In the Privy Council

No. 68 of 1947

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

BETWEEN

ETHEL QUINLAN (*Wife of John T. Kelly*),

(Plaintiff) Appellant,

AND

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

(Defendants) Respondents,

AND BETWEEN

KATHERINE KELLY (*Wife of Raymond Shaughnessy*),

Intervenant) Appellant,

AND

CAPITAL TRUST CORPORATION LIMITED,
and GENERAL TRUST OF CANADA es-equal. Executors,

(Contestants) Respondents.

CASE OF ETHEL QUINLAN, WIFE OF JOHN T. KELLY (PLAINTIFF) APPELLANT

BLAKE & REDDEN
For (Plaintiff) Appellant
Ethel Quinlan (Wife of John T. Kelly)

BENALLACK PRESS LTD., MONTREAL

15 April 1947

Lords Thankerton
Du Parcq
Normand
Oaksey
Morton

M. H. Swords } for applts
D. Swords

Graham } for Rt Robertson
~~Geoffrion~~
Casgrain

Papineau-Couture } for Trustees
Geoffrion

11 am. Swords.
Facts - history of litigation

3 pm. Pleadings
Declaration

Wednesday
2nd day 16 Apl

Swords - continuing
Cap Trust
Robertson
Pltfs motion for particulars
Cap Trust p 52
Robertson p 56
Will Vol 6 p. 229.
Correspondence
Bk 8
Discovery evidence of Robertson

Thursday 3rd day
17 Apl.

10.30 Swords contg

Discovery evidence of Robertson
Interruption and postal to judgments

4th day
Monday
21st Apl. (Thankerton absent)

11 am Swords contg
1st Trial judgment
11.45 K.B. judgment
J. Howard's reasons

St Germain

2.20 Supreme Ct judgments Vol X 432
3.20 Gibsone's judgment

5th day
Tues. 22 April

10.30 am. Swords contg
Gibsone's judgment

6th day
Wed. 23rd April
10.30 Swords contd
Gibsone's judgment
12.5 } 1 pm K Bench judgmt
3 pm. A. Prevost J.
B. McDougall

7th day
Thurs 24 Apl
10.30 Swords - contg
? agreement or mandate
Burden of proof against Robertson
Commercial matter
commencement of proof in writing

In the Privy Council

No. 68 of 1945

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CANADA

BETWEEN

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(Contestants) Respondents.

CASE OF ETHEL QUINLAN, WIFE OF JOHN T. KELLY (PLAINTIFF) APPELLANT

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1. This is an appeal as of right from a judgment of the Court of King's Bench of the Province of Quebec dated the 30th April 1943, reversing a judgment of the Superior Court of the District of Montreal, dated 26th April 1940, and dismissing Appellant's Cross-Appeal from the said judgment of the Superior Court for a greater and different award. Bk. 10 p. 405 Bk. 10 p. 271 Bk. 10 p. 411 l.35

Bk. 10 p. 469
Bk. 9 p. 1
Bk. 8 p. 807
Bk. 8 p. 781
Bk. 9 p. 3 l.17
Bk. 9 p. 3 l.20
Bk. 9 p. 3 l.30 et seq.

2. This is also an appeal by special leave from a judgment of the Supreme Court of Canada dated 6th June 1934 quashing a judgment of the Court of King's Bench of the Province of Quebec, dated December 30th, 1932, also quashing in part a judgment of the Superior Court dated 6th February 1931, as well as certain rulings refusing to admit parole evidence; declaring certain issues therein to be *res judicata* and remitting the case to the Superior Court for further *enquete* and a new adjudication on specific restricted issues.

3. This case has been the subject of five judgments, namely:

Feb. 6, 1931:	Superior Court, Martineau, J., in favour of Appellant;
Dec. 30, 1932:	Court of King's Bench, unanimously in favour of Appellant;
June 6, 1934:	Supreme Court of Canada, (Mr. Justice Cannon), remitting case to Superior Court for new adjudication, with an order to admit parole evidence;
April 26, 1940:	Superior Court, Gibsone, J., in favour of Appellant;
April 30, 1943:	Court of King's Bench, unanimously against Appellant and dismissing Appellant's action and Cross-Appeal.

4. This litigation was commenced on October 25, 1928, by action instituted by Appellant and her sister Margaret Quinlan (wife of Jacques Désaulniers, of Montreal, Barrister and Solicitor), both beneficiaries under the Will of their father, the late Hugh Quinlan, against the executors and trustees of their father's estate, the Respondents Robertson and Capital Trust Corporation Ltd., personally and *es qualite*.

5. The action complained that the executors and trustees were guilty of fraud in the administration of the estate; that the inventory and financial statement prepared by them 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 Respondent Robertson had illegally and fraudulently and while an executor and trustee purported to acquire from the estate, for $250,000, shareholdings of the estate in certain companies, valued in the action at $2,355,000.

6. The action sought principally return of the shareholdings plus dividends and profits or payment of their value, annulment of the inventory and financial statement, removal of the executors and trustees and an account-

ing of their administration.

7. In 1897 the late Hugh Quinlan and Respondent Robertson formed a partnership to carry on the business of building and paving contractors.

The name of the partnership was Quinlan & Robertson.

In 1907 they incorporated themselves into a limited company under the name of Quinlan & Robertson Ltd. and transferred all the partnership assets to that company, each partner owning one-half of the issued capital stock.

In 1919 they took in a third partner, one Alban Janin, and formed a new company called Quinlan, Robertson & Janin Ltd., each of the three partners owning one-third of the issued capital stock.

Although said Quinlan & Robertson Ltd. was not wound up, its assets were transferred to a new company called A. W. Robertson Ltd., in which only Quinlan and Robertson were shareholders, each owning one-half of the issued capital stock.

In 1924 the three partners formed a paving company called Amiesite Asphalt Ltd., Janin taking one-half of the issued capital stock and Quinlan and Robertson one-quarter each.

In 1925 the three partners formed still another paving company called Ontario Amiesite Ltd. in which there were five shareholders, each of the three partners owning one-fifth of the issued capital stock.

In 1925, Quinlan and Robertson alone formed a company called Fuller Gravel Co. Ltd., (to operate sand and gravel quarries) in which each of the two partners owned 1,000 preferred and 500 common shares.

And, on April 27, 1927, two months before Quinlan's death, Robertson and Janin alone formed another paving company, Macurban Asphalt Limited, which they financed from Quinlan, Robertson & Janin Ltd. to the extent of $4,386.67 and from Amiesite Asphalt Ltd. to the extent of $32,501.47, with which latter company Macurban Asphalt Limited forthwith went into competition at the offices, with the employees and the telephone service of Amiesite Asphalt Limited and Quinlan, Robertson & Janin Ltd.

Bk. 3 p. 495 l.27
Bk. 5 p. 29 l.24
Bk. 8 p. 665 l.23
and p. 670 l.30
Bk. 1 p. 121 l.30
Bk. 2 p. 222 ll.33-50
Bk. 2 p. 223 l.35

Robertson and Janin, while directors of Quinlan, Robertson & Janin Ltd. and of Amiesite Asphalt Ltd., issued all the capital stock of Macurban Asphalt Ltd. to themselves.

Bk. 2 p. 217 ll.31-32
Bk. 4 p. 721 l.13
Bk. 6 pp. 277-279

Quinlan received no participation whatever, nor did his estate.

Bk. 3 p. 495 1.38
Bk. 1 p. 120 1.23
Bk. 4p. 658 1.41
Bk. 4 p. 725 1.17

8. In December 1925 Quinlan suffered a heart attack and thereafter remained an invalid, sometimes better, sometimes worse, but never well enough to resume full business activity, yet (Janin's evidence) taking a "great interest" in the business and being "useful to the firm."

9. On April 14, 1926, Quinlan made his Last Will and Testament, which was not changed or amended before his death.

Bk. 3 p. 588 11.1-25

10. On May 21, 1927, Quinlan's son recorded in his own handwriting, at Quinlan's request, a memorandum, as follows:—

Bk. 6 p. 282

# 9	Amiesite	Dunlop	200	Dep. in AWR Box
# 5	"	H Q	49	
# 1	"	"	1	
	Q. R & J	H Q	1	Dep. in AWR Box
	"	"	1150	

May 21/27

Bk. 9 p. 106 11.9-43
Bk. 9 p. 96 11.11-21

11. On May 23, 1927, Robertson took the following formal written acknowledgement written by Leamy, Secretary-treasurer of A. W. Robertson Ltd. and Leamy received the certificates listed in it for "safekeeping."

"A. W. ROBERTSON LIMITED
Engineers & Contractors.
May 23rd 1927.

"A. W. Robertson,
1690 St. Patrick St.,
Montreal, 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. 1	Amiesite Asphalt Limited	1 share
No. 5	" " "	49 "
No. 9	" " "	200 "
No. 4	Quinlan, Robertson & Janin Limited	1 "
No. 8	"	1150 "

Yours truly,
A. W. Robertson, Limited
per L. N. Leamy."

12. On June 26, 1927, Quinlan died.

13. Save a few special bequests, the Will vested the entire estate in trust to the Respondents Robertson and Capital Trust, as executors and trustees, with the widest powers, until complete execution of the trusts.

By the terms of the Will, Quinlan's wife (since deceased) and eight children share the revenues from the estate during their lifetime. Upon the death of the last survivor of his children, the corpus of the estate is to be divided among Quinlan's grandchildren and great-grandchildren.

14. Robertson and the Capital Trust Corporation took office as executors and trustees on the date of Quinlan's death, June 26, 1927.

Robertson remained in office until he was advised by Martineau, J. in his Reasons for Judgment to resign before continuing the litigation, if Plaintiffs (Appellant and her sister) do not appeal " . . . et se nommer un successeur, comme le testament lui en donne le droit, en ayant le soin de choisir un homme qui lui est absolument étranger, afin que celui-là soit libre de combattre ses prétentions, et que les héritiers ne puissent douter de son impartialité." Bk. 8 p. 806 l.15

Robertson resigned on February 19th, 1931, and selected and appointed his own successor, the Respondent General Trust of Canada. Bk. 6 p. 232 l.38-40

The Capital Trust Corporation has throughout remained joint executor and trustee.

15. The Will gave the executors and trustees power to continue Quinlan's participation in the various joint stock companies, to increase or reduce capital, to subscribe for new or additional stock, to amalgamate or reorganize any company, in which his estate may hold stock. Bk. 6 p. 231

16. The Will expressed the "wish and desire" that the Hon. J. L. Perron be the legal adviser of the estate. Mr. Perron had been and continued to be the lawyer for all the partnership interests, as well as Robertson's lawyer, Janin's lawyer and "very great" friend for thirty years. He directed Robertson's and the Capital Trust Corporation's personal defence, the defences of both said Respondents as executors and trustees and appeared as attorney for one of the mises-en-cause in this case, Ontario Amiesite Ltd. Bk. 6 p. 236 l.15; Bk. 1 p. 121 l.17-23; Bk. 8 p. 698 l.40; Bk. 4 p. 724 l.26-29; Bk. 8 pp. 687 l.20 to 697 l.45

17. The Will permitted the executors and trustees to take "commercial inventory" rather than notarial. The duties of executors respecting the taking of inventory are contained in the first paragraph of Article 919 of the Civil Code: Bk. 6 p. 234

Art. 919 C.C. The testamentary executor must cause an inventory to be made *after notifying the heirs, legatees and other interested persons to be present . . .*

Bk. 2, p. 423 11.33-40

18. The executors and trustees took inventory of the estate on July 9, 1927. The Capital Trust Corporation took possession of such papers and documents as Robertson and Leamy gave it, and did not make any inquiries to find anything else.

19. The heirs and beneficiaries were not notified, were not present, and received neither notice nor copy of the inventory until more than a year after Quinlan's death.

Bk. 8 p. 641 1.10; p. 642 1.10; p. 643 1.10 and 1.40

Bk. 8 p. 648 1.30; p. 649, 1.10; p. 650 1.10; 1.30; p. 654 1.15; p. 658 1.38; p. 660 1.1

Bk. 6 p. 309

Bk. 8 p. 644 1.30

Bk. 8 p. 645 1.30

Bk. 6 p. 312 1.40

On August 7, 1928, after several written requests from Appellant and after correspondence and consultation between the Capital Trust and Hon. J. L. Perron as to whether the heirs were entitled to copy of the Inventory, Appellant received a copy of an unsigned document purporting to be the inventory as of June 26, 1927, which Appellant repudiated, asking for an accounting.

The inventory listed 1151 common shares of Quinlan, Robertson & Janin (erroneously called "Hugh Quinlan & Janin Co.") at $150,000.

Bk. 8 p. 646 1.30

20. On August 29, 1928, Appellant received a financial statement dated August 8, 1928, which listed among the assets of the estate:

Bk. 6 p. 296e 1.13

"Quinlan, Robertson & Janin Ltd. — 1151 shares com. — $25,000.00"

Bk. 6 p. 301 1.13

21. Another copy of the same financial statement sent to Appellant's sister Margaret Quinlan contained the same entry, but added by way of footnote to one of the pages: "Quinlan, Robertson & Janin Ltd. *sold* in 1928 for $250,000."

Bk. 6 p. 301 1.30

Bk. 8 p. 647 11.10-45

22. Both Appellant and her sister repudiated the financial statement.

Bk. 8 p. 660 1.30 to p. 661 1.10

23. On August 22, 1928, Robertson's auditors, who were also the estate's auditors, wrote the Capital Trust as follows:

"P. C. SHANNON SON & COMPANY
Accountants & Auditors
Montreal

Montreal, August 22nd, 1928

"Messrs. Capital Trust Corporation,
10 Metcalfe Street,
Ottawa, Ont.

