy of the 'Inventory' printed at pp. 309-315 said to be as of the date of death 26th June 1927. Features of this document which in the opinion of the Plaintiffs cast doubt upon it were: that it was merely a list of assets without mention of liabilities, although undoubtedly there were liabilities; it contained no mention as to who had prepared it, there was no indication that anyone had signed it, there was no indication of the sources whence taken; but above all it represented the gross value of the Estate to be $1,170,000. (round numbers) whereas their knowledge of their father's affairs (superficial knowledge perhaps) made them estimate the value of his Estate at four million dollars.

2.—The report mentioned supra dated 8th August 1928 by P. C. Shannon Son & Co., the Auditors of the Estate, the report addressed to the Executor-trustees, and purporting to be an audit of the books and accounts of the Estate for the period 26 June–31 December, 1927. The statement of income during that period and how it was expended is doubtless correct, it is not a question in the case; but what is of interest is that attached to this report and forming part of it is a list of the assets of the Estate as of the date 31st December 1927. On the copy of this report sent to Mrs. Kelly on 29th August, 1928 (p. 647) the Estate appears as owner of 1151 shares of Quinlan Robertson & Janin Ltd.

3.—Another copy of this Shannon report with the list of assets annexed all exactly the same as that sent to Mrs. Kelly on the 29th August, this second copy having been sent to Mrs. Desaulniers on 5th September (p. 647), But on this second copy was added a most significant note with respect to the 1151 shares of

Quinlan, Robertson & Janin Limited; the note was not on the copy sent to Mrs. Kelly; the note was: "Quinlan, Robertson & Janin Limited sold in 1928 for $250,000."

The action

10 I have mentioned supra that the contracting business of Hugh Quinlan and his associates was carried on by means of incorporated companies,—all of them private companies, the three associates being the sole shareholders. For a number of years preceding Hugh Quinlan's death the business had been extensive, successful, and supposedly very profitable. The exact or even the approximate worth of the companies, whether individually or in combination was not ascertainable by an outsider,—not even by Hugh Quinlan's heirs—and, perhaps naturally, these latter attributed a very high valuation to each and to all of them.
20

The companies referred to in the action are:

Amiesite Asphalt Co. Ltd.,
Quinlan, Robertson & Janin Limited,
Fuller Gravel Co. Limited,
A. W. Robertson Limited,
Ontario Amiesite Limited,
Macurban Asphalt Limited,
30 Quinlan, Robertson & Janin (England) Limited.
Crookson Quarries Limtied,
Canadian Amiesite Limited.

Amiesite Asphalt shares.

Information had come to the Plaintiffs (it does not appear, and it is not material, how it came) to the effect that on 22nd June 1927, which was four days before Hugh Quinlan's death, Robertson had somehow acquired from him, supposedly for $100. per
40 share, the 250 shares which Quinlan owned in the Amiesite Asphalt company. It was quite certain to the Plaintiffs when they instituted the action, and it is quite certain now, that on *22nd* June 1927, Hugh Quinlan was non compos mentis.

They therefore alleged in para. 11 . . .:

> that on or about 22nd June, three days before the testator died, the said Angus William Robertson, one of the Defendants personally and for his own benefit, acquired a num-

ber of shares the property of the testator to wit 250 shares of Amiesite Asphalt Limited. . that the said transfer was due to fraud on the part of the said Robertson, . . . the transfer was fraudulently operated when the said testator was fatally ill with a malady wherefrom he died three days later . . . when he was unable and forbidden, to the knowledge of everyone, to attend to any business whatever . . . when the said testator was under the care of two day nurses and two night nurses, as well as of the doctors in attendance. . . when he was in a physical and mental state which rendered him capable of giving a valid consent. That the shares were transferred to Robertson at an under-valuation inasmuch as they were worth $1,000. per share and they were improvidently sold to him at $100. per share. That the sale was made secretly and clandestinely without the knowledge of the heirs; . . . that in order to conceal the true character of the transfer Robertson had the transfer made to other persons, these latter being only prete-noms for him Robertson.

Quinlan, Robertson & Janin Limited shares.

Unquestionably up to immediately before his death Hugh Quinlan was the owner of 1151 of these shares. The first and only information which the Plaintiffs received as to them was what appeared in the three documents which they received in Angust and September 1928. According to the 'inventory' Quinlan was the owner of these shares at the time of his death, and the 'inventory' put a valuation upon them of $150,000.

The Shannon report of 8th August 1928 with its list of assets, as these were on 31st December 1927, included these shares, but according to this list the valuation was put at $25,000. This is what was sent to Mrs. Kelly on 29th August.

The same Shannon report sent to Mrs. Desaulniers on 5th Sesptember had had added to it a note that these shares had been sold in 1928 for $250,000.

I would think that the literal meaning of the Shannon report (including the list annexed to it) was that according to the Estate books these 1151 shares were the property of the Estate on the 31st December 1927, and were likewise so on the 8th August. It was the trust company that had possession of and made the entries in the books of the Estate, so the fact that it, the Trust

Company, on 29th August sent the Shannon report in its original form to Mrs. Kelly would indicate that on that date the shares were still carried on their books as belonging to the Estate. The note added to the copy of the Shannon report sent to Mrs. Desaulniers on the 5th September would indicate that the note had reference to a transaction which took place between 29th August
10 and 5th September.

As to these Quinlan, Robertson & Janin shares, here in substance is what the action alleges:

That in the course of the year 1928 the said 1151 shares were sold by the Executor-trustees to the Defendant Robertson, he being one of the Executor-trustees, such sale being evidenced by the statement sent by the Defendants to Mrs. Desaulniers; that up to the spring of 1928, the Executor-
20 trustees always treated the Estate as the sole owner of these shares;

That the sale of the shares is illegal and null on its face, and is the result of the fraud of the Defendants;

That the said shares are worth the sum of $700. each, and the sale was collusively contrived by the Defendants as part of a scheme, and that the full value of the shares was
30 not realized.

Fuller Gravel Company Limited There is no dispute but that at the time of his death Hugh Quinlan owned 1,000 preferred and 499 common shares in this company. They are listed in the inventory (p. 313); there they appear to be considered as worthless, and are given the nominal value of $1.00. They do not appear in the Shannon list of assets of 31st December 1927, but, in that list, there is mention that an additional sum of $24,999.00 had been received in respect of them. This entry was understood by the Plaintiffs
40 to mean that, at the date 31st December 1927, these Fuller Gravel shares had been sold for $25,000.00. It is admitted that what was meant by the latter entry, was that at the date 31st December 1927 an additional $24,999.00 had been received in respect of them. Here in substance is what the Plaintiffs in their action allege with respect to these shares:

That the said shares were fraudulently and collusively sold by the Executor-trustees to Robertson, himself an Executor-trustee, at a nominal figure and not at their real

value and thereby the said Robertson became the purchaser of all those shares either himself of in the names of persons interposed who in reality were acting for him;

That this collusive sale is illegal null and void as against the Plaintiffs.

10

A. W. Robertson Limited. At the date of his death, Hugh Quinlan owned 1587½ of these shares; his holding was exactly one half of the capitalization of the company. The Plaintiffs make certain complaints as to the undervaluation of these shares & c. I anticipate and mention that apparently no issue as to them was pursued in the case, as the company was put into voluntary liquidation.

Shares in other companies. The Plaintiffs allege that the decedent was the owner of shares in the following companies:

20

Ontario Amiesite Limited,

Macurban Asphalt Limited,

Quinlan, Robertson & Janin Limited (London, England),

Crookson Quarries Limited,

30 and in other companies also, these latter being unknown to the Plaintiffs, but well known to the Defendant Robertson; and the Plaintiffs call upon Robertson to disclose the names of these companies. They also allege that the 'inventory' does not show that the Estate was the owner of shares in any of the above companies, and that this is due to the manipulations of the Defendant Robertson.

Allegation of a general nature against the Defendant Robertson:

40 The Plaintiffs say that since the death of Hugh Quinlan the Defendant Robertson has pursued in dealing with the assets and good will of the companies in which the Estate was interested a system whereby such assets have been merged into other companies without the consent or even knowledge of the Quinlan heirs: in disregard of the interest of the Estate, in violation of his duties as trustee, and solely to serve his personal ends; That he has caused to be incorporated a number of companies for such purpose; That in abuse of his duties he has caused such transfers to be made in order to enrich himself, and leave the companies in which the Estate is interested without any tangible assets or good will.

Conclusions affecting the Defendant Robertson: The Plaintiffs say that they are entitled to have it established that the three transfers of the shares of the Amiesite Asphalt Limited, of Quinlan, Robertson & Janin, Limited, and of the Fuller Gravel Limited be declared illegal null and void, and they pray that they be so declared both with respect to the Defendant Robertson and with
10 respect to his nominees or prêtenoms; that the Defendants be condemned to return the said shares to the Estate, and in their default so to do to pay the value thereof to wit the sum of $1,350,000.00 with adjustment however of what may have been (i.e. the $250,-000.00 mentioned in the Shannon report) and interest or dividends &c to which the Estate may be entitled;

That the Estate be declared to be the owner of the shares of which the decedent owned in Ontario Ameisite Limited, in Macurban Asphalt Limited, in Quinlan, Robertson & Janin Limited (London,
20 England), and in Crookson Quarries Limited; That the Defendants be condemned to return the said shares to the Estate, and in default of so doing condemned to pay as the value thereof the sum of $1,000,000.00.

DEFENCE OF THE DEFENDANT ROBERTSON.

By his Defence this Defendant denies all the allegations which impute wrongdoing to him.

30

As to the Shares in Fuller Gravel Company, he says:

> That the valuation $1.00 and the subsequent acknowledgement of receipt of $24,999.00 were mere book-keeping entries; that the total holding of these shares was in fact sold for $50,000. which was a fair and reasonable price; that it was not to this Defendant that the sale was made, but to others, and that it was only after certain purchasers refused to take and pay for them, that the Defendant Robertson, to help the Estate, paid for the shares at the price at which they had been sold.

40

As to the shares: Quinlan, Robertson & Janin Limited, Amiesite Asphalt Limited, and Ontario Amiesite Limited, this Defendant says:

> That the shares of these companies were not listed on any stock exchange, the value was not easily ascertainable, such value was at all times variable as dependant largely upon the efforts of the officers and shareholders;

That "in or about the month of June 1927, and some time before his death, the said H. Quinlan transferred and delivered all his holdings of stock in the said companies" to his partner and associate, defendant Robertson, under an agreement with said Robertson, the terms of which were as stated in a letter addressed by said Robertson to said Quinlan, dated June 20th 1927";

10

That "the said letter reads as follows:

Montreal, June 20th 1927.

Mr. Hugh Quinlan,
357 Kensington Ave.,
Westmount, Que.

20

Dear Hugh,

This will acknowledge your transfer of the following stocks to me:

1,151 shares Quinlan, Robertson & Janin Limited,
50 " Amiesite Asphalt Limited,
200 " Ontario Amiesite Asphalt, Limited
200 " Amiesite Asphalt Limited, in the name of H. Dunlop

30

which stock represented all your holdings in the above companies. I have agreed to obtain for you 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 6%. Should your health permit you to attend to business within one year from this date I agree to return all of the above mentioned stocks to you on the return to me of the monies I have paid you thereon including interest at 6%.

40

Yours Truly,

A. W. Robertson.

""At the time the contract and agreement evidenced by the above letter was entered into, the said H. Quinlan was in the full and complete possession of his faculties and thoroughly capable in all respects, of passing upon the property and sufficiency of the

said transaction; and the Defendant Robertson agreed to send the above letter only after he had been repeatedly and urgently requested to do so by and on behalf of the said late H. Quinlan. After the death of the late H. Quinlan, the Defendant Robertson endeavoured strenously to find some buyers, for said shares, at the price mentioned in the above letter, but was unable to do so,
10 and finally he paid himself to the Estate of the said late H. Quinlan, in fulfilment of his obligations, $250,000. as agreed upon between himself and the said late H. Quinlan;"

"At the time the agreement evidenced by the letter of the 20th June 1927 was entered into, the shares of the Ontario Amiesite Asphalt Limited were of little or no value and the price fixed between the said late H. Quinlan and the Defendant Robertson, as per the letter of June 20th 1927 for the shares therein mentioned, was a fair and reasonable price and was fabourable to said Quin-
20 lan;"

"Moreover, in connection with the transfer of the said shares of Ontario Amiesite Asphalt Limited, the Estate of the said Hugh Quinlan was, in consideration thereof, released by the Bank of Toronto, from a serious obligation to said Bank as guaranter of said company and was also released from other obligations on various maintenance and guarantee bonds of the said company, which said obligations greatly exceeded the value of said shares.
30 The shares mentioned in the above letter of June 20th 1927 were not assets of the estate of the said late Hugh Quinlan at the time of his death; but they were (in effect, sold and transferred by the said H. Quinlan himself either to Defendant Robertson, or to some other buyer, whom the latter agreed to obtain and, failing the obtaining of whom, said Defendant Robertson was obliged and entitled to retain said shares at the price of $250,000. agreed to be paid therefor;" That "it was an error on the part of a subordinate employee of the Capital Trust Corporation Ltd who helped prepare the statement of assets and liabilities constituting the
40 estate of the late H. Quinlan" (referred to in the action as the 'inventory') "that the 1,151 shares of Quinlan, Robertson & Janin Ltd. were entered as an asset of the said estate, the said shares being at the time of the death of the said Hugh Quinlan transferred and delivered to the defendant Robertson with said other shares on terms of the agreement aforesaid, and all that should *have been entered as an asset of the estate of the said H. Quinlan* was the claim against the said Robertson and or others to obtain payment of the price of the said shares as and when it became payable in terms of said agreement;

This Defendant says also that he has actually paid to the Estate the $250,000. above mentioned namely $125,000. in December 1927, and $125,000. in January 1928; the whole in accordance with the letter of 20th June 1927'';

As to the Shannon report this Defendant says that it was prepared by the Shannon firm at the request of the Executor-Trus-
10 tees, and copies of it were sent to the heirs for their information; he says that the Shannon firm ''were the trusted auditors of the said late H. Quinlan in his lifetime and were selected by defendants to make the audit of the books and accounts of the said estate in consequence';

As to the part of this Defendant in the administration of the Estate, he says: The Defendant now pleading has at all times administered the affairs of the estate of the said late Hugh Quinlon, in good faith, diligently, completely and in accordance with
20 the provisions of the last will and testament of the said late H. Quinlan, and he has been guided in all legal question by the legal adviser and advocate of the estate named in the will, as said defendant was bound and entitled to do, and said defendant believes that the said advice was sound, beneficial and given in the best interests of the estate.

Other matters pleaded are: That the Plaintiffs have not the status to institute the present action; That Plaintiffs cannot ask
30 for the annulment of the transfers of shares without tendering back the purchase price paid for them, and that Plaintiffs have no right to make tender from the assets of the Estate; and this Defendant says that he has at all times been willing and is now willing to render accounts of the administration as executor of the Estate;

And he prays for the dismissal of the action in so far as concerns him.

40 On demand being made, the Defendant Robertson furnished the following Particulars:

That the Sales of the Fuller Gravel Shares were verbal.

The sales were made in September 1927, the original purchasers being:

Tummon	600	preferred,	299	common
Rayner	200	"	100	"
McCord	200	"	100	"

That payment to the Estate for the shares was made by Robertson in different payments between 6th September 1927 and 26th May 1928 total amount $50,000;

The most important part of the Particulars furnished were those with respect to the events of 20th June 1927 and the particulars
10 given were these:

A. The said transfer of said shares from the said Hugh Quinlan to Defendant A. W. Robertson, took place on or about the 20th of June 1927;

B. The Agreement was in writing;

C. The said agreement was dated the 20th of June 1927;

20

D. The said agreement 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;*

E. The document was a private writing under the form of a letter addressed to the late Hugh Quinlan, and signed by the defendant A. W. Robertson.

30 (I have reproduced verbatim the Particulars furnished by Robertson with respect to the 20th June 1927. These contentions of Robertson were entirely unknown to the Plaintiffs prior to the delivery of his Defence in November 1928. I have underlined the words which I think are of the very essence of the title which Robertson contends for. It is particularly with respect to the title claimed by Robertson as resulting to him from the events he alleges to have taken place on the 20th June, that the reference comes here from the Supreme Court).

40 By their Answer to Robertson's Defence and the Particulars to it which he furnished, the Plaintiffs say:

They deny that in or about the month of June 1927 or at any other time any valid transfer was made or executed by the late Hugh Quinlan of all his holdings of stock in the said companies to the Defendant Robertson, and the Plaintiffs deny that the terms of any such pretended transfer are to be bound in the alleged letter of the date 20th June 1927; They deny the Particulars, and say that if any

pretended transfer of shares, as set out in A of the Particulars, was ever purported to be made, the same was illegal unauthorized null and void; and, as to B. C. D. and E, they deny that any agreement was ever concluded; as to the alleged letter of the 20th June 1927, they say that they now see a copy for the first time, and they are without knowledge as
10 to the existence of an original thereof; they deny that any such letter was ever assented to by the late Hugh Quinlan, or was ever communicated to him; they say that at the date in question he was not in the full and complete possession of his faculties nor capable of passing judgment upon the said transaction, but that by reason of bodily-weakness and illness he was not able to comprehend the terms of the said alleged contract or to give a valid assent thereto;

20 And they join issue with or deny the other allegations of the Defence.

(I should insert here, I think, a word of the explanation with respect to the two dates 20th June and 22nd June 1927. More will be said later on, for the present I will say that *20th June* is the date on which, according to Robertson, he and his bookkeeper Leamy went into Quinlan's sick room, and there made the agreement for the acquisition of the shares; bearing the date *22nd June* are entries in the Minute Books of certain of these companies, entries
30 the purpose of which is to record transfers of shares from Quinlan to Robertson. The entries were made on Robertson's verbal order to bear that date: 22nd June. I mention also that, according to the Plaintiffs, Quinlan was certainly non compos mentis on the 22nd June. They contend that he was non compos on the 20th June also.)

The above were the written pleadings at the first trial; the pleadings are the same now. The issues remain unchanged.

40 Before proceeding to deal with the whole record from the point of view of the re-trial, I think I should give some account of the proceedings at the first trial, and of the judgments rendered with respect to it. There, the only personal condemnations against Robertson which were pressed and persisted in, were those with respect to the following shares, namely of Amiesite Asphalt, Quinlan, Robertson & Janin, Fuller Gravel ,Ontario Amiesite and Macurban Asphalt. There is mention in the action of other claims, but, as they are not given the form of express demands in the conclusions of the action, they may not constitute issues, nor give rise to condemnations against him.

The following were the grounds upon which, in their action, the Plaintiffs asserted that Robertson personally was obliged to make reparation to the Estate, as to the Amiesite Asphalt shares, because Robertson had had these shares transferred into his name on 22nd June 1927, a date on which Hugh Quinlan was non compos, and for an insufficient price; as to the Quinlan-Robertson-Janin shares because Robertson a Trustee, in 1928, apparently between the 29th August and 5th September, had acquired them for his own personal account from his co-trustee and himself in contravention of C.C. 1484; and also at a total insufficient price; as to the *Fuller Gravel* shares because, as it was charged, the Trustees sold these shares to Robertson or to prêtenoms for him at a totally insufficient price, and in contravention of C.C. 1484; as to Ontario Amiesite and Macurban Asphalt because Hugh Quinlan had owned some of these shares, and they were not listed in the "inventory" nor in the Shannon report.

The prohibition of C.C. 1484 was, of course, an obstacle absolute to the acquisition of property belonging to the Estate either by Robertson, he being a Trustee, or by any prêtenom for him. Any title which Robertson might invoke of a date subsequent to the 26th June 1927 would necessarily be derived from the Trustees, and would come under the effect of C.C. 1484. Now, the matter Robertson pleaded in his Defence was of a nature to negative the applicability of C.C. 1484, for he pleaded as to Quinlan-Robertson-Janin, as to the Amiesite Asphalt and as to the Ontario Amiesite shares that he had acquired them from Hugh Quinlan himself in his lifetime, namely on 20th June 1927, As to the Fuller Gravel shares he pleaded that they had been sold by the Trustees for a full and fair price to different buyers that, after having made the purchases, these buyers refused to take delivery and pay; and that in order to render service to the Estate, he Robertson took over the purchases himself, and paid for them to the Estate.

1

As to the group of companies the title which Robertson verbatim claims, he sets out in his Defence:

> C.P. 90 ". . H. Quinlan transferred and delivered all his holdings of stock in the said companies. . . to defendant Robertson, under an agreement with the said Robertson, the terms of which were stated in a letter, addressed by said Robertson to said Quinlan dated June 20th 1927 . . ." C.P. 56 "The said agreement was signed by A. W. Robertson the de-

fendant, and by him delivered to Hugh Quinlan, who in turn, delivered to the said defendant Robertson his certificate for the shares endorsed in blank."

This is very clear and definite statement of when and how the alleged agreement was made, of what it consisted, and where the
10 exact terms of it are to be found, What its exact effect is alleged to be, is in para. 43 of Robertson's Defence:

C.P. 92 "The shares mentioned in the above letter of June 20th 1927 were not assets of the estate of the late Hugh Quinlan, at the time of his death; but were, in effect, sold and transferred by the said H. Quinlan himself either to defendant Robertson, or to some other buyer, whom the latter agreed to obtain and, failing the obtaining of whom, said defendant Robertson was obliged and entitled to retain
20 said shares at the price of $250,000 agreed to be paid therefor:"

Unquestionably, I think the affirmation is that on the 20th June Quinlan handed to Robertson the scrip for these shares, the scrip being indorsed in blank, and Robertson in return handed to Quinlan a document by which he acknowledged receipt of the scrip, and in the document embodied upon what terms and for what purpose the scrip was put into Robertson's possession.

30

Every detail of these affirmations is denied strenuously by the Plaintiffs; a considerable amount of evidence was heard upon the mater, and I will be obliged to relate it infra. But leaving aside those denials for the moment, the question which must be met within in limine is this: what juridical situation would the document according to its terms and coupled with the delivery of the scrip, have created between the parties Quinlan and Robertson?

40 (The scrip admittedly indorsed in blank — which permitted the insertion of any name as the buyer) Secondly, assuming that the consent of both parties was given on the 20th June, did it then create the bilateral contract which we call sale? Did Quinlan thereupon cease to be owner of the shares, and Robertson thereupon become the owner of them? Did Robertson by his consent to the terms of the document thereupon become the debtor of Quinlan in the sum of $250,000.?

The answer to those questions, I would say, is in the negative. By the very terms of the document, it is certain that an

actual sale did not take place on the 20th June, for *payable one half cash on the day of the sale* cannot refer to a sale then made, but only to a sale to be made, or expected to be made at some future date.

I am quite mindful of Robertson's words "I have agreed to
10 obtain for you the sum of $250,000. for those securities". If those words had been: I have agreed to pay you $250,000. for those securities, the agreement would undoubtedly have expressed a purchase by Robertson. But the words used do not express an agreement on Robertson's part to buy the shares. Now, sale is a consensual contract, and, without consent on his part, Robertson could not, in law, be considered a buyer. What those words do in fact clearly contemplate is that some one else is to become the buyer, — not Robertson, so there cannot have been intended a sale to Robertson.
20

The immediate question I am considering is as to whether the reciprocal delivery of scrip and document, as Robertson alleges, would have constituted a sale by Quinlan to Robertson on that date. Definitely, for the reasons given, the answer is in the negative.

Counsel for Robertson — realizing the difficulty in the way of contending for a sale, complete and operative, Quinlan to Ro-
30 bertson, on the date 20th June — took as an alternative ground that these matters of the 20th June produced, in law, these effects namely: that a sale actually took place and was completed on that day: that the seller was Quinlan, and the buyer was the person who was later to be found by Robertson. That when such person was found and he having expressed to Robertson his consent to buy on the terms mentioned, he thereby became the buyer, with retroactive effect to the 20th June.

(It was explained that Quinlan's consent to such an arran-
40 gement would be easily presumed, because Robertson personally undertook to find a buyer, and Robertson was well able, financially, to support the consequence if he were to fail to find one.

The essential feature of this contention from the point of view of Robertson's interest, in fact the only one that could be of help to him, was that the sale, made to this subsequently found buyer, have a retroactive date, namely that it have the date of Quinlan's consent on the 20th June.

It is clear to me that the buyer's consent would not by sole operation of law date back his rights and his obligations to the date of the seller's consent or authorization.

In our law, the contract of sale is formed by the reciprocally accepted consents of the seller to sell and of the buyer to
10 buy. The contract is not formed until there is a seller who has sold, and a buyer who has bought. It is perfectly licit for a prospective seller, when commissionning some agent to find a buyer for him, to obligate himself to sell on named conditions to whomsoever the agent may find as a buyer; it is equally licit for him to authorize such agent, in dealing with the prospective buyer, to express the seller's consent and thereby, then and there, make complete the contract of sale. But, until there has been a buyer who has bought, there has not come into existence a contract of sale. In the example just mentioned the sale would become com-
20 pleted only on the latter date, namely when there had come to be a buyer; prior to that there was only one party—the prospective seller.

No sale took place on the 20th June; on that date there was according to Defendant's contention a party willing to sell, but there was no buyer. Robertson did not buy. The party who it was expected would buy was not yet found. Robertson undertook to find such a person, that was all. That by itself did not constitute
30 a sale.

Counsel for Robertson advance still another contention as to the juridical consequences of the events of 20th June. They say that those events are to be given this meaning and effect namely: that those events effected a real and complete sale of the shares; that positively and definitely Quinlan then sold the shares that positively and definitely a buyer then bought them, though on that date such buyer was not a person certain; nevertheless that the date of the sale was 20th June.
40

According to this contention: would become buyer, the person whom Robertson would name later on, thus Robertson, after finding a buyer, would report to Quinlan who this person was, and this person would, in law, be the buyer as at the date 20th June. This is the contention.

The whole purpose, of course, is to have it established that when Robertson found the buyer, the sale would be one directly from Quinlan to that buyer, and the date it would bear would be the 20th June 1927, a date when Quinlan was still alive.

It must be admitted on Robertson's side, and it is admitted, that, owing to the fact that he was a trustee, Robertson could not legally acquire any of the property of the Estate after Quinlan's death; hence the absolute necessity for him to have the sale bear, by effect of law, the date 20th June 1927.

10 The contention is not: 1.—that there was a joint purchase by Robertson and another, for it is certain from the document, (which he says contains the terms agreed upon on that date), that he did not himself become a buyer. Nor is it 2.—that there was an undertaking on Quinlan's part to accept as buyer whomsoever Robertson might present as such, for that would amount to a mandate to Robertson to effect a sale, and the date of the sale in such case would be the date on which Robertson came to terms with the buyer; (it would be perfectly allowable to these parties to agree that as between themselves the effect of the sale would 20 be the same as if it had been made on the earlier date, but such an agreement would not change the date when, legally, the contract of sale as such became formed). Nor is it 3. that Quinlan having accepted Robertson as the buyer, agreed that Robertson would have the right later on to substitute another in his place, and himself cease to be the buyer, for again this would have required that Robertson have himself been buyer on 20th June,— which was not the case.

30 It is said on behalf of Robertson that what this contention really asks for is that it be recognized that the agreement, which as it is alleged was made between Quinlan and Robertson on the 20th June, included what is known to the law of France as the "réserve de déclaration de commande" (the words "commande" meaning "veritable buyer"). As its designation implies, it is a "réserve" namely an express stipulation in the contract of sale; its scope is this; that the buyer having subscribed in the contract to all the obligations of a buyer as for himself personally, expressly and with the consent of the seller, reserves the right to 40 declare, later, that another person is the real buyer, and not himself. If, later, he does make this declaration, the substitute becomes the buyer exactly as if he had been the buyer in the original contract with the seller, and he who was the original buyer ceases to be so, retroactively. If the original buyer who has stipulated the "réserve" does not make the declaration. he remains the buyer.

This stipulation is expressly authorized in France,—not by the Code Napoléon, but by fiscal laws, more particularly by those

of the 22 frimaire an VII and of the 28 April 1816. The important point is that it is authorized there by legislative enactment. The enactments there recognize and admit that, when the stipulation has been agreed to in the manner above mentioned, and the declaration subsequently made, it is to be considered that there has been only one sale made, and that only one transfer tax is payable.
10 Those fiscal laws of France are not in force here, and there are no similar provisions in our fiscal legislation. We are governed in respect to the matter by the provisions of our Civil Code. Our code makes no provision that the title of a later found substitute for the buyer, may *de jure* be dated back to the date when his seller acquired the object sold. Parties under the general law are free to agree upon such adjustments as they please, but they cannot by their agreements vary the principles of the law. Its essential rules continue to apply, and, there being no legislative enactment to effect it here as there is in France, the substitute buyer above
20 referred to, cannot be admitted to have acquired directly from the original seller, unless that original seller was alive and compos and consenting in the sale where, he, the substitute, is the buyer:— and the date of the sale cannot be other than the date when the consents to buy and to sell were exchanged.

There is no diversity of opinion among the writers on the law of France as to the following: 1.—that this "réserve" may be stipulated for only by one who has, in all respects, himself taken
30 on the quality of buyer; 2.—the stipulation for the right must have been in express terms and have been in the contract of sale itself; 3.—the exercise of the right, namely the declaration of who the real buyer is, may be exercised only within the delay agreed upon by the parties as stated in the contract of sale; 4.—that delay according to French fiscal law may not exceed 24 hours; 5.—within the same delay the registrar of deeds must be notified of it. (vide Colin & Capitant vol. 2. p. 430) It must be evident, I think, that Robertson is not in any of these conditions, and, if in France, he could not pretend to the right. In this Pro-
40 vince no legislative sanction has been given. either directly or indirectly to the modality to the contract of sale, which exists in France under the name "réserve de déclaration de commande", and a fortiori Robertson cannot pretend to such a right here.

(Note that he seeks to make the declaration more than six months after the 20th June.)

Robertson's contention to the effect that the "réserve de "déclaration de commande", as understood in the law of France, exists in this Province, and his contention that that "réserve"

may be invoked by him, in support of a title in his favour to the Quinlan-Robertson-Janin shares, must be declared to be unfounded.

What then would be the legal effect of the 'letter' of 20th June, if it were proved to have been a valid agreement between
10 Quinlan and Robertson? Simply this: a receipt for the scrip; an undertaking to find a buyer for the scrip at a price of $250,-000.; an authorization by Quinlan to do so, namely a mandate from Quinlan to Robertson. The mandate terminate, of course, on Quinlan's death 26th June 1927, (C.C. 1755) and thereafter Robertson was no longer a mandatary. The note in the Shannon report was that the Trustees had sold the Quinlan-Robertson-Janin shares in 1928. Evidently, by reason of the date, if for no other reason, such sale could not have been made under a mandate from Quinlan, and hence Robertson's interests to have it
20 declared that these shares came to him by virtue of the "réserve de déclaration de commande".

One other question arising out of the text of the document dated 20th June; it is with respect to Robertson's contention that the shares in the three companies:

> "were, in effect, sold and transferred by the said late H. Quinlan himself either to defendant Robertson, or to some
30 other buyer, whom the latter agreed to obtain and, *failing the obtaining of whom, said defendant Robertson was obliged and entitled to retain said shares at the price of* $250,000. *agreed to be paid therefor.*" (para. 43)

The contestation I wish now to refer to is, as underlined, that by reason of his having undertaken to find a purchaser at the price named, he was *obliged* and *entitled* to retain the shares at the named price, in the event of his failure to find another buyer for them.

40

First the question as to whether he was 'entitled' to buy. As to this, it will be admitted, I think, that an agent with authority to sell, may constitute himself the buyer on the terms authorized, unless, in the special circumstances, there be reason to the contrary. If authority was given to Robertson, on the 20th June, to sell the shares, then he could sell, and could himself become the buyer, so long as the authority to sell remained effective; but any authority to sell which may have been given by Quinlan, terminated on the 26th June, and it is certain that Robertson did not constitute himself the buyer in that interval.

Next: to what extent was he 'obliged' to retain the shares if he failed to find a buyer? The answer must be, I think, that if he failed to execute a valid contractual obligation, he would be liable to damages as set out in arts. 1070 and following C.C. But, as C.C. 1070 provides, he would not be liable to pay damages unless and until he was put in default to execute the obligation in
10 question, and Robertson was never put in default by anyone. The authority to sell, according to the document he invokes, lasted only six days.

Was not the undertaking to find a buyer integrate with, and inseparable from, the authority to sell at the price as fixed? What was the extent of his liability for damages, for not having found a buyer in the six days? How could he have been put in default after Quinlan's death to execute a mandate that had ceased to exist, i.e. when there was no longer authority to sell, and
20 no price fixed? If the heirs had known of this document (and they did not), and they had instituted an action against Robertson to claim $250,000. from him, would Robertson have had no defence to it. It seems to me very clear that according to its terms the document alleged did not oblige Robertson to himself buy the shares in the event of his failure to find a buyer.

The failure to execute a valid contractual obligation will give rise to the obligation to pay damages. The words valid con-
30 tractual are not surplusage; it is not every promise or undertaking which is a contract; one of the essentials of a contract is that there have been a lawful consideration stipulated. When there has not been stipulated a lawful consideration for the execution of the promise or undertaking, the agreement is merely a *nudum pact*. That is the case here. In this 'letter' Robertson says: "I have agreed to obtain for you the sum of $250,000. for the above mentioned securities . . ." Robertson makes that promise or undertaking without any remuneration to himself, there is no consideration for the undertaking, therefore he did not
40 obligate himself in law. (C.C. 984) and did not lay himself open to damages if he did not carry out, or if he failed to carry out, the undertaking. If an action, claiming damages from him for failure to find a buyer at $250,000.00 had been instituted against him, I have no doubt what one of the defences would have been, and I have no doubt as to what the judgment on that defence would have been.

Robertson's contention that he was obliged and entitled to retain the said shares is declared to be unfounded.

In the above remarks, I have been inquiring as to the intrinsic value and effectiveness of the events which, according to the allegations of Robertson's Defence, occurred on the 20th June 1927, (allegations reproduced verbatim at p. supra). For the purpose of that inquiry, but for the purpose of inquiry only, I assumed those allegations to have been truthful and to
10 have been proved. I have declared my findings to be: 1.—that on 20th June 1927, Robertson did not buy the shares from Quinlan; 2.—that if it were proved that, on 20th June 1927, Quinlan had delivered to Robertson the scrip, indorsed in blank in exchange for Robertson's 'letter' of that date, both parties consenting, the juridical situation thereby created would have been: an acknowledgment by Robertson of receipt of the scrip, for the purpose of carrying out a mandate then received from Quinlan; a mandate from Quinlan authorizing Robertson to sell the shares represent-
20 ed by that scrip for $250,000,—the scrip being indorsed in blank, to permit the name of the buyer, whoever he might prove to be, to be inserted there; 3.—that this mandate was inexecued during Quinlan's lifetime, and therefore, on his death, it became terminated and inoperative.