Attention E. L. Parent, Esq., L.A.
Estates Manager

Dear Sirs:—

We beg to enclose you herewith a rider which we would ask you to kindly attach to our statements of the Estate of late Hugh Quinlan.

Thanking you in anticipation and with best regards to all.

Yours very truly,
(Signed) P. C. Shannon Son & Co.

"CAS/ED
Typed by CR.
Certified Copy:
T. Cloutier.
Paul Mackay.

"NOTE BY AUDITORS

On the list of Stocks will be found Quinlan, Robertson & Janin Limited, 1151 Shares valued at $25,000.00. From *information* which we received we find that this stock and paving Companies *was after the date of December 31st, 1927*, sold for $250,000.00.

(Signed) P. C. Shannon Son & Co.

Typed by CR.
Certified copy:
T. Cloutier.
Paul Mackay."

24. On October 25, 1928, Appellant and her sister Margaret Quinlan instituted this action.

Plaintiffs' amended declaration, dated February 28, 1930, alleged among other things that: Declaration Bk. 1 pp. 73 et seq.

Plaintiffs are beneficiaries and *cestui que trustent;* that on or about June 22, 1927, Robertson personally, by fraud and collusion, acquired Quinlan's 250 shares of Amiesite Asphalt Ltd. and transferred them to himself while Quinlan was fatally ill and *non compos mentis,* for $100 each instead of their value of $1,000 each; and that such transfer was deliberately omitted from the inventory, which contained no mention of any price paid therefor;

That when Quinlan died he held 1151 common shares of Quinlan, Robertson & Janin Ltd. worth $700 each, which the Capital Trust Corporation sold in 1928 to Robertson for $250,000, and that such sale is fraudulent and illegal and null on its face, said shares having until the Spring of 1928 been treated by the executors and trustees as the property of the estate;

That when Quinlan died he was holder of 1,000 preferred and 499 common shares of Fuller Gravel Co. Ltd. which the executors and trustees valued in the inventory at $1 for the whole; and which were variously shown in the financial statement at page 4 as "stock sold not listed as an asset, $24,999", and on another page as "Credits (shown in balance sheet as reserve) Fuller Gravel Co. Ltd., $24,999";

That the said shares were fraudulently and collusively sold by the Capital Trust Corporation to Robertson, directly or indirectly, at a nominal figure, although their real value was $300,000, and that such sale is null and void;

That at the time of his death Quinlan was also a shareholder in Ontario Amiesite Ltd., Macurban Asphalt Ltd., Quinlan, Robertson & Janin (London, England) Ltd., Crookson Quarries, Canadian Amiesite Ltd., and other companies unknown to Plaintiffs but well known to Robertson; and that the inventory and financial statement did not list any such shareholdings as assets of the estate, due to Robertson's manipulations;

That Quinlan was also the holder of 1587½ common shares of A. W. Robertson Ltd. at the time of his death, worth over $700 each and that such shares are falsely valued in the financial statement at only $158,750, and that Defendants (Robertson and Capital Trust Corporation) do not show what dividends have been paid or are payable since Quinlan's death;

Declaration
Bk. 1 p. 81 l.40

"75. That the Defendant Robertson has, since the death of the said testator, adopted and pursued a system of dealing with the assets and goodwill of all the companies mentioned in the present declaration, whereby such assets and goodwill have been transferred to and merged in other companies at his own mere will and pleasure, and without having regard to the interest of the heirs of the said testator, and without consulting the said heirs or apprising them of such transformations of assets and goodwill; the whole in a manner inconsistent with his duties as executor and trustee under the said will, and solely to serve his personal ends; and the several acts of the Defendant Robertson in this respect constitute a maze of intricate transactions involving a number of companies which he has caused to be incorporated for the above

purpose; the details of such matters being well-known to the Defendant Robertson, but unknown to the Plaintiffs, who, in common with the other heirs of the said Testator, have been kept and now remain in ignorance thereof;

"76. That all the acts and transactions and incorporations and transfers and transformations of assets and of good-will, effected by the said defendant Robertson as stated in the last preceding paragraph, were put through by him, as well in his said quality of Executor & Trustee, and by acting as Director and stockholder in the several companies in question, with intent to benefit himself and enrich himself by such acts and dealings, whether directly or indirectly, and in order to defeat the rights of the Plaintiffs and the other heirs of the said testator;

"77. The result of the acts and dealings of the Defendant Robertson, set forth in the two preceding paragraphs, has been to transfer to him or persons representing his private interests, all the assets and goodwill of the said companies, and furthermore to leave such companies without any tangible assets, and furthermore to wipe out the interest of the heirs of the said testator;"

That the inventory and financial statement are incorrect, false and fraudulent;

25. The conclusions of Plaintiffs' action pray for the removal of the executors and trustees and an accounting of their administration; that the sales and transfers to Robertson of 250 common shares of Amiesite Asphalt Ltd., 1151 common shares of Quinlan, Robertson & Janin Ltd., 1000 preferred and 499 common shares of Fuller Gravel Co. Ltd. be declared null and void, that Robertson be ordered to return same to the estate and in the event that Defendants (Robertson and Capital Trust Corporation) are unable to return same, to pay the value thereof, $1,355,000; that Quinlan's shares in Ontario Amiesite Ltd., Macurban Asphalt Ltd., Quinlan, Robertson & Janin (London, England), Crookson Quarries and Canadian Amiesite Ltd. be declared to be the property of the estate and in the event said Defendants are unable to return same that they be condemned to pay to the estate the value thereof, $1,000,000; that it be declared that all profits made and dividends paid since Quinlan's death respecting all said shares be declared the property of the estate; that said Defendants be condemned personally to the payment of all balances of account and sums due to the estate as a result of their fraud, waste, secretions and malversations; and that Defendants be condemned to pay costs; the whole

Declaration Bk. I p. 83 l. 15

under reserve of the right to take other and further conclusions in the present action.

Writ Bk. 1 pp. 15-17

26. All the heirs were impleaded, as were also the following companies:

QUINLAN, ROBERTSON & JANIN LTD., (whose name had by then been changed to Robertson & Janin, Ltd. by Supplementary Letters Patent dated February 18, 1928)
ONTARIO AMIESITE LTD.
FULLER GRAVEL LTD.

Bk. 9 p. 164 l 40 to p. 166 l 20

Bk. 2 p. 220 11.29-40

27. Amiesite Asphalt Ltd. and Macurban Asphalt Ltd. were not impleaded because Robertson had by then sold all the issued capital stock thereof, for $750,000 which Robertson had received and shared with Janin on the basis of $250,000 to Robertson and $500,000 to Janin.

Defence Bk. 1 pp. 17 et seq.

28. For Defence the Capital Trust, pleading separately, alleged:

That as to Fuller Gravel Co. Ltd. the valuation of $1 was only intended to be temporary because at the time of the listing it was impossible to establish their real value and that the various entries of $24,999 were mere bookkeeping entries rendered necessary by reason of the subsequent sale of the Fuller Gravel Ltd. shares for $50,000.

That the Fuller Gravel shares were not sold to Robertson and if Robertson has any interest therein such interest is unknown to Capital Trust Corporation and

> ". . . in any event said Defendant Robertson is in all respects solvent and responsible and if he owes any accounting to the Estate of the said Hugh Quinlan in respect of said shares, or otherwise, as to which Defendant now pleading is ignorant, there is no difficulty in calling him to account therefor."

That the Capital Trust Corporation is not aware of any matter or thing in respect of which Robertson is accountable to the estate, has no reason to doubt his honesty and integrity, and that he is "in any event thoroughly responsible financially should he be accountable in any respect to the said estate Quinlan . . ."

29. The Defence of Capital Trust Corporation was not amended or altered throughout the litigation.

30. Respondent Robertson filed a Defence dated November 17, 1928, repeating almost verbatim the allegations contained in the Defence of the Capital Trust Corporation.

31. Both Robertson and the Capital Trust alleged that Quinlan transferred and delivered all his holdings of stock in Quinlan, Robertson & Janin Ltd., Amiesite Asphalt Limited and Ontario Amiesite Limited to Robertson under "an agreement" stated in a letter of June 20, 1927. That letter reads as follows:

Defence Bk. 1 p. 22 l. 19 p. 30 l. 29 p. 90 l. 20

"Montreal, June 20th 1927.

Bk. 1 pp. 90-91

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

"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.

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 to me of the monies I have paid you thereon including interest at 6%.

Yours truly,

(Signed) A. W. ROBERTSON."

32. Appellant moved for the following Particulars with respect to the alleged agreement of June 20, 1927:

Bk. 1 p. 42 l 41 to p 43 l 20
ibid p. 47 l 48 to p 48 l 12

(a) The date in the month of June on which said shares were transferred and delivered to Defendant (Robertson) himself;
(b) If said agreement was in writing or verbal;
(c) When said agreement was dated;
(d) If said agreement was in writing, by whom it was signed;
(e) Whether it was an authentic document or a document under private seal;
(f) Whether the H. Dunlop named in the letter is or is not one Harry Dunlop impleaded in this case.

Bk. 1 p. 53 ll.32-42

33. The Capital Trust furnished the following Particulars:

"(a) The foregoing letter, *accompanied* by the delivery by the late Hugh Quinlan of his certificates for said shares endorsed in blank, to Defendant Robertson, embodied all the agreement entered into between them as far as Defendant now pleading is aware.

"(b) The said transfer of said shares from the said Hugh Quinlan to Defendant Robertson took place on or about the said 20th of June, 1927."

Bk. 1 p 56 l 38 to p. 57 l 8

34. Respondent Robertson furnished the following Particulars:

"As to paragraph 37 of the Plea:—

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;

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."

Bk. 1 p. 174 ll. 13-38

35. Before trial Robertson was examined for Discovery, at which he avowed that he had no intention of working for the heirs of the estate, that the reorganizations of the companies and the distribution of assets and shareholdings following Quinlan's death were not intended for the benefit of the heirs but for Robertson's and Janin's "particular benefit", and that if it turned out that any of the profits could be claimed by the heirs, Robertson and Janin could charge up salaries big enough so that there would be no profits, or they would not "operate."

Bk. 1, p. 161 l. 25 Ibid. p. 179 l. 24

36. Robertson's testimony at Discovery also reveals that since the death of Hugh Quinlan, Robertson had neither bid for nor taken a single contract for the A. W. Robertson Ltd. company, and in fact Robertson on his own initiative decided to discontinue business, and on October 9, 1929,

caused the company to pass a resolution ordering that it be voluntarily wound up, although the company was in process of executing a $10,000,000 contract; Bk. 1, p. 191 l. 41

Although the winding up had still not been completed, some of its plant and machinery had been disposed of and acquired by Robertson by way of a partition between himself and the estate, at a time when he was still trustee. Bk. 5, p. 217

10

37. As to Quinlan, Robertson & Janin Ltd., Robertson testified that since Quinlan's death its name had been changed to Robertson & Janin Ltd. Several new companies had been formed, to which plant and machinery and goodwill of Quinlan, Robertson & Janin Ltd. to the extent of $500,000 to each of said companies had been transferred. The companies so formed were:

ROBERTSON & JANIN BUILDING CO. LTD.
ROBERTSON & JANIN PAVING CO. LTD.
ROBERTSON & JANIN CONTRACTING COMPANY
20 MONTREAL CONSTRUCTION & SUPPLY CO. LTD.

Bk. 4 p. 729 l. 44 to p. 730 l. 22

Prior to the organization of the new companies all the various business activities had been carried on by Quinlan, Robertson & Janin Ltd. Bk. 4 p. 731 ll. 27-32

Robertson states that the profits from all the subsidiary companies *except Robertson & Janin Contracting* would go to the parent company, Robertson & Janin Ltd. Such profits, for the year ending March 31, 1929, were: Bk. 1 p. 180 l. 18 Bk. 1 p. 181 l. 43

Robertson & Janin Ltd.	$ 69,965.29
30 " " Paving Co. Ltd.	77,328.60
" " Building Co. Ltd.	10,118.87
Montreal Construction Supply & Equipment, Ltd.	16,792.84
TOTAL :	$174,205.50

Bk. 8 p. 743 Bk. 8 p. 737 Bk. 8 p. 725 Bk. 8 p. 729

38. Between the date of examination for Discovery and the date of trial, Robertson purported to sell to Janin all Robertson's shareholdings in Alban Construction Limited, alias Robertson & Janin Ltd. (formerly Quinlan, Robertson & Janin Ltd.), for $269,000, buying in exchange from Janin, the
40 latter's holdings in the several subsidiaries, and other companies, (*including 1500 shares of Robertson & Janin Contracting Company Limited*, which was organized after Quinlan's death but not as a subsidiary of Robertson & Janin Ltd.), by written agreement under date of 12th September 1930. This sale included the shares of the Quinlan estate in Alban Construction Limited, which Janin took subject to the following conditions: Bk. 9 pp. 166-171

"2) The party of the first part has further transferred this day to the party of the second part one thousand one hundred and fifty-one shares (1,151) of the ALBAN CONSTRUCTION LIMITED being the shares presently under litigation and the party of the second part has this day endorsed, the new certificate for the said shares in blank, and has deposited the said certificate in escrow with THE SUN TRUST COMPANY, LIMITED, with instructions to the said THE SUN TRUST COMPANY, LIMITED, that if the party of the first part is declared by a final judgment to be the owner of the said shares then the said, THE SUN TRUST COMPANY, LIMITED, will deliver the said certificate back to the party of the second part, and that if by final judgment of the Court it is declared that the said shares are the property of the Estate of the late Mr. Hugh Quinlan, the said THE SUN TRUST COMPANY, LIMITED, will have to abide by the said judgment, and will complete the endorsements in blank on the said certificate and transfer the said shares "A QUI DE DROIT" in conformity with the said judgment and in such event the party of the first part shall pay to the party of the second part, the sum of two hundred and sixty-nine thousand ($269,000.00) dollars, plus interest thereon at the rate of six percentum per annum, from the twenty-sixth day of June, nineteen hundred and thirty, in lieu of and in full of all claims in respect of said shares."