If the conclusions of my inquiry are juridically correct, it is a matter of no consequence whether the facts as alleged are proved or not, because, even on the assumption that they are proved they do not, and cannot constitute a title in Robertson to
30 the shares.

Those findings, however, are based upon construction and upon law; as such as they would come to have their application in the adjudication of the case upon the merits; under our system they did not constitute an obstacle of a nature to prevent Robertson from making at the trial, proof of his allegations; it would be in the judgment that the juridical situation would be declared. Robertson's allegations were matters for inquiry at the trial, and my next task must be to refer to the evidence made
40 and to the effect of it.

Robertson's allegations as to the events of 20th June 1927 are in his Defence C. at p. 38 or 90, as further detailed in his Particulars C. at p. 56:

> "some time before his death, the said Hugh Quinlan transferred and delivered all his holdings of stock in the said companies to. . . the defendant Robertson under an agreement with the said Robertson, the terms of which were as

stated in a letter addressed by said Robertson to said Quinlan, dated 20th June 1927. . ." . . . The said agreement was signed by said Robertson the defendant and *by him delivered to Hugh Quinlan, who in turn, delivered to him said defendant Robertson* his certificate for said shares,, endorsed in blank."

10

The Plaintiffs denials were:

1.—that there had been any interview between Robertson and Quinlan on the 20th June 1927;

2.—That there had been on that date any delivery of scrip by Quinlan to Robertson;

20 3.—That there had been on that date the delivery of any letter (or purchase agreement) by Robertson to Quinlan;

4.—that in any case the document invoked by Robertson (the 'letter' of 20th June), by its very terms, was not a purchase agreement; it was merely a mandate;

5.—that on that date (or indeed on any other) there had been any sale of these shares by Quinlan to Robertson;

30 6.—that, on the date, by reason of his physical and mental condition, Quinlan was not capable of giving a valid consent to such a sale.

These were the issued between the parties on this branch of the case when they came to the first trial (before Martineau J.) The situation being that Robertson was claiming title to shares by reason of a sale which he alleged was made to him by Quinlan, the burthen of proof to prove that sale lay upon Robertson. It is not unfair to add that the claim being made against heirs of 40 the alleged seller, parties who had no knowledge of the alleged sale, it being made only long after the death of the alleged seller, and the amount involved being very considerable, these heirs would be particularly entitled to require that clear and definite legal proof of the alleged sale be made, for them to be bound by it.

The trial began before Martineau J. on the 17th September 1930. On that day William Quinlan, a son of the testator, was heard as a witness he still lived in the family house with his mother; he was summoned to produce any papers found in the

house which might have a bearing on Estate matters, and he produced among other papers the exhibit P-66. (It is reproduced by photography C. p. 282) the interest attaching to it was not realized until later, and he was examined respecting it on 2nd December 1930, C. p. 584. This exhibit P-66 is an informal note made by William Quinlan at his father's request, on the date 21st
10 May 1927, and it states that the share-certificates for Hugh Quinlan's shares in the companies: Quinlan-Robertson-Janin and Amiesite Asphalt were deposited in A. W. Robertson's box. This is admitted by Robertson; the box is in the vault belonging to the office of A. W. Robertson Limited, — where both Quinlan and Robertson had their offices.

The five share certificates mentioned in William Quinlan's memorandum have been produced as exhibits; four of them are in Hugh Quinlan's name; all four appear to have been in-
20 dorsed by Hugh Quinlan, and each of the signatures appears to have been witnesses by a Miss Kerr. Miss Kerr was one of the nurses attending Hugh Quinlan; she was examined as a witness; she remembered witnessing Hugh Quinlan's signature to two such documents; she remembers she was called into Hugh Quinlan's room, by Robertson, in order that she sign as a witness, and she did so; the only other persons present at the time being Quinlan and the Defendant Robertson. Leaving aside other matters, what is important now in her testimony, is that this occurred in the
30 month of May 1927, not in the last week of that month, but in the second or third week. Her evidence in fact confirms the date 21st May of P-66. Neither Robertson nor anyone else, has contested, nor attempted to deny the date 21st day 1927 of P-66, nor Miss Kerr's evidence as to the date; in fact Robertson in his evidence—given on the 9th December namely after the production of P-66 and after the evidence of Miss Kerr—says that the date on which Quinlan indorsed these certificates was, as nearly as he could recollect, about the last week in May 1927. The five certificates mentioned in P-66 were the scrip for Quinlan 1151
40 shares in Quinlan-Robertson-Janin (a certificate for 1 share and a certificate for 1150 shares), and for his 250 shares in Amiesite Asphalt (a certificate for 1 share and another certificate for 49 shares both in Quinlan's name, and a certificate for 200 shares in Dunlop's name. (Dunlop a son in law, the shares admitted to be Quinlan's).)

If it appears from the evidence, as it does, and uncontradicted, that it was on 21st May that Robertson came into possession of the share certificates for the Quinlan-Robertson-Janin

and the Amiesite-Asphalt shares, it must be certain that the allegation in the Defence: that, in execution of an agreement then made between them, on the 20th June 2927, Robertson delivered his letter to Quinlan, "who in turn, delivered to him said defendant Robertson his certificate for said shares, endorsed in blank" is untrue. Robertson was examined as a witness as to
10 what occurred on the 20th June he did not pretend that the share certificates were handed to him on that date; not only did he not make any such statement, but he was not asked by his Counsel any question which would have opened the way for him to make that statement. It was on the 9th December that Robertson was giving his evidence, and his Counsel knew both from Robertson's acknowledgement that the date of Quinlan's indorsement of the scrip was in May, and the evidence of William Quinlan and Miss Kerr, given by them on the 2nd and 3rd December, that it was on 21st May that Robertson came into possession of them. In the
20 hearing before me, Leamy testifies as to this and that this scrip was then (he says 23rd May) received "for safekeeping".

I think there is no room for doubt as to this, and after receiving the scrip from Quinlan on 21st May, Robertson handed them to Leamy, the Secretary of A. W. Robertson Limited. In return Leamy gave him the following receipt for them. It is Exhibit D.R-54:

Montreal, May 23rd 1927.

30 A. W. Robertson,
1680 St. Patrick Street,
Montreal, P.Que.

Dear Sir,

This will acknowledge receipt from you, to be kept in the office here, the following stock certificates, the property of Mr. Hugh Quinlan.

	No.	Company	Shares		
40	No. 1	Amiesite Asphalt Limited	1	share	
	5	" "	49	"	
	9	" "	200	"	J. H. Dunlop
	4	Quinlan, Robertson & Janin Ltd.	1	"	
	8	" "	1150	"	

Yours Truly,

A. W. Robertson, Limited,
per: L. N. Leamy.

So much for the date of receipt by Robertson of the scrip. It is certain that that date was 21st May, and that it was received by him "for safekeeping". It is equally certain that no letter was, either on 20th June or on any other date, handed by Robertson or on his behalf, to Quinlan. In no part of Robertson's evidence, either at the first trial or before me, does Robertson say or pre-
10 tend that the so-called letter of 20th June was delivered to Quinlan. Those said to have been present on 20th June were Quinlan, Robertson and Leamy; both Robertson and Leamy have given evidence. Before Martineau J. they were not allowed to testify as to a verbal sale of the shares, though they were allowed to testify as to all acts during that supposed interview; before me, they were allowed to testify as to anything that happened on that date, without restriction, yet, neither before Martineau J. nor before me, did either Robertson or Leamy say, or suggest, or in any way indicate that this 'letter' was delivered to Quinlan.
20 What both of them say, in their evidence before me, is that Leamy read the letter to Quinlan, and Quinlan then said "That is all right". Leamy, continuing, says that he handed the letter to Robertson; that he then withdrew from the room, leaving Quinlan and Robertson there together. It is certain from other evidence, which I will refer to infra, that this supposed letter remained in Robertson's possession for many months after Quinlan's death. I will be obliged also to deal with the suggestion that the 'letter' came into existence only at a considerably later date,
30 but, for the moment, I point out merely the fact that no letter having reference to the alleged transaction was, on 20th June, delivered to Quinlan.

It seems clear to me that the reading of a letter, the reader retaining possession of it, is not at all equivalent to delivery of a letter to the person addressed. I think that when we speak of a letter as a communication to a person, we have in mind a signed document completed by delivery of it to that person. Without delivery there was no letter and no writing,—not in the sense in
40 which we use the word 'writing' or 'written' in our law of evidence. What Robertson and Leamy testify to is merely a reading, itself merely a spoken word — seeing that there was no delivery of the paper on which the writing was. In my opinion and I so declare, the communication testified to by these witnesses was a purely verbal communication to Quinlan. The answer he gave according to their testimony was also purely verbal. Such agreement as may have been made between Quinlan and Robertson by these spoken words of each, was, I would say, a verbal agreement. If such agreement amounted to a contract, it was a purely verbal one.

It is not a digression here to say this: that if, in his Defence, Robertson had set up a title to the shares which was merely verbal, it is certain, that under our law, such contract could not have been proved by testimony; C.C. 1233. It would have been quite hopeless for Robertson to have based a title upon such an allegation, It is quite certain, also, under our law, that the actual
10 delivery of scrip, in exchange for a written acknowledgement of purchase with undertaking to pay, would constitute a sale, and would be provable.

We know for certain now, from the testimony of both Robertson and Leamy, that on 20th June, no scrip was delivered by Quinlan to Robertson, and no letter delivered by Robertson to Quinlan; and we know also from the fact that no questions towards proving such matters were put to them by their Counsel, that these Counsel knew that those witnesses could not testify to
20 the truth of those veritably crucial allegations.

What can be the explanation, when these allegations in the Defence are diametrically at variance with both Robertson's and Leamy's evidence? Can it be that these allegations contained in the Defence (which was prepared and filed in November 1928) were in accordance with the information then given by Robertson to his legal adviser Mr. Perron, K.C., or to his Attorney ad litem Mr. Beaulieu, or to Mr. Campbell the Attorney ad litem of
30 the Capital Trust? If so, the information he so gave was deliberately untruthful, as we now know from his own testimony, and that of his witness Leamy. Or can it be that Robertson in November 1928, told his legal advisers exactly what he has testified to in Court, and that, in disregard of what he told them, they, of their own motion, inserted these untrutfhul allegations in the Defences, Defences to which they affixed their signatures, thereby themselves certifying that these were veritably the contentions of Robertson.

40 I fear no contradiction when I say that, in pleading, good faith and truthfulness have an honoured place; when I say that the insertion in a pleading of allegations known to be false, allegations designed to mislead for the advantage of the party pleading, constitute mala fides and when I say that such conduct is a circumstance pertinent to the question of the good or bad faith of that party,—to the validity of an act when good faith is an essential to its validity—, and that it is pertinent also in the appraisal of the credibility and value of the testimony of the individual who was a party to the deceit.

I am not called upon to decide what is the explanation; it is not part of the case. But it is due to Mr. Robertson personally to say this: that, outside of the fact that these false affirmations in his Defence are over the signature of his authorized attorney ad litem, there is nothing in the record; that I have met with, which would connect him, in any way, with them; his
10 own testimony is clear and definite, and it is to the contrary effect. The responsibility would seem to rest entirely upon Robertson's legal adviser Perron, for as shown above, it was he who directed the defences of both defendant, it was he who revised and decide upon the terms of the Defences to be filed, and it was he who instructed Mr. Beaulieu, (who acted really for Perron, as Robertson's Attorney ad litem). I have no doubt, of course, that both Beaulieu &Co. and Campbell & Co. — had no knowledge of the falsity of those allegations, when they signed and filed those Defences. to the action.
20

This is perhaps the convenient place to deal with a question as to the admissibility of testimony,—a question which was a matter of debate at the first trial. Testimony as to certain matters was tendered by Robertson; Martineau J. held it to be inadmissible; his holding was unanimously concurred in by the Court of King's Bench; the Supreme Court reversed these holdings, and ordered that on the present retrial such testimony be admitted.

30 The way in which it occurred that this testimony was not admitted, was that: on a question being asked, objection to it was made by the Plaintiffs, and the trial judge maintaining the objection, disallowed the question. Throughout the trial of course, a number of questions from both sides were disallowed and the rulings acquiesced in. But the rulings which Robertson as Appellant made a matter of special complaint when before the Supreme Court, and concerning which that Court made special provision in its judgment, were those which disallowed certain questions put to Robertson and to Leamy, and a question put to
40 Miss King when they were testifying as witnesses for the Defendant Robertson.

Here are the questions which were disallowed as to Leamy: *Leamy, C. vol.* 4 *p.* 758 *et seq.*:

After these preliminary questions: Q.—Do you remember having paid a special visit to Mr. Hugh Quinlan in April 1927? A.—I do.

Q.—Do you remember if at that time Mr. Robertson was absent from the City? A.—He was in Egypt, or on the

Mediterranean somewhere for his health. Q.—During that special visit to which you have referred was there any talk between you and Mr. Quinlan about Mr. Robertson? A.—There was.

then this series of questions:

Q.—Did Mr. Quinlan mentioned to you what he intended to do with his shares? Objected to: objection maintained.

10

Q.—Was there mention made of particular shares he wanted to dispose of? Objected to: objection maintained.

Q.—Was the name of Mr. Robertson mentioned by Mr. Hugh Quinlan in connection with the sale of his shares?

Objected to; objection maintained.

Q.—In order to be more explicit, will you please state if during that conversation with Mr. Quinlan special mention was made of his intention to dispose of 1151 shares of Quinlan, Robertson & Janin Limited, 250 shares of Amiesite Asphalt Limited, and 200 shares of Ontario Amiesite, Limited?

20

Objected to; objection maintained.

The reasons of the trial judge for maintaining these objections do not appear in the transcribed depositions, but this much is undeniable that the matter in controversy being a sale between Quinlan and Robertson on 20th June a conversation between Quinlan and an employee of his office in April was, I would think, prima facie irrelevant and inadmissible. It could be said,—and from my knowledge of procedure at trials I have no doubt that it was said,— that the matters referred to in these questions were not an issue between the parties, neither in the action nor in the Defence, and therefore that Defendant was not entitled to introduce them. (With reference to this: our Code of Procedure at art. 339 "Witnesses are examined by the party producing them, or by his counsel, *but only touching the facts in issue*").

30

In the course of the trial, the 'letter' of 20th June came in, I have no doubt, for a good deal of adverse comment from the Plaintiffs' side, and for the purpose, I suppose, of confirming the fact of its existence, and also of defending the draftmanship of it, the defence sought to show that it had been drafted by Mr. Perron, Robertson's lawyer, or, at least, that it was a modified form of what Perron had drafted, and the following questions were put to this witness Leamy: (p. 760)

40

Q.—Was the letter Exhibit D.R.-1 copied in part or in whole upon a document prepared by the Hon. Mr. J. L. Perron, which you had in your possession?

Objected to; objection maintained.

Q.—Is it to your knowledge that after receiving the document from the Hon. Mr. J. L. Perron Mr. Robertson communicated with Mr. Perron by telephone as to the tenor of the letter he wanted the draft to follow?

Objected to; objection maintained.

Q.—Were there slight modifications made to the draft prepared by Mr. Perron and submitted to Mr. Robertson by the phone to Mr. Perron, to your knowledge?

Objected to; objection maintained.

The reason for maintaining these objections is not given, but the issue between the parties being the plain one above stated, this Exhibit D.R.-1 being, according to the express pleading in the Defence, the embodiment of the agreement made between the parties on the 20th June, with no mention whatever of participation by Perron or by anyone else in the matter, the source whence Robertson may have procured the form, or part of the form, for his letter, would seem to be irrelevant to the question, whether Quinlan had, on 20th June, agreed to the proposal contained in the letter, and what the effects of such an agreement on his part would have been. Evidently, I would think, that was the reason for the disallowance of the questions by Martineau J.

On the present reference, however, the answers to those questions are to be received, and Leamy has given them. As to his conversation with Quinlan in April, he says: "Mr. Quinlan said that he was anxious for Mr. Robertson to return from the South or from his Mediterranean trip, that he wanted to transfer to Mr. Robertson his shares in Quinlan, Robertson & Janin, Amiesite Asphalt and Ontario Amiesite Limited". Asked "Did you report that conversation to Mr. Robertson" he answers "Yes I did".

As to the drafting of the letter of 20th June, he says in effect this: that Robertson asked Perron for a draft, and Perron sent one; that Robertson modified the draft so received; that, as so modified, Leamy struck it off on the typewriter, and what Leamy had this struck off on the typewriter, was what was read to Quinlan when they saw him later that day. Also after making those modifications to the draft he had received from Perron, Robertson, by telephone, informed Perron of the modifications he had made.

What does, I think, appear clearly form Leamy's account (and Robertson's evidence is much to the same effect) is that Perron, in the matter, was acting as Robertson legal adviser; Ro-

bertson, contemplating an agreement with Quinlan for the purchase (so Robertson says) of Quinlan's shares, Robertson asks his lawyer to draft the letter for him. It is noticeable that the situation was not, that Perron was called in by both to draw up an agreement for them; the circumstance has some bearing on Robertson's contention that, throughout, Perron acted as Quinlan's designated and authorized legal adviser.

Here are the questions disallowed as to Robertson:

Robertson, C. vol 4 *p.* 818 *et seq.*:

After the preliminary questions: Q.—Mr. Robertson I have already exhibited to you the four certificates P-9, P-10, P-26 and P-27 and you have already stated that they were endorsed by the late Hugh Quinlan? A.—Yes. Q.—I think you have also stated that they were endorsed in your presence? A.—Yes. Q.—Will you state what date they were endorsed? A.—The latter part of May 1927.

He is asked this series of questions:

Q.—Will you explain under what circumstances these transfers were endorsed by Mr. Quinlan?
Objected to; objection maintained.
Q.—Will you state what was the reason of the endorsement on these certificates?
Objected to; objection maintained.
Q.—Will you state if at the time of the endorsement there was already an agreement between Mr. Quinlan and yourself as to the taking over of those shares?
Objected to; objection maintained.
Q.—Is it not a fact that there was only one point left in abeyance at the time, that is to say the fixation of the value of them, and all the rest of the agreement was completed between yourself and Mr. Quinlan?
Objected to; objection maintained.
Q.—In the letter D.R.-1 of the date June 20th 1927, reference is made to the shares of the Quinlan-Robertson & Janin, Amiesite Asphalt, and Ontario Amiesite; will you state if you have acquired or purchased or obtained the shares of the Amiesite Asphalt Limited by any other agreements than the agreement mentioned in the letter D.R.1?
Objected to as not pleaded. Objection maintained.

Saving as to the last question, there is no indication in the transcribed depositions as to why these questions were disallowed, but according to the rules of our practice, the reason (or at least one sufficient reason) is very obvious. Namely it was because the questions were aimed to prove 1.—matters which had not been pleaded, and 2. matters which themselves were in contradiction
10 to what had been formally and definitely pleaded in Robertson's Defence. Unequivocally, according to his Defence, Robertson's title was alleged to result from the exchange, of the indorsed scrip for the letter on 20th June, both parties consenting. That is the Defence he filed in November 1928; he was examined on discovery, and at length, in the autumn of 1929, with plenty of opportunity to refresh his memory and if necessary amend his Defence, to make it conform to the facts theretofore left out of account. Yet when the trial started in September 1930, the above affirmation remained intact in his Defence.
20

William Quinlan's Exhibit P-66 was filed in September 1930 thence forward it was known for certain that the scrip in question had been handed to Robertson,—not in exchange for a letter from Robertson,—not as the execution of a contract of sale between the two,—not on 20th June as alleged, on the contrary it was certain that this scrip was deposited in Robertson's box on 21st May. Miss Kerr whom it was that Robertson called into the room to serve as witness to Quinlan's indorsements on the scrip,
30 says as to Robertson that then "He did made some remark—shares of the Company, *that they were selling,* and that was why he would like my signature to witness Mr. Quinlan's". Note that it was shares that "they were selling" and not that Robertson was buying the shares from Quinlan. (Now after the evidence heard before me on this re-trial, we know, especially from Leamy's letter to Robertson of the 23rd May 1927, that from that date 23rd May 1927, the scrip was in the vault in the A. W. Robertson Limited office;—that it was there for "safekeeping", and that it was there as "the property of Mr. Hugh Quinlan". This letter of 23rd May
40 1927 was not in the record at the first trial.)

After William Quinlan had been heard on the 2nd December, Robertson went into the box (on the 9th) and the above questions were put to him. They were put to him evidently in the endeavour to prove something different from the allegation that the scrip was handed to him on the 20th June, and evidently in the endeavour to prove something different from the allegation that the transaction was made between him and Quinlan on that date 20th June. It would have been open of course, to Robertson to amend

his Defence in any way he chose, but if so, then subject to the ordinary conditions namely opportunity to the opposite party to reply, and delay to enable that party to prepare himself for the new situation. But no amendment was made; the questions were put as being admissible upon the issues set out in the original Defence, they were objected to and disallowed.

10

As I say, the trial Judge disallowed those questions and his rulings were concurred in by the Court of Appeal. On the present re-trial, the answers to those questions are to be received into the record.

At this re-trial, those identical questions were not put to Robertson, but (instead?) the following questions were: (p. 28).

20

Q.—Do you recognize the signatures of Mr. Hugh Quinlan on the back of these four certificates?

A.—Yes.

Q.—Now Mr. Robertson, you have already stated that you paid a visit to Mr. Quinlan prior to the endorsements of these certificates?

A.—Yes.

Q.—After a trip you made abroad?

A.—Yes.

Q.—You remember that?

30

A.—Yes.

Q.—You were then prevented from stating what took place during that conference. Will you now state to the Court what took place during the conversation between yourself and Mr. Hugh Quinlan in May 1927 after your return from abroad?

A.—When I came back, he told me he had definitely decided to get out of those Companies and he wanted me to take over the stock.

Q.—Was there anything else to your recollection?

40

A.—That he would arrange with Mr. Perron as to the value of them.

Q.—That was all what was said at the time, so far as you can recollect?

A.—Yes.

The questions put to Robertson *as to the occurrences of the 20th June,* which were disallowed at the first trial, and which were a ground of complaint on his part were these: after he had testified that he and Leamy had on that date seen Quinlan in his

sick room, and that Leamy had read the letter to Quinlan, Robertson is asked:

Q.—Did Mr. Quinlan express his approval or disapproval of the contents of this letter?

Objected to; objection maintained.

Q.—Did Mr. Quinlan say anything atfer the reading of that letter?

10

Objected to; objection maintained.

Q.—Did he make any signs at the reading of that letter?

Objected to; objection maintained.

The reason for the ruling is not stated, but quite evidently it is because in our law testimony is not admissible as the proof of a contract the amount of which exceeds $50. (This rule is not drawn from the Statute of Frauds, but is a provision in our Civil law applicable to civil law contracts.)

20

At the present trial, Robertson's answers to those questions is to be admitted, and the questions put to him were:

Q.—Will you please take communication of this letter of June 20th 1927, which bears your signature, and which is filed as Exhibit D.R.-1, and state if you remember that letter?

30

A.—I do.

Q.—You have already said that this letter was read in your presence by Mr. Leamy to the late Mr. Hugh Quinlan on the date it bears, 20th of June 1927?

A.—Yes.

Q.—Will you state to the Court what answer, if any, Mr. Hugh Quinlan gave after the letter was read to him?

A.—He said, "That is all right".

40

Next as to Miss King. Miss King's evidence is not with respect to anything that occurred on the 20th June; she had no knowledge of what events may have happened on that date. If I interpret the course of the trial correctly, the development which took place was this: that when it became certain that there had not been reciprocal exchange of scrip for letter on the 20th June, (as was alleged in the Defence), the defence decided upon other means in order to fortify their allegation that a sale of the shares had, on that date been veritably made between the parties the means

adopted were these: to contend and make proof that in May Quinlan had asked Robertson to take over these shares; that he then delivered the scrip into Robertson's custody; that the price which Robertson would be called upon to pay would be the price which would be fixed by Perron, Quinlan's lawyer; that Perron did fix the price, and at $250,000.; that the letter of 20th June was

10 really drafted by Perron for the purpose of the sale; that some time in May, Perron went and saw Quinlan at his home—presumably to agree with him upon the price to be fixed. What I think is evident about this new representation of what occurred, is that it differs noticeably from what Robertson's Defence says. To be admissible, it should have been specially pleaded (C.P. 110). At the same time it is certain that what it seeks is just this that the letter of the 20h June be found to be the contract between the parties.

20 Miss King was the first witness toward proving this new line of defence. She was heard on 3rd and 4th December 1930. She had been secretary to Mr. Perron for ten years; he had just died, namely on 20th November 1930.

First, Miss King produces, and it is filed as an Exhibit, a document found by her in Mr. Perron's records; it is a duplicate of Robertson's 'letter' to Quinlan of 20th June, and it bears Robertson's signature; as to it, she says (p. 665) "I found this letter

30 in Mr. Perron's safe in the office, *where he told me he deposited it at the time"*.

Next, Miss King produces the draft of a letter which, as it is contended, Robertson had from Perron and which served as the form for his 'letter' of 20th June; it also comes from Perron's safe. As to it she says that it is: "a draft of a letter that I remember distinctly making out myelf. It does not bear any date, because it was subject to modifications".

40 As to this draft she was asked "What that dictated to you by Mr. Perron?; the question was objected to and the objection maintained by the Court. By direction of the Supreme Court her answer to that question is now to be admitted. and, when put to her at the re-trial, she answered it in the affirmative, she says also that the date of the dictation of this draft was a few days prior to the letter of the 20th June.

Then (at the first trial) the following in Miss King's evidence is tendered as proof that Perron had an interview with Quinlan some time in May:

Q.—Is it to your knowledge that the Hon. J. L. Perron paid a visit to the late Hugh Quinlan some time before his death?

A.—Yes.

Q.—Wil you please state what you know about it? Do you know it personally?

10 A.—I know it personally. Mr. Perron asked me to get him Mr. Quinlan's address on Kensington Avenue at the time and asked me to call for a taxi at the same time.

Q.—Did he tell you he was going to see Mr. Quinlan?

A.—He was going to see Mr. Quinlan, *because he wanted his address on Kensington Avenue.*

Q.—Can you fix the approximate date?

A.—I am quite sure it was certainly not in the winter time. It was either in the spring or in the beginning of the summer.

20

The Plaintiffs very strongly took the ground that these answers of Miss King do not constitute proof that Perron actually saw Quinlan upon the matter of the sale of these shares, and certainly do not prove that any such interview had contributed to the events which the Defence alleges to have occurred on the date 20th June.

In my opinion those two contentions of Plaintiffs are well
30 founded in law and in fact.

I have endeavoured to give an account of the questions disallowed at the first trial, to which the answers must be admitted at this re-trial. Whatever view be adopted as to legal admissibility, there is one point as to which, I think, there can be no disagreement, and that is that all the evidence so tendered was directed towards establishing that there was: either completely made on 20th June, or consumated on that date after negotiations preceding it, a contract or agreement between Quinlan and Robertson
40 "*the terms of which were as stated in a letter, adressed by said Robertson to said Quinlan, dated 20th June* 1927 (para 37 of Robertson's Defence).

Robertson's claim is that by reason of a contract or agreement between himself and Quinlan, the terms of which were as set out in that letter, he became on 20th June the owner of the shares in question. The Plaintiffs deny, both that such agreement was made between the parties, and also, that, if made, it would have had the effect of making Robertson owner.

The investigation of such a controversy might begin either by *first* ascertaining if the contract or agreement was really made between the parties, and in the event of that being found to be the case, *then,* the interpretation of the agreement, to ascertain if it is to be given the effect claimed. *Or* the investigation might commence by assuming for the purposes of inquiry that a contract or
10 agreement was made in exact accordance with the letter, and ascertaining, from its very terms, if it would have the effects claimed for it. If the finding be that an agreement in the terms set out in the letter did not, and could not, render Robertson owner of the shares, inquiry as to whether the parties had agreed to the terms of the letter would be academic and purposeless.

The method of inquiry apparently preferred for this re-trial is the former of the above two, accordingly all evidence, which the Defendant Robertson has tendered, has been admitted without
20 restriction. The most that all Robertson's evidence can effect is to have it be declared that the 'letter' of 20th June contains and expresses the actual and exact agreement between Quinlan and Robertson on that date. That is the issue which his Defence raises. Under our system, it is the parties themselves who, by their pleadings, says what the issues are; it is from the submissions as so made that the our Courts derive jurisdiction to decide those issues. The jurisdiction is confined to those issues (C.P. 113,541); the Courts are obliged to decide them C. C. 11)

30

Supra, I have supposed the said 'letter' to be all that Robertson represented it to be, and, as carefully as I could, I have construed it according to its terms. I have set out my conclusions there namely: that the letter does not constitute a sale to Robertson; that at most it is a mandate, which necessarily terminated on Quinlan's death. In my judgment, those conclusions are not, in any way, displedged by the evidence added at this re-trial.

If Robertson did not become owner of the shares by reason
40 of the events of 20th June, it must be obvious. I think, that no act of his, subsequent to Quinlan's death, could have created such a title for him. Prima facie, his conduct subsequent to Quinlan's death is irrelevant to the question of his title. Nevertheless this conduct has some bearing as to other points in the case. The circumstances attending the drafting of Robertson's Defence have been mentioned supra. Robertson is made to plead that he, in person, acquired the shares from Quinlan in person, on 20th June, and that these shares did not form part of Quinlan's Estate at the time of his death. Well, it appears from the record that on

18th July 1927 an inventory was made as by the Executor-Trustees, of whom Robertson was one it bears the heading "Inventory at date of death June 26 1927"; a copy of it was sent to one of the Plaintiffs on the 7th August 1928; it was sent to her by the Capital Trust Corporation to which, as Executor, she had applied for the information; on 29th August the Capital Trust sent her also
10 a copy of the Estate Auditors' Reports, which was dated 8th August 1928, and with it the Auditors' list of the asests of the Estate as on the date 31st December 1927; in this list of assets there appeared as belonging to the Estate (p. 296-e) "Quinlan, Robertson & Janin Ltd. 1151 shares Com." On 5th September 1928 the Capital Trust Corporation, always acting as Executor, sent to another of the Plaintiffs other copies of those same documents, but with respect to the 1151 shares of Quinlan Robertson & Janin Ltd., there was the note (p. 301) "Quinlan, Robertson & Janin Ltd. sold in 1928 for $250,000."
20

Not only did these 1151 shares of Quinlan, Robertson & Janin Ltd. appear, as belonging to the Estate, in the inventory made by the Executor-trustees on the 18th July 1927, and in the list of assets of the date 31st December 1927, but in all their dealings with the Succession Duties Office for the payment of succession duties to the Province, the shares were represented as being owned by the Estate. The Declaration to that office, sworn to by Mr. Parent, the Estates Manager of the Capital Trust, dated 17th
30 September 1927 (C. vol. 7 p. 413) list among the assets: "1151 shares Common; Quinlan, Robertson & Janin Ltd." Some of the valuations in Mr. Parent's Declaration were not accepted by the Succession Duties Office, and negotiations followed; the final Declaration was made by Mr. Paul Mackay, Assistant Estates Officer of the Capital Trust Corporation on 6th July 1929 (C. vol. 7 p. 430-42) in which at p. 438 item 24 "24. Quinlan, Robertson & Janin Co. Ltd, 1151 shares, Common, valued at $185." are among the sworn assets.

40 In the Declaration for Succession Duties purposes of 17th September 1927, the valuation of the 1151 shares of Quinlan, Robertson & Janin Ltd was put at $150,000. The Collector of Provincial Revenue refused that valuation as being insufficient, he fixed the valuation of these shares at $185. per share, making a total of $212,935. thus an increase of $62,935, and the Capital Trust was notified of this by letter of the 22nd November 1927 (C. vol. 7 p. 477). The Capital Trust advised Robertson of this in their letter of 28th December 1927 (ib. p. 478) "Quinlan & Janin is also increased by $62,935". Robertson on 29th December acknowledges

receipt of this letter, and says "...So far as Quinlan Robertson & Janin Ltd is concerned, you know neither you nor I can get anyone to buy it..." On 31st December 1927 the Trust Company write Robertson that, with the information given in his letter, they will take up "the matter of the A. W. Robertson Ltd. and Quinlan & Janin Ltd. stocks with the Succession Duty Office, and
10 see if we can succeed in having the Succession Duty Office revise their valuation". On 2nd January 1928 Robertson replies thus: "My opinion is that if you would elecit the co-operation of Hon. J. L. Perron you would obtain a reduction in the succession duties". The Trust Company did have Mr. Perron negotiate for a reduction. Perron did so, and he succeeded in having a reduction made in the valuation of the A. W. Robertson Ltd. shares, but not of the Quinlan, Robertson & Janin Ltd. shares.

20 What is undoubted from the above is that Robertson, personally, knew that these Quinlan, Robertson & Janin Ltd shares were reported to the Succession Duties Office as belonging to the Estate, and that the Estate paid the succesison duties upon them as owner thereof. That conduct is in direct contradiction to the contention that he became owner on 20th June 1927. It is undoubted also that Perron knew of all this, and yet the Defences, as he had prepared them, certainly as he had approved them, contained these allegations:

30 *Capital Trust's* para. "57. Defendant now pleading never had possession of said shares in said Companies referred to in the foregoing letter and *did not consider that they were assets of the Estate of the late Hugh Quinlan at the time of his death...*"

59.—It was an error on the part of a subordinate employee of the Defendant now pleading... that the said shares of Quinlan, Robertson & Janin Limited . . . were entered as an asset of the said Estate. . . the said shares being at
40 the time of the death of the said Hugh Quinlan transferred and delivered to Defendant Robertson..."

It is evident from the sworn declarations of Parent of 17th September 1927, and of Mackay of 6th July 1929, and from the actual payment by the Estate of succession duties upon these shares, that these affirmations were false,—to the knowledge both of Perron and of the Trust Company. Yet Perron and the Trust Company inserted them in this Defence. (If it was not Perron who inserted these affirmations, it was necessarily Campbell &

Co., with Perron's approval). In any case they were false, and were deliberately inserted there.

Robertson's Defence para. 44. "44. It was an error on the part of a subordinate employee of Defendant Capital Trust Corporation Ltd. . . that the said 1151 shares of Quinlan, Robert-
10 son & Janin Ltd. . . were entered as an asset of the said estate. . .

This affirmation also, knowingly false both to Perron and to Robertson, was inserted in the Robertson's Defence by Perron. It does not appear that Robertson had knowledge that it was inserted there.

Misrepresentations of fact, which are known to be misrepresentations at the time they are made, are of a nature to throw doubt upon the good faith of the party making them. I feel obliged
20 to refer to matter such as the above, because of the affirmation which is pleaded, and which is repeated again and again throughout the conduct of the Defendants case, to the effect that everything that the Defendants did, certainly everything that the Plaintiffs complain of, was done with the concurrence and approval of Perron, woh is represented ac acting always for, and in the interest of the Estate. In my judgment, the record shows the contrary to be the case, and that throughout he acted as Robertson's adviser and helper, and in Robertson's sole interest.
30

I mentioned supra that the so-called letter, Robertson to Quinlan 20th June 1927, was never delivered to Quinlan. That is clear from the record. The Plaintiffs in their pleadings deny both the sum, and all the details, of the events alleged to have taken place on the 20th June; there is the allegation in Robertson's evidence that the letter was delivered to Quinlan; neither Robertson nor Leamy pretend that it was; neither is asked any question which would call for the answer that it was delivered. Leamy just says that, after reading it, he handed it to Robertson, and he then
40 left the room. If delivery of it was a part of Robertson's contention. it was incumbant upon him to prove it. and he has not done so. Robertson remained in possession of it (that is to say of the original) until 6th December 1927, on which date it was that the Trust Company received it from him (the Company's letter acknowledging receipt C. vol. 8. p. 699).

At times, in the period during which Robertson was retaining possession of the original of the 'letter' of 20th June, he seems to have mis-informed even the Trust Company as to what

the nature and the terms of the 'letter' were, as an example of this, Parent, in his evidence, (C. vol. 4, p. 774) says that he saw a copy of the letter of 20th June 1927 on the 9th July 1927; at the time he was giving this evidence, 5th December 1930, he evidently was assuming that what he saw was a copy of the 'letter' as now filed. But he must have been mistaken in that assumption, as appears from the letter he wrote to Robertson on the 23rd August 1927 (C. vol. 6 p. 374) thus: Robertson, by a letter of 19th August, had broached to the Trust Company the question of selling the shares belonging to the Estate in Quinlan, Robertson & Janin Ltd. and the paving companies; he suggested the price $250,000. In reply Parent wrote on the 23rd August to say:

> "Yours of the 19th instant has been duly received, in which you state that Mr. Janin suggested a purchaser for the shares 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;* . . . 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."

The words I have underlined indicate what representation had been made theretofore by Robertson to the Trust Company as to the letter of 20th June; at the least they indicate what Parent understood, and Parent could not have got any such impression from reading on 9th July, a correct copy of the 'letter' now filed.

Another incident which indicates what representations were being made between 20th June 1927 and 6th December 1927, —during which Robertson was keeping possession of the original of his 'letter' of 20th June 1927—is the following: On 25th September 1927, a conference was held between Perron and the two Executor-Trustees. Under date 26th September 1928 Perron wrote to them as follows:

> "Following our conference of yesterday morning, I beg to remind you of the decisions which were adpoted at that conference:
>
> 1.—Try, if possible, to find the original of the letter of the 20th June 1927 from the late Mr. Quinlan to Mr. A. W. Robertson."..

It would be next to impossible to believe that on the 25th September, when this letter was a subject of consultation and discussion between them, Perron had made confusion between a letter from Quinlan to Robertson and one from Robertson to Quinlan; and it would be next to impossible to believe that Perron's memory was so defective, as to make him confuse the two converse case, twenty four hours after the consultation had taken place. Nevertheless, Robertson testifies that Perron's letter is erroneous: that the letter, which was discussed during the consultation on 25th September, was none other than Robertson's 'letter' to Quinlan of the 20th June 1927. If Robertson is right in this affirmation, then there was something wrong with Perron's mental processes at the time. If Robertson is right, then apparently the anxiety on the 25th September was that they did not have the text of the letter of the 20th June—the original by reason of it being an original was not of importance seeing that it had not been delivered — what was required was certainty as to what had been read to Quinlan. If that were the nature of the discussion on the 25th September, what becomes of the pretention that Perron had drafted it, that a signed duplicate had been sent to Perron, and that, as Miss King says, Perron told her *at the time* approximately, 20th June 1927 that he had deposited that duplicate in the safe in his office. If true, all these latter facts must have been in the minds of Perron and of Robertson on the 25th September. I am afraid there is mis-information somewhere; it is with respect to matters the onus of which is upon Robertson, and the lack of veri-similarity must weigh against his version.

The next point to which I must give attention is with respect to the happenings alleged to have occurred on 20th June 1927. It is because of the fact that Robertson has alleged them that they are a matter of inquiry here. What he alleges is that an interview took place on that date between him and Quinlan, and then and there an agreement as to certain shares was made between them. The Plaintiffs expressly and positively denied both that any agreement was made, and even that an interview took place on that date.

The onus is of course upon Robertson to prove both that the interview took place, and also to prove the agreement that he alleges was then and there made. The visit to the Quinlan house and the sick-room is itself a fact, and proof of it may be made by evidence which is admissible for the proof of facts. Proof, however, of matters alleged to constitute a civil contract is governed

by special rules; and to be acceptable as proof of the agreement that Robertson alleges, the proof that he tenders must be in conformity with those rules.

On the question whether the occurrences alleged by Robertson to have taken place on 20th June 1927 did take place, the
10 witnesses on Robertson's side are two only, namely himself and Leamy.

At the hearing before me the Plaintiffs applied for an order to exclude the one who was to be heard second, while the first of the two was giving his testimony. I had to say that I had not jurisdiction to order that Robertson be heard first, with Leamy excluded during the examination, and to say that I had not jurisdiction to exclude Robertson during any part of the trial, he being a party. I suggested that the Defendant might consent. The de-
20 fence refused consent, and Leamy testified first, Robertson being present.

In the main, they give the same account of what happened, namely: that on that morning at between eleven and noon, together, they went to the Quinlan Residence; they rang the door bell; they were admitted and went directly to Quinlan's bed-room; they entered his room; no one was there but Quinlan; he was propped up in bed; only the three were in
30 the room, Quinlan, Robertson and Leamy; after salutations, Leamy asked Quinlan how he felt, then Robertson said in effect that there was a letter which Leamy would read; Leamy read it; Quinlan understood it, and said That is all right, Leamy then handed the 'letter' to Robertson and went out of the room, he had been in the room for two or three minutes only; Robertson remained there with Quinlan for five or ten minutes; (no attempt was made to have information as to what these two may have said to each other when they remained alone in the room). Leamy says that he saw Mrs. Quinlan, and spoke to her,
40 before he went into Quinlan's room; apparently Robertson did not see anyone, but he says that, when Leamy left Quinlan's room, it was to go and speak to Mrs. Quinlan; they both left the Quinlan house together; the total time, from when they arrived to when they left, was about ten minutes.

Each in turn was pressed to give his reasons for affirming that the date of that declared visit was the 20th June. Each refers to the date on the 'letter', as being proof that that was really the date. Each, as additional proof of this date, refer to two cheques which they say were signed on that same date by Robertson and

Mrs. Quinlan. The cheques are filed; they are printed in C. vol. 6 p. 288. It is not pretended that these cheques were signed during the visit in question; it is evident from the detailed account from arrival to departure given by both Robertson and Leamy that it was not during this visit; it must have been at some other time, if at all, on that day. The cheques bear the date 20th June, but
10 that of itself does not prove that they were signed on that day; the Bank stamps on them show that they were negotiated to the payees' banks the one on the 22nd, and the other on the 23rd June; —dates which do not necessarily confirm that they were issued by the drawers on the 20th. In my judgment, neither the date on the 'letter', nor the date on these cheques, can constitute an independent confirmation of the testimony of these two witnesses on his contested point.

20 The conclusion to which I must come is that proof of the interview comes only from the testimony of these two: Robertson a much interested witness, and Leamy his employee. The inherent improbabilities of their account are strong. Thus into this well ordered house they say they made a visit, yet apparently no one saw them come or go. Leamy says that he saw Mrs. Quinlan, but she was not called upon to testify to that fact if it was a fact. Since they rang, some maid or other must have opened the door, yet no attempt was made to hear any such person. Then there was Quinlan's physical condition; he was a very sick man on that day; the
30 orders were that no one was to see him; he had had a day nurse and a night nurse for over a year; on Saturday, 18th June, he had been for a motor drive; on his return, he was nigh exhausted and took to his bed; he did not leave it again, and he died on the 26th. From the 18th, he kept getting worse until the 26th. Miss McArthur was the day nurse during that last week, the 19th to the 26th; she remembers his condition during those days; she was on duty on the 20th, a Monday; she went on duty at 8 a.m.; she was certainly on duty at the time of the visit Robertson alleges; beween eleven and noon on that day. As a witness in rebuttal at the
40 re-trial, she testifies: (p. 3).

Q.—During the week before Mr. Quinlan's death, that is from the Sunday morning on the 19th previous to his death and the balance of the week up to the day on which he died did Mr. A. W. Robertson and Mr. L. N. Leamy see Mr. Quinlan during the day?

A.—To my knowledge they did not, Mr. Leamy did.

Q.—When?

A.—On Monday.

Q.—That would be Monday the 20th?

A.—Yes.

Q.—Just tell his Lordship what happened?

A.—We were under instructions not to allow any one to see Mr. Quinlan. He was very very seriously ill, and I left room long enough to go to the end of the hall and back.
10 When I came back Mr. Leamy was in the room standing at the foot of Mr. Quinlan's bed, and I asked him if he did not understand that the instructions were that he was not to go into the room that morning. He did not answer me. As far as I remember he looked at me, and I still waited for him to leave and then he did leave.

Q.—What was Mr. Quinlan's position in bed? Was he lying down?

A.—He had a hospital bed which we kept up.

Q.—The head was raised up?

20 A.—From time to time we adjusted it, sometimes lower and sometimes higher.

Q.—When you came back and saw Mr. Leamy in the room, was Mr. Quinlan aware of Mr. Leamy's presence?

A.—I do not think so.

Q.—Why do you say you do not think so?

A.—That morning he was not in a condition to talk to any one unless he was talked very directly to and then I think all he would be able to do was to answer.

30 Q.—Were his eyes open when you went into the room?

A.—They might have been.

Q.—When you went into the room and found Mr. Leamy there?

A.—I could not remember then.

Q.—How long were you out of the room at that time?

A.—I should say not more than a minute and a half or two minutes, may be not so long.

Q.—Where did you go?

A.—I turned down to the bath-room at the head of
40 the hall and back, just long enough to empty something and then go back again.

Q.—Mr. Robertson has stated in his evidence at the trial that he saw Mr. Quinlan on Wednesday or Thursday before he died. Did he see him during the daytime?

A.—No he did not. He could not have without my knowledge, because I was there all the time. He might have from the door.

Q.—That is he might have looked in the door?

A.—Yes he might have done that.

Q.—But he did not go into the room?

A.—No.

and at p. 8:

Q.—But when you went to the end of the hall you did not think it necessary to have some member of the family to replace you?

10 A.—Not for that length of time. I knew I was only going and coming back. Mr. Quinlan was resting quietly at the time. That I remember quite well.

Miss Kerr the night nurse testifies: (p. 11)

Q.—Were you on duty during the month of June 1927, the month in which Mr. Quinlan died?

A.—Yes, I was. I was on night duty in the month of June.

Q.—What were your hours?

A.—From eight at night until eight in the morning.

20 Q.—During the last week of Mr. Quinlan's life, the week beginning Sunday the 19th, did Mr. A. W. Robertson interview Mr. Quinlan at any time while you were on duty?

A.—Not to my knowledge, not while I was on duty. He may have been in the house; I do not know, but he was not in the room. He used to come and see Mrs. Quinlan; I did not see him in the room during the last week.

Q.—Were you continuously with Mr. Quinlan when you were on duty?

30 A.—Yes, I was. I would never leave him for any length of time.

Q.—Was he allowed to see visitors during the last week of his illness?

A.—No, he was not, just his own family.

Q.—What do you mean by just, his own family?

A.—Mrs. Quinlan at all times and the sons and daughters would come in and always speak to him, but they would not remain. They never stayed.

There is also the evidence of Mrs. Desaulniers (Margaret Quinlan)

40 (C. Vol. 3. p. 576)

Q.—Did you see him on the Sunday? (i.e. the 19th)

A.—Yes I did. That was the last time I spoke to him.

Q.—How was he that day?

A.—He was very ill. I went to the house for dinner with my husband, and he was too sick to see my husband and also my brother in law who was also invited for dinner. There was some little business he promised to settle for me, he told me to come back the next day and it would be settled.

I went back the next day, and he was too ill, and I could not even speak to him. That was on the Monday. My mother told me he could not possibly settle the business he had to settle for me.

Q.—Did you see him on the Monday?

A.—Yes, but he did not speak to me. He was lying in bed very ill.

10

Q.—Did you inquire if you could speak to him?

A.—I did. Mother was having her lunch in his room with the nurse, Miss McArthur, and she said: "Your father is to ill today. He cannot see you on business".

The time this last incident occurred, was very close to the time when Robertson and Leamy say that they saw him.

Questions to Mrs. Desaulniers continue:

Q.—Did you see him on the following day?

A.—No I did not. I telephoned the house, and mother told me he was not very much better. On Wednesday I went in, but no one was allowed in his room. Mother telephoned that my father was dying and to come down to the house. That was about ten o'clock in the morning.

20

Q.—That was on June 22nd, 1927?

A.—Yes.

Q.—Did any one try to see your father that day?

A.—Yes. I was speaking to mother, and Dr. Hackett had gone in to see him. Mother asked Dr. Hackett how my father was, and if he could get better, and Dr. Hackett said No, and that he feared very much if he got better his mind or his sight were gone.

30

As mother was speaking, Mr. Robertson came to the room and asked to see father on business, and Dr. Hackett said No, that no one could see him and that he could not be disturbed. Mr. Robertson telephoned to Mr. Perron not to come to the house, that father could not be disturbed that day.

Q.—That was Mr. J. L. Perron?

A.—Yes. That was about eleven o'clock or half past eleven in the morning.

40

According to Robertson's account, already in April and May Quinlan was anxious to sell these shares; if such was the case, the likelihood would be that Mrs. Quinlan also was aware of his anxiety. If so, it would have been but natural that on the sale (as Robertson alleges) having been made on the 20th. Robertson would have told her of it. But he told nobody, neither Mrs. Quinlan nor any of the heirs, for their knowledge was derived from the papers sent them in August and September 1928.

I am called upon, from the above and from other indicia, (these latter less positive and direct than the above) to decide whether my reasonable preponderance, Robertson has proved that the interview he alleges actually took place. I formally declare the opinion that the evidence above quoted of Miss McArthur and of Miss Kerr both of whom testified before me, to be veracious and
10 reliable. I accept it is true. I accept as true the above quoted testimony of Mrs. Desaulnier; I mention, perhaps unnecessarily, that her above testimony was not given before me. I take into consideration the improbabilities, which as I think, strongly indicate that the story is not reliable nor true; I formally declare that it has not been proved, and that for the present litigation it mus be considered that it did not take place.

If this case were now being dealt with as one in the ordinary course, is in such case one of the questions in debate was as
20 to whether a certain interview had taken place, and that the conclusion reached was that the interview as a fact had not been proved by preponderance of evidence, that conclusion would of itself dispense from examination in detail as to what events had taken place at that interview. Supra, I have set out what I find to be the juridical construction and interpretation of the document said to have been agreed upon at that interview. I need not return to the document. My finding was that according to its very terms it could not have the effect contended for by Robertson. In
30 such case, in an action being dealt with as in the ordinary course, it would not be necessary to make further inquiry, more particularly there would not be occasion to consider disputed questions as to the legal admissibility of some or all of the evidence which had been tendered as proof of the document. But the case having come back here for re-trial by reason of a reference, it may be desirable that such matters also be dealt with, de bene esse.

The matter sought to be proved is that, on the occasion in question, a sale was made by Quinlan to Robertson of certain
40 shares for the price $250,000. That is what Robertson's allegation is. The onus is upon him to prove it. I have declared it to be my finding that, as alleged, the contract is a civil contract,—not a commercial one—and I mention, what of course is not a matter of contestation, that there are respects, as to which our rules of evidence vary, according as the juridical relation in controversy concerns a commercial, or a non-commercial matter. As to the presently alleged contract, the rules of evidence applicable are those laid down for non-commercial matters.

The rules are in C.C. 1233, it being especially ss (7) which is applicable here, namely that "proof must be made by writing or by the oath of the adverse party" except "in cases in which there is a commencement of proof in writing". And C.C. 316 adds: "A party may be examined by the opposite party and his evidence may be used as a commencement of proof in writing". The admis-
10 sibility of the evidence which Robertson tendered to prove his allegation is to be determined by these rules. What constitutes a 'commencement of proof in writing' is, I think, clearly understood. Whether the concise definiton contained in the art. C.N. 1347, or the more lengthy one in Pothier Obl. Bugn. n. 801, be referred to, the result is the same, namely that there must be a writing which has emanated from the party against whom the vinculum juris is being set up. Once that writing has been produced, testimony is admissible to complete the proof of the vinculum juris. Admission in evidence, given by the party in question, are the equivalent
20 of a writing emanating from him; but extra judicial declarations or admissions are not. It is not a matter of controversy now, I think,—if ever it was—, that once the vinculum has been proved, testimony, and other methods of proof, are admissible to prove the details of the agreement or contract between the parties. Those are the rules of evidence which Robertson must comply with.

Now it seems clear to me that: to allege that a contract was formed between two parties by the reading by one of them to the
30 other, of a proposal, and the verbal declaration by that other that he agreed to what was read, the party reading retaining in his possession the paper that he has read, is to allege a contract formed by spoken word. I do not ask what the legal consequence would have been, if the writing had been delivered to, and accepted by, the party read to, for that admittedly was not the case here. Where there has been a reading, a listening, a verbal approval of what has been read, the party reading retaining in his possession the paper read from, I cannot see how possibly it could be said that the written matter in question emanated from the party who heard it
40 read. By the law, as above quoted: unless the writing can be said to have emanated from a party, it cannot constitute a 'commencement of proof in writing' against him. The case here is that Robertson having himself prepared a paper, which was in the form of a letter addressed to Quinlan, and having had it read to Quinlan, and Quinlan having said to it 'That is all right', the paper throughout and thereafter remaining in Robertson's possession, I would find it impossible to say that what was alleged was other than a verbal contract, and I would find it impossible to say that the 'letter' which was read emanated from Quinlan. By what mental process could it be said that a letter, written and addressed by A to B, was a writing which emanated from B?

Part of Robertson's allegation was that the scrip for the shares, the same indorsed in blank, had been delivered to him at that meeting on 20th June. The significance would have been that the delivery constituted a completion of the sale. The allegation was false, and Robertson knew it to be false; it is now proved to be false. It is unquestionable now, that on 21st May Quinlan in-
10 dorsed the scrip, and handed it to Robertson for safe-keeping; on 23rd May, Robertson handed it to Leamy to be put in the office safe. Leamy put it in the office safe, namely in the office safe of A. W. Robertson Limited, a company of which Quinlan was half owner. Leamy then gave to Robertson a receipt, in the form of a letter addressed to Robertson, which stated that the scrip was put in the safe, that it was the property of Quinlan, and that it was there for safe-keeping. It is certain, I think, that Quinlan's indorsement on the scrip on 21st May cannot constitute a 'commencement of proof in writing' toward proving that Quinlan sold the
20 shares to Robertson on the 20th June.

There being no writing to prove the sale, and no commencement of proof in writing to admit testimonial proof of it, Robertson invoked, as proof, the probability of it, this by reason of a number of circumstances some of which he proves (under reserve of objections), others, hinted at, rather than proved. The first remark to make is, of course, that the law does not permit a contract, such as this, to be proved otherwise than as set out in the
30 articles of the Codes cited supra.

Among the circumstances relied upon, perhaps the principal ones, are these: that in April, Robertson being then travelling on the Meditarranean, Quinlan, in conversation with Leamy, said in effect that he was awaiting Robertson's return as he would like to sell his shares in different companies to Robertson; that when Robertson, aftter his return, saw Quinlan, Quinlan told him he would like to sell his shares and suggested Robertson might buy them; it is half affirmed in Robertson's evidence, that
40 a sale to Robertson was approved between them in principle, the price to be fixed by J. L. Perron; it is said that Perron went to see Quinlan about this, the only proof as to this being Miss King's evidence that on an occasion—not in the winter, but in the spring or early summer,—Perron had asked for Quinlan's home address and that a taxi be called for him,—this is looked upon as sufficient proof that Perron saw Quinlan and fixed the price of $250,000.; then the endorsement and delivery of the scrip and the meeting on 20th June.

In my view, circumstances such as the above are not admissible as proof of the sale alleged. In my judgment the above circumstances, if admissible, and if true, would not be sufficient to establish as a fact that a sale was made. I add this: what is contended is that these circumstances were the preliminaries of a sale, Quinlan to Robertson; Perron was called in to complete and
10 give form to a sale; he is said to have prepared the document which culminated the whole matter; that document is the 'letter' of 20th June; it is sufficient to read it to see that it does not express nor constitute a sale from Quinlan to Robertson. If it does not do that, it must follow that the supposed conversations in April or May, between any of the parties named, were not intentioned toward a sale.

There is another matter which, I think, I should mention here;—it is with respect to transfers, made in company books, of
20 Quinlan's shares into Robertson's name. As mentioned supra, Robertson received from Quinlan, on 21st May, the scrip representing Quinlan's 1151 shares in Quinlan, Robertson & Janin Ltd, and his 250 shares of Amiesite Asphalt Ltd, all of which indorsed in blank. The circumstances also are mentioned supra.

In the Minute Book of the Quinlan-Robertson-Janin company, there is a minute of a meeting of the Board of Directors of that company which, it is stated, was held on the 22nd June 1927
30 at eleven o'clock a.m.; the minute states that notice for the meeting was given on the 18th June; the minute states that those present at the meeting were A. W. Robertson and A. Janin; A. Janin was the secretary of the company; the minute contains this entry: (C. vol. 6 p. 277).

The Secretary submitted to the meeting a transfer by Mr.

Hugh Quinlan of One thousand one hundred and fifty one shares of the capital stock of the Company in favour of Mr.
40 A. W. Robertson, Montreal.

On motion duly made, seconded and carried unanimously It was resolved that the said transfer be accepted.

In the Minute Book of the Amiesite Asphalt Ltd. there is a minute of a meeting of its Board of Directors stated to have been held on the 22nd June 1927 at noon; the minute states that notice for the meeting was given on 18th June; it states that those present were Alban Janin and A. W. Robertson; C. J. Malone was

the secretary of the company; (ib. pp. 279-280) in this minute are two resolutions, identical in terms to the above, for the transfer into Robertson's name of the 50 shares which were in Quinlan's name, and the 200 shares which were in Dunlop's name.

According to Robertson's evidence it was the auditor of
10 the Companies who drew up these minutes. The auditor was a Mr. Petrie. Petrie testifies as to these matters (C. vol. 4 p. 690). He tells us pp. 700-2 that it was upon Robertson's instructions that he prepared the notices, which he believes were sent out on that date 18th June; that Robertson told him then that the purpose of the meeting was to transfer shares; He says that the minute as entered was prepared by him, in accordance with Robertson's instructions. His evidence is the same as to both Companies.

The 'transfers' mentioned in those minutes were the trans-
20 fer indorsements printed on the back of the scrip, which Quinlan had signed in blank, and into which, on Robertson's order, Petrie had inserted Robertson's name as transferee.

Thus it appears, from the information and instructions given by Robertson to Petrie on the 18th June, and the notices of meeting sent out on that date, that on 18th June Robertson had decided to have put in his name the scrip that Quinlan had handed to him. In the circumstances recounted, on the 21st May.

30

There is quite room for doubt as to whether Directors' meetings of the companies were held on the date mentioned, the minute may have been entered and afterwards approved, as is frequently done in the case of private companies (Petrie pp. 701-2), and according to Mrs. Desaulniers' evidence it was just at those hours of that day that Robertson was at the Quinlan house. But that is not the point; the real point is that Quinlan had no part nor knowledge of these transfers, and that the transfers were in violation of the purpose for which the scrip was
40 handed to Robertson on 21st May, which was "safe-keeping".

In some way, it had come to the knowledge of the Plaintiffs that Robertson had had made, in the company books, transfers of the Quinlan shares to himself (Robertson); although without particulars, they alleged the matter in their action, paras. 11 to 16;

> 11.—That on or about the 22nd day of June 1927, . . . the said Robertson . . . personally and for his own benefit, acquired a number of shares, the property of the said testator, in different companies. . .

12.—The said transfer of said shares to said. . . Robertson is due to fraud on the part of the said Robertson. . .

13.—That the said transfer of shares was thus fraudulently operated when the said Testator was fatally ill . . .

10

14.—That the said transfer of shares was contrived at a stage of the Testator's last illness when he was unable and forbidden, to the knowledge of everyone, to transact any business whatsoever; and his attending physician had given strict orders to that effect;

15.—That the said transfer of shares was made at a moment when the said testator was continuously under the care of two day nurses and two night nurses, as well as of doctors in attendance;

20

16.—That the said testator at the time of the said transfer of shares was in a physical and mental state which rendered him incapable of giving a valid consent;

We know from the testimony of the nurses, of Mrs. Desaulniers, of Dr. Hackett &c. in what condition Quinlan was on the 22nd June; it coming to the knowledge of the Plaintiffs that transfers as of the date 22nd June were set up by Robertson, it was natural enough that they should have referred to them in the way they did in their action. Now, the contention has been put forward, on behalf of Robertson, that these allegations in paras. 11 to 16 are to be interpreted as being admissions by the Plaintiffs that real and consensual transfers of the shares were made by Quinlan to Robertson on the date 22nd June; that, such being the admission,—the formation of the vinculum juris being admitted—the sole question remaining is as to whether there is any illegality attaching to those voluntary transfers. I declare the contentions to be unfounded; it is based upon a misinterpretation of the allegations; it leaves out of account the circumstances in which the Plaintiffs were when the allegations were made; it leaves out of account the proof subsequently made of the complete circumstances; and it is incompatible with the Defence, which is that the shares were sold to Robertson on the 20th.

30

40

I do not require to say that the whole proceeding of 22nd June, being due to Robertson's orders, has no more legal effect than Robertson's orders could create. The proceeding on the 22nd June remained secret until shortly before the action was instituted.

The conclusions to which the matters above related all lead are:

1.—That Robertson did not at any time, during Quinlan's lifetime and by reason of a purchase made by him from Quinlan, become the owner of the shares Quinlan - Robertson - Janin, Amiesite - Asphalt, and Ontario-Amiesite;

10

2.—It was a breach of the terms, upon which he received possession of the scrip on 21st May 1927, that Robertson had the shares represented by that scrip transferred into his name; (it was by reason only of his authority over the employees of the companies in question, that he was able to have these transfers entered in the companies books);

20

3.—As between Robertson and Quinlan at the time of Quinlan's death, and as between Robertson and the Estate Quinlan thereafter, the said shares were the property of the Estate and formed part of the corpus thereof;

4.—By reason of her right to have conserved intact the corpus that Estate, the Plaintiff is entitled now, in this action, to demand the restitution to that Estate of those shares, or of the value thereof, as may be found proper;

30

Those shares, having formed part of the Estate, and Robertson being an Executor-trustee, the article 1484 C.C. prohibited him from becoming buyer of them, either openly in his own name, or through some other person for his advantage or account.

1484. The following persons cannot become buyers, either by themselves or by parties interposed, that is to say: . . . Administrators or trustees, of the property in their charge . . .

40

I mentioned, supra, that one of the condemnations, sought by the action, was that the Executor-trustees be condemned to render an account of their administration; I mentioned also, that the Defendants, in their Defences, affirmed that they were then, and had always been, willing and ready to render an account; I then made some comment as to the untruthfulness of this affirmation; my comment was justified also by the fact that these De-

fendants persisted in their refusal to render an account, and that the judgment of 6th February 1931 declared that they were not obliged to render one. The Supreme Court has declared that issue to be res judicata; namely that the Plaintiffs are not obliged to render an account now. The reason, of course, is that the Executor-trustees are still in office, and it will be when their trusteeship
10 ends, that they will be called upon to render it.

Such being the circumstances, it seems clear to me; by reason of the declaration in the judgment of this Court of the 6th February 1931, supplemented by the declarations in the judgment of the Supreme Court, that questions of the nature of contestations of a trustee's account have been relegated from this action. Claims of that nature, which Plaintiffs put forward in their notarial protest, and which Intervenant sought to bring into the case by his Intervention, amount to hundreds of thousands of dol-
20 lars. As mentioned supra, Robertson had them struck out by the judgment of the Court of Appeal of 26th June 1936. The claims in question were not thereby lost to the Plaintiffs, nor to the Estate, but the adjudication of them is left to litigation, other than the present, if they are to be persisted in.

The significance of the finding, just expressed, is that the present action is to be confined to what is relevant to preserving "intact the corpus of the estate" as against Robertson, namely in
30 having restitution from him, personally, of what he may, without legal right, have possessed himself of, from the assets of the Estate.

The assets as to which restitution is claimed are these:

The group 1151 shares Quinlan-Robertson-Janin,
250 " Amiesite-Asphalt
200 " Ontario-Amiesite

40 1000 shares preferred Fuller Gravel Co. (atttached to which are 499 shares of common).

Before coming to the consideration of each of those assets, I probably should recount, succintly, the administration of the Estate from the date of the death to the institution of the action. Hugh Quinlan died on 26th June 1927. On 9th July, the Safety Deposit Box, which he had at the Bank of Toronto, was opened, and a list made of the contents. Those present were the Managing Director of the Capital Trust Co., the Estates Officers of that

company, and L. N. Leamy accountant of the Quinlan-Robertson-Janin Company.

On 18th July, a document bearing the caption 'Inventory at date of death June 26th 1927' was composed, partly from the Safety Deposit Box list, partly from elsewhere; it purports to be a
10 list of assets, without mention of any liabilities, and it does not appear by whom it was made; it is unsigned.

Under the law of this Province C.C. 919, testamentary executors are obliged to cause an inventory of the estate to be made, *after notifying heirs legatees and other interested parties to be present.* No notification of any kind was given to the Quinlan heirs or legatees; none of them had any knowledge either of the opening of the Deposit Box, or of the preparation of this 'inventory,. This is one of the complaints in the action. The answer
20 which the Defendants individually make to this complaint is that "there was no necessity in fact or in law of giving notice to" the heirs. They rely, as justification for the omission of notice to the heirs and the incompleteness of the 'inventory', upon the article 6 of the Will: 'It is my desire that no inventory be made before Notary and that the inventory of my Estate shall be made in the form of commercial inventories'. I am unable to admit that dispensation from the notarial character, dispensed from notice to the interested parties, or from the observance of C.C. 919, or deprived
30 the interested parties of the safeguard of an inventory in which they took part.

I am unable to admit that the words of the Will: "give and bequeath the residue or balance of my estate without any exception, in trust jointly . . . appointing them jointly my Trustees and Testamentary-Executors, with the seizin and possession of all the said residue or balance. . . immediately after my decease. . ." made these trustees the absolute masters of the Estate, with the right to completely ignore the heirs in the determining of the
40 composition of the Estate (the inventory); to leave the heirs in complete ignorance of the trustees' administration; to deny to the heirs information, except what they might glean ex post facto from the annual report of the Auditors of the Estate; (The Audit of the years 1927 was sent to the heirs only in August and September 1928); to consult the heirs as to nothing. After all, these Defendants were not owners but merely Trustees, and in addition to the words which invested them into that office, the Will continued: "for the purpose of carrying into effect the provisions of this my present will. . ."

It is quite evident, however, that that is the way these trustees assumed to act, and acted. The explanation is not difficult to find; it is indicated in the correspondance of August and September 1928, where, in effect, Perron directs that the heirs are to be ignored. The representation from Robertson's side is repeated, and repeated again, that everything that was done throughout, was done with the approval of Perron. That affirmation is to this extent borne out in the record, that throughout, Perron was acting in and for Robertson's interest, as Robertson's adviser and helper; nominally he was consulted as the legal adviser of the Estate, but really the advise given was in the sense sought to Robertson.

It is next to impossible to suppose that the Capital Trust Corporation, an experienced and high-class Trust Company, would, if left to itself, have assumed to act in the arbitrary, inconsiderate and discourteous way in which these Trustees acted. The explanation must be that the Trust Company felt obliged to follow Robertson, and the conduct was directed by Perron.

Their contestation of the demand in the present action namely the demand that Robertson return what it was alleged he wrongfully took, a contestation which was directed—perhaps instigated — by Perron is but one example of their ill-advised acts. Martineau J. felt obliged to put certain costs to their personal charge on account of that unjustifiable contestation, and I have felt obliged to do similarly. I am sure this Trust Company know from their experience,—and I am equally sure that it is their invariable practice when left to themselves—, that the duties of a trustee can be carried out just as efficiently when the attitude toward the cestuis que trust is one of impartiality, frankness and courtesy.

To continue the account during the administration: *Group of shares*: Quinlan-Robertson-Janin, Amiesite-Asphalt, Ontario-Asphalt;

On 22nd July 1927, Robertson wrote to the Trust Company and said that "all Quinlan-Robertson-Janin stock as well as all Amiesite stock that once stood in Hugh Quinlan's name were transferred to me before his death. . . These shares constituted *what I was to endeavour to obtain* $250,000. *for*. . ."

On 19th August 1927 Robertson wrote to the Capital Trust to say that Janin had suggested a purchaser for the Quinlan-Robertson-Janin shares at the price $250,000., one half cash, the other half payable in one year with interest at 6%, the shares to

remain in escrow until paid for, and he adds "If this proposition meets with your approval, kindly write to me, and I shall consummate the transaction at once."

On 26th August 1927 the Trust Company sent to Perron a copy of the 'letter of 20th June 1927 with information of Ro-
10 bertson's letter, and continued: "If you do not see anything that would present the executors from making a sale of the late Hugh Quinlan's interest in the following companies: . . .

will you kindly get in touch with Mr. Robertson at the first opportunity and arrange to prepare the said document, so as to enable the executors to complete the transaction as soon as possible".

Evidently the Trust Company were advised later that the Trustees could make the sale, and on 29th December 1927 Robert-
20 son sent them a draft for $125,000. "on account of the purchase of the late Hugh Quinlan's shares in Quinlan, Robertson & Janin Limited and the Paving Companies. This represents 50% of the total amount to be paid for the stocks in question".