Since the date of the purported sale to Janin, the latter has had full control of Alban Construction Limited and subsidiaries, has received such dividends and profits as may have been paid out and no accounting has been furnished to the estate or to Appellant.

As to Amiesite Asphalt Ltd. and Macurban Asphalt Ltd. Robertson testified that all their issued capital stock had been sold for $750,000 as aforesaid.

As to the Fuller Gravel Company shares, Robertson represented to the Capital Trust Corporation that he could sell them for $50 a share. The Capital Trust Corporation consented and the sale was effected allegedly to third parties. The evidence revealed that Robertson ended up as the owner of at least 600 shares; all the issued capital stock was then resold by Robertson at $90 per share for the preferred, with the common as a bonus; and Robertson made at least $24,000 profit which he did not turn over to the Quinlan estate.

39. As to Ontario Amiesite Ltd. the evidence reveals that the shares thereof were valueless during Quinlan's illness, but Ontario Amiesite Ltd. made "great progress" after Quinlan's death.

Bk. 4 p. 726 l.35

40. The sum total of the evidence is that the companies whose shares Robertson purported to have purchased so as to leave the estate with no interest in them, prospered, and the one company, A. W. Robertson Ltd., in which, according to Robertson, the estate continued to be a shareholder, got no new business between Quinlan's death and October 29, 1929, and then was put into voluntary and protracted liquidation by Robertson.

Bk. 1 p. 179 l. 40
Bk. 1 p. 179 l. 21

41. For its shareholdings and rights in companies which in the four years ending March 31st, 1928, had *earned* $1,460,540.77 the estate was paid $250,000 by Robertson.

Bk. 5 pp. 22 & 25
Bk. 5 p. 28
Bk. 5 pp. 28 & 31
Bk. 7 p. 588

The estate's shareholdings in those companies would have entitled it to receive by dividends for that period, if all the earnings were distributed (or upon liquidation, in earnings alone), $418,062.61.

Bk. 5 p. 154
Bk. 6 p. 226
Bk. 6 p. 270
Bk. 6 p. 276
Bk. 8 p. 664

In A. W. Robertson Ltd., which had paid in dividends out of profits $349,175.50 between February 1926 and June 1929, Robertson guesses that the assets will bring about $350,000 "if we get anything for the old plant", which upon liquidation and distribution would bring $175,000 into the estate. The liquid assets (bonds) amounted to $680,649.30.

Bk. 5 p. 217
Bk. 1 p. 161 l. 20
Bk. 5 p. 217

42. Robertson testified that the name Quinlan, Robertson & Janin Ltd. had been shortened to Robertson & Janin Ltd. because Quinlan had personally told him that he did not wish his name to be perpetuated in the company. Yet after Quinlan's death, Robertson and Janin incorporated an English subsidiary under the name of Quinlan, Robertson & Janin (London, England) Ltd.

Bk. 1 p. 165 l. 8
Bk. 1 p. 163 l. 12 and p. 166 l. 38

43. The principal issue relates to the shares listed in the letter of June 20, 1927; the Fuller Gravel shares and the Macurban Asphalt shares.

44. Both Robertson and the Capital Trust Corporation alleged in support of Robertson's title that he had obtained possession of Quinlan's certificates endorsed in blank at the time of and in exchange for delivery of the letter of June 20, 1927.

45. The evidence disclosed that Robertson had had the certificates, endorsed in blank, in his possession since May 21, 1927 and had received them from Quinlan for deposit in their vault at the office of A. W. Robertson Ltd.

Bk. 2 p. 266 ll.18-23; l.30-31; 43-48; p. 267 l.26
Ibid. l.39 Bk. 2 p. 2681.24-25 ll.37-41

Robertson knew this fact, yet at the first trial was unable to remember how, when, where and why he had received possession of the certificates.

Bk. 9 p. 108 ll.16-21

At the trial on the remitter, before Gibsone, J., Robertson admitted

that all along he had known that he had a letter (above quoted) dated May 23, 1927, from Leamy, the office manager of A. W. Robertson Ltd., for the certificates which Robertson had delivered to Leamy to hold, as Quinlan's property, in the company's vault.

Bk. 9 p. 106 11.9-13

46. At Discovery, being taxed with having a weak memory, Robertson says:

Bk. 2 p. 245 1.45

"Q — You admit your memory is weak?
"A — No.
"Q — You have a good memory?
"A — It all depends on whether I try to exercise it or not."

47. As to the letter of June 20, 1927, Robertson and Leamy testified, under reserve of Appellant's objection, that the letter was typed by Leamy at the office of A. W. Robertson Ltd. on the morning of June 20, 1927, from a draft prepared by Perron, which Robertson modified; that he signed two copies of the letter; that between 11 and 12 o'clock of the morning of June 20, 1927, he and Leamy went to Quinlan's house and entered the sickroom. Leamy stayed two or three minutes and read the letter to Quinlan, then handed it to Robertson and left the room. Robertson stayed in the sickroom 5 to 10 minutes then left the house together with Leamy.

Bk. 4 p. 819 1.17- to p. 820 1.45

Bk. 4 p. 794 1.35 to p. 795 1.25
Bk. 4 p. 799 1.44 to p. 780 110

Bk. 9 p. 97 1.45 to p. 98 1.15; p. 106 1.44 to p. 107 1.11 p. 109 1.5 to p. 1.10 1.27

Neither the original nor a copy of the letter was given to or left with with Quinlan, nor did Quinlan sign it.

Bk. 4 p. 822 11.8-13

A carbon copy signed by Robertson was allegedly mailed to Perron on June 20, 1927.

48. Martineau, J. refused to admit testimony as to Quinlan's reply, if any, to the alleged reading of the letter of June 20, 1927.

On the remitter Robertson and Leamy both testified that all Quinlan replied was: "That is all right".

Bk. 9 p. 107 11.9-11
Ibid. p. 98 11.5-10

49. During the month of June 1927 Quinlan had two day nurses and two night nurses. The day nurse on duty on June 20, 1927, Miss MacArthur, distinctly recalls having absented herself from Quinlan's room for only two or three minutes to empty something in the bathroom at the head of the hall. Upon her return to Quinlan's room she found Leamy standing at the foot of his bed. She ordered him out and he left. Robertson was not there.

Bk. 9 p. 118 18 to p. 121 1.40

50. It is in evidence, uncontracdited, that from June 18, 1927, Quinlan's condition gradually worsened, that he began to get dull, that by June 22

Bk. 4 p. 660 11.1-15 and 1.45

he was *non compos mentis* and remained in that state until he died on June 26.

51. On June 22, 1927, Appellant's sister Margaret Quinlan was at her father's home. On that date Robertson came to the house and asked to see Quinlan on business, to which Dr. Hackett, Quinlan's pyhsician, said no, whereupon Robertson telephoned to Perron from Quinlan's house, instructing him not to come that day as Quinlan was too ill. This evidence is not contradicted, and is important in view of Robertson's attempt to establish that the price of $250,000 had been agreed upon between Quinlan and Perron prior to Perron's drafting the letter of June 20, 1927, no explanation being offered by or on behalf of Robertson as to what the purpose of Perron and Robertson's proposed interview with Quinlan on June 22 might have been. Bk. 3 p. 577 l.10-20

52. On June 22, 1927, Robertson caused Quinlan's shares in Quinlan, Robertson & Janin Ltd. and Amiesite Asphalt Ltd. to be transferred to himself and ordered the secretary of the respective companies to enter that Hugh Quinlan tendered his resignation as an officer and director.

53. Robertson contended that the letter of June 20, 1927, together with the following circumstances constitute a "commencement of proof in writing." The other circumstances are:

(a) An obsolete agreement dated June 11, 1925, giving to the surviving partners the right to purchase the shares of a predeceasing partner at prices to be fixed at the annual meetings of shareholders of Quinlan, Robertson & Janin Ltd. and Amiesite Asphalt Ltd. in each succeeding year. Robertson and Capital Trust admit that the agreement lapsed. Bk. 5 pp. 167-168 at p. 168 l.5-7

(b) Robertson's possession of the endorsed certificates now explained by Exhibit DR-54, Leamy's receipt of May 23, 1927. Bk. 9 p. 83 l.36

(c) Nurse Kerr's testimony that *Robertson told her* on May 21, 1927, out of Quinlan's presence, when he asked her to witness Quinlan's endorsement of the share certificates "that they were selling" shares of the company. Bk. 3 p. 566 l.28

(d) An interview between Quinlan and Perron in May 1927, at Quinlan's residence. There is no evidence whatever as to what was discussed.

(e) The memorandum that Quinlan dictated to his son on May 21, 1927, recording the delivery of the endorsed share certificates to Robertson in the following terms: "Dep. in A. W. Robertson's box"

with the list of such certificates. (This memorandum is also explained by Leamy's letter of May 23, 1927, above quoted, not produced until 1938.)

(f) The carbon copy of the letter of June 20, 1927, signed by Robertson, which was finally discovered in the vault in Perron's office by Perron's secretary, Miss King.

Bk. 9 p. 92 l.1 to 45

(g) The parole evidence of Robertson and Leamy that the letter of June 20, 1927, had been read to Quinlan.

54. On February 6, 1931, Martineau, J. rendered judgment, which may be summed up as follows:

Bk. 8 p. 781 et seq.

The executors and trustees are not removed because they acted in everything upon the legal advice of Perron;

The inventory is not anulled because the omissions and errors have been corrected since institution of suit;

Quinlan's shares in the following companies are the property of the estate, namely all the shares listed in the letter of June 20, 1927;

That the letter of June 20, 1927, is not a concluded contract and in any event cannot be interpreted as intending a sale;

That the Fuller Gravel shares were purchased by Robertson in contravention of the law, and the profit which he made by the resale of 400 of such shares belongs to the estate;

That the shares listed in the letter of June 20, 1927, be returned to the estate, but not until the estate would have reimbursed to Robertson the $250,000 which he had paid therefor;

That failing return of the shares, Robertson pay to the estate their value set at $408,928 with legal interest from the date of institution of action.

Bk. 8 p. 786 l.14

55. The learned trial judge rejected Robertson's contention that the letter of June 20, 1927, with the circumstances related above constitute a commencement of proof in writing so as to admit parole evidence to show a concluded contract.

Bk. 8 p. 7

56. The learned trial judge criticized the Capital Trust Corporation for having supported Robertson's claim to the shares, against the estate, and

Bk. 8 p. 806 l.1

condemned the Capital Trust Corporation to pay a portion of the costs personally.

57. Robertson and the Capital Trust Corporation and the General Trust of Canada filed formal acquiescence in the said judgment, in their quality of executors and trustees, and agreed to accept the benefits thereof for the estate.

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58. Robertson then resigned as executor-trustee after appointing Respondent General Trust of Canada as his successor, and appealed personally from the judgment of Martineau, J. to the Court of King's Bench.

59. The Court of King's Bench unanimously confirmed the judgment of Martineau, J. by judgment dated December 30, 1932, but modified the judgment of the Lower Court by substituting the word "bonuses" for the word "profits" in the condemnation so as to read "dividends and bonuses" instead of "dividends and profits." Bk. 8 p. 807

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60. The Court of King's Bench also found that the date, December 31, 1927, when Robertson made the first payment for the shares, to the estate, which the learned trial judge had selected for the establishment of the value of the shares in question, was wrong and that this date should have been the date of institution of action.

However, the Court of King's Bench did not modify the judgment so as to increase the amount of the condemnation, nor in any other respect to benefit Appellant, since Appellant and her sister had not cross-appealed.

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The Court of King's Bench judgment states: Bk. 8 p. 808 l.40 to p. 809 l.12

"CONSIDERANT, quant aux actions de la compagnie Quinlan, Robertson & Janin Ltd., de la compagnie Amiesite Asphalt Ltd. et de la compagnie Ontario Amiesite Ltd., que ni les formules de transport signées *en blanc* par Hugh Quinlan au dos de certificats d'actions, et destinées à en faciliter la négociation, le cas échéant, ni la lettre de Robertson en date du 20 juin 1927 ne comportaient une vente desdites actions par Quinlan à Robertson, et ne constituent même un commencement de preuve par écrit autorisant la preuve par témoins; qu'à la mort de Hugh Quinlan, survenue le 27 juin 1927, lesdites actions étaient la propriété de ce dernier; que c'est illégalement que lesdits transports avaient été exécutés, le 22 juin 1927, en faveur de Robertson, et enregistrés dans les livres des compagnies; que, si Robertson avait acquis lesdites actions, ce ne pourrait être qu'après le décès de feu Quinlan,

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apparemment vers le 27 décembre 1927; que cette acquisition serait pareillement illégale, parce que faite de biens dont ledit Robertson était en possession à titre d'exécuteur testamentaire, fiduciaire et administrateur;"

Bk. 8 p. 818 l.47 to p. 819 l.20

61. On the question of commencement of proof in writing, Howard, J. says:

"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.' 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 in the evidence now under consideration defeats the appellant's claim that it constitutes a commencement of proof.

"Taking the facts, therefore, as they are established on the record as it is, I come to the conclusion that the shares in question were not disposed of by Mr. Quinlan before his death, as the appellant contends."

Bk. 8 p. 812 l.13

62. The Court of King's Bench also held that the obligation to return the shares is indivisible, and that unless Robertson could return them all, he could not return some and pay for others, but had to pay for all.

63. Robertson appealed to the Supreme Court of Canada from the judgment of the Court of King's Bench. Neither Appellant nor her sister cross-appealed.

64. At the first hearing, before the Supreme Court, argument was postponed so as to enable the trustees and executors, Capital Trust Corporation and General Trust of Canada to appear and be heard.

65. Before the date fixed for the second hearing, Robertson and the executors and trustees purported to enter into an agreement of compromise or settlement, under date of January 31, 1934, whereby the parties purported to settle this litigation out of Court and to grant reciprocal releases and dis-

charges from any and all claims of any and every kind whatsoever for the consideration of an additional sum of $50,000, to be paid by Robertson to the estate, and some $14,000 to be paid by Robertson to the attorneys for Appellant and her sister Margaret Quinlan, whose husband Jacques Desaulniers, received $27,500 therefrom as one of the attorneys for Plaintiffs. Bk. 10 p. 267 l.10

66. All the living heirs of the late Hugh Quinlan were parties or represented by their tutors to this purported agreement of settlement, with the exception of the Appellant and her daughter Katherine Kelly.

67. It is a condition of the agreement that it would only come into effect after it had been submitted to the Supreme Court, "and, provided the said Court before which the litigation between the parties hereto is still pending, see no objection to the party of the third part (Capital Trust and General Trust) 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." Bk. 9 p. 231 l.33-43

68. The executors and trustees filed written appearances explaining that they had not appeared theretofore because of the criticism of the learned trial judge, Martineau, J. respecting the Capital Trust's contestation of Appellant's action, and submitted themselves to justice.

69. At the second hearing before the Supreme Court, Respondent Robertson set up the settlement agreement and requested that the Court grant *acte* or record thereof.

70. Mr. Justice Cannon rendered judgment on behalf of the Supreme Court, by which the settlement agreement was acknowledged, with reservations, in the following terms: Bk. 10 p. 439 l.47 to p. 440 l.13

> "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.
>
> "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 con-

cerned, we cannot refuse to find as a fact that they have settled their differences and wish to stop this litigation.

"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."

71. The judgment of the Supreme Court quashed the judgment of the Court of King's Bench and quashed in part the judgment of the trial judge, as well as certain rulings, namely, the rulings refusing to admit parole evidence of Quinlan's reply to the reading of the letter of June 20, 1927, and of the other circumstances urged by Robertson in support of its sufficiency.

The Supreme Court finding that parole evidence should have been admitted, remitted the case to the Superior Court for further enquiry and a new adjudication.

The remitter was, however, restricted to certain specific issues, other issues being declared by the Supreme Court to be *res judicata.*

72. The issues declared to be *res judicata* are the following:

Bk. 10 p. 441 l.15

"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."

73. The issues remitted to the Superior Court for further *enquête* and a new adjudication are the following; the remitter being in the following terms:

Bk. 10 p. 441 l.27-42

"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."

"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." Bk. 10 p. 444 l.31-12

74. On January 11, 1935, before trial on the remitter, Robertson filed a Supplementary Plea by which he set up the purported settlement agreement of January 31, 1934, now part of the record by authority of the Supreme Court judgment.

The Supplementary Plea alleges that by the terms of the settlement agreement Robertson "has purchased and repurchased, so far as may be necessary, from the then testamentary executors and trustees," (Capital Trust and General Trust), all the shares which by the judgment of Martineau, J. and the Court of King's Bench Robertson had been ordered to return to the estate or pay the value of; that the shares thus purchased and repurchased, are: 1151 shares of Quinlan, Robertson & Janin Ltd., 250 shares of Amiesite Asphalt Ltd., 200 shares of Ontario Amiesite Ltd., and 400 shares of Fuller Gravel Ltd.

The Supplementary Plea adds that, moreover, the executors and trustees have desisted from the judgments of both the Superior Court and the Court of King's Bench; and that the executors and trustees have furthermore "renounced to all and every right, claim, action and pretension of whatever nature or description", against Robertson "arising from any of the facts disclosed in the evidence adduced in the present 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 Hugh Quinlan, as co-partner, co-shareholder, co-associate or otherwise, or from the dealings, connections or operations of the Defendant now pleading acting jointly with the said late Hugh Quinlan, with third parties, or from the personal acts or deeds of the Defendant now pleading, in whatever capacity, circumsstances or time."

Robertson's Supplementary Plea sets up his payments of $50,000 and of all taxable and extra-judicial costs, disbursements and counsel fees, over and above the $270,000 which he had paid to the estate as the original purchase price of the shares which he had been ordered to return.

It also alleges that this agreement is in all respects binding upon the estate and the heirs and legatees of the late Hugh Quinlan *including Appellant.*

75. Appellant answered the Supplementary Plea denying the power of the executors and trustees to sell or otherwise deal with the shares in question in the circumstances; that the Supreme Court remitter stipulated the specific issues of further enquiry and did not include the issue of the validity, effect or otherwise of the purported settlement agreement; that the Supreme Court had, with full knowledge of the purported settlement agreement, declared that Appellant had sufficient interest and status to preserve intact the *corpus* of the estate.

Appellant's Answer further alleges that Respondents Capital Trust and General Trust had given written notice under date of September 6, 1933 to all parties interested in the litigation that they have accepted on behalf of the estate all the benefits and advantages accruing to the estate under the judgments of the Superior Court and the Court of King's Bench; that the value of the shares fixed by the Superior Court was $408,928 and by the Court of King's Bench $415,956.25, and that the amount of dividends and bonuses ordered repaid by the Superior Court and Court of King's Bench judgments was at least $36,565.84, and that notwithstanding those values the executors and trustees had purported to accept $320,000 in full settlement; that the consent of the heirs and legatees of the late Hugh Quinlan to the purported settlement agreement had been obtained by misrepresentations, it being represented to them that if Robertson returned the shares to the estate the estate would be obliged to repay the $250,000 with interest, which it had received from him, and that the known fact that Robertson was unable to return the shares, having sold them, or part of them, was withheld from the heirs and legatees; that Robertson and the trustees knew that the estate had

numerous other claims against Robertson all of which had been made known to them by way of written notification and protest under date of October 17, 1933; and, Appellant's said Answer sets up the want of authority of the signing officers of the Capital Trust and General Trust to execute the purported settlement agreement of January 31, 1934.

76. By Order of June 26, 1935, rendered by Forest, J., all the heirs and legatees who had been present or represented at the signing and who had executed the purported settlement agreement were impleaded as Defendants in the present litigation.

77. On August 27, 1935, Appellant's sister Margaret Quinlan, now an impleaded Defendant, moved that Appellant be ordered to implead Appellant's daughter, Katherine Kelly.

78. Said Margaret Quinlan replied to Appellant's Answer to Robertson's Supplementary Plea, by denying Appellant's allegations and praying for a Declaration of Validity of the settlement agreement.

79. On November 28, 1935, Appellant's daughter Katherine Kelly intervened in the action as then constituted and in addition to attacking the validity of the purported settlement agreement, alleged anew the claims which Appellant was by her action urging against Robertson, together with numerous other claims which had been notified to the executor-trustees by notarial protest.

Bk. 9 p. 173 et seq. and p. 190 et seq.

80. Katherine Kelly's intervention was contested by the Capital Trust Corporation and General Trust, in their quality of executors and trustees, by written contestation under date of March 27, 1936.

81. Robertson took exception to the introduction of new claims by way of Katherine Kelly's intervention. His exception was dismissed by the Superior Court and maintained by the Court of King's Bench, reversing the judgment of the Superior Court, with the result that Katherine Kelly's intervention was reduced to the simple allegations denying the validity of the purported settlement agreement of January 31, 1934.

Katherine Kelly respectfully excepted from the judgment of the Court of King's Bench dated June 26, 1936, striking out the major portion of her intervention.

82. Robertson filed a written contestation of the intervention under date of April 22, 1938.

83. Appellant's sister likewise contested the Intervention, under date of April 30, 1938.

84. Issue having been joined by all parties on the Supplementary Plea as well as on the Intervention and Contestations thereof, the case came to trial anew in the Superior Court on November 2, 1938, before Gibsone, J.

85. Parole evidence was admitted on the remitter that when the letter of June 20, 1927 was read to Quinlan, Quinlan answered "That is all right." 10

No testimony was offered as to any other conversation between Robertson, Leamy and Quinlan on that occasion, or that Quinlan had been asked to sign and had been unable to do so.

86. Appellant proved that Robertson was not in Quinlan's sickroom at any time during the morning of June 20, 1927, and Leamy was only there two to three minutes while the day nurse Miss MacArthur absented herself, and that on her return to the room she ordered Leamy out and he left. 20

Without offering any explanation as to why the letter of May 23, 1927 had not been produced at or prior to the first trial, Robertson acknowledged having had it in his possession and having known and remembered it since May 23, 1927.

87. On April 26, 1940, Gibsone, J. rendered judgment which may be summed up as follows:

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That the settlement agreement of January 31, 1934 is null and void against Appellant as well as against the estate, by reason of want of capacity of the parties thereto; that the ancillary issues of removal of the executor-trustees and the rendering of account by them were excluded by the Supreme Court judgment; that the sole matters remaining in issue are those concern-in the shares in question and their return or the restitution to be made therefor by Robertson to the estate; that although mention was made both in the pleadings and during trial of certain other shares, nevertheless the issue became confined to the following specific items:

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"*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 1,000 shares of Fuller Gravel Co. Ltd."

That as to the Quinlan, Robertson & Janin Ltd., the Amiesite Asphalt Ltd. and the Ontario Amiesite shares, they form a group because of Robertson's contention that he acquired them as a group and for a lump sum from the deceased himself before his death, namely on June 20, 1927, for the sum of $250,000.

That as to the Fuller Gravel shares, they were acquired by Robertson from the estate some months after Quinlan's death.

That until May 10, 1928, when succession duties were paid on the 1151 shares of Quinlan, Robertson & Janin Ltd., Robertson and The Capital Trust as well as the auditors of the estate treated those shares as the property of the estate.

That on May 21, 1927, Quinlan entrusted to Robertson the scrip representing the shares in question, endorsed in blank by Quinlan, and that Robertson turned the scrip over to Leamy in exchange for a receipt of that date (May 23, 1927) which stipulates that the scrip was the property of Quinlan.

That it appears that Robertson sought to give to the Capital Trust the impression that the 1151 shares of Quinlan, Robertson & Janin Ltd. were to be sold to a third party and that not until August 25, 1928, was the Capital Trust informed that Robertson was himself the purchaser.

Bk. 6 p. 374 l. 15 and l. 45
Bk. 6 p. 377 l. 40
Bk. 6 p. 381 l. 45 and p. 382 l. 22
Bk. 6 p. 388 l. 40 at p. 389 l. 8

That Robertson's Defence alleges that on June 20, 1927, Robertson obtained Quinlan's shares in exchange for the letter dated June 20, 1927, and that Robertson had been the owner thereof since that date.

That on June 22, 1927, Robertson caused the shares in question to be transferred to himself on the respective transfer books, in breach of trust and contrary to the terms upon which he had received the scrip from Quinlan on May 21, 1927.

That Quinlan could have had no knowledge of those transfers.

That at trial neither Robertson or Leamy, the only persons present at the alleged reading of the letter of June 20, 1927, testified that the scrip was delivered to Robertson at that time.

That the letter of June 20, 1927 was never delivered to Quinlan but always remained in Robertson's possession; that it first emerged from Robertson's possession on December 6, 1928, before which its existence was some-

Bk. 8 p. 699; p. 690 l. 18
Bk. 8 p. 689 l. 1-40
Bk. 8 p. 688 l. 20

what uncertain; that Parent, the estates manager of the Capital Trust, is supposed to have seen a copy of it on the 9th or 18th of July, 1927, but that this can hardly be so, for on the 29th of July 1927 he declared under oath that the 1151 shares of Quinlan, Robertson & Janin Ltd. were part of the estate; that although a copy of the letter of June 20, 1927 is supposed to have been sent to Parent about August 20, 1927, Parent again made a sworn declaration to the Succession Duties Office on September 17, 1927, that the shares were part of the estate; that the letter of June 20, 1927 was still a matter of discussion on September 25, 1928; that it had been mislaid and at that date had not been found, those present at the discussion being Robertson, Parent and Perron, and it appears from Perron's letter of September 26, 1928 that Perron referred to the letter as a letter from Quinlan to Robertson, not from Robertson to Quinlan.

That the visit of Robertson and Leamy to Quinlan on June 20, 1927 is a question of fact and that their testimony is contradicted by other testimony and by circumstances and probabilities of fact; that in law it was incumbent upon Robertson to prove his allegation by reasonable and sufficient preponderance and that in the judgment of the Court he had not done so.

That the Court declares that the proof of such interview (of June 20, 1927) 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 and that for the same reasons it is declared and decided that the letter of June 20, 1927 was not on that date or at any time read to Quinlan.