Robertson sent another $125,000. on 28th January 1928. It is by these payments amounting to $250,000, that Robertson paid for, and supposedly became owner of, the Quinlan shares in Quinlan-Robertson-Janin, Amiesite-Asphalt and Ontario-Asphalt com-
30 panies. Such purchase by him was, by reason of C.C. 1484, illegal, null and of no effect.

Fuller Gravel Co. shares: This was a company with a capitalization of 2,000 preferred shares and 1,000 common shares.

Quinlan owned one half of each class of shares.

On 16th August 1927 Robertson wrote to Perron asking him to arrange to meet himself (Robertson) and Dr. Connolly of the
40 Capital Trust Company in order to discuss the sale of the shares of Quinlan Estate in this company. In this letter Robertson adds "I, personally, do not want to buy any of the stock, except two or three shares each of the common and preferred so that I shall have 51% of the stocks".

Apparently the meeting took place, for on 20th August the Capital Trust, per Parent the Estate Manager, wrote to Perron asking to be advised "if it will be in order to accept the offer of $50,000. for Mr. Quinlan's interest in the Fuller Gravel Company Limited."

On 22nd August Perron wrote: "I have examined the statements of the Fuller Gravel Company Limited and have carefully considered the matter. *I agree with Mr. Robertson* that if the Estate can get $50,000. for its interest in this corporation, it should dispose of it."

10 It may be noted that the name of the party offering the price $50,000. is not mentioned. From the correspondence I think we may take it as certain that Robertson represented to the Trust Company that he had a firm offer of $50,000. for the shares. From receipt of Perron's letter of 22nd August Robertson looked upon himself as authorized to sell it at the price named $50,000. which is $50. per share for the Preferred — the common as a bonus. (The sequel was that he had 850 of the shares transferred to himself at that price). Some correspondence followed, and later he reported that he had sold the total number, namely as follows:
20

To W. E. Tummon	600	Preferred with	bonus of common
G. W. Rayner	200	do	do
G. S. McCord	200	do	do

It is stated in Robertson's Particulars (C. vol. 1, p. 55) that Tummon refused to take and pay for the 600 shares said to have been sold to him; this is not borne out by the evidence at the trial —not entirely. What appears there is that Tummon did even-
30 tually keep 50 shares, and the other 550 shares were transferred to Robertson. Much the same happened with respect to the 'sales' to Rayner and McCord; in each case, the nominal buyer kept 50 shares, and the remainder were transferred to Robertson. Robertson thus got 550 of the 'Tummon' shares, 150 of the 'Rayner' shares and 150 of the 'McCord' shares in all 850 of the Quinlan 1000 shares. It is admitted in the same Particulars, and is proved in the record that it was Robertson who paid the total $50,000. for the 1,000 shares, Subsequently, and between Robertson and each of Tummon, Rayner and McCord, he received back from each $2,500. Some
40 months later Robertson sold the total 2,000 shares namely his own original 1,000 shares, the 50 of Tummon, the 50 of Rayner, the 50 of McCord, and the 850 that he acquired through Tummon, Rayner and McCord for $180,000. namely at $90. per share. He had paid the Quinlan Estate $50. per share for them.

The question to which these transactions give rise is as to whether the sales, which Robertson reported he had made to Tummon, Rayner and McCord were genuine and bona fide transactions, or were they colorable transactions, those parties being

merely interposed, and with the intention on Robertson's part to get title to those shares for himself? Martineau J. came to the conclusion that illegality affected acquisition by Robertson of 400 shares only; Martineau J. was willing to suppose that the three transactions Tummon, Rayner and McCord should be considered valid each for 200 shares, and he found by the judgment of 6th
10 February 1931 that it had been illegaly—as in contravention of C.C. 1484—that Robertson had acquired the other 400 shares. Martineau J. reached this conclusion, although he finds that Robertson was acting in good faith.

Since there was no cross-appeal, the Court of Appeal was unable to increase Martineau J's award—which as just stated was limited to the 400 shares—and the Court of Appeal left the condemnation as it was.

20 In my judgment, it appears amply from the record that all three transactions were colorable transactions, that all three Tummon, Rayner and Mc Cord were persons interposed, for the purpose on Robertson's part of himself eventually acquiring title to the shares.

Quite possibly these persons were not aware of the role they were playing but Robertson knew all along. It is equally certain that Robertson acquired the shares for the purpose of making the
30 profit which he actually did make, and that under our law he was forbidden thus to traffic in the assets of the Trust for his own personal profit. He must be condemned to make restitution to the Estate of the profit he personally made, namely $40. per share on the 850 shares, to wit: $34,000.

Perron's above letter was of the 22nd August 1927; both in Robertson's and in the Capital Trust Company's Particulars it is stated that the sales to Tummon, Rayner and McCord were made "during the month of August 1927"; this statement is not quite
40 right, according to the correspondence filed; according to this latter the dates would be in September 1927; the payments extended over the period 6th Sepember 1927 to 28 May 1928.

It is recounted, supra, that Quinlan's shares in Quinlan-Robertson-Janin and in Amiesite-Asphalt were transferred into Robertson's name on 22nd June 1927. At a meeting of the Board of Directors of the Ontario Amiesite Company, held on the 16th November 1927, resolutions identical to those passed on 22nd June were passed for the transfer into Robertson's name of the 200

shares theretofore in Quinlan's name. (C. vol. 6 p. 280) Thus, it is from the 16th November, that all the shares of the 'group' were in Robertson's name. In August he had advised the Capital Trust of a buyer suggested by Janin for these shares at the price of $250,000. and Perron was consulted as to whether the Estate might sell them for that price. The conclusion arrived at was evidently
10 in the affirmative, for as above stated Robertson remitted the money. The purchase was made by and for himself. The date of it was the 29th or 31st December 1927.

From the record it seems to me to be undoubtedly clear, that, up to that date say 31st December 1927, the Executor-trustees, and all concerned, never thought otherwise than that the shares in this 'group' belonged to the Estate,—although they were in the companies' books registered in Robertson's name. Robertson's letters—including especially that of the 19th August 1927—
20 make it certain that that was his view. the report to the Succession Duties Office of the 18th July 1927, sworn to by Mr. Parent on the 17 September, 1927 (declares the Quinlan-Robertson-Janin shares to be the property of the Estate. (There is no mention in this report of the Amiesite-Asphalt or the Ontario-Asphalt shares, but they were in the same 'group', and I would think the omission was due to inadvertence.) It is impossible to believe and I do not believe that Mr. Parent swore otherwise than what he believed to be true, namely: that these shares were the property of the Estate;
30 as at the date 31st December 1927, these shares, according to the Auditors' examination of the books and their report, were still borne as assets of the Estate, and, when that report was sent to the Plaintiffs in August 1928, the same state of affairs was indicated. In September 1928 a correction was made, and the statement then made that the Q-R-J shares were sold in 1928, —apparently giving to the sale the date of Robertson's final payment which was 28th January 1928.

The conclusion to be drawn from these facts is that the
40 date when Robertson really assumed to be, and became, the purchaser of these shares was 31st December 1927.

It is, as of that date, that the valuation of the shares is to be made. (With much respect I mention that in the Court of King's Bench, the view was expressed that the date should be the date of the institution of the action, but, since then, the matter has been further clarified, and the date I have given seems to be the one to be adopted.—in any case the difference in valuation was not large, and it was in the Plaintiffs' favour.)

It was only after the action was instituted, and when the matter came into the hands of counsel as above mentioned, that the affirmation was made that there had been a sale on the 20th June 1927—an affirmation which proved to be entirely without foundation from all the circumstances proved, and more particularly from the evidence of Robertson and of Leamy, both at the
10 first trial, and as unrestrictedly allowed at the trial before me. The explanation of this also has been indicated supra.

The conclusion to which I must come is that date of the sale was 31st December 1927, for that was the date when the Capital Trust Company received the first payment and gave its consent to the sale. The sale must be annulled, and declared to be null and illegal, by reason of the purchaser being a trustee, this under C.C. 1484

20 The sale to himself, which Robertson brought about, being annulled, what must the consequences be? In normal circumstances, the return to the rightful owner of the articles wrongfully possessed together with natural or civil fruits, together with indemnity for deteriorations if any, together also with damages according to circumstances, this against re-payment of the price paid. The result, that must be brought about by the adjudicating authority, is that the rightful owner is re-established in a monetary way so that he will not suffer loss. If the articles cannot be
30 returned, or if their return would not bring about the result above mentioned, justice may require that the wrongful possessor be condemned to pay the value on the date of the sale plus interest and plus also damages if the case require it.

The shares included in the sale of the 31st December 1927 were those composing the 'group' already noted:

1151 shares Quinlan-Robertson-Janin,
250 " Amiesite-Asphalt,
40 200 " Ontario-Amiesite.

As to the Amiesite-Asphalt shares, Robertson sold them together with the other 750 shares in that company to the W. P. McDonald Company;—this in September 1928, so when the action was instituted, he was no longer in possession of them.

As to the Ontario-Amiesite shares they were in Robertson's possession when he gave evidence at this re-trial.

As to the Quinlan-Robertson-Janin shares, it appears by a written agreement which Robertson filed that he sold these 1151 shares to Mr. Janin on 26th June 1930, and that by that agreement it was provided that these 1151 shares should be held in escrow by the Sun Trust Company, and in the event that by the final judgment to be rendered in the present suit it is declared that
10 those shares are the property of the Quinlan Estate, then the Trust Company is authorized to abide by the judgment and deliver the shares, in which event Robertson is to reimburse Janin the buyer the sum of $269,000. with interest thereon at 6% from 26th June 1930. (In this agreement the shares are called shares of the Alban Construction Company,—that being the new name of the Q-R-J Company.)

As stated supra, the sale to Robertson of the shares in Quinlan-Robertson-Janin, Amiesite-Asphalt and Ontario-Asphalt must
20 be declared illegal and null. The date of this sale was 31st December 1927, which is the date on which the Capital Trust accepted the initial payment of $125,000. and gave formal indication of its consent to this sale (C. 6, 280). The sale being annulled, what must be the restitution that Robertson must make? Counsel on his behalf suggest that no more can be ordered that return in kind of the Ontario-Amiesite and of the Quinlan-Robertson-Janin shares, together with the value at the date of the sale of the Amiesite-Asphalt shares. Opposing counsel say that these shares having
30 been sold as a group, the only tender admissible — even at the commencement of the suit—would have been of everything included in the group; they say that, even then, if the totality was not returned, the alternative was monetary compensation for the lot.

In my opinion, the juridical situation, and the requirements of substantial justice require that the restitution consist of the fair value of the shares at the date of the sale, with interest from the date of the default, (C.C. 1077-a.2) but without allowances for appreciations or depreciations in value which may have occurred
40 thereafter. It is such compensation which I propose to allow in the judgment.

In connection with this, I may say that it is now more than twelve years since Robertson took possession of these shares; since possession taken he has done with them what he pleased; when required, in October 1928, to return them, he refused, and he has refused continuously ever since; the Plaintiff, and the Estate, have no knowledge of what he may have done with the assets of the companies, or in what condition they are; if taken back at the present date, they would be taken back blindly.

For the Estate to take back these shares today, there would be cast upon it, in its interest, the obligation to investigate the last twelve years, and then seek to exercise such recourses as may have become attached to the shares during that period. These, and other considerations equally pertinent, juridical and equitable, make it certain, I think, that it is monetary compensation to which
10 the Estate is entitled.

I am called upon therefore to fix valuation for the shares as at the date 31st December 1927. In coming to this task, there are I think, these two considerations which should be given effect to: *first* that the shares were taken without the consent, and without even consultation with, those who had the proprietary interest in them, I mean the Quinlan family; the buyer's co-executor was deceived into giving its consent; the price paid he says was a price which the buyer himself fixed,—he in consultation with his lawyer
20 Perron;

second: that after twelve years of possession, of uncontrolled possession, of evidently illegal possession the spoliator cannot beg for favours, he cannot ask for ultra-precise and niggardly valuations. There is a rule of conduct in the Civil law, one meant for application in situations to which the present one bears much analogy, and the rule is *spoliatus ante omnia restituendus.* The figures which I feel called upon to adopt are figures which may
30 fairly be said to be Robertson's own, for I will go by the Balance Sheets of the Companies. I will take however these figures as they appear there, they are the figures which were declared by the companies' auditors unquestionably they were adopted by the Directors, of whom Robertson was certainly the chief. Dodgings away from those figures do not appear to me to be permissible or even straight forward.

The figures which I adopt and follow are those of Mr. Schurman, a chartered accountant, called in for the purpose of
40 analysing the balance sheets,—not to reform or re-explain them—, himself unconnected with the controversies. I find his evidence more acceptable than that of Petrie for obvious reasons.

To arrive at the valuation which Robertson should pay for the *Quinlan-Robertson-Janin shares,* I am given that the assets shown on the Balance Sheet of the date 31st March 1927 work out to represent a value of (approx.) $207. per share; the Balance Sheet of the date 31st March 1928 shows assets which work out to represent a value of $249. per share. The increase in value was,

I would think, due, at least chiefly, to profitable business in the interval between the two Balance Sheets and it is not said or contended that any new capital, as such, was put into the company during that interval. The date 31st December 1927 is between these two Balance Sheets, the exact figures of values for the date 31st December 1927, are not in the record, probably they were never made up. But I am obliged to find a figure, and I think I may, without risk of any error to Robertson's disadvantage take as the value on 31st December 1927, a figure about half way between those two. I do so, and put the value per share on that date as $227. per share. This gives to the Quinlan 1151 shares a value of $261,277. (This figure seems to be a fair one when it is borne in mind that Robertson sold these same shares to Janin on 26th June 1930 for $269,000.) (Exhibit P.-S.-7 filed at the re-trial). The values of $207. and $249. per share are arrived at after providing among the liabilities for a dividend, declared but not yet paid, amounting to $84,947.; of this the amount payable on the 1151 Quinlan shares was $28,315. This $28,315 being added to the $261,-277., brings to the Quinlan shares, on the date 31st December, 1927, a valuation of $289,592. It is at that figure that I must fix their value, and the price that Robertson must pay.

To arrive at the valuation which Robertson should pay for the *Amiesite Asphalt* shares, I am given that the assets shown on this company's Balance Sheet of 31st March 1927 work out to represent a value of (approx.) $265. per share; its Balance Sheet of the 31st March 1928 shows assets which work out to represent a value of (approx.) $434. per share. The company was in a very prosperous way, for the assets on 31st August 1928 showed a value on that date of $608. per share. In September 1928 Robertson sold these shares for approximately that figure $608. per share. Martineau J. estimated the value of these 250 shares of Quinlan to be $400. each, thus $100,000. for the lot; I agree with his opinion that the matters proved justify that valuation of these shares. I adopt the valuation of these shares at $100,000.

Robertson says in his evidence that the shares of *Ontario-Amiesite* are, and all along were, valueless. No evidence was made to contradict that statement, and I accept it. He will not therefore be condemned to pay anything as for the value of those shares.

The conclusion then is that Robertson must be condemned to pay $289,592. as for the Quinlan-Robertson-Janin shares, and $100,000. as for the Amiesite-Asphalt shares and he must be condemned to pay as for the difference on the Fuller Gravel shares $34,000. The debits must bear interest at the legal rate, from the

date of the institution of the action, credit must be given on the same basis for the amount since paid, and the account made up accordingly.

Before proceeding to make up the account, on the basis just stated, and proceeding to deal with the question of costs, there are a few remarks that I think I should make.

10

The first is that so far as the record shows, Mr. Janin took no participating part in bringing about the transfer of the shares from the name Quinlan to the name Robertson; he did not do anything to oppose what Robertson was engaged in, and it could not be expected of him. Mr. Janin at some time or times may have assented that $250,000. was a fair price for the shares, but in his evidence at the re-trial p. 45-6, he corrects that he had proposed a buyer as Robertson had said in his letter of 19th August 1927 to the Trust Company.

20

Second: I think that the record is to the effect that the intentions and attitude of the Trust Company were to act in compliance with legal requirements (in the preparation of the inventory &c) to act with consideration and courtesy toward the cestuis que trust, and otherwise conduct the realization and administration of the Estate in a normal business way, not with secrecy and arbitrariness. I cannot explain, and no more than Martineau J., I cannot pass without comment their active espousal,—against the interests of the Estate,—of Robertson's contestation of the present action, nor the consequences which they thereby brought upon themselves.

30

Third: For my own part, I would be willing to believe that Robertson personally believed he was within his right throughout, but if that were so, the error in which he was, was due to the bad advice he had received: the bad advice that a testamentary executor's inventory could legally (or even with a semblance of fairness) be made without notice to the heirs: the bad advice that while being a trustee he could acquire property forming part of the trust, that he could buy it in order to re-sell at a profit; the bad advice that cestuis que trust may be refused all information as to the composition, realization and administration of the trust property, except what they may find in a belated audit report the bad advice that it is permissible, or even sensible to ignore them "entirely"; the bad advice that the 'letter' even according to its terms constituted a sale to him of the shares (a contention which began only after the action was instituted, Robertson himself did not, until then, côntend any such thing; then the affirmation in the Defence that on the 20th June there had been simultaneous exchange of 'letter' for scrip; the affirmation that the Defendants were and had, at all times, been willing to render account.

40

It is evident I think that having adopted the advice given him, and having acted upon it, the consequences must be borne by himself. It seemed to me for a time, on general irenic grounds, that there might be room for a settlement of this matter between the parties, and I asked them if that might be so. After some delays, it became certain that no agreement could be arrived at, and
10 that a judgment must intervene.

Fourth: There is in the Will this provision: "I wish and desire that the Honourable J. L. Perron be and should continue to be the legal Adviser and Advocate of my Estate". Those words are clear and definite the functions of a legal adviser and advocate are well known; since the testator did not grant more or other, not more or other authority was possessed. It is urged, on behalf of the Defendants, that anything that Perron may have approved of is to be considered as binding upon the Estate. As a matter of law that
20 proposition is erroneous; the general principles of the law of Mandate, and more particularly of the mandate of the Advocate, deny it. But there is another reason, and a potent one, namely that, throughout, Perron was the advocate and legal adviser of Robertson pearsonally, he was therefore debarred from acting as legal adviser to the Estate in its dealings with Robertson personally, such matters, the dealings between the Estate and Robertson personally, are the sole matters at issue in the present suit.

30 *Fifth:* The record is voluminous, there is much matter in it, some parts of more direct bearing than others, and the issues have been very fully argued; it is certain that not all points made, or argued for, can be dealt with in these notes, though they have reached somewhat inordinate lenght I can say, though, that I think I have given careful consideration to all what was before me, even if there be not mention of it herein.

Sixth: in the adjudication which must be made against the Defendant Robertson, the item of interest wil be a very large amount.
40 It is unfortunate, but all the delay is imputable to himself and he may not complain of it. When all the parties were in the Supreme Court apparently a settlement was sought for, but, oddly enough, the Plaintiff Mrs. Kelly was not brought into it. The omission was patent enough, I would say, but it seems to have been persisted in from the date of the deed with the other interested parties (31st January 1934) until the Supreme Court judgment of 6th June 1934. There being no settlement made with Mrs. Kelly by the latter date, the Supreme Court, in its judgment, affirmed her right to continue the suit in order to preserve intact the corpus of the Estate.

The formal judgment will not contain a computation of interest, but the condemnation will work out much as follows:

31st December 1927

Quinlan-Robertson-Janin shares	289,592.
Amiesite Asphat shares	100,000.
	389,592.
Less payment on account	125,000.
	264,592.
21st January 1928	
Payment 'as for interest' but as in execution of a transaction declared to be illegal and null, and therefore the payment is to be credited generally on account of the purchase price	3,750.
	260,842.
28th January 1928	
Payment on account	125,000.
	135,842.
23rd May 1928	
Profit on 850 shares of Fuller Gravel Co. Ltd., due to the Estate	34,000.
	169,842.
This $169,842 was the amount due by Robertson to the Estate at the date of the institution of the action.	
The date of the service of the action does not appear from the record as before me, and I am assuming the date to have been the 31st October 1928.	
Interest on the above amount commenced to run from the date of service, at 5%, and calculated up to 21st December 1934 6 years and 51 days.	52,140.22
Amount due on that date 21st December 1934	221,982.22

	Capital	Interest
On which date the Defendant Robertson paid to the Estate the sum of:	50,000.00	
and there remained due a total of:	$171,982.22	
of which $169,842. was capital, and $2,140.22 was interest	$169,842.	2,140.22
On the capital interest runs; and, calculated up to the expected date of the present judgment, 21st April, 1940, there will be added that interest 5 years and 5 months, at 5%		45,953.66
	$169,842.	$48,093.88

At the date 21st April 1940, the balance due would be:

In capital:	$169,842.00
and in Interest:	48,093.88
Thus a total of:	$217,935.88

The judgment must be to condemn the Defendant Robertson to pay to the Estate Quinlan the above amount of capital together with interest calculated according to the indications hereinabove. The Judgment must also authorize and direct the Executor-Trustees to accept, as belonging to the Estate and from the said Defendant, the above amounts, as they may be paid by or collected from that Defendant. It may not be necessary to add that the Plaintiff, entitled as she is expressly declared by the formal judgment of the Supreme Court of 6th June 1934 to be, to institute the present suit for the preservation intact of the corpus of the Estate, will be declared entitled to execute the judgment in due course of law, and to take the legal measures necessary for its execution.

As to the credit given for the $50,000. paid to the Executor-Trustees on the 21st December 1934, I should make an explanation. That amount was paid to the Executors as in execution of the agreement contained in the deed of 31st January 1934; that deed, by the present judgment, is being declared null and void as against the Estate, so, in the ordinary course, the Defendant would

be entitled to return to him of the money so paid together with legal interest. But, if the demand for the return were made, the answer from the Executors would be that, by this same judgment, the party entitled to re-imbursement was condemned to pay a larger sum to the debtors of the re-imbursement, and by operation of law compensation would extinguish the claim to re-imbursement
10 as also pro tanto the larger claim of the debtors of the re-imbursement. The result would in fact be as above set out.

Next, is the question of costs. I mentioned supra, that the judgment of the Supreme Court, of 6th June 1934, had quashed "in part" the judgment of this Court of the 6th February 1931, and I mentioned, for the reasons I then gave, that the interpretation to be given to this is, that, saving the exceptions mentioned in the Supreme Court judgment itself, the judgment of 6th February 1931 is quashed in toto. That would mean that the con-
20 demnations to costs, contained in that judgment, ceased to be of effect, and that costs of that trial became one "of the issues remaining to be decided" between the remaining Plaintiff and the Defendant Robertson. I mentioned, supra that the action as instituted was a composite one namely *as to one part* it was directed against Trustees alleging neglect of duty &c. and asking for their ouster and for a rendering of account; *as to the other part* it was directed against Robertson personally (he one of the Trustees) to have him return property to the Estate with the Trustees parties
30 to this issue to ensure acceptance and receipt by them of whatever Robertson might be condemned to return. The part of the action, which sought ouster of the Trustees and an account, was dismissed, and that dismissal was acquiesced in by the Plaintiffs. It is completely ended, and no part of it comes up on this re-trial. The other part of the action, namely that against Robertson personally, was maintained by the first judgment; it went by appeal to the Supreme Court, and is back here for re-trial. The jurisdiction being exercised now is with respect to this part, and this part only, of the original action.
40

By the judgment of the 6th February 1931, the costs were adjudicated as follows: 1.—The costs of the trial proper, namely the enquête: enquête, counsel fees witnesses stenography of all the parties to be bulked together, then that aggregate to be divided into thirds one third payable by Robertson personally, one third payable by the Capital Trust personally, and one third payable by the Estate; 2.—The Capital Trust Co. to pay their own costs of defence, but not condemned to pay any part of the Plaintiffs' costs;

3.—The Defendant Robertson condemned to pay Plaintiffs' costs of action other than the costs of enquête which were adjudicated as above.

Those adjudications have been quashed; it is my duty to adjudicate upon the costs of the first trial; but I must not trespass
10 upon the issue which is declared terminated, namely that between Plaintiffs and the Trustees for ouster and account. It is not the easiest thing to decide where the line between the two lies, in this matter of costs. I know from the deed of 31st January 1934, and the discharges subsequently given, that all of these costs have been paid in accordance with the terms of that judgment of 6th February 1931. The proper thing for me to do, I think, is to leave those matters rest as they are now.

20 I will therefore, as to the costs of the first trial, repeat the adjudications made by Martineau J. in his judgment. As to the costs of the re-trial of the issues between Plaintiff and him, they will be adjudicated against Robertson. The costs in the other proceedings such as the Intervention et., they will be adjudged in the manner mentioned hereinabove in these notes.

(signed) G. F. Gibsone.

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In the Court of King's Bench (Appeal Side)

Bail Bond
25 May 1943

BAIL BOND

AND WHEREAS the said Judgment has been appealed from to His Majesty in His Privy Council by the said Plaintiff-Appellant, thus rendering necessary the security required by Article 1250 of the Code of Civil Procedure;

THEREFORE THESE PRESENTS TESTIFY THAT, on the 25th day of May, One Thousand, Nine Hundred and Forty-Three, came and appeared the CANADIAN GENERAL INSURANCE COMPANY, having its Head Office in the City of Toronto, in the Province of Ontario, and having its chief office for the Province of Quebec, in the City of Montreal, in the said Province of Quebec, and duly authorized to become surety before the Courts of this Province by Order-In-Council No. 2445, dated the eleventh day of October, One Thousand Nine Hundred and Thirty-Four under the provisions of the Guarantee Companies' Act (R.S.Q. 1925, Chapter 249), said authorization having been published in the Quebec Official Gazette on the eleventh day of October, One Thousand Nine Hundred and Thirty-Four, and herein represented and acting by JAMES P. BURROWS, Attorney of the said company, duly authorized by Power of Attorney, executed by the Proper Officers of the said Canadian General Insurance Company, duly certified copy of said Power of Attorney being hereunto annexed, and which said Company has acknowledged and hereby acknowledges itself to be the legal surety of the said Plaintiff-Appellant in regard to the said appeal, and hereby promises and binds and obliges itself that, in case the said Plaintiff-Appellant does not effectually prosecute the said appeal, does not satisfy the condemnation and pay such costs and damages as may be awarded by His Majesty, in case the judgment appealed from is confirmed, then the said Surety will satisfy the said condemnation in principal, interest and costs and pay such costs and damages as may be awarded by His Majesty in case the judgment appealed from is confirmed to the extent of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) in Canadian funds, to the use and profit of the said Respondent "Intime", his heirs, administrators, executors and assigns.

AND the said Canadian General Insurance Company has signed these presents by its said Attorney.

CANADIAN GENERAL INSURANCE COMPANY,
By JAMES P. BURROWS,
Attorney.

Taken and acknowledged before me
at Montreal, this 25th day of May,
A.D. 1943.

In the Supreme Court of Canada

Reasons for Judgment of the Supreme Court of Canada given by the Hon. Mr. Justice Cannon. 7 Sept. 1943 (Continued)

copy of the reasons for judgments given by Honourable Mr. Justice Cannon, of the Supreme Court of Canada in this case; and that there are no other reasons for judgment given by the other Honourable Judges sitting in the case, as they have expressed their concurrence in the judgment delivered by Mr. Justice Cannon.

10

Armand Grenier,
Law Reporter.

JUDGMENT RECEIVING APPEAL TO HIS MAJESTY IN HIS PRIVY COUNCIL AND FIXING SECURITY

In the Supreme Court of Canada

Judgment receiving Appeal to His Majesty in His Privy Council and fixing security. 17 May 1943

20 Montreal, Monday, the seventeenth day of May, One Thousand nine hundred and forty-three.

Present: Honourable Mr. Justice Stuart McDougall (In Chambers)

Having heard the parties by their respective Counsel on the Petition of the plaintiffs-appellants and intervenants appellants for leave to appeal to His Majesty in His Privy Council, from four final judgments included in the consolidated judgment pronounced in this case by the Court of King's Bench (Appeal Side), at Montreal, on the 30th day of

30 April, 1943, and to fix a delay, within which security on the said appeal should be furnished:—

CONSIDERING that by reason of the nature and the circumstances of this case, an appeal lies from each of the four judgments included in the said consolidated judgment to His Majesty in His Privy Council in virtue of Article 68 of the Code of Civil Procedure of the Province of Quebec;

I, the undersigned, one of the Judges of this Court of King's

40 Bench, DO FIX a delay expiring on the 25th day of May, 1943, within which the appellants may give, in conformity with the provisions of Article 1249 of the said Code of Civil Procedure, and in the manner and for the purposes therein mentioned, the security required by the law governing the said appeal, and do fix at the sum of $2,500.00 the security to be furnished in each of the four appeals; costs to follow:—

E. STUART McDOUGALL,
Judge of Court of King's Bench.

In the Supreme Court of Canada

Reasons for Judgment of the Supreme Court of Canada given by the Hon. Mr. Justice Cannon. 7 Sept. 1943 (Continued)

The appellant has submitted to us that the children of Hugh Quinlan have no other right in their father's estate than the personal claim to the revenue payable out of the said estate; that mere creditors of revenues are as such unable to dispose of the estate or any portion thereof and that therefore they have no status to take an action concerning the ownership of any property appertaining to the estate.

The only remaining plaintiff now prays, as above stated, that the various sales and transfers of shares be declared null and void and that it be declared that these shares belong and have never ceased to belong in full ownership to the estate of Hugh Quinlan. As creditors of the revenues of the estate, the plaintiffs certainly had an interest sufficient to sue for the removal of the executors, if they were acting fraudulently. But now that these conclusions have been refused, and that this issue has been finally determined between the parties, can we say that the sole remaining plaintiff has the right to compel the executors and Robertson to undo what she alleges has been done illegally and return to the "corpus" the shares in question? We believe that Ethel Quinlan Kelly, to the extent that she is entitled to a variable share in the net revenue of the estate of her father, has sufficient interest and "status" to preserve intact the "corpus" of the estate if she can satisfy the court, that the shares mentioned in the letter of June 20, 1927, or that the 400 shares of the Fuller Gravel Company Limited were illegally transferred after the death of her father to the present appellant and should be returned to the estate.

We do not and cannot disturb that part of the judgment of the Superior Court which is now "res judicata" between the parties, since the respondent acquiesced in the dismissal of that part of her conclusion above enumerated, nor can we disturb that part of the judgment accepted by the executors and trustees.

We therefore allow the appeal with costs; quash in part the judgment of the Superior Court and also the rulings during the trial refusing oral evidence of the facts and circumstances hereinabove mentioned under paragraphs A, B, C and D; we declare such oral evidence to be admissible, and we send back the parties to the Superior Court to so complete the evidence already taken by a further *enquête* and then secure a new adjudication on the merits of the issues hereinabove shown as remaining to be decided as between the respondent Dame Ethel Quinlan (Mrs. Kelly) and the appellant Robertson personally. The Court gives "acte" and considers as part of the record of this case the deed or agreement of settlement passed before R. Papineau Couture, N.P., on the 31st day of January, 1934, within the limits above stated.

Ottawa, 7th September, 1943.

I hereby certify that the foregoing (except the reporter's note on page 12) is a true

all accrued interests and revenues equally per capita "par tête" between my grandchildren and great grandchildren issued of legitimate marriages and then living.

Article Twelfth

In order that all the stipulations of this, my present will, may be respected by all and each of my legatees and beneficiaries, I hereby formerly (sic) declare that should any of them contest any stipulation of this, my present will and testament, they shall *ipso facto* lose their rights and titles of legatees or beneficiaries in this, my present will.

Article Thirteenth

I expressly declare that no other parties or persons may have the right to endeavour, control, manage and divide the property of my estate, but my said testamentary executors and trustees and their successors in office and thus, without any intervention of any third party, tutors, curators and so on and so on and that the powers and authority hereinbefore given to my testamentary executors and trustees shall be interpreted as covering all deeds, documents and proceedings without any special judicial formalities being required and thus notwithstanding any provisions of the law to the contrary.

The nature of the rights vested in the female respondent under the will of the late Hugh Quinlan is not doubtful. He bequeathed his entire estate, save and except certain legacies in particular title, "in trust" to his trustees who are "seized and vested with the whole of my said property and estate."

As to the children of the first degree, their rights are strictly limited, until the death of their mother, to

"an annual sum not less than one thousand dollars ($1,000) and not over two thousand dollars ($2,000) payable by monthly instalments in advance as will seem fit to my executors and trustees, and thus until such child or children will not remain with his or their mother."

And after the death of their mother, the rights of the children of the first degree are restricted to "all the net income or revenue of my estate," with the stipulation that, in the event of the death of one of them

"his shares in the revenues of my estate shall be added to the shares of his surviving brothers and sisters, per capita (par tête), and nephews and nieces "par souche".

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"I extend the duration of their authority and seizin as such executors and trustees beyond the year and day limited by law, and I constitute them administrators of my succession and declare that they and their successors in office shall be and remain from the date of my decease seized and vested with the whole of my said property and estate for the purpose of carrying into effect the provisions of this, my present will, with the following powers in addition to all the powers conferred upon them by law;

10

(a) Power to collect all property assets and rights belonging to my Estate: power to sell and convert into money all such portions of my property and Estate, movable and immovable, as are not herein specially bequeathed, and that they may deem inadvisable to retain as investments as and when they think best, for such prices and on such terms and conditions as they may see fit: to receive the consideration prices and give acquittances therefor; to invest the proceeds and all sums belonging to my succession in such securities as they may deem best but in accordance with Article 981o of the Civil Code of the Province of Quebec, and to alter and vary such investments from time to time.

20

(b) To compromise, settle and adjust or waive any and every claim and demand belonging to or against my succession.

(c) To sell, exchange, convey, assign, borrow money, mortgage, hypothecate, pledge, or otherwise alienate or deal with the whole or any part of the property or assets at any time forming part of my succession, either movable or immovable, bank or other stocks or bonds and to execute all necessary deeds of sale, mortgage, hypothec and pledge, acquittances and discharges and other documents, in connection herewith, and thus "de gré à gré," without judicial formalities and with the express understanding that any third party dealing with my Executors and Trustees shall never be compelled to attend or to control the investment or reinvestment (emploi ou remploi) of the moneys.

30

(d) After the death of my said wife, to distribute and divide all the net income or revenue of my Estate equally between my children issued of my marriage with the said Dame Catherine Ryan "par tête" or the legitimate issue "par souche" and thus until the death of the last survivor of my said children at the first degree, it being my wish and desire that should any of my said children die without issue, his share in the revenues of my Estate shall be added to the share of his surviving brothers and sisters per capita "par tête" and nephews and nieces "par souche".

40

(e) After the death of all my said children at the first degree to divide the capital and property of my whole Estate, with

as aforesaid by the appellant. The respondent in her memorandum does not object to the above suggestions of theappellant's attorney. We must take it that she would be content, to reopen the *enquête* within the above mentioned limits, although she has refrained from offering any suggestions in respect thereto.

We believe, however, that we should not send the case back to the Superior Court before deciding the question of the status of the plaintiff Ethel Quinlan, which was strongly attacked and defended before us. It must be borne in mind that the litigation has taken a different aspect since the judgment of the Superior Court, which dismissed a very substantial part of the conclusions, to wit:—

1. The prayer that the appellant A. W. Robertson and the Capital Trust Company be removed from office;

2. The prayer that they be condemned to render an account;

3. The prayer that the inventory be annulled;

4. The various allegations of fraud against the appellant, as well as the allegation that the late Hugh Quinlan was not of sound mind when the letter of the 20th of June, 1927, was read to him.

Now, the plaintiff having acquiesced in the judgment of the trial judge, the issue before the Court of King's Bench and before us was limited to the following points:—

(a) The existence or nullity of the transfer to the appellant of the shares enumerated in the letter;

(b) The validity of the transfer to the appellant of four hundred shares of the Fuller Gravel Company Limited;

(c) The value of the shares whose transfer has been set aside; and as to the time at which the valuation should retroactively be made;

(d) The legality of the finding that the appellant should pay all the profits made and dividends paid since the death of the late Hugh Quinlan.

In this connection, we must take cognizance of the last will and testament of the late Hugh Quinlan, dated April 14, 1926.

The testator empowered his executors and trustees, in part, as follows:—

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We see no reason why we should not declare that the settlement forms part of the record of the appeal and that we grant *acte* thereof without passing upon the validity or the binding character of the agreement in question, nor deciding whether or not the intervenants acted within their powers and the officers of the intervenants within their authority. As far as Robertson and Margaret Quinlan are concerned, we cannot refuse to find as a fact that they have settled their differences and wish to stop this litigation.

10

The filing of the agreement in the record so that it will form part thereof for the future is all that is required and granted by giving "acte" of the production of the settlement.

Therefore, there remains before us only the appellant Robertson, the respondent Ethel Quinlan (Mrs Kelly) and the two trust companies, who intervened here at the request of the court to watch the proceedings, although they, at first, only appeared to submit to justice, *s'en rapporter à justice,* they having accepted the judgment of the Superior Court.

20

The appellant's counsel submits that the only additional evidence which should be allowed, if the *enquête* is re-opened before the Superior Court, is the evidence which has been offered, and refused by the trial judge. This should include oral evidence to show:—

(a) the answer given by the late Hugh Quinlan when the letter of June 20, 1927, was read to him, including, of course, the conduct, statements, communications and declarations of the persons present when the letter was so read and of the late Hugh Quinlan himself and generally, all relevant circumstances relating thereto;

30

(b) All the facts, circumstances, statements and communications relating to the drafting of the said letter of June 20, 1927, including the conduct of all those who shared in the drafting of the said letter; and the whereabouts and safekeeping of said letter;

(c) All the facts, circumstances, statements and communications relating to the visits of the Honourable J. L. Perron and of the present appellant to the late Hugh Quinlan, during the month of May, 1927, or thereabout, and to the endorsement of the four certificates of shares filed as exhibits P-9, P-10, P-26 and P-27; also to the memorandum of the 21st of May, 1927, P-66; including the conduct of all the participants in these various events;

40

(d) Generally, all facts, conditions and circumstances tending to show that the late Hugh Quinlan agreed, or disagreed, as the case may be, to the contents of the letter of June the 20th, 1927.

The respondent would also bring new evidence of all facts, declarations and statements which might tend to rebut the evidence to be afforded

"L'acheteur se réserve donc, dans le contrat, la faculté de se substituer une autre personne, généralement non désignée, laquelle prendra le marché pour son compte. Si cette personne, appelée command, ne se déclare pas, c'est l'acheteur en nom ou commandé qui reste acheteur.

La vente avec réserve de déclaration de command (ajoutent-ils) est moins une vente conditionnelle qu'une vente affectée d'une alternative, quant à la personne de l'acheteur, l'un des deux
10 acheteurs éventuels étant dès à présent déterminé et l'autre restant encore inconnu. (Voir note de M. Glasson, D.P. 95, 2, 1.)"

La conduite des intéressés, dès le 22 juin 1927, en enregistrant le transport dans les livres des compagnies, semble confirmer cette interprétation de l'entente alléguée.

Nous sommes donc d'avis de mettre de côté les jugements de la Cour Supérieure refusant cette preuve testimoniale. Vu cependant les frais énormes déjà encourus, nous désirons, avant d'aller plus loin, entendre les parties durant le terme actuel pour décider ce qu'il serait juste et
20 convenable de faire dans les circonstances.

Reporter's note:—

(As it appears by the last words of the above judgment, a final judgment was not rendered by this Court, which was desirous, owing to the enormous costs already incurred, to hear later on the parties in order to decide what should be reasonably done under these circumstances. The parties were so heard, and, on the 6th of June, 1934, the following final judgment by the Court was delivered by):—

30
CANNON J.—

Since the court ruled on March 6, 1934, that the trial judge misdirected himself when he refused to hear oral evidence of the testator's answer to Robertson's letter of June 20, 1927, the parties were heard and requested to file in writing their views of the proposed settlement and as to what evidence should be allowed, if the case be sent back to the Superior Court. The respondent Margaret Quinlan reiterated her decision not to be any longer involved as plaintiff in this case and prayed that, under the agreement of settlement executed between herself and all parties inter-
40 ested in the estate of the late Hugh Quinlan, excepting only the appellant Dame Ethel Quinlan (Mrs Kelly) and the tutor, if any, of her minor children, passed before R. Papineau Couture, N.P., on the 31st of January, 1934, whereof a certified copy was left with the Registrar, this court should either declare that it sees no objection to the intervenants carrying it into effect or grant *acte* thereof.

The intervenants also explained that the reason why the stipulation of paragraph 6 was inserted in the agreement was because the intervenants, having filed before this court a declaration that they submit to justice, there was at least doubt of their right to enter into a settlement without the acquiescence of the court.

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"The contract must be proved by the opposite party, aliunde of the admission. But the admission is sufficient as a commencement of proof in writing to legalize oral evidence of it and of its conditions."

L'honorable juge Howard nous dit:—

"The appellant answers: "Well, if the evidence does not amount to complete proof, it constitutes a commencement of proof sufficient to open the door to testimony on the point." 10

"Again I cannot agree. If the evidence were all one way, it would, in my opinion, be sufficient, but it is rebutted by the significant fact that the appellant and his co-executor treated these shares as belonging to the succession of the late Mr. Quinlan, whereas if the proposal had been accepted by Mr. Quinlan and therefore the agreement, whatever it should be called, completed before his death, these shares would have been removed from his succession and their value, that is, the consideration received for them, would have taken their place among its assets. This conflict 20 in the evidence now under consideration defeats the appellant's claim that it constitutes a commencement of proof."

Avec respect, l'honorable juge nous semble avoir été trop sévère. Le fait que ces actions avaient été par erreur, suivant la prétention du défendeur, mentionnées par sa co-exécutrice testamentaire, exclusivement chargée de la comptabilité, comme faisant partie de l'actif de la succession, aurait parfaitement pu servir à la transquestion de Robertson, mais n'est pas suffisant par lui-même pour détruire la vraisemblance du fait allégué, savoir l'acceptation du prix de $250,000 par Hugh Quin- 30 lan. Ce n'est pas d'ailleurs l'acte personnel de Robertson. Il est fort possible que dans l'esprit de ce dernier et de sa co-exécutrice, étant données les conditions de cette acquisition, aussi longtemps que le montant convenu n'avait pas été payé par un acheteur ou par lui-même, la valeur des actions, sinon les actions elles-mêmes, faisaient nécessairement partie de l'actif de la succession. Il s'agit de mots, plutôt que de la substance de la chose: de toutes façons, ces actions ou leur valeur devaient figurer au bilan de la succession Quinlan. Cette erreur, qui a été expliquée, ne devrait pas, à notre avis, suffire pour mettre de côté tous les éléments de preuve énumérés plus haut et qui, d'après le juge Howard, seraient suffi- 40 sants pour constituer un commencement de preuve par écrit. La nature du contrat intervenu peut expliquer cette attitude de Robertson, que lui reproche M. le juge Howard. Il s'obligeait à payer à Quinlan ou à ses héritiers la somme de $250,000 pour obtenir la propriété des actions énumérées dans la lettre. Il y a donc eu, d'après lui, contrat d'aliénation d'une chose certaine et déterminée pour un prix en argent, ou, en d'autres termes, une vente. Le prix devait être payé moitié comptant et l'autre moitié dans l'année. Il s'agit dans l'espèce d'une vente avec "réserve d'élection d'amis" ou de déclaration de "command". *Colin et Capitant* (Droit Civil, vol. 2, page 429) nous disent à ce sujet:—

mais ce qui est probable, mais qu'il ne suffit pas que le fait allégué soit rendu seulement possible. Le juge ne se contente pas de prendre en considération le fait établi et le fait allégué; mais il examine tout le procès en se basant sur ces circonstances extrinsèques."

En appliquant ce critère, il nous semble que le juge de première instance a restreint la portée qu'il fallait donner aux écrits et aux allégués des parties en refusant, comme il l'a fait, de prouver par témoins l'attitude
10 et la conduite de Quinlan en cette circonstance. Il se contente de dire qu'il est *possible* que le prix de $250,000 ait été fixé en vue des conditions énoncées en l'acte d'accord du 11 juin 1925. Nous croyons qu'il aurait dû aller jusqu'à accepter la vraisemblance et la probabilité que ce prix de $250,000, ayant été fixé dans les circonstances plus haut relatées après les entrevues de Quinlan avec son homme de confiance et avocat, l'honorable M. Perron, a été accepté par Quinlan comme définitif, lorsqu'il lui fut offert par écrit par son associé Robertson. Or la vraisemblance du fait allégué est le criterium du commencement de preuve par écrit.

20 Voir *Cox v. Patton* (1874) 18 L.C.J., 317.

Il a été décidé en revision dans *Lefebvre v. Bruneau* (1870) 14 L.C.J., 268,

> "que la possession en fait de meubles équivaut à un commencement de preuve par écrit, suffisant pour permettre au possesseur d'expliquer sa possession par une preuve testimoniale."

Le Juge Tellier a jugé de même dans *Boucher v. Bousquet* (1889) M.L.
30 R., 5 S.C., 11, at 15, que la possession seule d'effets mobiliers fournit en faveur du défendeur une présomption de droit de propriété assez forte pour lui donner droit de prouver son titre par témoins. Or, dans l'espèce, Robertson était en possession des actions depuis mai 1927, et aussi de celles endossées par Dunlop. Voir aussi *Forget v. Baxter* (1900) A.C. 467, at 474, 475.

En présence de la plaidoirie écrite résumée plus haut, ne pouvons-nous pas dire, comme feu le juge-en-chef Taschereau, parlant au nom de cette cour dans *Campbell v. Young* (1902) 32 Can. S.C.R. 547, at 550:—
40

> "It is not a commencement of proof of a contract that is in question.... The appellant had not to prove it, since it is admitted, pleaded by the respondents themselves. . . . Once a contract is admitted, no commencement of proof in writing is required for the admissibility of oral evidence of the amount of the consideration thereof."

Mais, même si l'article 1243 C.C. et la règle de l'indivisibilité de l'aveu s'appliquent, nous dirions, comme dans cette cause:—

garde-malade Kerr, la formule de transport au dos de quatre certificats d'actions, dont deux représentant 1151 actions de Quinlan, Robertson & Janin, et deux certificats de 50 actions de Amiesite Asphalt Co. Ltd.;

7.—Le témoignage de Mlle Kerr à l'effet qu'à cette occasion l'appelant lui avait expliqué le but de sa visite, qu'il s'agissait de la vente de certaines actions;

8.—Le même jour, le testateur dicta à son fils le mémoire qui est devant la cour, énumérant tous les certificats qu'il détenait dans ces deux compagnies, avec la note suivante: "Dep. in A. W. Robertson's box," avec la date des endossements, savoir le 21 mai 1927, ce qui, à mon avis, démontrerait clairement que, dans l'esprit du testateur, ces valeurs devaient être considérées sous le contrôle et en possession de l'appelant à partir de cette date; cet écrit provient certainement du défunt; 10

9.—Après cette livraison et cet endossement, Robertson soumit à M. Janin que le prix de $250,000 serait raisonnable; et ce prix, conformément à l'avis de l'honorable J.-L. Perron, fut fixé comme représentant la valeur réelle de ces actions; 20

10.—Le fait qu'un double de la lettre datée du 20 juin 1927 fut trouvé dans la voûte de l'honorable J.-L. Perron à l'endroit que ce dernier avait indiqué à son secrétaire;

11.—La preuve que cette lettre a été lue à Quinlan, qui, d'après le juge de première instance, était parfaitement en état de comprendre son contenu et de donner ou refuser son assentiment au prix proposé. 30

A part la nature de la contestation liée entre les parties, tel qu'indiqué plus haut, le transport des actions portant la signature de Quinlan et leur possession par Robertson et le mémoire préparé sous la dictée de Quinlan, joints à l'entente qui existait entre les associés, constituent-ils, oui ou non, un commencement de preuve par écrit? Le seul fait qu'il restait à prouver était qu'à cette date du 21 juin Quinlan a bien et dûment, pour le montant de $250,000 mentionné dans la lettre de Robertson, consenti à rendre définitive, suivant les conditions de la lettre de Robertson, l'aliénation des actions dont les certificats endossés par lui étaient déjà physiquement en la possession de Robertson depuis le 20 mai. Ces écrits ne constatent pas le consentement de Quinlan à accepter $250,000; mais constatent-ils des faits qui rendent vraisemblable le fait allégué? Il n'est pas nécessaire que l'écrit établisse un des éléments du fait à prouver; il peut être simplement le point de départ d'un raisonnement pour le juge. 25 Revue Trimestrielle de Droit Civil (1926) p. 410. 40

"Il ressort des décisions jurisprudentielles (nous disent Planiol & Ripert, 7 Droit Civil, no 1534) que le fait établi par le commencement de preuve doit rendre à première vue le fait allégué vraisemblable, que la vraisemblance n'est pas l'apparence de la vérité,

D. The said agreement 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;

E. The document was a private writing under the form of a letter addressed to the late Hugh Quinlan, and signed by the defendant A. W. Robertson;"

10

De sorte que l'on peut dire que l'action a été prise par deux légataires pour mettre de côté l'acquisition qu'elles allèguent avoir été faite le 20 juin, avant la mort du testateur, pour le motif que le transport des actions aurait été consenti alors que ce dernier, ne jouissant pas de la capacité mentale requise, aurait été victime des manoeuvres dolosives de Robertson, son associé, qui aurait abusé de sa confiance en lui payant un prix insuffisant. Il semble donc que le litige entre les parties ne mettait pas en doute l'existence d'une vente à cette date; mais il s'agissait simplement de prouver en quelles circonstances elle avait eu lieu et quelle était
20 la capacité mentale de Quinlan lors de la transaction alléguée de part et d'autre dans les procédures.

Il nous faut donc décider aux lieu et place de la Cour Supérieure si la preuve déjà faite et les allégués étaient suffisants pour constituer le commencement de preuve par écrit exigé par le paragraphe 7 de l'article 1233 du code civil pour permettre la preuve testimoniale. Les faits et écrits devant la cour étaient les suivants:—

30 1.—L'entente de 1925, par laquelle Quinlan et ses deux associés, Robertson et Janin, avaient pourvu à l'acquisition par les survivants de la part de l'associé décédé; cet écrit porte la signature de Quinlan et celle de ses associés;

2.—L'état de santé précaire depuis plusieurs mois de Quinlan, qui faisait prévoir sa fin prochaine;

3.—Les pourparlers au sujet de cette acquisition entre Janin, Robertson et l'honorable M. Perron, avocat de Quinlan, qui lui a continué
40 sa confiance même après sa mort en l'instituant par testament l'aviseur de sa succession;

4.—L'entrevue de M. Perron avec Quinlan, au commencement de mai 1927;

5.—La fixation du prix de $250,000 par M. Perron comme étant la juste valeur des intérêts de Quinlan dans les différentes compagnies contrôlées par les trois associés;

6.—La visite de l'appelant à Quinlan, le 21 mai 1927, au cours de laquelle Quinlan endossa en blanc, en présence de l'appelant et de la

(39) At the time the contract and agreement evidenced by the above letter was entered into, the said H. Quinlan was in full and complete possession of his faculties and thoroughly capable, in all respects, of passing upon the propriety and sufficiency of said transaction; and the defendant Robertson agreed to send the above letter only after he had been repeatedly and urgently requested to do so by and on behalf of the said late H. Quinlan;

(40) After the death of the late H. Quinlan, the defendant Robertson endeavoured strenuously to find some buyers, for said shares, at the price mentioned in the above letter, but was unable to do so, and finally he paid himself to the estate of the said late H. Quinlan, in fulfilment of his obligations, $250,000, as agreed upon between himself and the said late H. Quinlan; 10

(43) The shares mentioned in the above letter of June 20th, 1927, were not assets of the estate of the said late Hugh Quinlan, at the time of his death; but they were, in effect, sold and transferred by the said late Hugh Quinlan himself either to defendant Robertson, or to some other buyer, whom the latter agreed to obtain and, failing the obtaining of whom, said defendant Robertson was obliged and entitled to retain said shares at the price of $250,000, agreed to be paid therefor; 20

(44) It was an error on the part of a subordinate employee of defendant "Capital Trust Corporation Ltd." who helped prepare the statement of assets and liabilities constituting the estate of the said late H. Quinlan and filed as plaintiffs' exhibit P-2, that the said 1,151 shares of Quinlan Robertson & Janin Ltd. (erroneously called "Hugh Quinlan & Janin Co.") were entered as an asset of said estate, the said shares being at the time of the death of the said Hugh Quinlan transferred and delivered to defendant Robertson with said other shares on terms of the agreement aforesaid, and all that should have been entered as an asset of the estate of the said late H. Quinlan was the claim against the said Robertson and of others to obtain payment of the price of said shares as and when it became payable in terms of said agreement;" 30

Le défendeur Robertson fournit ensuite les détails suivants quant au paragraphe 37:— 40

"A. The said transfer of said shares from the said Hugh Quinlan to defendant A. W. Robertson, took place on or about the 20th of June, 1927;

B. The agreement was in writing;

C. The said agreement was dated the 20th of June, 1927;

(13, 14, 15, 16) that said transfer was made when said Hugh Quinlan was not *compos mentis;*

(17, 18, 19) that it was clandestine and made for less than the real value of the said shares;

(20, 21, 22, 23) that in order to conceal said transfer, said defendant Robertson has assigned some of these shares to *prête noms* of his, unable to pay for same;

10

(24) that the said transfer was not mentioned in the inventory sent by defendants to plaintiff Ethel Quinlan on August 8, 1928;

Considering that the allegations of defendant Robertson's plea are in the following terms:—

(37) In or about the month of June, 1927, and some time before his death, the said late H. Quinlan transferred and delivered all his holdings of stock in the said companies to his partner and associate, defendant Robertson, under an agreement with said Robertson, the terms of which were as stated in a letter addressed by said Robertson, to said Quinlan, dated June 20th, 1927:—

20

(38) Said letter reads as follows:—

Montreal, June 20th, 1927.

Mr. Hugh Quinlan,
357 Kensington Ave.,
Westmount, Que.

30

Dear Hugh, — This will acknowledge your transfer of the following stocks to me:—

1,151 shares Quinlan, Robertson & Janin, Ltd.
50 shares Amiesite Asphalt Limited.
200 shares Ontario Amiesite Asphalt Limited.
200 shares Amiesite Asphalt Ltd., in the name of H. Dunlop.

Which stock represented all your holdings in the above companies. I have agreed to obtain for you 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 6 per cent. Should your health permit you to attend to business within one year from this date, I agree to return all of the above mentioned stocks to you on the return to me of the moneys I have paid you thereon including interest at 6%.

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Yours truly,

(Signed) A. W. Robertson.

I have nothing to add to the disposition which Mr. Justice Prévost proposes to make of the remaining appeals. I concur with him.

In the Supreme Court of Canada

Reasons for Judgment of the Supreme Court of Canada given by the Hon. Mr. Justice Cannon. 7 Sept. 1943

REASONS FOR JUDGMENT OF THE SUPREME COURT OF CANADA GIVEN BY THE HON. MR. JUSTICE CANNON

Les seules parties en présence devant nous sont l'appelant Robertson et l'intimée Ethel Quinlan et la Capital Trust Corporation comme fiduciaire exécutrice testamentaire de la succession de feu Hugh Quinlan, décédé le 26 juin 1927; le procureur de l'intimée Margaret Quinlan nous demande *acte* d'une transaction intervenue entre elle et l'appelant avec le concours de l'exécutrice et à laquelle sa soeur Ethel a refusé d'adhérer. Pour déterminer l'appel entre ces deux parties, sur cette partie du jugement de la Cour Supérieure portée en appel devant la Cour du Banc du Roi et devant nous, la question capitale, comme l'a fort bien dit le juge de première instance, est de savoir s'il y a eu une vente des actions en litige *avant* le décès du testateur. Si cette vente a eu lieu avant son décès, elle est valide, quelle que soit la vilité du prix; car, dit le juge de première instance, le 20 juin, M. Quinlan était en état de consentir à la vente; si, par contre, elle a eu lieu après, elle est invalide, vu la prohibition de l'article 1484 C.C. alors même que le prix représenterait la pleine valeur des actions. Le juge de première instance ne donne pas en détail les raisons pour lesquelles, après avoir permis la preuve que la lettre de Robertson, du 20 juin 1927, à Quinlan avait été lue à ce dernier en présence de M. Leamy, le tribunal a refusé de laisser faire la preuve par témoins de la nature de la réponse de Quinlan, alors que Robertson avait plaidé que ce dernier avait accepté sa proposition.

Il me paraît essentiel, avant dediscuter les autres points soulevés, d'étudier d'abord le bien ou mal fondé de cette décision à l'enquête qui, d'après les notes de l'honorable juge Martineau, a entraîné comme conséquence cette partie du jugement final dont l'appelant se plaint. La situation des parties avant l'enquête me semble bien résumée comme suit par l'honorable juge Surveyer, dans son interlocutoire du 7 janvier 1929:

"Considering that in paragraphs 11 to 25 of their declaration, plaintiffs allege in substance:—

(11) that on or about the 22nd day of June, 1927, three days before the said testator died, said Angus William Robertson, one of the defendants, personally and for his own benefit, acquired a number of shares, the property of the testator, in different companies;

(12) that the said transfer of said shares to defendant Robertson is due to fraud on the part of said defendant Robertson and to collusion by him with others;

OPINION DU JUGE FRANCOEUR

In the Court of King's Bench (Appeal Side) — Opinion of Mr. Justice Francoeur.

J'adhère sans réserve aux motifs et aux conclusions exposés par notre collègue M. le juge Prévost dans ses notes très élaborées.

NOTES OF ERROL M. McDOUGALL, J.

In the Court of King's Bench (Appeal Side) — Notes of the Hon. Mr. Justice Errol M. McDougall

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The turn given to this protracted litigation by the judgment of the Supreme Court remitting the record to the Superior Court for further evidence as to the letter of June 20th, 1927, has proved to be decisive of the issue. Implicit in the order of the Supreme Court (C.L.R. 1934, at pp. 565) was the all important factor that all the elements of a valid contract would be present, were it established that the late Hugh Quinlan assented to the proposition made to him by Robertson as evidenced by the said letter of June 20th, 1927, (Exhibit D: R-1): As indicative of this view, the remarks of the late Mr. Justice Cannon, at page 557 of the report may be cited. His Lordship says:—

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> "Le seul fait qu'il restait à prouver était qu'à cette date du "21 juin Quinlan a bien et dûment, pour le montant de $250,000. "mentionné dans la lettre de Robertson, consenti à rendre défini- "tive, suivant les conditions de la lettre de Robertson, l'aliénation "des actions dont les certificats endossés par lui étaient déjà physi- "quement en la possession de Robertson depuis le 20 mai."

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The proof that such assent was in fact given has been clearly demonstrated in the terse and compelling analysis of the evidence made by Mr. Justice Prévost in his notes, with whose reasons for arriving at this conclusion I am in entire accord. I am not concerned with the nature of or the name to be given to the contract thus entered into. It is sufficient for me that it contains no illegality and, significantly, that the effect thereof is to transfer title to the property therein described. It was incumbent upon the Respondent to show that there was no contract or, if there was one, that it was vitiated by fraud. No question of fraud or bad faith being open, as determined by the Supreme Court, the transaction must be regarded as having been validly consummated.

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Upon the other branch of the case, having to do with the shares of the Fuller Gravel Company, I am of opinion that the settlement agreement of January 31st, 1934, successfully disposes of the Respondent's claim. With Mr. Justice Prévost, I agree that the Trust Company Executors had power to dispose of the litigation then pending and that their action, in conjunction with all the interested parties, save the principal Respondent, and the payment over of a sum amply sufficient to repay the difference in value between $50. and $90. per share upon 400 of such shares, was sufficient to dispose of this feature of the case.

In the Court of King's Bench (Appeal Side)

Notes of the Hon. Mr. Justice Prévost (Continued)

Il va sans dire que les appelants avaient été assignés par l'intervention en leur qualité d'exécuteurs testamentaires, et que c'est en cette qualité qu'ils ont comparu et contesté.

Le reproche qui leur est adressé d'avoir pris fait et cause pour Robertson est absolument gratuit. Les conclusions de leur contestation se lisent comme suit: *"that the first conclusion of the intervention"* — (celle qui demandait la nullité de la transaction) — *"be dismissed, and, as to the "other conclusions, the present contestants submit themselves to jus- "tice"*. . . . 10

D'ailleurs, après la production de la contestation, un jugement de cette Cour a réduit l'intervention à la seule conclusion première.

Qu'en soutenant la validité de l'acte, les appelants aient tendu vers le même but que leur co-contractant, c'était inévitable, et nul ne peut leur en faire grief.

En second lieu, parmi les moyens de nullité invoqués par l'intervenante contre la transaction, se trouvaient nombre de faits imputés aux appelants comme dérogatoires à leurs fonctions et entachés de mauvaise foi: de fausses représentations, des abus de pouvoirs, etc. Comment concevoir que les appelants, admis à contester l'intervention en leur qualité d'exécuteurs testamentaires pour repousser les griefs de nullité fondés sur le droit, dussent produire une autre contestation en leurs noms personnels pour repousser les moyens de nullité tirés d'accusations téméraires contre eux. N'y a-t-il pas suffisamment de contestations dans la cause? 20 30

Au surplus, de tous ces prétendus méfaits l'intimée n'a rapporté aucune preuve.

La contestation des appelants ès qualité était donc pleinement justifiée. Non seulement ils avaient le droit de contester, mais, dans les circonstances, c'était pour eux un devoir. (*Howard v. Bergeron et Kriklow*, 71 B. R. 198).

En examinant l'appel de *Robertson v. Kelly*, j'ai déjà disposé des autres moyens de l'intervention. 40

Pour ces motifs, je maintiendrais l'appel et la contestation des appelants ès qualité.

D'abord l'un des exécuteurs testamentaires, le Trust Général du Canada, n'exerçait pas cette charge, quand l'action originaire a été instituée. Il a été désigné par Robertson, après le jugement rendu par l'honorable juge Martineau. Il n'a jamais eu d'intérêt dans la cause. Quant à l'autre exécuteur testamentaire, le Capital Trust, il était défendeur dans l'action originaire en autant que les demanderesses demandaient sa destitution, une reddition de compte, et la nullité de l'inventaire; mais toutes ces conclusions avaient été rejetées par l'honorable juge Martineau, et les demanderesses avaient acquiescé au jugement. Il n'était donc plus défendeur, quand la transaction a été effectuée.

Il reste que les officiers des compagnies agissant comme exécutrices testamentaires de la succession Quinlan n'étaient pas spécialement autorisés à signer l'acte de compromis, lorsqu'il a été reçu par le notaire Couture. Toutefois, l'acte a été dûment ratifié en temps utile, ainsi qu'il appert aux résolutions de leurs conseils d'administration en date des 21 septembre et 18 octobre 1934.

Pour ces motifs, les divers griefs de nullité invoqués par l'intervenante sont mal fondés.

Je maintiendrais l'appel et je rejetterais l'intervention de l'intimée.

APPEL DE
CAPITAL TRUST ET AL V. DAME KATHERINE KELLY

Par ce dernier appel, les exécuteurs testamentaires de la succession Quinlan se plaignent du jugement qui a rejeté leur contestation de la même intervention, et qui les a condamnés personnellement aux frais de cette contestation.

L'article 552, C. proc., édicte que "les tuteurs, curateurs ou autres "administrateurs, qui abusent de leur qualité pour faire des contestations "évidemment mal fondées, peuvent être condamnés aux dépens person- "nellement et sans répétition."

L'honorable juge *a quo* reconnait que les appelants étaient justifiables de contester l'intervention pour soutenir la validité de la transaction à laquelle ils avaient été parties. Il leur reproche d'avoir pris fait et cause pour leur cocontestant Robertson, et en autant que l'intervenante leur reprochait des actes dérogatoires à leur charge, il prétend qu'ils devaient se disculper en plaidant en leurs noms personnels. C'est pour cela que *proprio motu* il a cru devoir leur infliger la sanction applicable aux administrateurs *qui abusent de leur qualité.*

mais l'adhésion au contrat de sept des huit enfants du défunt attestait de la prudence des exécuteurs testamentaires, qui avaient tenu à les consulter avant de poser un acte, dont l'opportunité était sujette à discussion de leur part. Par ailleurs, leur participation et leur concours atténuaient d'autant la responsabilité éventuelle des exécuteurs testamentaires. Et, au surplus, cette participation des héritiers Quinlan, qui était de pure surérogation, n'infirmait nullement le contrat. *Quod abundat non viliat.*

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L'honorable juge *a quo* reconnait que le testament de feu Hugh Quinlan confère à ses exécuteurs testamentaires le pouvoir de transiger; mais il statue que, dans la présente cause, ils ne pouvaient exercer ce pouvoir, parce que la Cour Suprême avait déclaré définitivement que *"respondent Ethel Quinlan has a sufficient interest and status to preserve "intact the corpus of the estate"*, et que la transaction visait à la frustrer de ses recours.

A mon avis, ce dictum de la Cour Suprême n'avait nullement pour objet de dénier aux exécuteurs testamentaires la faculté de mettre fin au litige par une transaction. 20

Mais ce droit de plaider au bénéfice de la succession qui lui est reconnu et qui lui est *personnel,* est bien distinct de la créance qui fait l'objet de ses procédures et qui appartient, non pas à elle, mais à la succession. De son droit elle peut user ou non; elle peut se désister de ses procédures en tout temps; et cependant de la créance dont elle poursuivait le recouvrement, elle n'aurait jamais pu donner quittance. Le droit de disposer de cette créance n'appartenait qu'aux exécuteurs testamentaires de la succession, dans la mesure des pouvoirs que leur a conféré le testateur. 30

Hugh Quinlan aurait pu confier l'administration de sa succession à ses enfants. Il ne l'a pas voulu. Il apréféré choisir comme exécuteurs testamentaires une compagnie de fiducie, et son associé Robertson, qui (ce dernier) s'est démis de sa charge et a désigné comme son successeur le Trust Général du Canada.

A ces corporations incombe l'administration, sauf à elles d'user 40 d'une sage discrétion dans l'exercice de leurs pouvoirs. Et quand elles exercent ces pouvoirs, hors les cas de fraude, d'abus ou d'injustice grave équivalente à fraude, leur autorité est absolue. Ce n'est pas parce qu'un héritier intente une action, qu'elles auraient pu intenter elles-mêmes, qu'elles sont déchues du pouvoir de transiger.

L'intimée objecte encore que les exécuteurs testamentaires ne peuvent transiger dans un litige où ils sont intéressés. Cette proposition légale est juste, mais les faits ne donnent pas lieu à son application.

En vue des conclusions déjà prises et sans prononcer ici sur la validité de la transaction, il suffit de constater que l'appelant a payé à la succession une somme de $50,000.00, alors qu'il ne lui devait que $21,200.00, soit $16,000.00 de capital, et environ $5,200.00 d'intérêts accrus de la fin de mai 1928 à la fin de novembre 1934.

Ce paiement a donc libéré l'appelant de sa dette.

10 Par ces motifs, je maintiendrais l'appel de l'appelant Robertson, et je rejetterais le contre-appel de dame Ethel Quinlan.

APPEL DE ROBERTSON V. DAME KATHERINE KELLY

Par ce second pourvoi l'appelant Robertson se plaint du jugement qui a rejeté sa contestation de l'intervention produite par l'intimée dame Katherine Kelly.

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Les conclusions de cette intervention, après avoir été émendées par le jugement de cette Cour, ne demandaient plus que la nullité de l'acte de transaction.

Les griefs de nullité invoqués étaient les suivants:—

1o.—L'acte a été consenti au détriment de la succession et sans la participation de l'intervenante;

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2o.—Il a été signé par erreur et à la suite de fausses représentations faites aux héritiers par les exécuteurs testamentaires;

3o.—Les exécuteurs testamentaires n'avaient pas le pouvoir d'y consentir;

4o.—Les officiers qui ont signé pour les corporations exerçant les fonctions d'exécutrices testamentaires n'étaient pas autorisés à ce faire.

40 Les conclusions que j'ai adoptées sur l'appel principal font voir que, loin de préjudicier à la succession, la transaction du 31 janvier 1934 lui a été profitable. Aussi l'examen des autres griefs n'offre plus qu'un intérêt purement académique.

On peut ajouter cependant, qu'il n'y a au dossier aucune preuve de fausses représentations de la part des exécuteurs testamentaires ni de qui que ce soit, en vue d'induire les héritiers de feu Hugh Quinlan à signer l'acte. Sans doute les enfants Quinlan n'avaient pas le droit de transiger au nom de la succession; seuls les exécuteurs testamentaires étaient revêtus de ce pouvoir en vertu du testament de feu Hugh Quinlan;

A l'occasion de cette transaction, l'appelant Robertson réalisa un bénéfice de $16,000.00 sur les 400 actions qu'il avait reprises de Tummon.