That in any event the reading of a paper, memorandum or note, whatever the form, without delivery of same and the reader withholding and keeping the same in his own possession is and remains a verbal act.

That even if read, the reading and Quinlan's reply *viva voce* would merely constitute an oral understanding; that the document which Robertson cites as title to the shares, namely the letter of June 20, 1927, does not on true construction thereof constitute title or transfer of title in the shares to Robertson.

That the shares in question were acquired by Robertson from the estate on or about December 31, 1927, and that by reason of Article 1484 of the Civil Code the acquisition was and by the judgment is declared to have been illegal, null and of no effect, and that Robertson is in law bound to return the shares or make restitution.

That as to the Fuller Gravel shares, 850 shares thereof were illegally acquired by Robertson from the estate and that he is bound to return the same or make restitution therefor.

That because Robertson has dealt with the shares in question as he saw fit for a period of some twelve years, and because Robertson and Janin were able to dispose of the assets and businesses in the way they pleased during that period, the Court is of the opinion that the return of the shares would not constitute a re-establishment of rights and that in the opinion of the Court the juridical and proper re-establishment of rights must consist in the valuation of the shares as at December 31, 1927 (date of Robertson's first payment on account of purchase price) and the condemnation of Robertson to pay that amount with interest from the service of the action.

That the valuations found by Gibsone, J. and the condemnations awarded are as follows:

1151	shares of Quinlan, Robertson & Janin Limited at $227. per share	$261,277.	
	Plus 1/3rd. of dividend $84,947	28,315.	$289,592.
250	shares of Amiesite Asphalt Ltd. at $400. per share		$100,000.
850	shares of Fuller Gravel at $90. per share		$ 76,500.
			$466,092. Bk. 10 p. 398
1151	shares Quinlan, Robertson & Janin Limited at $227 per share	$261,277.	
	1/3 of $84,947. dividends declared and not paid	28,315.	$289,592.
250	shares Amiesite Asphalt Limited at $400 per share		$100,000.
850	shares Fuller Gravel Limited at $40. per share (balance of $90. per share)		34,000.
			$423,592. Bk. 10 p. 288

Credits

Payments by Robertson		
21st. January 1928	$ 3,750.	
31st. December 1927 / 28th. January 1928	250,000.	$253,750.
		$169,842.

88. The learned trial judge dismissed all the contestations of the Intervention of Katherine Kelly and maintained her intervention, declaring the purported settlement agreement of January 31, 1934 to be null and of no effect as against her as well as against the estate.

89. The Reasons of the learned trial judge (Gibsone, J.) set forth an elaborate and detailed discussion of the facts and the law relating to the issues of this case, justifying his refusal to believe Robertson's and Leamy's testimony or to grant Robertson's contentions, accepting, as the learned trial judge does, the disinterested and impartial testimony of other witnesses.

90. The learned trial judge refuses to interpret the Supreme Court judgment as intending that regardless of what evidence might finally be adduced on the remitter, the conclusion must always be that Robertson had been in good faith.

Bk. 10 p. 313
36

91 The learned trial judge dismisses Robertson's contention that the letter of June 20, 1927 and the other circumstances relied on constitute a commencement of proof in writing sufficient to admit parole evidence that the letter became a concluded contract on that date; as well as the other contention that the letter must be interpreted as reserving to Robertson the right to substitute another buyer for himself, with the final obligation upon Robertson to purchase if he could find no such buyer.

92. The learned trial judge found that no such type of contract is known to the law of the Province of Quebec.

93. The learned trial judge finds that the Honourable J. L. Perron was acting throughout the case as a personal adviser of Robertson against the interests of the estate.

94. Robertson appealed to the Court of King's Bench from the judgment of Gibsone, J.

95. The Capital Trust and General Trust appealed to the Court of King's Bench from the dismissal of their contestation of the intervention and the condemnation against them to pay costs.

96. Appellant cross-appealed from the judgment of the learned trial judge for a greater and different award, namely the return of the shares or payment of $1,613,304, after crediting Robertson with all payments made on account, and interest thereon.

97. Katherine Kelly likewise cross-appealed.

98. On April 30, 1943, the Court of King's Bench rendered judgment unanimously maintaining Robertson's appeal and maintaining the appeals of Capital Trust and General Trust, reversing the judgment of Gibsone, J. and dismissing Appellant's action and cross-appeal as well as Katherine Kelly's intervention and cross-appeal. Bk. 10 p. 405 et seq.

10

99. The judgment of the Court of King's Bench may be summed up as follows, namely:

That Robertson proved Quinlan's assent to the letter of June 20, 1927, by testimony, as had been ordered and allowed by the Supreme Court judgment; that although Robertson had acquired the Fuller Gravel shares in contravention of the law, the settlement agreement of January 31, 1934, had covered the nullity; that Appellant (Ethel Quinlan) had not established the nullity of the settlement agreement; that the settlement agreement is valid
20 and put an end to the litigation as well against Appellant as against the estate.

100. The Reasons of Prevost, J., may be summed up as follows:

The Supreme Court judgment constituted *res judicata* as to the admissibility of parole evidence of Quinlan's assent and of the other circumstances establishing that the letter of June 20, 1927, constitutes a concluded contract, and that Robertson had adequately made the necessary parole evidence; that the Supreme Court had given its interpretation of the letter of June 20,
30 1927, and that the Supreme Court would not have ordered the remitter if it had not been of the opinion that the letter of June 20, 1927 constituted a valid contract.

Prevost, J. states that he does not pronounce himself as to the validity of the purported settlement agreement of January 31, 1934. Bk. 10 p. 427 l. 1

101. The Reasons of Francceur, J. may be summed up as follows:

The learned judge accepts and concurs in the Reasons of Prevost, J.

40

102. The Reasons of McDougall, E. M., J., may be summed up as follows:

That implicit in the order of the Supreme Court 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 letter of June 20, 1927; that the learned judge accepts the Reasons of Prevost, J. to the effect that Quinlan's assent has been adequately proven; that 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; that as to the Fuller Gravel shares, the settlement agreement successfully disposes of Appellant's claims.

103. There were no other Reasons for the judgment of the Court of King's Bench.

104. The Appellant contends, and respectfully submits, as against Respondent Robertson that:

(a) All questions of credibility of Robertson's testimony should be considered in the light of the avowed conflict between his personal interest and his duty as trustee.

Robertson's interest, reticences, contradictions and equivocations make his testimony unreliable.

(b) As to the shares in Quinlan, Robertson & Janin Ltd., Amiesite Asphalt Ltd., and Ontario Amiesite Ltd., Robertson came into possession of the certificates or scrip therefor, endorsed in blank by Quinlan, as depositary, on May 21, 1927;

(c) The provisions of Article 2195 C.C. are as follows:

"*Art. 2195:* When possession is begun for another, it is always presumed to continue so, if there be no proof to the contrary."

Article 1239 C.C. states the effect of a legal presumption:

"*Art. 1239:* Legal presumptions are those which are specially attached by law to certain facts. *They exempt from making other proof those in whose favor they exist;* certain of them may be contradicted by other proof; others are presumptions *juris et de jure* and cannot be contradicted."

(d) Article 1234 C.C. excludes testimony even where allowed by Article 1233 C.C.:

"*Art 1233:* Proof may be made by testimony:

1. Of all facts concerning commercial matters;

2. In all matters in which the principal sum of money or value in question does not exceed fifty dollars;

3. In cases in which real property is held by permission of the proprietor without lease, as provided in the title *Of Lease and Hire;*

4. In cases of necessary deposits, or deposits made by travellers in an inn, and in other cases of a like nature;

5. In cases of obligations arising from quasi-contracts, offences and quasi-offences, and all other cases in which the party claiming could not procure proof in writing;

6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced;

7. *In cases in which there is a commencement of proof in writing.*

In all other matters proof must be made by writing or by the oath of the adverse party.

The whole, nevertheless, subject to the exceptions and limitations specially declared in this section, and to the provisions contained in article 1690."

"*Art. 1234:* Testimony cannot *in any case* be received to contradict or vary the terms of a valid written instrument."

"*Art. 1234: Dans aucun cas* la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait."

The letter of May 23, 1927 (Ex. DR-54) is a "valid written instrument", "un écrit valablement fait", produced by Robertson and acknowledged by Robertson and Leamy.

MIGNAULT, op. cit., loc. cit., p. *83*:

"La première condition c'est qu'il y ait un écrit *valablement fait,* c'est-à-dire un écrit dressé avec soin, et qui prouve la convention. Un écrit informe, comme l'entrée dans un registre, pourrait certainement être contredit (b).

"(b) Un reçu doit être assimilé à un contrat, et comme ce dernier, il ne peut être contredit ou changé par une preuve testimoniale: juge Loranger, *West* v. *Fleck*, 15 L. C. R., p. 422; juge Andrews, *Gilchrist* v. *Lachaud*, 14 Q. L. R., p. 278, et cour de revision, même cause, 14 Q.L.R. p. 366. Celui qui dans un reçu désignerait une autre personne comme propriétaire de certains effets ne pourrait ensuite prouver par témoins qu'il était lui-même le propriétaire réel de ces effets: juge Davidson, *Hall* v. *McBean*, R.J.Q., 3 C.S., p. 242."

Testimony admitted in contravention of Article 1234 is null:

"*Art. 14:* Prohibitive laws import nullity, although such nullity be not therein expressed."

LANGELIER, de la PREUVE, p. 246, 20 584:

"584. L'art. 1234 du Code Civil s'exprime comme suit:
Dans aucun cas la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait.

"Nous venons de voir sept cas dans lesquels, contrairement à la règle générale d'après laquelle la preuve testimoniale est rejetée par notre droit, elle est admissible. Eh bien, même dans ces cas, elle reste exclue si elle tend à contredire ou modifier les termes d'un écrit. Ainsi donc, même en matière commerciale, même s'il s'agit d'un montant ne dépassant pas cinquante piastres, même s'il s'agit d'un dépôt nécessaire, même s'il y a un commencement de preuve par écrit, du moment qu'il y a eu un écrit de rédigé pour constater un fait, les parties à cet écrit, et leurs ayants cause à titre universel, n'y peuvent toucher au moyen d'une preuve testimoniale."

BURY and MURRAY, 24 Canada Supreme Court Reports, p. 77. (Sir Henry Strong, C.J. and Fournier, Taschereau, Sedgewick and King, J.J.)

Per the Chief Justice at p. 82:

"I am of opinion that the appellant has entirely failed in proof of his allegations. It has been determined, first by Mr. Justice Davidson, and then by the Court of Appeals, that there was no sufficient commencement of proof in writing to be found in the

deposition of the respondent to let in the testimony of witnesses. Whether this is so or not can, in the view which I take, make no difference, for even assuming that there was a perfectly good commencement of proof in writing verbal evidence would still be inadmissible.

Article 1234 of the Civil Code says:

> Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument."

And again, at p. 83:

". . . Then is it permissible, nothwitstanding this article 1234, to receive verbal testimony to alter or contradict a deed or other writing on the ground that there is a commencement of proof in writing? By article 1233 seven cases are enumerated in which testimonial proof is admissible; one of them is the case where there is a commencement of proof by writing. Then as article 1234 says that oral proof shall not in any case be received it must be interpreted as excluding all the cases mentioned in the next preceding article. It is not to the purpose to show that the French authorities are against this, for the French code makes different provisions for such a case. Art. 1341 of that code which says that oral proof shall not be received against *actes* is followed by article 1347, which introduces an express exception in favour of the admission of such proof when there exists a commencement of proof by writing. This question is ably treated in a work on the law of evidence in the province of Quebec (1) lately published; and in the absence of judicial decisions to the contrary I adopt the learned author's conclusions, inasmuch as they appear to be founded on unanswerable arguments.

(1) Langelier de la Preuve, arts. 584-640." (Fournier, Sedgewick and King J.J. concurred with the Chief Justice. Taschereau J. concurred for other Reasons and expressed no opinion on the question of admissibility of testimony).

MIGNAULT, Droit Civil Canadien, Vol. 6 at pp. 82-83:

"1° *De l'exclusion de la preuve testimoniale contre les écrits.* — J'ai dit qu'en matière de preuve, la preuve littérale est la règle,

la preuve testimoniale, l'exception. Il s'ensuit naturellement que lorsqu'il y a un écrit, même dans une matière où la preuve par témoins serait admissible, c'est cet écrit seul qui régit les droits des parties, et qu'on ne peut le contredire ou le modifier par une preuve testimoniale. C'est la règle que porte l'article 1234 en ces termes:

> 1234. 'Dans aucun cas la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait.'
>
> "Cette disposition n'est pas nouvelle dans notre droit. Dès 1566, nous trouvons, dans l'article par lequel l'ordonnance de Moulins décrétait qu'il serait passé contrats de toutes choses excédant la valeur de 100 livres, la défense de 'recevoir aucune preuve par témoins contre le contenu auxdits contrats, ni sur ce qui serait allégué avoir été dit ou convenu *avant icelui, lors et depuis.*' Et l'ordonnance de 1667, titre 20, article 2, allait encore plus loin, car elle disait: 'ne sera reçue aucune preuve par témoins contre et outre le contenu des actes, ni sur ce qui serait allégué avoir été dit *avant, lors ou depuis* les actes, encore qu'il s'agit d'une somme moindre de 100 livres.' "

The reading of the letter of June 20, 1927, is not "a commencement of proof in writing" within the meaning of Article 1233, par. 7. It is a commencement of proof by testimony:

LANGELIER op. cit. pp. 239-240, nos. 565, 566, 567:

> "565. Mais que faut-il entendre par *commencement de preuve par écrit.*
>
> Notre code, à la différence du Code Napoléon,[1] n'en donne aucune définition. Pothier,[2] dit que c'est un écrit authentique auquel était partie celui contre lequel on veut prouver, ou un écrit privé, signé ou écrit par lui, et qui, sans établir le fait qu'il s'agit de prouver, *prouve quelque chose qui y conduit ou en fait partie.* L'art. 1347 du Code Napoléon le définit:
>
> > Tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.
>
> C'est, en d'autres termes, la définition de Pothier. On peut donc,

chez nous, suivre cette définition du Code Napoléon, du moins dans son esprit.