Or, l'intimée Ethel Quinlan soutient qu'en se portant acquéreur des actions Fuller Gravel, qui se trouvaient dans l'actif de la succession, l'appelant Robertson, à raison de ses fonctions d'exécuteur testamentaire et de fiduciaire, a enfreint la prohibition édictée par l'article 1484 C. civ.

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Sur ce point l'intimée a raison.

Certes, je ne doute pas de la bonne foi de l'appelant, et je suis convaincu, que lorsqu'il a repris à son compte — pour en payer lui-même le prix fixé — les 400 actions dont Tummon n'avait pu disposer, il croyait rendre service à la succession. Mais les bonnes intentions ne permettent pas de déroger à la loi. Robertson ne pouvait recevoir ces actions de Tummon, qu'à titre de fiduciaire de la succession Quinlan, et il doit rembourser à la succession le profit qu'il a réalisé à l'occasion de la revente de ces actions.

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L'honorable juge Gibsone est allé plus loin. Il déclare que Reyner, McCord et Tummon, qui avaient acheté les 600 autres actions n'étaient que des personnes interposées pour l'appelant, que chacun d'eux n'avait payé que 25% de son prix d'achat; et que l'appelant doit compte du profit réalisé sur 450 actions additionnelles.

Avec toute déférence, je dois dire que cette prétention n'est pas soutenue par la preuve. Reyner, McCord et Tummon avaient dûment acquis de la succession chacun 200 actions; et on ne peut reprocher à l'appelant d'avoir aidé les acquéreurs dans leur finance.

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D'ailleurs, sur ce point, l'honorable juge Martineau, la Cour d'appel et la Cour Suprême se sont déjà prononcés. Ils ont décidé que l'appelant ne devait compte à la succession que de 400 actions. L'intimée a acquiescé à ces jugements. Il y a donc chose jugée.

QUATRIEME MOYEN

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La transaction du 31 janvier 1934 a-t-elle mis fin au litige?

On connait déjà la nature et l'objet de cette convention intervenue pendant que la cause était en instance devant la Cour Suprême. En exécution de ce contrat, l'appelant Robertson a payé à la succession Quinlan en novembre 1934, une somme additionnelle de $50,000.00, afin d'obtenir un titre indiscutable aux actions en litige. En même temps il a payé $44,000.00 de frais, dont une partie indéterminée libérait la succession d'honoraires de conseils qui, dans tous les cas, devaient rester à sa charge.

pêche pas le contrat de produire ses effets à l'expiration du terme ou à l'avènement de la condition, que cette condition soit expresse ou implicite.

Pour ces motifs, je conclus que l'appelant Robertson, ayant payé le prix convenu, en temps utile, à la succession Quinlan, a valablement acquis les actions mentionnées dans l'écrit du 20 juin 1927.

DEUXIEME MOYEN

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L'évaluation des dites actions faite par le tribunal de première instance est-elle excessive et illégale?

En vue des conclusions prises sur le premier moyen, il n'y a pas lieu de fixer la valeur de ces titres.

TROISIEME MOYEN

L'acquisition faite par l'appelant des actions de la compagnie Fuller
20 Gravel est-elle légale?

Nous avons vu dans l'exposé des faits que Quinlan et l'appelant Robertson détenaient chacun la moitié des actions de cette compagnie au capital-actions constitué de 2000 actions privilégiées et de 1000 actions ordinaires. La succession Quinlan avait donc dans son actif 1000 actions privilégiées et 500 actions ordinaires de cette compagnie. Dès juillet 1927, Robertson suggéra à sa coexécutrice testamentaire de vendre ces actions, dans l'intérêt des héritiers, parce que les affaires de cette compagnie
30 n'étaient pas prospères. L'aviseur de la succession dûment consulté, on décida de vendre les actions au prix de $50.00 pour chaque action privilégiée avec boni de ½ action ordinaire, ce qui en représentait la pleine valeur, suivant la preuve, et suivant l'appréciation de l'honorable juge Martineau, de la Cour d'Appel, et de l'honorable juge Gibsone. A cause de ses relations d'affaires, l'appelant Robertson fut chargé de vendre ces valeurs au prix fixé. Dans le cours de l'été et de l'automne 1927, il vendit 200 actions privilégiées avec la proportion du boni en actions ordinaires à un nommé Reyner, et la même quantité à un nommé McCord; puis il transporta les 600 autres au gérant de la compagnie, un nommé
40 Tummon, qui en achetait 200 pour lui-même, et se proposait de vendre les autres à deux de ses amis. Malheureusement, Tummon essaya vainement de disposer de ces 400 actions, et au mois de mars 1928, l'appelant les reprit à son propre compte, au lieu de les remettre à la succession.

Deux mois plus tard, un monopole fut formé dans l'Ontario de toutes les compagnies similaires et les promoteurs s'abouchèrent avec l'appelant pour acheter toutes les actions de la compagnie Fuller Gravel au prix de $90.00 l'action. Le marché fut conclu, et Robertson reçut en paiement de la totalité des actions un chèque de $180,000.00, dont il distribua le produit aux actionnaires, au *pro rata* du nombre d'actions qu'ils détenaient.

In the Court of King's Bench (Appeal Side)

Notes of the Hon. Mr. Justice Prévost (Continued)

Ici, encore, la Cour Suprême s'est prononcée sur la nature du contrat. Et, en passant, on peut observer, que cette Cour, qui se déclare soucieuse d'éviter aux parties des frais inutiles, ne les aurait pas renvoyées devant la Cour Supérieure, pour prouver l'assentiment ou le dissentiment de Quinlan au contenu de la lettre, si le document ne révélait pas un contrat valide. Elle y a vu une vente avec déclaration de command ou réserve d'élection d'ami; et, à mon avis, la convention répond bien à la définition que donnent les auteurs des modalités de cette vente. L'acheteur achète, avec réserve de se substituer une autre personne non désignée, et susceptible de prendre le marché pour son compte. (Colin et Capitant, Droit civil, vol. 2, p. 429; — 1o. Planiol et Ripert, nos 213, 214; Glasson, note sous D.P. 85, 2, 1). C'est bien notre cas: Robertson achetait les actions de Quinlan au prix déterminé, et se réservait la faculté de se substituer un acheteur susceptible de devenir son associé au lieu et place de Quinlan. L'engagement de l'appelant de restituer les actions à Quinlan, s'il revenait à la santé, ne faisait pas obstacle à cette substitution éventuelle, puisqu'il n'avait qu'à stipuler la même condition, en traitant avec l'acheteur substitué.

En tout cas, peu importe le nom qu'il convient de donner au contrat. La lettre du 20 juin est bien un acte translatif de la propriété des actions. Elle dit: *this will acknowledge your transfer of the following stock to me.* Et ceci dispose de la théorie du mandat, adoptée par l'honorable juge Gibsone. Le mandant ne transporte pas au contraire la propriété des biens à vendre.

En second lieu, il y a dans la lettre un prix fixé, que l'acheteur s'engage à procurer au vendeur (*to obtain for you*): donc à payer au vendeur, si un autre ne le paye pas. Dans le mandat, le mandataire chargé de vendre, ne s'engage pas à payer le prix, et encore moins à restituer au vendeur les choses vendues.

Du reste, dès que la convention est un contrat d'aliénation, les parties sont admises à y insérer toutes les conditions et modalités qu'elles jugent opportunes, pourvu que ces conditions et modalités ne violent ni l'ordre public ni les bonnes moeurs. Le contrat est la loi des parties et doit recevoir son exécution tel qu'elles l'ont voulu.

Mais, on dit: la moitié du prix était payable comptant, et l'appelant n'a payé cette partie du prix que trois mois plus tard, après la mort du vendeur. Pourtant, il n'y a là rien d'incompatible avec la validité du contrat. Les parties savaient bien que, dans les circonstances, la faculté réservée par Robertson d'élire un nouvel acheteur ne pouvait s'exercer du jour au lendemain. Quinlan avait foi en son associé, et tout ce qui l'intéressait c'était l'engagement personnel qu'il assumait de lui procurer le prix convenu de $250,000.00.

Rien ne prohibe aux parties contractantes de suspendre ou d'ajourner les effets du contrat; et, en pareil cas, le décès de l'une d'elles n'em-

res communes. Il savait sans doute qu'il lui serait plus facile qu'à ses héritiers de disposer avantageusement de cette partie de son avoir. Apprenant que Robertson était alors en voyage de repos, il manifesta le désir de le voir dès son retour. A son arrivée, l'appelant est avisé des intentions de Quinlan, et discute aussitôt avec Janin de l'opportunité d'accepter les propositions éventuelles de Quinlan, et du prix qu'il y aurait lieu de payer. En tablant sur la base qu'ils avaient déjà adoptée pour fixer la valeur des actions de leurs compagnies en 1925, ils en vinrent à la conclusion qu'une somme de $250,000.00 représentait la juste valeur des intérêts de leur associé. L'honorable M. Perron était leur aviseur légal commun. Ils eurent recours à ses lumières et à son expérience, discutèrent avec lui la valeur marchande de ces actions, et, finalement, celui-ci se chargea d'aller voir M. Quinlan pour lui soumettre les vues de l'appelant.

Quelque temps après, le 21 mai, au cours d'une visite de Robertson, où le projet fut sans doute examiné, Quinlan lui remit, endossés en blanc, les certificats de ses actions dans la compagnie Quinlan, Robertson et Janin, et deux autres certificats représentant 50 actions dans la compagnie Amiesite Asphalt. L'endossement de Quinlan sur ces certificats est attesté par la signature de la garde-malade Kerr, qui déclare qu'elle a compris que *"Mr. Quinlan was selling those shares to Mr. Robertson."* Le même jour, Quinlan dictait à son fils un mémoire des certificats remis à l'appelant, mentionnant aussi un certificat de 200 actions de la compagnie Amiesite Asphalt, qui était au nom de son gendre (Dunlop) et qui fut également transmis à l'appelant, pour être gardé avec les autres dans son coffre de sûreté. Quinlan avait déclaré s'en rapporter à l'honorable M. Perron de fixer lui-même le prix des actions. Après de nouveaux pourparlers, M. Perron s'arrêta définitivement au prix de $250,000.00, et rédigea lui-même, pour constater le contrat, un projet à peu près semblable à la lettre du 20 juin. Robertson modifia légèrement ce projet pour lui donner sa forme définitive, en donna lecture à M. Perron par téléphone, et fit dactylographier la lettre en double par Leamy. Après l'avoir signée, tous deux se rendirent chez Quinlan, entre onze heures et midi, pour la lui soumettre.

En considérant cette chaine decirconstances, il me semble que l'adhésion de Quinlan au contenu de la lettre, est l'aboutissement logique de longues tractations antérieures; et qu'il n'y a pas lieu de douter de la sincérité des témoignages de Robertson et Leamy, lorsqu'ils affirment cette adhésion.

D'où je conclus que le consentement de Quinlan à la teneur de la lettre du 20 juin, est prouvé.

b) S'il en est ainsi, cette lettre comporte-t-elle une cession à l'appelant Robertson des actions de compagnies qui y sont mentionnées?

coup insisté sur ces variantes pour conclure à l'invraisemblance et à la fausseté des témoignages de Leamy et de Robertson, et pour en élaguer tout ce qui n'est pas *secumdum allegata*. Certes, la règle invoquée n'est pas douteuse, mais elle s'applique à toutes les parties; et dans son application, il faut tenir compte de toute la contestation liée. L'intimée ne doit pas oublier qu'elle est demanderesse, et qu'elle a allégué elle-même l'acquisition par l'appelant des actions en litige à la date du 22 juin (par. 11), et que cette acquisition avait été effectuée par fraude et collusion de l'appelant avec d'autres personnes, à une période de la maladie de son père où son état physique et mental ne lui permettait plus de donner un consentement valide (par. 12 à 16). 10

L'appelant en défense a nié tous les griefs de nullité (la fraude, la collusion et l'incapacité du vendeur) invoqués contre son titre, et, corrigeant la date du contrat, il en a allégué les circonstances principales. Il lui était sûrement loisible de prouver par le détail tous les faits pertinents à la transaction, susceptibles d'en démontrer la vérité et l'honnêteté, sans être restreint par la lettre ou la forme d'une allégation, surtout après avoir été soumis à un examen préalable prolongé, réparti en plusieurs séances au cours d'une période de sept semaines. Que, dans ses multiples dépositions sur une série de faits intervenus à l'occasion de différentes entrevues avec Hugh Quinlan, il se soit contredit ou qu'il ait confondu l'ordre chronologique des faits, il n'y a là rien que de purement humain, et, à tout événement, rien qui permette de récuser sa bonne foi. 20

Pour apprécier la preuve des faits relatifs à l'écrit du 20 juin 1927, et pour rechercher la nature de la convention qu'il comporte, il faut considérer les relations passées de Quinlan et de Robertson,: les circonstances dans lesquelles se trouvait Quinlan, et toute une série de faits qui ont précédé l'écrit. Quinlan et l'appelant étaient associés depuis trente ans, et ces relations d'affaires avaient engendré chez eux une profonde amitié et une confiance réciproque absolue. Par son testament de 1926, déjà malade depuis six mois, Quinlan désigne l'appelant comme l'un de ses exécuteurs testamentaires et l'un des fiduciaires de sa fortune. Il le désigne comme son associé et son ami. Il lui adjoint une compagnie de fiducie, et il a la délicatesse de l'exempter de la comptabilité inhérente à la charge. Ces hommes d'affaires étaient néanmoins des réalistes. Chacun savait que la partie de sa fortune, engagée dans les compagnies qu'ils opéraient en société, ne maintenait sa valeur que par sa coopération personnelle à l'entreprise commune, et qu'advenant son décès, seuls les associés survivants, ou un tiers de leur choix, seraient en mesure de payer à la succession du défunt la valeur approximative de ses intérêts dans l'entreprise. Cette idée avait inspiré aux trois associés la convention du 11 juin 1925 accordant aux survivants un droit de préemption sur les actions de l'associé prédécédé, dans les compagnies qu'ils exploitaient en commun. La même idée dominait l'esprit de Quinlan, dont l'état s'aggravait, lorsqu'en avril 1927, il manifesta à Leamy, et plus tard à Janin, l'intention de se retirer des affaires, et de céder à ses associés ses intérêts dans leurs affai- 30 40

sément pour obtenir la preuve de la détermination de Quinlan, à la lecture de la lettre, que la Cour Suprême a renvoyé le dossier à la Cour Supérieure, en définissant les faits sur lesquels l'enquête devait porter.

A mon humble avis, il n'appartient ni à la Cour supérieure ni à la Cour d'appel d'infirmer le jugement de la Cour Suprême. L'admissibilité de la preuve testimoniale sur les points définis par cette Cour, constitue chose définitivement jugée entre les parties, en autant que nos tribunaux
10 sont concernés.

Il en est de même du fait de la lecture de la lettre. M. le juge Martineau, qui a entendu la preuve sur ce point, a déclaré dans ses notes de jugement, que cette lettre avait été lue à Hugh Quinlan. La Cour Suprême, après avoir examiné la preuve à son tour, a adopté la même conclusion, et proposé ce fait comme l'une des circonstances établies dans la cause, qui constituaient un commencement de preuve par écrit de la vente constatée par la lettre, et justifiaient la preuve orale du contrat allégué. En même temps, elle a approuvé la conclusion de M. le juge Martineau, que
20 Quinlan était parfaitement en état de comprendre le contenu de la lettre et de donner ou de refuser son assentiment. Comment nous appartiendrait-il de déclarer le contraire?

Quant à l'adhésion de Quinlan au contenu de la lettre, elle est prouvée par Robertson et Leamy, c'est-à-dire par les mêmes témoins qui en avaient prouvé la lecture à la satisfaction de M. le juge Martineau et de la Cour Suprême. Leamy était le secrétaire de la compagnie-mère depuis trente ans, et manifestement dévoué envers Quinlan, qu'il visitait chaque
30 semaine durant sa maladie. C'est un témoin désintéressé. Robertson est sans doute intéressé à titre de partie dans la cause, mais c'est un homme respectable, dont toutes les Cours, à l'exception de l'honorable juge *a quo,* ont jusqu'ici reconnu la bonne foi. Il n'est pas possible d'imputer à ces témoins une escroquerie et un double parjure, parce qu'à dix ans d'intervalle une garde-malade croit se rappeler qu'à une certaine date elle n'a pas quitté la chambre de son malade pendant plus de deux minutes consécutives, et que personne n'a pu, à son insu, avoir avec ce malade une entrevue de cinq ou six minutes; — surtout quand ces témoins sont partiellement corroborés par un témoin comme le Docteur Hackett, à qui
40 Quinlan a déclaré le 20 ou le 21 juin *"that he had transacted some business."*

Cette preuve affirmative directe n'est nullement infirmée par des incidents de détail, comme des erreurs de description du document que certaine correspondance du Capital Trust ou de l'honorable M. Perron attribue par inadvertance à Quinlan, au lieu de l'attribuer à Robertson;— ces méprises étant d'occurrence fréquente et bien explicables dans le tourbillon des affaires. Il n'y a pas lieu non plus d'attacher d'importance aux légères variantes à relever entre la preuve de l'appelant Robertson et l'allégation 37 de son plaidoyer. Les procureurs de l'intimé ont beau-

"éteint tous les recours que la succession Quinlan pouvait exercer contre "lui.

"5o.—L'honorable juge *a quo* a adjugé *ultra petita* et contraire-"ment à l'autorité de la chose jugée, en privant l'appelant de la faculté "de se libérer par la restitution des actions dont il a annulé le transport."

PREMIER MOYEN

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Ce moyen d'appel pose deux questions, l'une de fait, et l'autre de droit, savoir: a) Est-il prouvé que Hugh Quinlan a adhéré à la lettre du 20 juin 1927? b) S'il y a adhéré, l'appelant a-t-il acquis par là les actions de compagnies mentionnées dans la lettre?

a) Le savant juge de la Cour Supérieure a admis sous réserve de l'objection de l'intimée Ethel Quinlan, la preuve testimoniale de la réponse donnée par Hugh Quinlan, après que le témoin Leamy lui eût lu la lettre du 20 juin 1927, dans sa chambre, en présence de l'appelant Robertson, qui l'accompagnait. Leamy et Robertson ont déclaré tous deux qu'après la lecture de la lettre, Quinlan *said that was all right.* 20

Pour contredire cette preuve furent entendues les deux gardes-malades, qui étaient au service de Quinlan durant la dernière période de sa maladie, les demoiselles Kerr et McArthur. La première faisait alors le service de nuit et n'a pu éclairer le tribunal sur ce qui s'est passé dans la chambre du malade le jour en question; mais mademoiselle McArthur, qui était en service de huit heures du matin à huit heures du soir, déclare que, durant la dernière semaine de la maladie de Hugh Quinlan, elle ne s'est jamais absentée de la chambre de son malade plus de deux minutes consécutives, et que Robertson n'a pu entrer à son insu dans cette chambre le 20 juin, bien qu'elle admette y avoir vu ce jour-là le témoin Leamy, à qui elle aurait reproché d'enfreindre les ordres du médecin. 30

C'est en s'appuyant sur les témoignages de ces deux gardes-malades, et sur celui qu'avait rendu dame Margaret Quinlan à la première instruction de la cause, que le savant juge de première instance a conclu que, non seulement Hugh Quinlan n'avait pas acquiescé à la teneur de la lettre, mais que cette lettre ne lui avait jamais été lue, et que la visite au malade rapportée par Robertson et Leamy n'avait pas eu lieu. Au surplus, il ajouta que la preuve testimoniale du consentement de Quinlan était illégale et ne pouvait être reçue. 40

Pourtant, la Cour Suprême avait décidé entre les parties que cette preuve était admissible, parce qu'il y avait au dossier un commencement de preuve par écrit. Et elle avait pris soin d'énumérer onze circonstances de faits, qui constituaient ce commencement de preuve par écrit, en ce qu'elles rendaient vraisemblable la vente par Quinlan à Robertson des actions de compagnies décrites dans la lettre du 20 juin 1927. C'est préci-

L'honorable juge a d'abord disposé de la réponse de l'intimée Ethel Quinlan à l'encontre du plaidoyer supplémentaire de l'appelant Robertson. Il a considéré cette réponse comme une demande incidente, et il en a maintenu les conclusions, annulant l'acte du 31 janvier 1934, et déclarant que ni les héritiers alors vivants du testateur, ni les exécuteurs testamentaires ne pouvaient valablement le consentir. Puis, statuant sur le fond de l'action originaire, il a décidé que la lettre du 20 juin 1927 n'avait jamais été lue à Hugh Quinlan, et qu'en admettant même qu'elle lui eût été lue et qu'elle fut acceptée par lui, cette lettre ne constituait pas en droit un titre d'acquisition par Robertson des actions des trois compagnies y mentionnées; que, relativement aux 1000 actions de la compagnie Fuller Gravel qui se trouvaient dans la succession de Hugh Quinlan, 850 avaient été vendues en réalité à des personnes interposées pour Robertson, et que ces ventes étaient illégales et nulles aux termes de l'article 1484 C. civ.; et après avoir évalué de nouveau les actions illégalement acquises par Robertson, il l'a condamné purement et simplement à payer la valeur ainsi établie de ces actions, sauf à déduire les montants par lui antérieurement versés, et à restituer le certificat des 200 actions d'Ontario Amiesite Asphalt, déclarées sans valeur. Enfin, prononçant sur l'intervention de Katherine Kelly, il en maintint les conclusions contre l'appelant Robertson, avec dépens, et rejeta aussi avec dépens les trois contestations produites à l'encontre de cette intervention par Robertson, par Margaret Quinlan, et par les exécuteurs testamentaires, condamnant ceux-ci personnellement aux frais.

De là les quatre appels énumérés au préambule de ces notes.

Examinons d'abord l'appel de Robertson du jugement qui a prononcé sur l'action originaire et sur la prétendue demande incidente.

L'appelant invoque ici cinq moyens d'appel qu'il énonce comme suit dans son mémoire:—

"1o.—Feu Hugh Quinlan a adhéré à la teneur de la lettre du 20 "juin 1927, après que lecture lui en eût été faite, et l'appelant a ainsi "acquis toutes les actions énumérées dans cette lettre.

"2o.—Subsidiairement, l'appelant a déjà payé intégralement le prix "et la valeur des dites actions, et, dans tous les cas, l'évaluation qu'en a "faite l'honorable juge *a quo* est excessive et illégale.

"3o.—L'acquisition faite par l'appelant des actions de la compa- "gnie Fuller Gravel, ayant appartenu à la succession Quinlan, ne tombe "pas sous l'application de l'article 1484, C. civ., et, dans tous les cas, "l'adjudication sur ce point est erronée.

"4o.—Quoi qu'il en soit, l'acte du 31 janvier 1934 a consolidé, si "besoin était, le titre de l'appelant à toutes les actions en litige, et a

"passing upon the validity or the binding character of the agreement "in question, nor deciding whether or not the intervenants acted within "their powers and the officers of the intervenants within their author- "ity." Enfin, elle déclara que le litige avait pris fin en autant que l'appelant Robertson et dame Margaret Quinlan Desaulniers étaient concernés.

Le dossier étant revenu à la Cour Supérieure, l'appelant produisit un plaidoyer supplémentaire pour invoquer comme moyen additionnel de défense la transaction du 31 janvier 1934, et alléguer qu'il avait réellement payé les considérations mentionnées dans l'acte en capital et frais. L'intimée Ethel Quinlan contesta la validité de la transaction et en demanda la nullité, parce que l'acte avait été signé par les héritiers par erreur et à la suite de fausses représentations; parce que l'acte excédait les pouvoirs des exécuteurs testamentaires; et parce que les officiers qui avaient signé pour les compagnies exerçant les fonctions d'exécutrices testamentaires n'étaient pas autorisés à cette fin. 10

Puis l'intimée demanda et obtint la permision de mettre en cause comme défendeurs toutes les parties à la transaction (jugement du 26 juin 1935), et plus tard, comme mis en cause, les procureurs de toutes les parties dont l'appelant Robertson avait payé les frais. 20

Assignée dans la cause, dame Margaret Quinlan, demanda à son tour et obtint que la fille mineure de l'intimée, Katherine Kelly, fut aussi mise en cause. (Jugement du 10 septembre 1935). Puis elle contesta la demande d'annulation de la transaction du 31 janvier 1934, produite par l'intimée, alléguant que cet acte était dans l'intérêt de la succession et que les exécuteurs testamentaires avaient le pouvoir de le consentir. 30

Katherine Kelly une fois mise en cause, et représentée par son père et tuteur Thomas Kelly, produisit à son tour une intervention, renouvelant les griefs invoqués par sa mère en l'action originaire, demandant la nullité de la transaction, et introduisant dans le litige de nouveaux griefs.

L'appelant Robertson forma contre cette intervention une exception à la forme, qui fut d'abord rejetée par la Cour Supérieure mais que la Cour d'appel accueillit, en écartant de l'intervention toutes les allégations et les conclusions qui excédaient le cadre actuel de la litiscontestation. 40

L'intervention de dame Kelly ainsi restreinte, fut contestée par les exécuteurs testamentaires, par dame Margaret Quinlan (Desaulniers) et par l'appelant Robertson, qui tous ont soutenu la validité de la transaction du 31 janvier 1934.

Ce sont là les multiples issues de la cause qui ont été soumises à la Cour Supérieure, présidée par l'honorable juge Gibsone.

payer le prix de $90.00 chacune que la succession aurait pu en obtenir, soit $36,000.00, sauf à déduire la somme de $20,000.00, représentant $50.00 l'action qu'il en avait déjà payé.

Seul, l'appelant Robertson se pourvut en appel de ce jugement devant cette Cour, après avoir eu le soin de se démettre de ses fonctions d'exécuteur testamentaire, et avoir nommé comme son successeur le Trust Général du Canada.

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La Cour d'appel, par son jugement du 31 décembre 1932, confirma en substance le jugement de l'honorable juge Martineau, tout en y apportant quelques modifications secondaires, notamment, quant à la date à laquelle on devait se reporter pour fixer la valeur des actions, — date qu'elle établit au jour de l'institution de l'action (25 octobre 1928) — avec le résultat qu'elle aurait majoré la valeur des actions d'environ $7,000.00, si les demanderesses avaient formé un contre-appel.

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L'appelant Robertson institua un nouvel appel devant la Cour Suprême du Canada. L'audition commencée dans les premiers jours de décembre 1933, fut ajournée par la Cour au terme de février suivant pour permettre aux exécuteurs testamentaires d'intervenir sur l'appel.

Pendant l'ajournement, soit: le 31 janvier 1934, devant Me Couture, notaire, intervint un acte de transaction entre l'appelant Robertson, les exécuteurs testamentaires de la succession, et tous les héritiers de feu Hugh Quinlan, y compris la demanderesse Madame Desaulniers, mais à l'exception de l'intimée Ethel Quinlan. La succession revendait, en autant que besoin, à l'appelant Robertson, toutes les actions en litige, et elle renonçait à tout recours contre lui, moyennant le paiement d'un prix additionnel de $50,000.00 et de tous les frais au montant d'environ $44,000.00. Une clause de l'acte prévoyait, toutefois, qu'il ne prendrait effet qu'après avoir été soumis à la Cour Suprême, au terme de février, et pourvu que la Cour ne voit aucune objection à ce que les exécuteurs testamentaires y donnent effet, ou que la Cour en donne acte.

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L'acte ayant été produit devant la Cour Suprême, au terme de février 1934, madame Desaulniers déclara qu'elle se désistait de son action, mais la présente intimée décida de continuer seule le procès, et attaqua l'acte de transaction dans un mémoire écrit.

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Par son jugement en date du 6 juin 1934, la Cour Suprême déclara que la Cour Supérieure avait eu tort de refuser la preuve orale offerte par l'appelant Robertson, et elle renvoya les parties devant la Cour Supérieure pour y compléter la preuve sur des faits et circonstances énoncés en son jugement; elle déclara aussi que certains points particuliers décidés par les tribunaux inférieurs dans la cause étaient passés en force de chose jugée; et, quant à la transaction du 31 janvier 1934, elle statua que cet acte formait partie du dossier de la cause, et elle en donna acte, "without

Par leurs conclusions elles demandaient: 1o.—que les exécuteurs testamentaires fussent destitués de leurs charges et condamnés à rendre compte; 2o.—que les transports des actions ayant appartenu à leur père dans les compagnies Quinlan, Robertson et Janin, Amiesite Asphalt et Fuller Gravel fussent annulés et les défendeurs condamnés à remettre ces actions à la succession ou à en payer la valeur, de $1,300,000.00; 3o.—qu'il fut déclaré que les actions mentionnées dans le dernier groupe de compagnies appartenaient à la succession Hugh Quinlan, et, au cas où les défendeurs ne pourraient les remettre, qu'ils fussent condamnés à en payer la valeur, soit $1,000,000.00; 4o.—que l'inventaire préparé par les exécuteurs testamentaires fut annulé comme faux et frauduleux; et 5o.—qu'il fut déclaré que tous les profits réalisés et les dividendes payés depuis la mort de Hugh Quinlan par toutes les compagnies mentionnées en la déclaration appartenaient à la succession. 10

Les défendeurs ont produit des défenses distinctes, niant toutes les imputations de fraude et de collusion portées contre eux. L'appelant Robertson invoqua en outre pour sa part, la lettre du 20 juin 1927 comme titre d'acquisition des actions mentionnées dans cette lettre, et il rapporta les circonstances particulières à la vente des actions Fuller Gravel. 20

Une première instruction de la cause eut lieu devant l'honorable juge Martineau. Celui-ci admit l'appelant Robertson à prouver que la lettre du 20 juin 1927 avait été lue à feu Hugh Quinlan, et qu'à ce moment Quinlan était sain d'esprit et en état de consentir une vente. Il déclara dans ses notes de jugement que cette preuve avait été faite.

Mais il refusa de laisser prouver par témoins que Quinlan avait adhéré au contenu de la lettre, de même qu'il refusa d'admettre la preuve testimoniale de ce qui s'était passé entre Robertson et Quinlan à une entrevue du 21 mai 1927, au cours de laquelle les certificats d'actions appartenant à feu Hugh Quinlan dans les compagnies Quinlan, Robertson et Janin et Amiesite Asphalt avaient été endossés en blanc et remis à l'appelant Robertson. 30

Par son jugement final du 6 février 1931, il rejeta l'action *in toto* quant au Capital Trust Corporation. Quant à l'appelant Robertson, il rejeta les conclusions qui demandaient sa destitution, une condamnation à rendre compte et l'annulation de l'inventaire; mais il le condamna: 1o.—à remettre à la succession les actions des compagnies mentionnées dans la lettre du 20 juin 1927, (puisque le consentement de Quinlan à la teneur de cette lettre n'avait pas été prouvé), et à défaut de les remettre, à en payer la valeur qu'il fixa à $372,928.00, sauf à déduire la somme de $250,-000.00 qu'il avait déjà payée; 2o.— à remettre aussi à la succession 400 actions de la compagnie Fuller Gravel, dont il n'avait pu se porter acquéreur légalement, à la rétrocession d'un tiers, à cause de sa fonction d'exécuteur testamentaire; et, à défaut par lui de remettre ces actions, d'en 40

Voici les termes de la lettre en question:—

"Dear Hugh:—

"This will acknowledge your transfer of the following stocks to me:

"1151 shares Quinlan, Robertson & Janin, Limited;
" 50 Amiesite Asphalt Limited;
10 " 200 Ontario Amiesite Asphalt Limited;
" 200 Amiesite Asphalt Limited, in the name of H. Dunlop.

"Which stock represented all your holdings in the above companies. "I have agreed to obtain for you the sum of two hundred and fifty thou-"sand dollars ($250,000.00) 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 6%.Should your health "permit you to attend to business within one year from this date, I agree "to return all of the above mentioned stocks to you on the return to me
20 "of the monies I have paid you thereon, including interest at 6%.

"Yours truly,

"(Sgd) A. W. ROBERTSON".

Cette lettre ne mentionne pas les actions de Quinlan dans les compagnies A. W. Robertson Limited, et Fuller Gravel Limited. Disons en passant, que la première de ces compagnies a été mise en liquidation volontaire en 1929. Quant aux actions de Quinlan dans la seconde, elles ont
30 été vendues par la succession durant l'été 1927, à la suggestion de Robertson, et celui-ci prétend qu'il a dû en reprendre une certaine quantité qui avait été vendue à un nommé Tummon.

Dans l'automne 1928, l'intimée Ethel Quinlan (Madame Kelly) et sa soeur Margaret Quinlan (Madame Desaulniers) deux enfants de feu Hugh Quinlan, instituèrent l'action en cette cause contre les exécuteurs testamentaires de la succession, alléguant entre autres choses, que le 22 juin 1927 l'appelant Robertson avait acquis, par fraude et collusion, de
40 feu Hugh Quinlan, alors que celui-ci était incapable de donner un consentement valide, vu sa maladie, 250 actions de Amiesite Asphalt Limited et un grand nombre d'autres actions au prix de $100.00 l'action, alors que ces actions valaient $1000.00 chacune; que durant l'année 1928 la défenderesse Capital Trust Corporation avait vendu au dit appelant, son coexécuteur testamentaire, frauduleusement et collusoirement, 1151 actions de la compagnie Quinlan, Robertson et Janin, au prix de $250,000.00, alors que ces actions valaient $700,000.00, et 1000 actions privilégiées et 500 actions communes de Fuller Gravel Co., à un prix nominal, alors que ces actions valaient $300,000.00; enfin, que leur père était à son décès actionnaire dans plusieurs autres compagnies, dont elles nomment quelques-unes.

"Amiesite Asphalt Ltd", destinée à exploiter des brevets d'invention pour la fabrication de bitumes propres au pavage des chemins, au capital-actions de $100,000.00, dont 500 actions do $100.00 attribuées à Janin, 250 à Quinlan et 250 à Robertson; 2o.—en 1925, "Ontario Amiesite Limited", destinée à étendre les entreprises de pavage à la province d'Ontario, par l'adjonction de deux entrepreneurs de cette province, au capital-actions de 1000 actions de $100.00, partagées également entre les cinq intéressés, soit 200 actions à chacun; 3o.—en 1925, "Fuller Gravel Co. Ltd", destinée à exploiter une sablière située dans l'Ontario, et qui appartenait à l'ancienne firme Quinlan et Robertson. Pour ce motif chacun d'eux reçut la moitié du capital-actions, soit pour chacun 1000 actions privilégiées, et 500 actions ordinaires; 4o.—Enfin, en juin 1927, "McCurban Asphalt Co. Ltd", destinée à exploiter un nouveau procédé de pavage, et dont les actions furent attribuées dans la proportion de deux tiers à Janin et d'un tiers à l'appelant Robertson. Quinlan ne s'intéressa pas à cette compagnie, parce qu'elle fut formée quelques jours avant son décès, alors qu'il était retenu chez lui par une maladie qui l'empêchait de vaquer à ses affaires depuis décembre 1925.

De fait, il décéda le 26 juin 1927. Par son testament du 14 avril 1926, il légua ses biens en fidéicommis à ses exécuteurs testamentaires Capital Trust Corporation et l'appelant Robertson, qu'il revêtit des plus amples pouvoirs d'administration et de disposition, avec instructions de distribuer les revenus de sa succession à sa femme et à ses huit enfants, et de partager le capital et les revenus accumulés, au décès du dernier de ses enfants, entre tous ses petits-enfants et arrière-petits-enfants alors vivants.

Une clause du testamtnt dispensait l'appelant Robertson de s'occuper de la comptabilité et des détails d'administration, et lui accordait la faculté de renoncer à la charge d'exécuteur testamentaire, à son bon plaisir, e t de nommer lui-même son successeur.

Une autre disposition ordonnait que l'inventaire de sa succession serait fait en la forme des inventaires commerciaux; et une dernière réglait que l'honorable J. L. Perron continuerait à être l'aviseur légal de sa succession.

Or, dès avant le décès de Quinlan, c'est-à-dire le 22 juin 1927, ses actions dans les compagnies Quinlan, Robertson et Janin et Amiesite Asphalt avaient été transférées dans les livres de ces compagnies au nom de l'appellant Robertson. Celui-ci prétendait les avoir acquises quelque temps auparavant, aux termes d'une convention constatée dans une lettre de Robertson à Quinlan en date du 20 juin 1927, et qui donnait suite à une convention sous seing privé, intervenue entre les trois associés deux ans auparavant (le 11 juin 1925), prévoyant qu'au cas de décès de l'un d'eux, les survivants auraient le droit d'acquérir, à l'exclusion de tous autres, les actions détenues par le prémourant dans les compagnies Quinlan, Robertson et Janin et Amiesite Asphalt.

de l'intimée quant aux appelants, et qui les a condamnés personnellement aux frais de leur contestation, est erroné;

MAINTIENT l'appel (no 1930) des appelants ès qualité, avec dépens, y compris un vingtième des frais de préparation et d'impression du dossier conjoint; infirme et met à néant ledit jugement de la Cour supérieure; et, procédant à rendre le jugement que ladite Cour aurait dû prononcer, maintient la contestation des appelants ès qualité, et rejette
10 l'intervention de l'intimée quant à eux, avec dépens, y compris un quart des frais d'enquête et de témoins de la seconde instruction.

(Signé) J. A. PREVOST,
J.C.B.R.

(Copie conforme.)

NOTES DU JUGE PREVOST

20 De ces jugements qui pourraient n'en faire qu'un, puisqu'ils prononcent sur diverses issues d'une seule et même cause, Robertson a formé deux appels: l'un pour demander le rejet de l'action, sur laquelle il a été condamné à payer la somme précitée, et l'autre pour demander le rejet de l'intervention de madame Kelly, qui a été maintenue contre lui; de son côté, madame Ethel Quinlan a formé un contre-appel pour demander que le montant de la condamnation prononcée contre Robertson soit augmenté à plus de $2,000,000.00; et enfin les exécuteurs testamentaires Capital Trust Corporation *et al* demandent par un quatrième appel, que l'intervention
30 de madame Kelly soit rejetée quant à eux, et que la condamnation personnelle aux frais de leur contestation prononcée contre eux soit infirmée.

LES FAITS

Les principaux faits de la cause sont les suivants:—

L'appelant Robertson et feu Hugh Quinlan ont fait ensemble le commerce d'entrepreneurs généraux, à Montréal, pendant près de trente ans, soit depuis 1897 jusqu'à la mort de Quinlan, survenue le 26 juin 1927,
40 d'abord sous la forme d'une société en nom collectif, puis à partir de 1907 sous la forme d'une compagnie à fonds social appelée "Quinlan et Robertson, Limited". En 1919, ils s'adjoignirent un M. Janin, et formèrent une nouvelle compagnie connue sous le le nom de "Quinlan, Robertson et Janin, Limited", dont les actions furent également réparties entre les trois associés. A cette occasion l'actif de la première compagnie fut transporté à une nouvelle compagnie appelée "A. W. Robertson Limited", dont les actions furent aussi divisées également entre Quinlan et Robertson.

D'autres compagnies auxiliaires furent organisées par les trois associés pour promouvoir leur commerce, savoir: 1o.—en 1924, la compagnie

In the Court of King's Bench (Appeal Side)

Judgment of the Court of King's Bench (Appeal Side) 30 April 1943 (Continued)

CONSIDERANT que l'intimée n'a pas établi les moyens de nullité allégués en son intervention, et que l'appelant a prouvé les allégations essentielles de sa contestation;

CONSIDERANT que le jugement de la Cour supérieure du district de Montréal, en date du 26 avril 1940, qui a maintenu l'intervention de l'intimée quant à l'appelant Robertson, et rejeté la contestation de ce dernier, est erroné;

10

MAINTIENT l'appel (no 1915) de l'appelant Robertson, avec dépens, y compris un vingtième des frais de préparation et d'impression du dossier conjoint; infirme et met à néant ledit jugement de la Cour supérieure; et, procédant à rendre le jugement que ladite Cour aurait dû prononcer, maintient la contestation de l'appelant, et rejette l'intervention de l'intimée quant à lui, avec dépens, y compris un quart des frais d'enquête et de témoins de la seconde instruction;

ET, procédant à statuer sur l'appel no 1930 des appelants *Capital Trust* et autre, à l'encontre du jugement qui a rejeté leur contestation de l'intervention de l'intimée Katherine Kelly, et les a condamnés aux frais personnellement;

20

ATTENDU que les appelants ès qualité sont les exécuteurs testamentaires et fiduciaires de la succession de feu Hugh Quinlan;

ATTENDU qu'ils ont été assignés en cette qualité par l'intervention de l'intimée;

ATTENDU que cette intervention demandait l'annulation de la transaction intervenue le 31 janvier 1934 entre le défendeur Robertson, d'une part, et les exécuteurs testamentaires et la majorité des légataires de feu Hugh Quinlan, d'autre part;

30

ATTENDU que parmi les griefs de nullité allégués par l'intimée se trouvaient nombre de faits imputés aux appelants comme dérogatoires à leurs fonctions et entachés de mauvaise foi, tels que de fausses représentations aux légataires, et des abus de pouvoirs;

CONSIDERANT que les appelants avaient le droit de contester en leur dite qualité l'intervention de l'intimée pour soutenir la validité de l'acte qu'ils avaient consenti, et repousser les moyens de nullité des accusations téméraires, que l'intimée a portées contre eux dans sa procédure;

40

CONSIDERANT que l'intimée n'a fait aucune preuve des actes dérogatoires qu'elle avait reprochés aux appelants;

CONSIDERANT que le jugement de la Cour supérieure du district de Montréal, en date du 26 avril 1940, qui a maintenu l'intervention

spécialement à leur faculté de transiger tout droit litigieux sans la participation des légataires;

CONSIDERANT que ladite transaction du 31 janvier 1934 a été validement consentie; et qu'elle a mis fin au litige;

CONSIDERANT que le plaidoyer supplémentaire du défendeur-appelant Robertson aurait dû être maintenu, en par lui payant les frais
10 encourus par la demanderesse-intimée jusqu'à et y compris la production dudit plaidoyer;

CONSIDERANT qu'il y a erreur dans les jugements de la Cour supérieure du district de Montréal, prononcés le 26 avril 1940, qui ont maintenu contre le défendeur-appelant l'action originaire et une prétendue demande incidente;

Procédant à statuer sur l'appel no 1916 de l'appelant Robertson :

20 MAINTIENT ledit appel avec dépens, y compris les neuf-dixièmes des frais de préparation et d'impression du dossier conjoint; casse et annule les jugements précités de ladite Cour supérieure, et, procédant à rendre le jugement que ladite Cour aurait dû prononcer, maintient le plaidoyer supplémentaire du défendeur-appelant, et rejette l'action de la défenderesse-intimée; condamne le défendeur-appelant à payer les frais encourus en Cour supérieure jusqu'à et y compris la production du plaidoyer supplémentaire, comme dans une cause de $25,000.00, sauf à lui donner crédit de ce qu'il aurait payé sur ces frais à l'occasion de la trans-
30 action du 31 janvier 1934; et condamne la demanderesse-intimée à payer les frais de la Cour supérieure subséquents à la production dudit plaidoyer supplémentaire, y compris la moitié des frais d'enquête et de témoins de la seconde instruction;

ET, procédant à statuer sur l'appel no 1935 de l'appelante Ethel Quinlan:

Persistant dans les motifs qui ont déterminé l'arrêt précédent;

40 REJETTE ledit appel, avec dépens;

Et, procédant à statuer sur l'appel no 1915 de l'appelant Robertson, à l'encontre du jugement qui a rejeté sa contestation de l'intervention de l'intimée Katherine Kelly;

ATTENDU que l'intervention de ladite intimée, telle qu'amendée par le jugement de cette Cour en date du 26 juin 1936, ne visait qu'à l'annulation de la transaction du 31 janvier 1934, et reposait substantiellement sur les griefs déjà invoqués par dame Ethel Quinlan;

vente définitive des dites actions pour le prix de $260,000.00, que l'appelant Robertson s'est engagé à procurer à Quinlan, et qu'il a de fait payé en temps utile à sa succession;

CONSIDERANT que ce contrat a conféré à l'appelant Robertson un titre valide aux valeurs mentionnées dans la lettre, savoir: 800·actions Ontario Amiesite Asphalt, limitée; 1151 actions Quinlan, Robertson et Janin ltée; et 250 actions Amiesite Asphalt limitée; dont les certificats (à l'exception de celui des actions Ontario Amiesite Asphalt) avaient été endossés en blanc et remis à Robertson par Quinlan dans une entrevue précédente, le 21 mai 1927;

CONSIDERANT, quant aux 1000 actions privilégiées et aux 500 actions ordinaires de la compagnie Fuller Gravel, détenues par Hugh Quinlan à son procès, que les exécuteurs testamentaires, dans l'exercice légitime de leurs pouvoirs, en décidèrent la vente en juillet 1927, au prix de $50.00 l'action privilégiée avec boni de ½ action ordinaire, ce qui représentait la pleine valeur des actions; que l'appelant Robertson fut chargé de les vendre au prix fixé; qu'il réussit à en vendre 600 par lots de 200 aux nommés Reyner, McCord et Tummon, et transporta les 400 autres au dit Tommon pour être vendues par lui à deux de ses amis; mais que, Tummon n'ayant pu trouver preneur pour ces 400 actions, les remit à Robertson, qui crut bien faire de les garder en en payant à la succession le prix fixé de $50.00 l'action, soit une somme de $20,000.00;

CONSIDERANT, néanmoins, que l'appelant Robertson, à cause de ses fonctions d'exécuteur testamentaire et de fiduciaire de la succession, ne pouvait se porter ainsi acquéreur de biens confiés à son administration (C.civ., art. 1404); et qu'ayant revendu ces actions plus tard au prix de $90.00 l'action, à l'occasion de la formation inopinée d'un monopole en mai 1928, il devait compte à la succession du bénéfice de $16,000.00 qu'il a réalisé dans cette opération;

CONSIDERANT, par ailleurs, qu'en exécution de la transaction intervenue le 31 janvier 1934, ledit Robertson a payé à la succession Quinlan une somme de $50,000.00, excédant de beaucoup ce qu'il devait alors à ladite succession, conformément au considérant qui précède;

CONSIDERANT que l'intimée Ethel Quinlan n'a pas établi les griefs de nullité invoqués dans sa réponse pour demander l'annulation de la dite transaction;

CONSIDERANT que le droit de plaider au bénéfice de la succession, que lui a reconnu la Cour Suprême, en déclarant qu'elle avait un intérêt et un status suffisants pour maintenir dans son intégralité le patrimoine de la succession, est bien distinct de la créance, qui faisait l'objet de ses procédures, et qui restait soumise aux pouvoirs d'administration conférés par Hugh Quinlan à ses exécuteurs testamentaires, et

bertson, et rejeté avec dépens les trois contestations produites à l'encontre de cette intervention par Robertson, par dame Margaret Quinlan, et par les exécuteurs testamentaires, condamnant ceux-ci personnellement aux frais de leur contestation;

ATTENDU que de ces arrêts quatre appels ont été logés devant cette Cour: deux par Robertson; le premier à l'encontre du jugement qui a maintenu contre lui l'action originaire et la prétendue demande
10 incidente, et l'a condamné à payer à la succession Quinlan $169,841.00, sauf à déduire un montant de $50,000.00 par lui payé en vertu de la transaction du 31 janvier 1934; le second, à l'encontre du jugement qui a maintenu contre lui l'intervention de Katherine Kelly; un troisième par dame Ethel Quinlan pour demander que le montant de la condamnation prononcée contre Robertson soit augmenté à plus de $2,000,000.00; et enfin, le quatrième par les exécuteurs-testamentaires de la succession Quinlan à l'encontre du jugement qui a rejeté leur contestation de l'intervention de dame Katherine Kelly, et les a condamnés personnellement aux frais
20 de leur contestation;

ATTENDU que cette Cour a ordonné qu'il ne soit fait qu'un seul dossier conjoint pour être commun aux quatre appels;

ATTENDU qu'il y a eu lieu d'examiner d'abord le mérite du jugement qui a prononcé sur l'action originaire et la prétendue demande incidente;

ATTENDU que le jugement de la Cour Suprême, qui a renvoyé
30 le dossier de l'action originaire à la Cour supérieure pour compléter la preuve faite dans une première instruction, a déclaré admissible la preuve orale de l'adhésion de Hugh Quinlan à la teneur de la lettre du 20 juin 1927, (parce qu'il y avait au dossier un commencement de preuve par écrit), et a enjoint au tribunal d'admettre cette preuve relativement à certains faits bien définis, dont le premier est justement: La réponse donnée par Hugh Quinlan quand la lettre du 20 juin lui a été lue;

CONSIDERANT que dans la première instruction de la cause il avait été prouvé à la satisfaction de l'honorable juge Martineau et de la
40 Cour Suprême que, dans une entrevue du 20 juin 1927, la lettre en question avait été lue à Hugh Quinlan, à son domicile, par le témoin Leamy, en présence de Robertson; et qu'à ce moment Quinlan était sain d'esprit et en état de consentir une vente;

CONSIDERANT que le consentement de Hugh Quinlan au contenu de la lettre a été prouvé par les mêmes témoins;

CONSIDERANT que cette lettre, en raison de l'assentiment de Hugh Quinlan au transport d'actions qu'elle mentionne, et de son acceptation des engagements corrélatifs souscrits par Robertson, constate une

ATTENDU que l'intimée demanda ensuite et obtint la permission de mettre en cause comme défendeurs toutes les parties à la transaction (jugement du 26 juin 1935), et plus tard, comme mis en cause, les procureurs de toutes les parties dont l'appelant Robertson avait payé les frais;

ATTENDU qu'assignée dans la cause, dame Margaret Quinlan demanda à son tour et obtint que la fille mineure de l'intimée, Katherine Kelly, fut aussi mise en cause; et procéda ensuite à contester la demande d'annulation de la transaction, produite par l'intimée Ethel Quinlan, alléguant que cet acte était dans l'intérêt de la succession et que les exécuteurs testamentaires avaient le pouvoir de le consentir;

ATTENDU que Katherine Kelly, représentée par son tuteur, s'est portée intervenante dans la cause pour demander également la nullité de la transaction, en arguant substantiellement des moyens invoqués par sa mère, l'intimée Ethel Quinlan; et que son intervention a fait l'objet de trois contestations distinctes de la part de l'appelant Robertson, de dame Margaret Quinlan et des exécuteurs testamentaires de la succession, qui ont soutenu la validité de la transaction;

ATTENDU que ces diverses instances ont été soumises à la Cour Supérieure sur une preuve commune à toutes les contestations, et qui comprenait la preuve orale et documentaire déjà rapportée au cours de la première instruction;

ATTENDU que, le 26 avril 1940, le tribunal de première instance a prononcé dans la cause les arrêts suivants: Disposant d'abord de la réponse de l'intimée Ethel Quinlan à l'encontre du plaidoyer supplémentaire de l'appelant Robertson, — réponse qu'il a désignée sous le nom de demande incidente, — il en a maintenu les conclusions, en annulant l'acte de transaction du 31 janvier 1934, par les motifs que ni les héritiers alors vivants de feu Hugh Quinlan, ni ses exécuteurs testamentaires ne pouvaient valablement le consentir; puis, statuant sur le fond de l'action originaire, il a décidé que la lettre du 20 juin 1927 n'avait jamais été lue à Hugh Quinlan, et qu'en admettant même qu'elle lui eût été lue et qu'elle fût acceptée par lui, cette lettre ne constituait pas en droit un titre d'acquisition par Robertson des actions des trois compagnies y mentionnées; que, relativement aux 1000 actions de la compagnie Fuller Gravel qui se trouvaient dans la succession de Hugh Quinlan, 850 avaient été vendues en réalité à des personnes interposées pour Robertson, et que ces ventes étaient illégales et nulles aux termes de l'article 1484 C.civ.; et après avoir évalué de nouveau les actions illégalement acquises par Robertson, il l'a condamné purement et simplement à payer la valeur ainsi établie de ces actions, sauf à déduire les montants par lui antérieurement versés, et à restituer le certificat des 200 actions d'Ontario Amiesite Asphalt, déclarées sans valeur; et enfin, statuant sur l'intervention de Katherine Kelly, il en a maintenu les conclusions contre l'appelant Ro-

1934, intervint un acte de transaction entre l'appelant Robertson, les exécuteurs testamentaires et tous les héritiers de feu Hugh Quinlan, y compris la demanderesse Margaret Quinlan, mais à l'exception de l'intimée Ethel Quinlan; qu'aux termes de cet acte, en vue de mettre fin au procès, la succession revendait, en autant que besoin, à l'appelant Robertson, toutes les valeurs en litige, et renonçait à tous recours contre lui, sur paiement d'un prix additionnel de $50,000.00 et de tous les frais encourus à date; mais qu'une clause de l'acte prévoyait qu'il ne prendrait effet qu'après avoir été soumis à la Cour suprême, et pourvu que la Cour ne voit aucune objection à ce que les exécuteurs testamentaires y donnent suite, ou que la Cour en donne acte;

ATTENDU que, l'acte de transaction ayant été produit devant la Cour Suprême au terme suivant, dame Margaret Quinlan déclara qu'elle se désistait de son action; mais que la présente intimée décida de continuer seule le procès;

ATTENDU que par son jugement, en date du 6 juin 1934, la Cour Suprême infirma le jugement de cette Cour en entier et celui de la Cour supérieure en partie; déclara que la Cour supérieure avait eu tort de refuser la preuve orale offerte par l'appelant Robertson, et renvoya les parties devant la Cour supérieure pour y compléter la preuve sur une série de faits et de circonstances énoncés au jugement, et notamment pour y admettre la preuve de la réponse donnée par Hugh Quinlan, quand la lettre du 20 juin 1927 lui a été lue; qu'elle déclara en plus que certains points particuliers décidés par les tribunaux inférieurs étaient passés en force de chose jugée; que, relativement à la transaction du 31 janvier 1934, elle statua que cet acte formait partie du dossier de la cause, et en donna acte, "without passing upon the validity or the binding character of the agreement in question, nor deciding whether or not the intervenants within their powers and the officers of the intervenants within their authority"; qu'elle déclara enfin que le litige avait pris fin en autant que l'appelant Robertson et dame Margaret Quinlan étaient concernés; et reconnut que l'intimée Ethel Quinlan, désormais seule demanderesse dans la cause, avait un intérêt et un status suffisants "to preserve intact the *corpus* of the estate";

ATTENDU que, le dossier étant revenu à la Cour supérieure, l'appelant produisit un plaidoyer supplémentaire pour invoquer comme moyen additionnel de défense la transaction du 31 janvier 1934 et alléguer qu'il avait réellement payé les considérations mentionnées dans l'acte;

ATTENDU que l'intimée Ethel Quinlan, en réponse à ce plaidoyer, contesta la validité de la transaction et en demanda la nullité parce que l'acte avait été signé par les héritiers par erreur et à la suite de fausses représentations; parce que l'acte excédait les pouvoirs des exécuteurs testamentaires; et parce que les officiers qui avaient signé pour les compagnies exerçant les fonctions d'exécutrices testamentaires n'étaient pas autorisés à cette fin;

contre eux; que l'appelant Robertson a invoqué en outre une lettre du 20 juin 1927 comme titre d'acquisition des actions Quinlan, Robertson et Janin, Amiesite Asphalt, et Ontario Amiesite Asphalt, et rapporté les circonstances particulières à la vente des actions Fuller Gravel;

ATTENDU qu'une première instruction de la cause eut lieu devant l'honorable juge Martineau, qui admit l'appelant Robertson à prouver, notamment, que, au cours d'une entrevue du 21 mai 1927, Hugh Quinlan lui avait remis, après les avoir endossés en blanc, ses certificats d'actions dans les compagnies Quinlan, Robertson et Janin et Amiesite Asphalt; qu'au cours d'une nouvelle entrevue du 20 juin 1927, la lettre du même jour, relative au transport des actions, avait été lue à Hugh Quinlan; et qu'à ce moment Quinlan était sain d'esprit et en état de consentir une vente; mais que l'honorable juge refusa d'admettre la preuve orale de l'adhésion que Quinlan avait pu donner à la teneur de la lettre;

ATTENDU que par son jugement final, en date du 6 février 1931, l'honorable juge a rejeté l'action *in toto* quant au défendeur Capital Trust Corporation; qu'il a aussi rejeté, quant à l'appelant Robertson, les conclusions qui demandaient sa destitution de la charge d'exécuteur testamentaire, une condamnation à rendre compte, et l'annulation de l'inventaire; mais qu'il l'a condamné: 1o.—à remettre à la succession les actions des compagnies mentionnées dans la lettre du 20 juin 1927, (puisque le consentement de Quinlan à la teneur de cette lettre n'avait pas été prouvé), et à défaut de les remettre, à en payer la valeur qu'il fixa à $372,928.00, sauf à déduire la somme de $250,000.00 qu'il avait déjà payée; 2o.—à remettre aussi à la succession 400 actions de la compagnie Fuller Gravel, dont il n'avait pu se porter acquéreur légalement, à la rétrocession d'un tiers, à cause de sa fonction d'exécuteur testamentaire; et, à défaut par lui de remettre ces actions, d'en payer le prix de $90.00 chacune que la succession aurait pu en obtenir, soit $36,000.00, sauf à déduire la somme de $20,000.00, représentant $50.00 l'action qu'il en avait déjà payé;

ATTENDU que seul l'appelant Robertson se pourvut en appel de ce jugement devant cette Cour, après avoir eu le soin de se démettre de ses fonctions d'exécuteur testamentaire, et avoir nommé comme son successeur le Trust Général du Canada;

ATTENDU que cette Cour, par son jugement du 31 décembre 1932, confirma en substance le jugement de l'honorable juge Martineau, tout en y apportant quelques légères modifications;

ATTENDU que l'appelant interjetta un nouvel appel à la Cour Suprême du Canada; que l'audition, commencée dans les premiers jours de décembre 1933, fut ajournée par la Cour au terme de février 1934, pour permettre aux exécuteurs testamentaires de la succession d'intervenir sur l'appel; que, pendant l'ajournement, c'est-à-dire le 31 janvier

In the Court of King's Bench (Appeal Side)

Judgment of the Court of King's Bench (Appeal Side) 30 April 1943

JUGEMENT

LA COUR DU BANC DU ROI:—

Après avoir entendu les parties par leurs avocats sur le fond des quatres appels en cette cause, examiné les actes de procédure, les pièces
10 et les dépositions; et sur le tout délibéré:—

ATTENDU que, dans l'automne 1928, l'intimée Ethel Quinlan (dame Kelly) et sa soeur Margaret Quinlan (dame Desaulniers), enfants de feu Hugh Quinlan et légataires chacune d'une part variable des revenus de la succession de leur père, ont institué l'action originaire en cette cause contre les exécuteurs testamentaires de la succession, alléguant, entre autres choses, que le 22 juin 1927, l'appelant Robertson avait acquis, par fraude et collusion, de feu Hugh Quinlan, alors que celui-ci était incapable de donner un consentement valide, vu sa maladie, 250
20 actions de Amiesite Asphalt Limited et un grand nombre d'autres actions au prix de $100.00 l'action, alors que ces actions valaient $1000.00 chacune; que durant l'année 1928 la défenderesse Capital Trust Corporation avait vendu au dit appelant, son coexécuteur testamentaire, frauduleusement et collusoirement, 1151 actions de la Compagnie Quinlan, Robertson et Janin, au prix de $250,000.00 alors que ces actions valaient $700,000.00, et 1000 actions privilégiées et 500 actions communes de Fuller Gravel Co., à un prix nominal, alors que ces actions valaient $300,000.00; enfin;
30 que leur père était à son décès actionnaire dans plusieurs autres compagnies, dont elles nomment quelques-unes;

ATTENDU que par leurs conclusions elles ont demandé 1o.—que les exécuteurs testamentaires fussent destitués de leurs charges et condamner à rendre compte; 2o.—que les transports des actions ayant appartenu à leur père dans les compagnies Quinlan, Robertson et Janin, Amiesite Asphalt et Fuller Gravel fussent annulés et les défendeurs condamnés à remettre ces actions à la succession ou à en payer la valeur $1,300,000.00; 3o.—qu'il fut déclaré que les actions mentionnées dans le der-
40 nier groupe de compagnies appartenaient à la succession Hugh Quinlan, et, au cas où les défendeurs ne pourraient les remettre, qu'ils fussent condamnés à en payer la valeur, soit $1,000,000.00; 4o.—que l'inventaire préparé par les exécuteurs testamentaires fut annulé comme faux et frauduleux; et 5o.—qu'il fut déclaré que tous les profits réalisés et les dividendes payés depuis la mort de Hugh Quinlan par toutes les compagnies mentionnées en la déclaration appartenaient à la succession;

ATTENDU que les défendeurs ont produit des défenses distinctes, niant toutes les imputations de fraude, de collusion et de nullité, portées

In the Privy Council.

ON APPEAL FROM THE COURT OF KING'S BENCH PROVINCE OF QUEBEC

10

BETWEEN

ETHEL QUINLAN (Wife of John Kelly)

(Plaintiff) Petitioner,

AND

20 ANGUS WILLIAM ROBERTSON, and
CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA,

Respondents.

PETITION FOR SPECIAL LEAVE TO APPEAL

30

SHEWETH :—

1. On October 25th 1928 the present action was instituted by your Petitioner and her sister Margaret Quinlan, both beneficiaries under the Will of their father, the late Hugh Quinlan, against the executors and trustees of their father's estate, the Respondent Robertson and Capital Trust Corporation Limited, both personally and es-qualité.

40

2. By their said action, your Petitioner and her sister complained that the said executors and trustees were guilty of fraud in the administration of the said estate; that the inventory and financial statement prepared by the executors and trustees, without notice to the heirs and beneficiaries, were inaccurate, incomplete, false and fraudulent; that the executors and trustees had committed breaches of trust, and that one of the executors and trustees, the Respondent Robertson, had illegally and fraudulently acquired possession of assets of the estate consisting of shareholdings in certain corporations valued in the declaration

at $1,355,000. by means of purported sales to himself, while an executor and trustee of the said estate, for the price of $250,000.

3. By their said action, your Petitioner and her sister claimed the return of the said shareholdings or payment of their value, the annulment of the said inventory and financial state-
10 ment, the removal of the said executors and trustees, and an accounting of their administration.

4. The trial judge, Mr. Justice Martineau, found in favour of your Petitioner and her sister, condemned the Respondent Robertson to return the said shareholdings or pay their value with dividends and profits and condemned Respondent Robertson to pay costs and Capital Trust Corporation Limited to pay personally the costs of its contestation of the action.

20 **5.** The learned trial judge, accepting the explanations offered by the executors and trustees that they acted on legal advice did not order their removal, did not annul the inventory and financial statement and not having ordered their removal, did not order an accounting.

6. However, accepting the direction of the learned trial judge, given because their existed a conflict between the Respondent Robertson's personal interest and his duty as an executor and trustee, the latter resigned his charge, but continuing to exer-
30 cise a privilege conferred upon him by the provisions of the Will appointing him, the Respondent Robertson named his own successor, General Trust of Canada, without consulting or otherwise obtaining the approval of the heirs and beneficiaries.

7. The Respondent Robertson appealed from the decision of the trial judge to the Court of King's Bench, Quebec, and that Court confirmed the finding of the learned trial judge but modified his judgment in respect to the condemnation to profits and
40 dividends, limiting same to bonuses and dividends;

8. Your Petitioner and her sister, not having cross-appealed to the said Court of King's Bench, the learned trial judge's decision was not altered with respect to the removal of the executors and trustees.

9. From the decision of the Court of King's Bench the Respondent Robertson appealed to the Supreme Court of Canada and again your Petitioner and her sister did not cross appeal.

10. The Supreme Court allowed the appeal of Respondent Robertson and reserved and set aside the judgment of the Court of King's Bench.

11. The Supreme Court also quashed, in part, the judgment of the learned trial judge as well as certain rulings made
10 by the trial judge refusing the admission of oral evidence of certain facts and circumstances principally the evidence offered to establish Quinlan's consent to a letter produced as defendant's exhibit D.R.-1, dated 20th of June, 1927, that is six days before Quinlan's death and while he was mortally ill.

12. The part of the judgment of the Superior Court, which was not quashed and which the judgment of the Supreme Court declared to be res judicata, is stated in the judgment of the Supreme Court, namely:
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"1o.—The prayer that the Appellant A. W. Robertson and the Capital Trust Company be removed from office —

"2o.—The prayer that they be condemned to render an account —

"3o.—The prayer that the inventory be annulled —

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"4o.—The various allegations of fraud against the Appellant, as well as the allegation that the late Hugh Quinlan was not of sound mind when the letter of June 20th, 1927, was read to him,—

and that the said judgment of the Superior Court in respect to the dismissal of the above mentioned conclusions, is now "res judicata" between the parties."

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13. The Supreme Court also ordered that the case be remitted to the Superior Court, for a partial re-hearing "to complete the evidence already taken by a further enquête, and then secure a new adjudication on the merits of the issues herein shown to be decided. . . . and that oral evidence be admitted at such further enquête, of the following facts and circumstances, to wit:—

A.—The answer given by the late Hugh Quinlan when the letter of June 20th, 1927, was read to him: including, of course, the conduct, statements, communications and declarations of the persons present when the letter was so

read ,and of the late Hugh Quinlan himself, and generally, all relevant circumstances relating thereto;

B.—All the facts, circumstances, statements and communications relating to the drafting of the said letter of June 20th, 1927, including the conduct of all those who shared in the drafting of the said letter; and the whereabouts and safekeeping of said letter;

C.—All the facts, circumstances, statements and communications relating to the visits of the Honourable J. L. Perron and of the present appellant to the late Hugh Quinlan, during the month of May, 1927, or thereabout, and to the endorsement of the four certificates of shares filed as exhibits P-9, P-10, P-26 and P-27; also to the Memorandum of the 21st of May, 1927, P-66, including the conduct of all the participants in these various events;

D.—Generally, all facts, conditions and circumstances tending to show that the late Hugh Quinlan agreed, or disagreed, as the case may be, to the contents of the letter of June the 20th, 1927—

The respondent would also bring new evidence of all facts, declarations and statements which might tend to rebut the evidence to be afforded as aforesaid by the appellant."

14. The Supreme Court did not order that the case return before it after such further inquiry and new adjudication.

15. Your Petitioner submits that the Supreme Court erred in restricting the remitter and new adjudication to the issues relating merely to the validity or nullity of the Respondent Robertson's purported acquisition of the said shareholdings and the amount of the condemnation, if any.

16. With the material then before it, which the Supreme Court considered incomplete, and which the said Court ordered to be completed by a further inquiry, the Supreme Court should not have declared that the ancillary issues were excluded from the rehearing and new adjudication.

17. The facts and circumstances concerning which the Supreme Court ordered a further inquiry were very comprehensive and of sufficient breadth to render possible a finding of

fraud in the administration of the trust, with a consequent duty upon and jurisdiction in the Court of first instance to annul the said inventory and financial statement and order the removal of the executors and an accounting of their administration.

18. The Supreme Court erred in not recognizing that 10 the jurisdiction of the Court to remove the trustees was ancillary to its principal duty to see that the trust were properly executed, and that in ordering a new adjudication on the issue raised by your Petitioner's complaint that the Respondent Robertson, with the knowledge of his co-executor and trustee, had illegally and fraudulently purported to acquire the said shareholdings, jurisdiction was automatically conferred upon the lower Court to which the case was remitted to order the removal of the trustee, whether such removal was asked for or not, and even if the Trustees, subsequent to judgment, had become guilty of some miscon- 20 duct, or if, susbequently to judgment, some circumstances had arisen which made it necessary to remove the trustees.

19. The Supreme Court, by the express terms of its judgment, purported to limit the jurisdiction of the lower Court so as to exclude any new adjudication upon the questions declared by it to have become res judicata as aforesaid, and, in fact, both the trial judge at the remitter (Gibsone J.) in his judgment thereon, and the Court of King's Bench, in its judgment on the appeal and cross-appeal, declared that they were bound by the findings 30 of the Supreme Court that the said issues were res judicata.

20. Your Petitioner submits that the Supreme Court of Canada erred also in the following matters:—

1.—In ordering oral evidence of Quinlan's consent:—

(a) because the contract to be proved was alleged by the Respondent who offered the oral evidence to be in 40 writing;

(a) because the sufficiency of a writing for a commencement of proof to make probable the facts to be proved is a question of fact and a Court of first instance should not be overruled unless there is manifest error on the part of the judge in appreciating the evidence;

(c) in finding that your Petitioner in her declaration had admitted the existence of a sale of the shareholdings in question by Quinlan to Respondent Robertson;

(d) because it is most impossible that the letter D.R.-1 could have been intented as a bill of sale.

This letter is in the following terms:

"Mr. Hugh Quinlan,
"357 Kensington Ave.,
"Westmount, Que.