"566. 1° Il faut un écrit, c'est-à-dire, un document qui, s'il était plus complet et plus précis, constituerait une preuve par écrit. Et il faut que l'écrit soit produit; on ne pourrait pas en prouver l'existence par témoins, même s'il était perdu.[3] *Car alors ce ne serait plus un commencement de preuve par écrit, mais un commencement de preuve par témoins.*

"567. 2° Il faut que cet écrit émane de la partie contre laquelle on veut être admis à faire la preuve par témoins, ou de son auteur à titre universel, ou de son représentant. Jamais un écrit émané d'un tiers qui ne représente pas la partie, ou qui ne la représentait pas quand il a fait l'écrit, ne peut servir de commencement de preuve par écrit, parce que jamais un tel écrit ne ferait preuve s'il contenait une déclaration complète du fait à prouver."

"1. Art. 1347.

"2. Obligations, 801 à 808.

"3. 19 Laurent, 490."

MIGNAULT op. cit., loc. cit., pp. 77-78:

"7° *Le cas où il y a un commencement de preuve par écrit.* — C'est ce qu'on invoque le plus souvent dans la pratique, et quand ce commencement de preuve par écrit existe, et qu'il couvre tous les faits qu'on demande à prouver, ou peut établir ces faits par témoins, quel que soit le montant en jeu.

"Notre code ne définit pas le commencement de preuve par écrit. D'après Pothier (a), le commencement de preuve par écrit existe 'lorsqu'on a contre quelqu'un, par un écrit authentique où il était partie, ou par un écrit privé, écrit ou signé de sa main, la preuve, non à la vérité du fait total qu'on avance, mais de quelque chose qui y conduit.'

"Aux termes de l'article 1347 du code Napoléon, le commencement de preuve par écrit est 'tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.'

"Cette définition ne diffère pas essentiellement de celle de Pothier et nous pouvons l'accueillir dans notre droit. Il faut donc le concours de trois conditions pour qu'il y ait commencement de preuve par écrit: 1° qu'il y ait un écrit; 2° que cet écrit émane de la partie ou de celui qu'elle représente; 3° qu'il rende vraisemblable le fait à prouver.

"Et d'abord il faut qu'il y ait un écrit, mais il n'est pas nécessaire que cet écrit constitue un *acte*. Du reste la déposition de la partie peut servir de commencement de preuve par écrit lorsqu'elle contient des admissions qui rendent le fait allégué vraisemblable (art. 316 C.P.) (b).

"L'écrit doit émaner de la partie elle-même ou de celui dont elle est l'avant-cause. L'écrit émané du représentant ou mandataire de la partie peut également servir de commencement de preuve comme il pourrait servir de preuve complète. Il n'est pas nécessaire qu'il soit signé par la partie, ni même que celle-ci l'ait écrit de sa main, comme l'exigeait Pothier. Il suffirait que l'écrit ait été dressé par un tiers sous la dictée de la partie, car il serait alors son œuvre et émanerait d'elle, mais l'on ne pourrait prouver autrement que par l'aveu de la partie elle-même que l'écrit a été fait sous sa dictée.

"Enfin l'écrit doit rendre vraisemblable le fait qu'on demande à prouver, autrement il serait sans conséquence.

(a) *Obligations*, no. 801.

(b) Il importe peu que la partie soit interrogée sur faits et articles ou comme témoin."

Unilateral writings do not make proof in favour of the person who wrote and retained them. They make proof against him.

A unilateral writing that proposes a form of contract which has never, in our jurisprudence, received judicial interpretation is not "vraisemblable."

When the best proof could easily have been obtained by a party to a $250,000 contract it is not "vraisemblable" that he would accept inferior proof.

Whether a "commencement of proof in writing" is sufficient, in the light of all the proof, to admit parole evidence, is a question of fact.

The concurring findings of two successive trial judges on a single question of fact should not be disturbed.

(e) Robertson's contention that he came into possession of the certificates or scrip endorsed in blank for the shares enumerated in sub-paragraph (b) of this paragraph in exchange for delivery by him to Quinlan of the letter of June 20, 1927, was proven false and abandoned by Robertson.

(f) Robertson is therefore left with only one-half of his Defence. The falsity of one-half of the contention destroys the whole, for the contention is not that the sale took place by delivery of the certificates but by the *exchange* of certificates for letter.

It is far-fetched to term the mere reading of a letter which the reader then and thereafter kept, proof of delivery in any legal sense — even to a listener who may have approved the words read.

As illuminated by the evidence, including the parole evidence, Robertson's Defence became:

> I received the shares from Quinlan
> on June 20, 1927,
> by having *Leamy* read him a letter
> which Quinlan said was all right,
> but which Leamy then gave me and I kept,
> in exchange for which,
> Quinlan "in turn"
> did not hand me
> the shares I said he did.

(g) The Reasons given by the learned trial judge at the remitter (Gibsone, J.) amply justify Appellant's contention that the letter of June 20, 1927 was not read to Quinlan on that or any other date.

(h) The effort to settle the litigation while the Appeal was pending before the Supreme Court of Canada was abortive, at least insofar as Appellant is concerned, because Appellant was not a party thereto.

(i) The purported settlement agreement is furthermore null and of no effect against the estate because neither the executors and trustees nor the other parties thereto had the authority or quality to end the litigation against a co-trustee respecting trust property the ultimate title to which is undetermined.

(j) Robertson could not by resigning his trusteeship compromise litigation which he could not compromise while such trustee, and the power conferred by the Will upon the trustees to compromise claims of and against the estate cannot be interpreted to include a claim of the estate against a trustee to recover trust property illegally acquired by such trustee while a trustee thereof.

(k) As trustee Robertson could not become buyer of the property in his charge. The relevant provisions of the Civil Code are contained in Article 1484:

> "*Art. 1484:* The following persons cannot become buyers, either by themselves or by parties interposed, that is to say:
>
> Tutors or curators, of the property of those over whom they are appointed, except in sales by judicial authority;
>
> Agents, of the property which they are charged with the sale of;
>
> *Administrators or trustees, of the property in their charge, whether of public bodies or of private persons;*
>
> Public officers, of national property, the sale of which is made through their ministry.
>
> The incapacity declared in this article cannot be set up by the buyer; it exists only in favor of the owner and others having an interest in the thing sold."

(l) At best the letter of June 20, 1927, was a mandate and terminated by the incapacity of Quinlan on and after June 22, 1927, or by his death, in accordance with the provisions of Article 1755 of the Civil Code:

> "*Art. 1755:* Mandate terminates:
> .....

(3) by the natural death of the mandator or mandatary;

. . . . . .

(7) by other causes of extinction common to obligations."

(m) Having treated the 1151 shares of Quinlan, Robertson & Janin Ltd. as assets of the estate until May 10, 1928, Robertson is barred by that conduct, by the fact of having caused the estate to alter its position to the extent of paying succession duties thereon, and by the concealment of the identify of the purchaser, from contending that those shares were his personal property from and after June 20, 1927.

(n) The shares of Quinlan, Robertson & Janin Ltd., Amiesite Asphalt Ltd., and Ontario Amiesite Ltd. form a group of assets, title to which will be determined as a whole by the adjudication upon Robertson's contention that he acquired all the said shares by the letter of June 20, 1927.

(o) Appellant submits that Robertson's efforts to conceal the letter of June 20, 1927, are due to his *misrepresentations as to its authorship*. On August 23, 1927, the Capital Trust wrote to Robertson asking for the letter or written agreement *by Quinlan* concerning the sale of the shares to Robertson. On September 26, 1928, Perron wrote to Robertson and the Capital Trust to try to find the letter which *Quinlan* had written to Robertson. And on October 29, 1930 *Robertson* wrote to Perron:

Bk. 6 p. 374 l. 40

Bk. 6 p. 394 l. 20

Bk. 8 p. 697 l. 30

"ANGUS ROBERTSON LIMITED

1006 Keefer Bldg.,
1440 St. Catherine St. E.,
October 29th, 1930

"Perron Vallée & Perron,
Themis Building,
Montreal, Quebec.

"Dear Sirs:—

Mr. George A. Campbell is anxious to know if Mr. Perron has the original letter which he drafted in connection with the sale of the late Hugh Quinlan's stock to me. If Mr. Per-

ron could do so, I should be pleased to have him show Mr. Campbell the letter in question. *The letter which Mr. Quinlan signed is in the possession of the Capital Trust Corporation.*

Yours truly,

(signed) A. W. Roberston."

105. Appellant contends, and respectfully submits, as against Respondent Capital Trust Corporation Ltd.:

(a) That the Capital Trust was remiss in its duties as executor-trustee in not conducting an independent enquiry and investigation into the assets of the Quinlan estate; in accepting its co-trustee's word as to his purported acquisition of assets of the estate; in not summoning the *cestui que trustent* to be present at the taking of inventory, and in not furnishing them with copy of inventory in proper commercial form duly signed and executed; in supporting Robertson's claim to assets of the estate; in contesting Appellant's action to recover assets of the estate; in participating in the purported settlement agreement of January 31, 1934 whereby it purported to grant a full and final release and discharge to Robertson from any and all claims which the estate might have against him, and in accepting less than the provable amounts for claims which had been adjudicated upon by a judgment which it and its co-executor and -trustee had acquiesced in and accepted on behalf of the estate.

(b) Appellant submits that the evidence establishes negligence, incompetency and misconduct on the part of the Capital Trust in its quality of executor and trustee of the Quinlan estate, both prior and subsequent to the first judgment of the Superior Court (Martineau, J.), and that the Capital Trust should have been and should now be removed from its office of executor and trustee of the Quinlan estate pursuant to the terms of Article 981d of the Civil Code:

"981d. Trustees dissipating or wasting the property of the trust, or refusing or neglecting to carry out the provisions of the document creating the trust, or infringing their duties, may be removed by the Superior Court."

106. Appellant contends, and respectfully submits, as against Respondent General Trust of Canada:

That its appointment was and is null;

That by its participation in the purported settlement agreement of January 31, 1934, and by its acceptance of less than the provable amounts of claims adjudicated upon from its appointor Robertson the General Trust has rendered itself guilty of negligence and misconduct sufficient to justify its removal from the office of executor and trustee of the Quinlan estate.

107. Appellant contends, and respectfully submits, as against the judgment of the Supreme Court of Canada, that the Supreme Court erred, for the following reasons:

(a) In restricting the remitter and new adjudication to the issues relating merely to the validity or nullity of Robertson's purported acquisition of the shareholdings and the amount of the condemnation, if any.

DALLOZ, Répertoire Pratique, verbo "Cassation" no. 406, no. 409 (part) and no. 443:

"406. La règle qui restreint dans ces limites les effets de la cassation souffre exception, lorsqu'il existe entre les divers chefs de la même décision un lien de connexité ou d'indivisibilité. Par exemple, lorsque les héritiers naturels poursuivent principalement la validité de la cession par laquelle le légataire universel leur a transmis ses droits à l'hérédité et, subsidiairement, la nullité du testament portant institution de ce légataire, ces deux chefs de conclusions forment un tout indivisible en ce qu'ils tendent l'un et l'autre à la revendication de la succession; en conséquence, la cassation de l'arrêt qui a statué sur les conclusions subsidiaires est totale, et la cour de renvoi est saisie de tous les chefs de demande débattus devant la cour dont l'arrêt a été cassé (Civ. 25 juin 1883, D.P. 84. l. 126).

"409. III. La cassation d'une décision ou d'un chef particulier d'une décision remet en question, devant le juge de renvoi, tout ce qui se lie par un rapport nécessaire au chef annulé ou qui en est une conséquence (Civ. 9 juin 1852, D.P. 54. l. 433; 17 nov. 1868, D.P. 68. l. 478; Req. 27 nov. 1871, D.P. 72. l. 92) . . .

"443. La cassation prononcée sur un chef particulier de la décision remet en question, devant le juge de renvoi, tout ce qui se lie par un rapport nécessaire au chef annulé ou qui en est une conséquence. Spécialement, lorsqu'un arrêt qui, annulant une vente, avait condamné l'acheteur à restituer les fruits à partir de la demande et le vendeur à tenir compte à l'acheteur des sommes par lui payées en

exécution de la vente, avec intérêts également à partir de la demande, a été cassé au chef qui n'avait condamné l'acheteur qu'à restituer les fruits à partir de la demande, l'acheteur peut prétendre de nouveau, devant la cour de renvoi, qu'il a droit aux intérêts des sommes qu'il a payées en exécution de la vente annulée à partir de l'époque où le vendeur prétend faire remonter la restitution des fruits (Civ. 17 nov. 1868, D.P. 68. l. 479)."

(b) With the material then before it, which the Supreme Court considered incomplete, and which it ordered to be completed by a further enquiry, the Supreme Court should not have declared that the ancillary issues were excluded from the re-hearing and new adjudication.

(c) The facts and circumstances concerning which the Supreme Court ordered a further enquiry 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.

(d) The Supreme Court erred in not recognizing that the jurisdiction of the Court to remove the trustees was ancillary to its principal duty to see that the trusts were properly executed, and that in ordering a new adjudication on the issue raised by Appellant'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 trustees, whether such removal was asked for or not, and even if the trustees, subsequent to judgment, had become guilty of some misconduct, or if, subsequently to judgment, some circumstances had arisen which made it necessary to remove the trustees.

Article 869 C.C.

"869. A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes whithin the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

Article 981a C.C.

"981a. All persons capable of disposing freely of their property may convey property, moveable or immoveable, to trustees by gift or by

will, for the benefit of any persons in whose favor they can validly make gifts or legacies."

RAPPORT DES CODIFICATEURS P. 180

"L'Article 869, qui se trouve en son rang parmi les précédents, expose en abrégé la loi sur les legs pour des objets pieux, de charité ou de bienfaisance; elle n'a pas été changée par la nouvelle législation sur les testaments, qui au contraire était de nature à l'étendre.

"Il est à remarquer que dans certains cas, des dispositions de cette nature, bien que tout-à-fait permises, pourraient se trouver sans effet, parce que d'après les technicalités du testament, il ne se trouverait personne d'habile à exercer le droit. Il en est de même de beaucoup d'autres intérêts légitimes qui apparaissent et qui cependant ne sont et ne peuvent être protégés d'après notre pratique judiciaire, par exemple dans le cas de non-nés, de mineurs, d'absents. Sous l'ancien droit, de hauts fonctionnaires de l'ordre judiciaire représentaient devant les tribunaux ceux qui ne pouvaient y agir autrement; en ce pays, ce fonctionnaire était appelé le procureur du roi. Sans vouloir que les cours prennent d'elles-mêmes l'initiative pour l'exercice des droits particuliers, sans requérir davantage dans toutes les causes comme autrefois l'intervention et les conclusions du ministère public, il serait peut-être important de rétablir à cet effet à certains égards, les fonctions de l'ancien procureur du roi, soit en commettant des devoirs de surveillance et d'action à une personne préposée exprès, ou aux officiers en loi qui ordinairement représentent la Couronne, soit même en outre en chargeant les tribunaux d'ordonner que communication de la cause leur soit faite lorsque la justice le requerra. *Sous les lois anglaises, la cour de Chancellerie et ses membres exercent de tels pouvoirs protecteurs. Les Commissaires ne se sont pas crus autorisés à recommander dans le Code le rétablissement d'une organisation qui tient de si près à l'ordre public, mais ils ont signalé le sujet à l'attention des autorités compétentes. Les dispositions adoptées pourraient ensuite être intercalées dans le code de procédure.*"

CODE DE PROCEDURE. Article 50.

"50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, *and all other persons and bodies politic and corporate,* within the Province are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided."

CIVIL CODE. Article 917.

"917. If, having accepted, a testamentary executor refuse or neglect to act, or dissipate or waste the property or otherwise exercise his functions in such manner as would justify the dismissal of a tutor, or if he have become incapable of fulfilling the duties of his office, he may be removed by the court having jurisdiction."

"*SECTION IV*

"*Of Incapacity, Exclusion and Removal from Tutorship*

"*Article 282.*

The following persons cannot be tutors:

. . . . . .

4. All those who themselves or whose father and mother have against the minor a suit at law involving his status, his fortune or an important portion of it."

Article 981d.

"981d. Trustees dissipating or wasting the property of the trust, or refusing or neglecting to carry out the provisions of the document creating the trust, or infringing their duties, may be removed by the Superior Court."

WRIGHTSON vs COOKE (1908) 1 Ch. 789 at 798.

(e) 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 of the Supreme Court that the said issues were *res judicata.*

108. Appellant respectfully submits that the Supreme Court of Canada erred also in the following matters:

(a) In ordering oral evidence of Quinlan's consent;

1. because the Respondent, who offered the parole evidence, has alleged that the contract was in writing;

2. because the sufficiency of a writing for a "commencement of proof" 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;

3. in finding that Appellant in her Declaration had admitted the existence of a sale of the shareholdings in question by Quinlan to Respondent Robertson;

4. in finding it probable that the letter of June 20, 1927, could have been intended as a bill of sale.

(b) In declaring that the letter of June 20, 1927 contained the elements of a valid contract;

(c) In declaring to be *res judicata*

1. the contention that the letter was read to Quinlan on the 20th of June 1927, when Appellant had not been called upon to contradict or rebut that evidence since the trial judge had refused to allow proof of Quinlan's answer;

2. the findings of the lower Court on the various allegations of fraud against Robertson;

3. the finding that Quinlan was of sound mind on the 20th of June 1927;

(d) In that the Supreme Court held that the elements of commencement of proof in writing were the following:

1. the admission of a sale in Plaintiff's 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 respecting deposit of the shares with Robertson on May 21, 1927.

4. the lapsed agreement of June 11, 1925, between Quinlan and his associates Robertson and Janin providing for the acquisition by the surviving partners of the shares of a deceased partner.

109. Appellant submits that the trial judge (Martineau, J.) unanimously confirmed by the Quebec Court of Appeal, did not consider that those elements constituted commencement of proof in writing, or that (Plaintiffs) Appellant had alleged more than a purported sale.

110. Appellant contends, and respectfully submits, that the learned trial judge, Martineau, J., the Court of King's Bench by its judgment of December 30, 1932, and the learned trial judge at the remitter, Gibsone, J., erred as to the rule to be applied in determining the value of the assets illegally acquired by Robertson, and the consequent award.

111. Appellant submits that the proper rule is that the estate is entitled to the highest value between the date of their purported acquisition and the date of return or payment therefor, plus the proportion of the dividends declared and paid or unreasonably withheld, and a sum in lieu of goodwill or future earning power.

112. Appellant furthermore contends, and respectfully submits, that in the absence of stock market quotations as a guide to the value of the shares of joint stock companies, the only satisfactory evaluation is that to be obtained from the financial statements and balance sheets of the respective companies; and that such evaluation should properly consist of the highest book value during the period of illegal detention, together with the average annual profit during the period for which financial statements are available, multiplied by the number of years of such illegal detention; to which should be added for goodwill a sum equivalent to three years' net profits at least.

113. Appellant contends, and respectfully submits, that by reason of the purported sale from Robertson to Janin of the estate's 1151 shares of Quinlan, Robertson & Janin Ltd. (Alban Construction Ltd.) effected during the pendency of this litigation, Appellant was prevented from establishing the value and earnings of the shares of that company subsequent to such purported sale; and that Appellant is consequently entitled to assume that the highest book value and the average net earnings for the period for which financial statements are available in the evidence continued to be the annual book value and net earnings in the succeeding years for which Appellant is entitled to claim.

114. Appellant submits that Robertson is to be considered a trustee wrongfully withholding securities which he is bound to deliver and as such liable for damages calculated upon the assumption that they would have been

disposed of at their highest value. In support of this contention Appellant relies on:

ALEXANDER McNEIL and WILLIAM S. FULTZ
Supreme Court of Canada (1906) S.C.R. 199

SISCOE GOLD MINES LTD. *vs* BIJAKOWSKI
Supreme Court of Canada (1935) 1 D.L.R. 513

115. Appellant further submits that since the annual statements do not reflect the goodwill attaching to the shares in question, an amount equivalent to the profits of three years should be added to the book value to supply this deficiency. Appellant relies on:

FOSTER vs MITCHELL (1911) 3 O.W.N. 425:

"Goodwill when applied to a business is generally used to denote the benefit arising from connection and reputation and its value is what can be got for the chance of being able to keep that connection and improve it. It is the benefit and advantage of the good name, reputation and connection of the business; it is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. Goodwill is included in the assets or property of a business although it is not expressly mentioned."

ACCOUNTING, by CROPPER, MORRIS and FISON, 5th ed. (1945) (London, Macdonald and Evans):

at pp. 63 and 64:

" 'The value of the goodwill attached to a given business is obviously dependent upon the nature of the undertaking, and upon the circumstances connected with it. For the purposes of sale the goodwill of a business is usually estimated as being worth a given number of years' purchase of the annual profits which may be expected to be derived from its possession; such future profits are usually estimated upon the basis of the average profits which have accrued during the last few years' trading immediately prior to the date upon which the sale takes place. The average of profits to be employed for the purposes of valuing a "goodwill" should be based upon the results of a sufficient number of years to give a fair estimate of future results, and in arriving at such average any special profits or losses due to extraneous circumstances should be disregarded. The average of the previous three to five years'

results is usually employed in arriving at the value of goodwill in ordinary commercial undertakings.

" 'The number of years' purchase of these ascertained 'average' profits to be taken in any given instance is naturally a matter which is subject to great variation according to circumstances. The goodwill of a professional business, in the successful conduct of which the personality of the previous owner is of paramount importance, and which can only be transferred to a new owner with the probability of considerable loss of clientele, may, in a given instance, only be worth from one to three years' purchase of the average profits previously derived from its possession; on the other hand, the good will of a trading business showing average profits of a similar amount may be worth a much larger proportionate sum. This difference in value would be due to the less exclusively 'personal' nature of the latter business as compared with the former. In fact, in many commercial undertakings the personal factor is practically non-existent in connection with the goodwill, which may be largely a question of locality or of reputation for the quality of merchandise sold. In an ordinary case the goodwill of a professional business may be taken to be worth from one to three years' purchase of the average past profits, and the value of the goodwill of a trading business will ordinarily be worth from two to five years' purchase of similar average past profits. If a share only of the goodwill is being disposed of, in cases where the previous partners, or some of them, continue to be associated with the undertaking, a greater number of years' purchase of the average profits will in many cases be obtainable by the vendors.' "

116. As to earnings upon the said shares, Appellant contends that the estate is entitled to the average annual net earnings revealed by the evidence multiplied by the twelve years from Robertson's purported acquisition of the shares to the date of judgment on the remitter.

117. Accordingly, Appellant contends that the award ought to have been arrived at as follows:

1151 shares of Quinlan, Robertson & Janin Ltd. (and/or reorganized companies and subsidiaries)
as at March 31st 1929

Parent Company.....	$ 929,540.64
Building Company.....	10,117.87

Equipment Company.....	16,792.84			Bk. 8 p. 746
Paving Company.....	77,328.60			Bk. 8 p. 726
				Bk. 8 p. 730
	$1,033,779.95			Bk. 8 p. 738
1151 shares or 1/3 the issued capital stock: 1/3 x 1,033,779.95		=	$ 344,593	
Add 1/3 average yearly profits i.e. $53,955 during twelve years 12 x $53,955		=	647,460	
250 shares of Amiesite Asphalt Ltd. As at March 31st 1929 — $608,395.44				Bk. 6 p. 276
250 shares or 1/4 issued capital stock: 1/4 x $608,395.44		=	152,098	
Add 1/4 average yearly profit i.e. $38,937 during twelve years 12 x $38,937		=	467,244	
250 shares Macurban Asphalt Ltd. Book value $158,518.70				Bk. 8 p. 670
1/4 issued capital stock: 1/4 x $158,518.70		=	39,629	
850 shares Fuller Gravel Ltd. 850 shares @ $90		=	76,500	
Interest from institution of action October 1928 @ 5%		=	49,725	
			$1,777,249	
Add Dividends				
1/3 Quinlan, Robertson & Janin Ltd. of $84,947	=	$28,315		
1/4 Amiesite Asphalt Ltd. of $33,000	=	8,250		
1/4 Macurban Asphalt Ltd. of $78,985	=	19,746		
			56,311	
Interest from institution of action, October 1928 @ 5%			39,417	
			$1,872.977	
Forward			$1,872.977	

CREDIT

850 shares Fuller Gravel Ltd. @ $50. . . .	$ 42,500	
Add interest @ 5%.	27,625	
Payment Dec. 31, 1927.	125,000	
Add interest @ 5%.	87,500	
Payment Jan. 21, 1928.	3,750	
Add interest @ 5%.	2,625	
Payment Jan. 28, 1928.	125,000	
Add interest @ 5%.	87,500	
Payment Dec. 21, 1934.	50,000	
Add interest @ 5%.	17,500	
		$ 569,000
		$1,303,977

Add Goodwill

1/3 of three years' profits of Quinlan, Robertson & Janin Ltd.	174,979
1/4 of same in Amiesite Asphalt Ltd.	134,348
	$1,613,304

118. The average yearly net earnings are arrived at as follows:

QUINLAN, ROBERTSON & JANIN LTD. EARNINGS:—

For the year ended the 31st March, 1925. . .$120,753.81 — 1/3rd. = $40,251. (Bk. 5, pp. 22 & 25)

For the year ended the 31st March, 1926. . . 163,639.71 — 1/3rd. = 54,546. (Bk. 5, p. 28)

For the year ended the 31st March, 1927. . . 206,021.28 — 1/3rd. = 68,673. (Bk. 5, pp. 28 & 31)

For the year ended the 31st March, 1928. . . 144,714.36 — 1/3rd. = 48,238. (Bk. 7, p. 588)

For the year ended the 31st March, 1929. .	174,205.60	— 1/3rd.	=	58,068. (Bk. see pp. below)
See details below)				
		5)		$269,776.
				53,955. Average per year.