"Montreal, June 20th. 1927

10

"Dear Hugh,

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

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

20

"Which stock represented all your holdings in the "above companies. I have agreed to obtain for you the sum "of two hundred and fifty thousand dollars ($250,000.00) "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 6%. Should "your health permit you to attend to business within one "year from this date, I agree to return all of the above "mentioned stocks to you on the return of the monies I "have paid you thereon including interest at 6%.

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"Yours truly,

"(signed) A. W. Robertson."

2.—In declaring that the letter D.R.-1 contained the elements of a valid contract, quoting from the reasons of Mr. Justice Cannon speaking for the Supreme Court: "Il "s'agit dans l'espèce d'une vente avec 'réserve d'élection "d'amis' ou de déclaration de 'command' ".

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3.—In declaring res judicata the contention that the letter D.R.-1 was read to Quinlan on the 20th of June, 1927, when it was evident that your Petitioner had not been called upon to bring evidence to contradict or rebut the evidence made by the Respondent Robertson seeing that the trial judge had refused to allow Respondent to complete this proof by oral evidence of Quinlan's answer supposing the letter were read to him.

4.—In declaring res judicata the various allegations of fraud against the Respondent as well as the allegation that the late Hugh Quinlan was not of sound mind on the 20th of June, 1927.

21. The Supreme Court has held that the elements of 10 commencement of proof in writing were the following:—

1.—The admission of a sale in Plaintiffs' pleadings.

2.—The transfer of the shares bearing Quinlan's signature and the possession of the share certificates by the Respondent Robertson.

3.—The notes prepared under the dictation of Quinlan.

20

4.—An Agreement of 1925 between Quinlan and his associates Respondent Robertson and Janin providing for the acquisition by the surviving partners of the shares of a deceased partner.

22. The trial judge, confirmed unanimously by the Quebec Court of Appeal, did not consider that these elements constituted a commencement of proof in writing. He considered that your Petitioner had not alleged more than a purported sale. 30 Further the Supreme Court, in considering that the issues between the parties did not put in doubt the existence of a sale on the 20th of June, 1927, failed to take cognizance of paragraph 29 of the declaration wherein it is alleged that the principal item of shareholdings, namely 1151 shares of Quinlan. Robertson & Janin, Ltd., were sold in the course of the year 1928 (that is long after Quinlan's death) by Capital Trust Corporation Limited, one of the executors and trustees to the defendant Robertson, the other executor and trustee.

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23. The transfer of the shares bearing Quinlan's signature to Respondent Robertson appears from the evidence to have taken place on the 22nd day of June, 1927, on which date Quinlan was undoubtedly incapable and such transfers were made without notice to Quinlan and were merely the unilateral act of Robertson.

24. The possession of the share certificates by Respondent Robertson is explained by the notes prepared under the dictation of Quinlan, dated 21st of May, 1927, to the effect that

the shares were deposited in A.W.R's box, which might mean Robertson's safety box or safety box of A. W. Robertson Limited, a company in which Robertson and Quinlan were equal partners and as it was proved on the remitter the latter is correct.

25. The agreement of 1925 gave the surviving associates 10 of Quinlan, Robertson & Janin an option to purchase the shares of a deceased associate *without any obligation to do so* and this agreement was no longer in force and the Respondent Robertson so stated in his evidence.

26. The fact that the Respondent Robertson's evidence, actions, pleadings and letters are inconsistent with the theory of a sale of the shares to him by Quinlan was, it is submitted, properly taken into account by the trial judge in deciding that this was not a case in which oral evidence ought to be admitted. His 20 pleadings were that the shares were handed over to him in return for a letter written by him and addressed to Quinlan in which he agreed to find Quinlan a purchaser for the shares in the sum of $250,000; his evidence was that he did not know how, when or why, he obtained possession of the share certificates. At a certain moment in the trial it is revealed that he had had the share certificates in his safety deposit box since the 21st of May, 1927; from then on his evidence is not in accordance with his pleading that he received the shares in exchange for the letter of the 20th June, 1927. His letters show that he was giving an impression to his co- 30 executor that he was trying to find a buyer for the shares and that he had found one ready to pay the amount which Quinlan is supposed to have accepted and he proceeded to take steps to sell the shares to his unnamed buyer. But the next thing the co-executor hears is that the Respondent Robertson purchases the shares himself on 29th December, 1927, while he was still an executor.

27. The partial re-hearing took place and a new adjudication was rendered in the Superior Court by Mr. Justice Gibsone.

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28. The said new adjudication, restricted as it was, to the principal issue as aforementoned, condemned the Respondent Robertson to pay to the estate a sum of $169,842. plus interest at the time of the judgment $48,093.88 a total of $217,935.88.

29. Thus, by three judgments, that of the first trial judge, that of the first appeal to the Court of King's Bench, and that of the second trial judge, the Respondent Robertson was held to have illegally acquired the said shareholdings and was ordered to effect restitution.

30. From the said judgment of Mr. Justice Gibsone, the Respondent Robertson appealed and your Petitioner cross appealed to the Court of King's Bench.

31. The Court of King's Bench allowed the appeal of Respondent Robertson and dismissed your Petitioner's action.

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32. The Court of King's Bench, not only gave the effect of res judicata to those issues said to be such in the Supreme Court judgment, but also declared that the Supreme Court judgment itself had become res judicata.

33. On November 16th, 1934, shortly after the said Supreme Court judgment was rendered, your Petitioner made application for special leave to appeal from the said judgment to your Most Gravious Majesty in Council. Leave was refused on the ground that an appeal should not be allowed, in the middle of a case, on a question equally open on appeal at the end of a case. (Per Lord Thankerton and Lord Wright, at p. 5, and per Lord Blanesburgh, at p. 13, shorthand notes of the hearing of November 16th, 1934, Frank Cannon, shorthand writer.)

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34. Your Petitioner has availed herself of the right to appeal from the said judgment of the Quebec Court of Appeal, which lies, as of right, to Your Most Gracious Majesty in Council, and the security furnished by your Petitioner has been accepted and approved by a judge of the said Court.

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35. Now that the remitter has been heard and the intermediate appeal disposed of your Petitioner again humbly seeks special leave to appeal from the said Supreme Court judgment of June 6th 1934, in order that the two appeals may then be consolidated and the whole case submitted without restrictions to Your Most Gracious Majesty in Council.

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36. Your Petitioner having appealed as of right from the said judgment of the Court of King's Bench of April 30th, 1934, to Your Most Gracious Majesty in Council, humbly submits that justice cannot be rendered on her said appeal unless special leave to appeal from the said Supreme Court judgment is graciously granted prior thereto, or alternatively, unless Your Most Gracious Majesty in Council, in adjudicating upon the present Petition, will be pleased to order that the Supreme Court judgment is encompassed in the appeal as of right from the said judgment of the Court of Kng's Bench.

Your Petitioner therefore humbly prays that Your Most Majesty in Council will be pleased to order that your Petitioner shall have special leave to appeal from the said judgment of the Supreme Court of Canada of the 6th day of June, 1934, or, alternatively, that the said Supreme Court judgment is encompassed in your Petitioner's appeal as of right from the judgment
10 of the Court of King's Bench of the 30th day of April, 1943; and your Petitioner further prays that all appeals in connection with this case be joined and consolidated including the appeal of Katherine Kelly and that Your Majesty may be graciously pleased to make such further and other order as to Your Majesty in Council may appear fit and proper.

And Your Petitioner will ever pray etc.

HENRY CHAUVIN.

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AT THE COURT AT BUCKINGHAM PALACE

The 20th day of January, 1944

PRESENT

10

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
LORD STANMORE
LORD LEATHERS
SECRETARY SIR ARCHIBALD SINCLAIR
SIR ARCHIBALD CLARK KERR
MR. ASSHETON
MR. MABANE
MR. PALING
CAPTAIN WATERHOUSE

20 WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 14th day of December 1943 in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Ethel Quinlan in the matter of an Appeal from the Court of King's Bench for the Province of Quebec between Ethel Quinlan Appellant and Angus William 30 Robertson Capital Trust Corporation Limited and General Trust of Canada Respondents setting forth (amongst other matters) that on the 25th October 1928 the present Action was instituted by the Petitioner and her sister Margaret Quinlan both beneficiaries under the Will of their father the late Hugh Quinlan against the executors and trustees of their father's estate the Respondent Robertson and Capital Trust Corporation Limited both personally and es-qualité: that by their Action the Petitioner and her 40 sister complained that the executors and trustees were guilty of fraud in the administration of the estate; that the inventory and financial statement prepared by the executors and trustees without notice to the heirs and beneficiaries were inaccurate incomplete false and fraudulent; that the executors and trustees had committed breaches of trust and that one of the executors and trustees the Respondent Robertson had illegally and fraudulently acquired possession of assets of the estate consisting of shareholdings in certain corporations valued in the

declaration at $1,355,000. by means of purported sales to himself while an executor and trustee of the said estate for the price of $250,000: that Martineau J. found in favour of the Petitioner and her sister condemned the Respondent Robertson to return the shareholdings or pay their value with dividends and profits and condemned Respondent Robertson to pay costs and Capital Trust Corporation Limited to pay personally the costs of its contestation of the Action: that accepting the direction of the learned trial judge given because there existed a conflict between the Respondent Robertson's personal interest and his duty as an executor and trustee the latter resigned his charge but continuing to exercise a privilege conferred upon him by the provisions of the Will appointing him the Respondent Robertson named his own successor General Trust of Canada without consulting or otherwise obtaining the approval of the heirs and beneficiaries: that the Respondent Robertson appealed to the Court of King's Bench and that Court confirmed the finding of the learned trial judge but modified his Judgment in respect to the condemnation to profits and dividends limiting the same to bonuses and dividends: that the Respondent Robertson appealed to the Supreme Court of Canada: that the Supreme Court allowed the Appeal of Respondent Robertson and reversed the Judgment of the Court of King's Bench: that the Supreme Court also quashed in part the Judgment of the learned trial judge as well as certain rulings made by the trial judge refusing the admission of oral evidence of certain facts and circumstances principally the evidence offered to establish Quinlan's consent to a letter produced as Defendant's exhibit D.R.-1 dated 20th June 1927 that is six days before Quinlan's death and while he was mortally ill: that the Supreme Court also ordered that the case be remitted to the Superior Court for a partial re-hearing "to complete the evidence already taken by a further enquête and then secure a new adjudication on the merits of the issues herein shown to be decided . . . and that oral evidence be admitted at such futher enquête" of certain facts and circumstances: that the partial re-hearing took place and a new adjudication was rendered in the Superior Court by Gibsone J.: that the new adjudication restricted as it was to the principal issue as aforementioned condemned the Respondent Robertson to pay to the estate a sum of $169,842. plus interest at the time of the judgment $48,093.88 a total of $217,935.88: that thus by three Judgments the Respondent Robertson was held to have illegally acquired the shareholdings and was ordered to effect resti-

tution: that the Respondent Robertson appealed and the Petitioner cross-appealed to the Court of King's Bench: that the Court of King's Bench allowed the Appeal of Respondent Robertson and dismissed the Petitioner's Action: that on the 16th November 1934 shortly after the Supreme Court Judgment was rendered the Petitioner made application for special leave to appeal to Your
10 Majesty in Council: that leave was refused on the ground that an Appeal should not be allowed in the middle of a case on a question equally open on appeal at the end of a case: that the Petitioner has availed herself of the right to appeal from the Judgment of the Court of King's Bench which lies as of right to Your Majesty in Council and the security furnished by the Petitioner has been accepted and approved by the Court: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court
20 of the 6th June 1934 or for such further and other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against
30 the Judgment of the Supreme Court of Canada dated the 6th day of June 1934 (2) that the Appeal ought to be consolidated with the Appeal from the Judgment of the Court of King's Bench already admitted and (3) that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the
40 usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

In the Privy Council.

ON APPEAL FROM THE COURT OF KING'S BENCH PROVINCE OF QUEBEC

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10 BETWEEN

KATHERINE KELLY (Wife of Raymond Shaughnessy)
(Intervenant) Petitioner,

AND

ANGUS WILLIAM ROBERTSON, and
CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA,
20 Executor of Estate Hugh Quinlan *(Contestants) Respondents.*

PETITION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

TO THE KING'S MOST EXCELLENT MAJESTY
30 IN COUNCIL,

THE HUMBLE PETITION of the above named KATHERINE KELLY, Wife separate as to property of Raymond Shaughnessy,

SHEWETH :—

1. Your Petitioner is desirous of obtaining special leave to appeal in forma pauperis from a judgment of the Court of King's Bench of the Province of Quebec, dated the 30th. day of 40 April, 1943, reversing the judgment of the Superior Court, District of Montreal, dated the 26th of April, 1940, which had dismissed the contestation of each Respondent of an intervention made and filed by your Petitioner in a suit taken by your Petitioner's mother, Ethel Quinlan, and her aunt Margaret Quinlan against the Respondent Robertson and the Capital Trust Corporation Limited, personally and as executors of the will of your petitioner's grandfather, the late Hugh Quinlan.

2. The said suit of Ethel and Margaret Quinlan was instituted against the Respondents, Robertson, and the Capital Trust Corporation Limited, to have inter alia replaced in the

estate of the late Hugh Quinlan certain shares which the respondent Robertson alleged that he had purchased from Quinlan shortly before the latter's death, for the sum of $250,000. The Quebec courts decreed on the first trial that the shares in question should be restored or, in the alternative that their value, found to be $372,928. should be paid to the estate. They also de-
10 creed that certain shares of Fuller Gravel Limited belonged to the estate and were wrongfully purchased by the said Robertson while he was the executor of the Estate and fixed the value at $36,000.

3. The Capital Trust Corporation Limited and the General Trust of Canada, the latter company having on the 19th February 1931, been appointed as joint executor with the Capital Trust in the place of Respondent Robertson who, on that date, had resigned as executor, took no part in the appeal to the Court
20 of King's Bench but obtained leave to intervene in the case before the Supreme Court of Canada.

4. The Supreme Court ordered the case to return to the Superior Court to allow verbal evidence to be given by the Respondent Robertson as to Quilan's verbal assent to the terms of a letter bearing date the 20th of June 1927 written by Robertson to Quinlan in respect to which Robertson and his accountant had testified that this letter was read to Quinlan on the 20th of June, 1927, that is six days before Quinlan's death, this letter being
30 relied upon by Robertson as containing the terms of an agreement with Quinlan for the purchase of shares belonging to the latter.

5. Before the case was heard in the Superior Court at Montreal on the reference from the Supreme Court, the Respondent Robertson filed a supplementary plea to the action. In this supplementary plea, Respondent Robertson pleaded that he had settled with the executors of the Quinlan Estate as set forth in an agreement passed before Maitre Papineau Couture, Notary, on
40 the 31st January, 1934, by purchasing and repurchasing so far as might be necessary from the executors, all the shares he had been ordered to return to the Estate in consideration of the payment of an additional $50,000. and the legal costs incurred by the Plaintiff, Margaret Quinlan, who was a consenting party to the agreement; that the executors had desisted from the judgments delivered by the Superior Court and the Cour of King's Bench in the present case and in addition had abandoned all demands, claims and pretensions which might have belonged to them in their quality under the said judgments and had renounced all and

every right, claim, demand, action and pretension which might belong to them or be vested in them es qualité against the respondent Robertson.

6. One of the Plaintiffs, to wit, Margaret Quinlan, was a party to the said settlement agreement of the 31st, January, 1934, and it appears from the evidence that her husband, Jacques Desaulniers, K.C., who had a minor part in the conduct of the case, received from Respondent Respondent Robertson, $27,500. out of a total of $44,000. paid as legal fees.

7. The said supplementary plea was contested by Ethel Quinlan, the remaining Plaintiff.

8. Before the reference from the Supreme Court and the contested supplementary plea were tried in the Superior Court, all the parties to the settlement agreement were ordered to be called into the suit and to be made parties thereto as mis en cause. Upon being made a party to the suit as mis en cause, Margaret Quinlan applied to and obtained an order from the Superior Court that your Petitioner be called in and made a party mis en cause.

9. Your Petitioner, who was then a minor, by an intervention in the original suit, through her father as tutor, contested the settlement agreement of the 31st January, 1934, on grounds inter alia that the executors had no power or authority to make the settlement, that the officers who signed for the executors were not authorized to do so, that the settlement was an improvident one and that the Estate had claims against Respondent Robertson of which the executors had been advised, — these claims aggregating over $800,000.

10. Respondent Robertson first contested the intervention by filing a preliminary exception thereto in the nature of an exception to the form. This exception to the form was dismissed by judgment of the Superior Court, but was maintained in part on an appeal to the Court of King's Bench; all allegations of the intervention which enlarged the scope of the original action being struck. In the result, the intervention was reduced to a demand for the annulling of the settlement agreement.

11. Respondent Robertson then contested the intervention on its merits and it was also contested by the executors.

12. The principal action together with the supplementary plea and the contestation of your Petitioner's intervention were tried together in the Superior Court and on the 26th of April 1940 judgments were rendered by Mr. Justice Gibsone, the trial judge, maintaining the principal demand for the restoration to the estate of the shares, dismissing Respondent Robertson's
10 supplementary plea; annulling the settlement agreement and dismissing the contestations by Respondents of your petitioner's intervention.

13. On appeal the Court of King's Bench ordered a single joint record for all appeals and by one judgment dated the 30th of April 1943, reversed the trial judge, dismissed the principal suit, maintained Respondent Robertson's supplementary plea, as well as respondents' contestations of your petitioner's intervention.
20

14. Joint application was made to the Court of King's Bench by Ethel Quinlan the Plaintiff and by your petitioner the intervenant for leave to appeal to the King's Most Excellent Majesty in council, from the said judgment of the Court of King's Bench of the 30th of April 1943. The security ordered on this application of $2500, in each of the four appeals, was furnished by Ethel Quinlan and received and approved by a judge of the Court of King's Bench in two appeals in which she was concerned, on the 26th of May 1943, but your petitioner being unable to
30 furnish the security ordered, to wit, the sum of $5000, that is to say, $2,500. in respect to the Robertson contestation, and $2,500 in respect to the contestation of the executors, asked for a further delay, which was granted, until the 25th of June 1943.

15. That your Petitioner will be unable to furnish the said security.

16. That your petitioner is not worth £25 in the world
40 excepting her wearing apparel and her interest in the subject matter of the intended appeal and your petitioner is unable to provide securities.

17. By the final clause of the settlement agreement it was provided that the agreement would only come into effect after the same should have been submitted to the Supreme Court of Canada at its February Session (to which term the hearing of the appeal had been continued) and provided the said Court saw no objection to the executors carrying the same into effect or granted acte thereof.

18. By its judgment of the 6th of June 1934, the Supreme Court declined to pass upon the validity of the said agreement but it granted "acte" of the production of the settlement; This term was defined by Cannon J. in delivering final judgment by the Court, thus, "The filing of the agreement in the record so that it will form part thereof for the future is all that is required
10 and granted by giving "acte" of the production of the settlement.

19. The Supreme Court declared that Respondent Robertson and Margaret Quinlan had settled their differences and ended the litigation as far as they were concerned and that Ethel Quinlan, to the extent that she is entitled to a variable share in the net revenue of the estate of her father, has a sufficient interest and status to preserve intact the corpus of the Estate.

20 **20.** The learned Judge at the retrial, Mr. Justice Gibsone, considered that Plaintiff Ethel Quinlan was exercising a right appertaining to herself and not in a representative capacity a right appertaining to the Trustees and consequently the executors could not deprive her of the right to proceed with her suit. Further the learned Judge considered that the action of the Supreme Court in returning the case of the Superior Court for retrial after having had the settlement agreement before it, where it was debated and considered, and after having declared that Ethel Quinlan had sufficient interest to preserve intact the corpus
30 of the Estate, had made it certain that the agreement did not operate a settlement of the suit or prevent Ethel Quinlan from continuing proceedings.

21. On appeal the Court of King's Bench by its judgment of the 30th of April, 1943, found that the Plaintiff, Ethel Quinlan, had not established the grounds of nullity invoked in her contestation of Respondent Robertson's supplementary plea. The appeal court interpreted the declaration of the Supreme Court
40 that Ethel Quinlan had an interest and status sufficient to preserve intact the corpus of the Estate as a right to plead for the benefit of the succession and considered that this right was quite distinct from the "creance" (shares) which were the object of the proceeding and which remained subject to the powers of administration conferred by Hugh Quinlan on his testamentary executors, especially to the faculty of transacting with respect to all litigous rights without the participation of the legatees, and the Court declared the transaction (settlement agreement) of the 31st January 1934 to have been validly agreed to and that it had put an end to the litigation.

22. The judgment of the Court of King's Bench (Francoeur, Bissonnette, Prevost, E. M. McDougall and Stuart McDougall J.J.) was delivered by Prevost J. who, in discussing one of the grounds raised by your petitioner against the validity of the settlement agreement, to wit, that the executors could not rely upon the powers given to them under the will to compromise a
10 law suit in which they were interested, stated that the proposition was sound but the acts did not give rise to its application. Prevost J. pointed out that General Trust of Canada was not an executor when the action was instituted, as the Company was appointed by Respondent Robertson himself under the powers given him under the will after the first judgment of the Superior Court and before the first appeal to the Court of King's Bench.

As to the other executor, Capital Trust, Prevost J. stated that it was a defendant in the original action only in respect to
20 that part of the demands thereof asking or the dismissal of the executors, the rendering of an account and the nullity of the inventory. That all of these conclusions were rejected by Martineau J. and the Plaintiffs had acquiesced in the judgment. The Capital Trust then states Prevost J. was no longer a defendant when this transaction was affected.

The Petitioner's contention is that the dealings with the shares attacked in the principal action were dealings between Respondent Robertson and Capital Trust while they were both
30 testamentary executors of the will of the late Hugh Quinlan. Both Respondent Robertson and Capital Trust were defendants in the original suit personally, as well as in their quality of executors and the conclusions asked that the defendants be condemned to return the shares to the succession or to pay the value thereof. In this respect, Martineau J. dealt only with the defendant Robertson and ignored the fact that the demand was against both defendants. The Petitioner points out that Respondent Robertson resigned and nominated General Trust of Canada in his place and
40 that General Trust of Canada and Capital Trust together entered with Robertson into a transaction designed to put an end to the law suit. Petitioner contends that Capital Trust is an interested party, that the powers given by the testator to the executors were not designed to be used by them to defend themselves against an attack by the testator's beneficiaries.

23. In respect to the other ground of nullity raised by your petitioner, to wit, that the officers of the executors who signed the settlement agreement were not authorised so to do, Prevost J. in his notes states that the acts of these officers were

ratified en temps utile by a resolution of the directors of these companies, one on the 21st of September and the other on the 18th October 1934.

24. Your Petitioner's contention is that the will conferred no power to compromise and transact upon the officers of the
10 executors and that the agreement signed by the officers is an absolute nullity due to want of authorisation and that an absolute nullity cannot be ratified. Further the estate was entitled to the benefit of the experience and judgment of the Board of Directors of each of the executors in a matter of this importance and that a ratification by the Board after the transaction had been entered into could not considered as the free expression of opinion of the directors in question.

25. The issues on the contestation by the respondents of
20 your Petitioner's intervention are the same as the issues upon the contestation by the Plaintiff, Ethel Quinlan, of the Respondent Robertson's supplementary Plea. In the trial court, the evidence taken at the retrial of the Plaintiff's case against the respondents, including the issues raised by Robertson's Supplementary plea, was made applicable to the issues of the intervention. In appeal, one record was ordered to serve for all appeals and the Appeal Court disposed of all the issues, proceedings and appeals by a single judgment.

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26. That it will be for the convenience of all parties and will save considerable expense if an order is made of the consolidation of the said appeals.

YOUR Petitioner therefore humbly prays that Your Gracious Majesty in Council will be pleased to order that your Petitioner shall have special leave to appeal in forma pauperis from the judgment of the Court of King's Bench of the Province of Quebec of the 30th of April, 1943, and that this appeal together
40 with the appeal of Dame Ethel Quinlan from the said judgment in respects to the principal action and the supplementary plea and its contestation be joined and consolidated and that Your Majesty may be graciously pleased to make such further or other order as to Your Majesty in Council may appear fit and proper.

And Your Petitioner will ever pray etc.

HENRY CHAUVIN.

AFFIDAVIT

I, Dame Katherine Kelly, wife seperate as to property of Raymond Shaughnessy, residing at No. 4541 Coolbrook Avenue, 10 in the City of Montreal, Province of Quebec, being duly sworn make oath and say:—

1. That I am the petitioner named and described in the foregoing petition or special leave to appeal in forma pauperis to the King's Most Excellent Majesty in Council.

2. That I am not worth £25 in the world excepting my wearing apparel and my interest in the subject matter of the intended appeal and that I am unable to provide sureties for the 20 said appeal.

And I have signed.

KATHERINE SHAUGHNESSY.

Sworn to before me at)
Montreal, Province of)
Quebec, this 19th day)
of June 1943.)
30

Ivanhoe BISSONNETTE,
Notary Public.

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NOTICE

To:

10 Messrs. Beaulieu, Gouin, Bourdon, Beaulieu & Montpetit, Attorneys for Respondent A. W. Robertson.

Messrs. Campbell, Weldon, Kerry & Bruneau, Attorneys for Capital Trust Corporation Limited and General Trust of Canada, Respondents.

Sirs,

Take notice of the foregoing Petition for leave to appeal
20 to His Majesty in His Privy Council, in forma pauperis, from the judgment of the Court of King's Bench for the Province of Quebec, rendered on the 30th of April, 1943, in causes numbers 1915 and 1930, and that the said Petition will be presented to His Majesty in His Privy Council, in the City of London, England, at the September term (1943), of the sittings of the Judicial Committee, and govern yourselves accordingly.

Montreal, 21st June, 1943.

30 HENRY CHAUVIN,
Attorney for Petitioner.

40

AT THE COURT AT BUCKINGHAM PALACE

The 20th day of January, 1944

PRESENT

10

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
LORD STANMORE
LORD LEATHERS
SECRETARY SIR ARCHIBALD SINCLAIR
SIR ARCHIBALD CLARK KERR
MR. ASSHETON
MR. MABANE
MR. PALING
CAPTAIN WATERHOUSE

20 WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 14th day of December 1943 in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Katherine Kelly in the matter of an Appeal from the Court of King's Bench for the Province of Quebec between Katherine Kelly Appellant and Angus 30 William Robertson and Capital Trust Corporation Limited and General Trust of Canada Executors of the estate of Hugh Quinlan deceased Respondents setting forth (amongst other matters) that the Petitioner is desirous of obtaining special leave to appeal in *formâ pauperis* from a Judgment of the Court of King's Bench of the Province of Quebec dated the 30th April 1943 reversing the Judgment of the Superior Court District of Montreal dated the 26th April 1940 which had dismissed the contestation of each Respondent of an intervention made and filed by the 40 Petitioner in a suit taken by the Petitioner's mother Ethel Quinlan and her aunt Margaret Quinlan against the Respondent Robertson and the Capital Trust Corporation Limited personally and as executors of the will of the Petitioner's grandfather the late Hugh Quinlan: and setting forth the litigation between the parties down to the said Judgment of the Court of King's Bench: that joint application was made to the Court of King's Bench by Ethel Quinlan the Plaintiff and by the Petitioner for leave to appeal to Your Majesty in Council from the

said Judgment: that the security ordered on this application of $2500 in each of the four Appeals was furnished by Ethel Quinlan and received and approved by the Court of King's Bench in two Appeals in which she was concerned on the 26th of May 1943 but the Petitioner being unable to furnish the security ordered the sum of $5000 asked for a further delay which was granted until the 25th June 1943: that the Petitioner will be unable to furnish the security; that the Petitioner is not worth £25 in the world excepting her wearing apparel and her interest in the subject matter of the intended Appeal and the Petitioner is unable to provide surities: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal *in formâ pauperis* from the judgment of the Court of King's Bench of the 30th April 1943 or for such further or other Order as to Your Majesty in Council may appear fit.

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"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal *in formâ pauperis* against the Judgment of the Court of King's Bench of the Province of Quebec dated the 30th day of April 1943:

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"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of King's Bench ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal."

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HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Quebec for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

FIAT FOR TRANSCRIPT OF RECORD

To
Messrs. Laporte and Falardeau,
Clerk of the Court of Appeal,
10 Montreal.

Sir:

We require the preparation of a transcript of record in appeal to his Majesty's Privy Council: said transcript to be printed in Montreal by C. A. Marchand, Printer.

Montreal, April 25, 1944.

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HENRY CHAUVIN,
Attorney for Appellant.

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CONSENT OF PARTIES AS TO THE CONSTITUTION OF RECORD OF PROCEEDINGS

We, the undersigned, do hereby agree that the following documents shall constitute the record of proceedings for the
10 Privy Council.

(1) The Supreme Court record as certified to by the Registrar of the Supreme Court on the 14th March, 1944, said record consisting of the Case in eight printed volumes, the factum of the Appellant, the factum of the Respondent, Ethel Quinlan, the factum of the Respondent, Margaret Quinlan and the factum of the Trustees, Intervenants — (these factums need not be printed in the record of proceedings), also the formal judgment of the Supreme Court and the
20 reasons for judgment of the Honorable Justice Cannon.

(2) The printed record filed in the Court of King's Bench on the last appeal with the exception of what is contained in the eight printed volumes of the case mentioned in Item 1. hereof.

(3) the factums of the appellant and of the Respondents filed in the Court of King's Bench on the first appeal.

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(4) The factums of the Appellant and Respondent filed in the Court of King's Bench on the last appeal in respect of the appeal No. 1916.

(4a) The Factum of Respondents (then Appellants) Capital Trust and General Trust filed in the Court of King's Bench in respect of Appeal No. 1930.

(5) The formal judgment rendered by the Court of King's
40 Bench on the 30th April, 1943.

(6) Reasons of judgment:—

(a) Honorable Mr. Justice Francoeur.
(b) Honorable Mr. Justice Prevost.
(c) Honorable Mr. Justice Errol McDougall.

(7) Certificate of the Clerk of the Court of King's Bench of there being no reasons of judgment from the other members of the Court of Appeals.

(8) Security Bond on appeal of Appellant Ethel Quinlan.

(9) Petition by Ethel Quinlan for special leave to appeal to the Privy Council from the Supreme Court judgment of the 6th June, 1934 and the King's Order thereon.

10 (10) Petition of Appellant Katherine Kelly for leave to appeal to the Privy Council in forma pauperis and the King's Order thereon.

(11) Fiat for Transcript.

(12) Consent of parties as to the Constitution of the record of Proceedings.

20 Montreal, March 29th; 1944.

HENRY CHAUVIN,
Attorney for Appellant Ethel Quinlan and appellant Katherine Kelly.

L. EMERY BEAULIEU,
Attorney for Respondent Angus William Robertson.

CAMPBELL, WELDON, KERRY & RINFRET,
per: G. C. Campbell, Counsel,
30 Attorneys for Respondents, Capital Trust Corporation and
General Trust of Canada.

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CERTIFICATE OF THE CLERK OF APPEAL

We, the undersigned, CLOVIS LAPORTE, K.C., and ADRIEN FALARDEAU, K.C., Clerk of Appeal of His Majesty's Court of King's Bench, for the Province of Quebec, do hereby
10 certify that the present transcript, from page 1 to page 473 contains true and faithful copies of the original papers, documents, proceedings and judgments of His Majesty's Superior Court for the Province of Quebec, sitting in and for the City of Montreal, transmitted to the Appeal Court in the said City of Montreal, as the record in the case therein lately pending, from the date of the judgment of the Supreme Court of Canada, to wit, the 6th June, 1934, whereby the herein below mentioned case was remitted to the Superior Court for further evidence and determined between Dame Katherine Kelly et al and Angus W. Robertson and various
20 other persons mis-en-cause, as well as in the intervention in the said suit of Dame Katherine Kelly et al, and also true copies of proceedings in the said Court of King's Bench, Appeal Side, and final judgments rendered therein on the appeals and cross-appeals of the parties, numbers 1915, 1916, 1930 and 1935, from the judgments of His Lordship Mr. Justice Gibsone, rendered on April 26th, 1940, together with all reasons of judgment filed by any of the judges of the Court of King's Bench.

In Faith and Testimony whereof we have to these presents
30 set and subscribed our signature and affixed the Seal of the said Court of King's Bench, Appeal Side.

Given at the City of Montreal in the part of Canada called the Province of Quebec, this 21st day of July 1944, and of His Majesty reign the eight.

CLOVIS LAPORTE, K.C.,
ADRIEN FALARDEAU, K.C.
Clerk of Appeal.

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CERTIFICATE OF CHIEF JUSTICE

I, the undersigned Honorable Sévérin Létourneau, Chief Justice of the Province of Quebec, do hereby certify that the said Clovis Laporte, K.C., and Adrien Falardeau, K.C., are Clerk
10 of the Court of King's Bench, on the Appeal Side thereof, and that the initials "L & F" subscribed at every eight pages and the signature "Laporte & Falardeau" of the certificate above written, is their proper signature and hand writing.

I do further certify that the said Laporte & Falardeau as such Clerk, are the Keeper of the Records of the said Court, and the proper Officer to certify the proceedings of the same, and that the seal above set is the seal of the said Court, and was so affixed under the sanction of the Court.
20

In testimony whereof, I have hereunto set my hand and seal, at the City of Montreal, in the Province of Quebec, this day of in the year of Our Lord one thousand nine hundred and forty four and of His Majesty's Reign, the eight.

SEVERIN LETOURNEAU,
Chief Justice of the Province of Quebec.

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SEAL

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In the Privy Council

No. of 1944

On Appeal from the Court of King's Bench for the Province of Quebec (Appeal Side) Canada

BETWEEN

ETHEL QUINLAN (Wife of John Kelly),
PLAINTIFF) APPELLANT,

and

ANGUS WILLIAM ROBERTSON, CAPITAL TRUST CORPORATION LTD, and GENERAL TRUST OF CANADA,
(DEFENDANT) RESPONDENTS,

and BETWEEN

KATHERINE KELLY (Wife of Raymond Shaughnessy),
(INTERVENANT) APPELLANT,

and

ANGUS WILLIAM ROBERTSON, CAPITAL TRUST CORPORATION LTD, and GENERAL TRUST OF CANADA,
(CONTESTANT) RESPONDENTS.

RECORD OF PROCEEDINGS

VOL. X. — EXHIBITS, JUDGMENT OF COURT OF APPEAL & REASONS FOR JUDGMENT AND PROCEEDINGS ON APPEAL TO PRIVY COUNCIL

BLAKE & REDDEN,
for Appellants.

LAWRENCE JONES & COMPANY,
for Respondent Robertson,

CHARLES RUSSELL & COMPANY,
for Respondents Capital Trust Corporation Limited, and General Trust of Canada.