Parent Company.....	$ 69,965.29	(p. 743)
Paving Company.....	77,328.60	(p. 737)
Building Company.....	10,118.87	(p. 725)
Equipment Company.....	16,792.84	(p. 729)
	$174,205.60	

AMIESITE ASPHALT LIMITED EARNINGS:—

For the year ended the 31st. March, 1925. .	$ 57,067.64	— 1/4	=	$ 14,267. (Bk. 5, p. 154)
For the year ended the 31st. March, 1926. .	93,444.75	— 1/4	=	23,361. (Bk. 6, p. 226)
For the year ended the 31st. March, 1927. .	191,380.27	— 1/4	=	47,845. (Bk. 6, p. 270)
For the year ended the 31st. March, 1928. .	165,571.85	— 1/4	=	41,393. (Bk. 6, p. 276)
For 5 months ended the 31st. August 1928 . .	180,443.35	— 1/4	=	45,110. (Bk. 8, p. 664)
	53/12th. into		)	$171,976.
				$ 38,937. Average per year."

119. As to the shares of Amiesite Asphalt Limited and Macurban Asphalt Limited, Appellant contends as follows:

The learned trial judge valued these shares at $400. each completely ignoring the proof made that Robertson had sold them at $600. per share. He found that they had a value on the 31st March, 1927, of approximately $265. and at the 31st of March, 1928, of approximately $434. per share and at the 31st of August, 1928, the shares had a value of $608. each (D.C. p. 287, ll. 8 to 12; p. 398, ll. 25 to 40; and Book 6, pp. 266 and 276; Bk. 8, p. 661).

Before dealing further with the shares of Amiesite Asphalt Limited, it is necessary to bring in at this point the shares of Macurban Asphalt Limited, since Robertson sold en bloc all the issued shares of both these companies for a single price $750,000.00. This price corresponds approximately with the combined book value of these companies as shown by their balance sheets as at August 31st, 1928..

Capital Stock & Profit & Loss Accounts Amiesite Asphalt Limited..... (Bk. 8, pp. 665 and 666)	$608,395.44 = $608. p. sh.
Capital Stock & Profit & Loss Accounts Macurban Asphalt Limited..... (Bk. 8, p. 670)	158,518.70 = $158. p. sh.
	$766,914.44

The contention of the Appellant is that the estate Quinlan is entitled to $600. per share for the Amiesite Asphalt shares, because that is the price Robertson obtained when he sold them and for the reasons hereinafter stated the estate claims $150. a share for 25% of the issued Macurban shares.

This Macurban Company was incorporated on the 27th of April 1927 (Bk. 3, p. 495, l. 27) that is to say while Hugh Quinlan was alive and while Robertson and Janin were directors of both Quinlan, Robertson & Janin Limited (Bk. 6, p. 277) and Amiesite Asphalt Limited (Bk. 6, p. 279).

The Company according to Robertson's testimony was incorporated by Mr. Janin and the capital stock of 1000 shares was all issued to Mr. Janin in payment of his patents. Janin gave Robertson one third of the capital stock for Robertson's financial support and retained two-thirds for himself. The stock appeared in the books in the names of nominees, but Robertson testified that one-third belonged

to him and two-thirds belonged to Janin. (Bk. 1, p. 210, ll. 1 to 48). See also Janin, Bk. 4, p. 727, ll. 38-48.

The records of the Company show that the stock was issued to one Charles A. Mullen for patent rights and that Mullen transferred to the Company a road building contract he had with the Honourable J. L. Perron as Minister of Roads. (Bk. 6, p. 291).

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The records also show that Mullen transferred all the stock to nominees of Janin and Robertson. Book 7, p. 574 shows the transfer from Mullen to J. J. Perrault. Perrault says that he was a nominee of Janin and that the certificate was put before him, that he endorsed it and handed it back to Mr. Janin and that is all he knows about it. (Bk. 3, p. 372, l. 12 and p. 523, l. 25).

The Macurban Company was organized to do road work just as Amiesite Asphalt. It was a competitor of Amiesite Asphalt Limited.
20 These are Robertson's admissions (Bk. 1, p. 120).

The Macurban company had no working capital as all its capital stock was issued for patents of invention. Even before its actual incorporation, Quinlan, Robertson and Janin Limited furnished equipment to the extent of $4,386.67, (Bk. 5, p. 29). The details are shown in Bk. 8, p. 777 and p. 778. It appears that this amount was never repaid to Quinlan, Robertson & Janin Limited. There were three subsidiary companies organized and the equipment department of Quinlan,
30 Robertson & Janin was transferred to one of these companies, namely, Montreal Construction Company. The Macurban statement made up just before its shares were sold by Robertson shows that it was indebted to Montreal Construction Company in the amount of $4,552.20. (Bk. 8, p. 670).

The rest of the working capital required by the Macurban Company was obtained from Amiesite Asphalt Limited. The amount advanced was $32,501.47 (Bk. 8, p. 665) and the Macurban balance sheet, at p. 670, acknowledges the indebtedness.

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The Macurban Company operated until it was sold en bloc in September 1928 with the Amiesite Asphalt Company but during its short existence from April 1927 to September 1928 it paid dividends of $78,985.05 (Bk. 8, p. 779) and when it was sold it had a surplus over capital account of $58,518.70 (Bk. 8, p. 666A).

The Amiesite and Macurban companies had their offices at the same place, had the same employees and the same telephone number. (Bk. 2, p. 223 to 225).

The late Hugh Quinlan owned one-third of the capital stock of Quinlan, Robertson & Janin Limited and one fourth of the capital stock of Amiesite Asphalt Limited. Robertson and Janin were directors of both these companies. While they were directors they organized the Macurban Company and used the funds of these companies to enable the Macurban Company to commence and carry on its business and divided the capital stock of Macurban Company between themselves to the exclusion of Quinlan.

Appellant relies upon the decision in COOK *and* DEEKS 27 D.L.R. p. 1:—

> "The majority directors of a corporation formed with an object of undertaking railway contracts, who are entrusted with the conduct of affairs of the Company, cannot consistently, before dissolution, deliberately exclude, by using their influence and position, the interest of the corporation in a railway contract they procured, in favour of a company separately formed by them with a similar object, and owe a duty of accounting to the minority in respect of the profits realized from such contract."

Robertson admitted that he realized that Macurban might compete with Amiesite Asphalt Limited and also admitted that Macurban got contracts from the Government. (Bk. 1, p. 121, l. 30).

As the late Hugh Quinlan owned one-fourth of the stock of Amiesite Asphalt, it is submitted that his estate is entitled to one-fourth of the dividends declared and paid by the Macurban Company before all its issued stock was sold by Respondent Robertson and one-fourth of the sale price of the Macurban shares.

The allocation of the purchase price of $750,000 would be, according to the respective balance sheets of the two companies, $600,000. for the Amiesite stock and $150,000. for the Macurban stock.

The dividend paid by the Macurban Company prior to its stock being sold by Robertson was $78,985.95. (Bk. 8, p. 779).

The sale of the shares of Amiesite and Macurban was accomplished by having 998 shares of each company transferred to John I.

MacDonald, who was the Vice President of William P. MacDonald Construction Company, the purchaser. One share in each Company was transferred to Sydney B. Kendall, and one share to Thomas F. Spellane in order that there would always be at least three shareholders. All these shares were deposited with the Sun Trust Company, in escrow until the purchase price was paid. The arrangement for this escrow appears in a letter written by William P. MacDonald Construction Son and Company. The purchase price was paid in the following manner:—

$100,000.	draft on Hackensack Trust Company.
50,000.	one month note payable to A. W. Robertson.
50,000.	two months note payable to A. W. Robertson.
300,000.	cheque of Amiesite Asphalt Limited payable to John I. MacDonald and endorsed by the latter.
75,000.	transferred from the Department of Highways of the Province of Quebec in favour of Robertson.
175,000.	transferred from the Department of Highways of the Province of Quebec, in favour of the said Robertson.
Total $750,000.	

The sum of $300,000. was taken out of Amiesite Asphalt cash and paid to Robertson; $175,000. belonged to Macurban Company in the hands of the Quebec Government; and $75,000. belonged to the Amiesite Company in the hands of the Quebec Government.

The Respondent Robertson and Alban Janin were in April 1927, when they caused Macurban Asphalt Limited to be organized, two of the three directors of Amiesite Asphalt Limited. Macurban was started with funds and plant furnished by Amiesite Asphalt Limited and Quinlan, Robertson & Janin Limited. Macurban Asphalt Limited did the same kind of work as Amiesite Asphalt Limited, that is road building and the Government contracts the Macurban Company got were obtained through Robertson & Janin, just as were the contracts obtained by Amiesite Asphalt. Robertson and Janin excluded Hugh Quinlan from Macurban Asphalt Limited. They organized this Company while Hugh Quinlan was ill.

At the time of the organization of Macurban Limited and during the time in which the dividends were paid and the profits made, Robert-

son and Janin had complete control of Amiesite Asphalt Limited and they diverted business that should properly have gone to that company.

120. Appellant contends, and respectfully submits, that the said Alban Janin, purported purchaser of the 1151 shares of Quinlan, Robertson & Janin Ltd., now Alban Construction Ltd., submitted himself to the jurisdiction of the respective Courts before which the present litigation was to come by the terms and conditions of the purported agreement to purchase the said shares, above quoted; and that in consequence the said Alban Janin is amenable to account of his dealings with the said shares, the earnings and profits which have accrued thereto, as well as of his dealings with the assets of any and all the companies of which the estate would and should have been a shareholder, directly or indirectly, had Robertson's purported acquisition never taken place.

121. Appellant contends, and respectfully submits, that in default of the return by Respondent and/or any subsequent purchaser of the shares in question in the present litigation, and the profits and earnings accrued and accruing thereto, and the shares of any subsidiary or subsidiaries thereof, and/or any and all the assets appertaining thereto which have been diverted or removed from such companies, and, in any event, *at Appellant's election,* Appellant is entitled to demand and obtain from the said Robertson and the Capital Trust Corporation and General Trust of Canada, and the said Janin represented herein by the said Robertson, jointly and severally, payment of the said sum of $1,613,304.00.

122. The Appellant submits that the Judgments of the Supreme Court of Canada and of the Court of King's Bench are wrong and should be reversed and that the judgment of the Trial Judge ought to be modified, for the following amongst other

REASONS

1. Because the letter of May 23, 1927, is a valid written instrument (un écrit valablement fait) and by the terms of Art. 1234 C.C. cannot *in any case* be contradicted or varied by parole evidence.

2. Because the letter of June 20, 1927, and the other "circumstances" relied on as a commencement of proof in writing are inadequate to admit testimony of a concluded contract.

3. Because in any event the letter of June 20, 1927, cannot be interpreted as intending a contract of sale.

4. Because the letter of June 20, 1927, can only be interpreted, at best, as a mandate to sell and consequently was terminated by the decease of the late Hugh Quinlan.

5. Because by the terms of Art. 1484 C.C. a trustee cannot become buyer of the trust property in his charge.

10 6. Because the concurrent findings of fact of the two learned trial judges who tried this case reject the testimony offered by Respondent Robertson.

7. Because even if the facts tending to show a concluded contract could have been proved by testimony, the law will only permit the truth to emerge by writing.

8. For most of the reasons given by the learned trial judge at the remitter (Gibsone, J.)

20 MONTREAL, July 17, 1946.

DAVID A. SWARDS
MAX HELLMAN SWARDS
Attorneys for Appellant.

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Thursday 24th apr

7th day contd

Johnson v Buckland (Romer J)

Romer's evidence on discovery at the trial

Monday 28th apr

8th

11.am 8th day

Swords contd

Contract Proof in writing.

Evidence of Dr Hackett on 2's capacity

" Marg Quinlan

Miss McArthur

2.40 Gahan

On settlement agreement

Vol 1234

Quinlan's evidence } not necessary to deal with

Tuesday contd

Sup Ct Act

RSC 1927 ch 35 046

x 18-19 Geo V. Ch 9 Sec 3.

p. 49

62

x 68 amended

2.55

Swords in reply on settlement agreement

"acte"

Tuesday 29th apr. 9th day.

Gahan - contd

10.30: Supplementary Plea.

Gibsone's judgment on settlement agreement.

art 951 supplied by Swords | Pap Cou no application

Prevost's judgment

[illegible]

12.15 Papineau-Couture

1. res judicata
2. Plea of settlement

Art 199

215

Vol 9 159 Letter R v Leamy

2.30 Geoffrion

Wed. 10 Day

29 Apr

Swords in reply

10.30. Bad faith of Trustees

1879 L J vol 68 p. 196 [illegible] J

MORTON NORMAND DU PARCQ OAKSEY

In the Privy Council

No. 68 of 1934

On Appeal from the Court of King's Bench for the Province of Quebec (Appeal Side) Canada.

BETWEEN

ETHEL QUINLAN (*Wife of John T. Kelly*),

(Plaintiff) Appellant,

AND

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

(Defendants) Respondents,

AND BETWEEN

KATHERINE KELLY,
(*Wife of Raymond Shaughnessy*),

Intervenant) Appellant,

AND

CAPITAL TRUST CORPORATION LIMITED, and GENERAL TRUST OF CANADA es-equal. Executors,

(Contestants) Respondents.

CASE OF ETHEL QUINLAN, WIFE OF JOHN T. KELLY (PLAINTIFF) APPELLANT

BLAKE & REDDEN
For (Plaintiff) Appellant
Ethel Quinlan (Wife of John T. Kelly)