47, 1947

# In the Privy Council.

No. 68 of 1944.

ON APPEAL FROM THE SUPREME COURT OF CANADA

AND

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

(CONSOLIDATED APPEALS)

UNIVERSITY OF LONDON
W.C.1.
23 OCT 1956
INSTITUTE OF ADVANCED LEGAL STUDIES
14697

BETWEEN

ETHEL QUINLAN (Wife of JOHN 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

ANGUS WILLIAM ROBERTSON, CAPITAL TRUST CORPORATION LIMITED and GENERAL TRUST OF CANADA ... ... ... ... (*Contestants*) RESPONDENTS.

N.B. For convenience of reference, it seems advisable to point out that the record of proceedings is divided into two parts; that Part I, comprising the eight first volumes, is subdivided into two sections; the second of which contains the Exhibits and is referred to as Part I, Exh.

## CASE

Of ANGUS WILLIAM ROBERTSON, a Respondent on the Plaintiff's Appeal and on the Intervenant's Appeal.

1.—These are appeals :—

(a) by the Plaintiff-Appellant Dame Ethel Quinlan by Special Leave from the Judgment of the Supreme Court of Canada (Duff, C.J., and Lamont, Cannon, Crockett, and Hughes, JJ.)

dated the 6th June, 1934, which reversed the Judgment of the Court of King's Bench of the Province of Quebec (Appeal Side) (Tellier, C.J., and Howard, Rivard, Bond and St. Germain, JJ.) and also in part quashed the Judgment of the trial Judge (Martineau, J.) dated the 6th February, 1931, in favour of the Plaintiffs and

(b) by the Plaintiff-Appellant Dame Ethel Quinlan and the Intervenant-Appellant Dame Katherine Kelly (the latter *in former pauperis*) from a Judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (Francoeur Bissonnette, Prevost Errol McDougall and Stewart McDougall, JJ.) dated the 30th April, 1943, which maintained the Respondent's Appeal from the Judgment of the Superior Court (Gibson, J.) and dismissed the action and the Cross-Appeal of Dame Ethel Quinlan as well as the intervention of Dame Katherine Kelly. 10

Part I p. 3 *et seq.*

2.—The proceedings out of which these appeals arise were commenced in the Superior Court of the Province of Quebec on the 25th October, 1928. They are of a complexity difficult to summarise and are dealt with in detail below.

Part I p. 73 *et seq.*

3.—By their Statement of Claim the original Plaintiffs, of whom the Appellant Dame Ethel Quinlan was one, alleged (*inter alia*) that on the 22nd June, 1927, this Respondent fraudulently and collusively acquired from the late Hugh Quinlan while he was unable to give a valid consent owing to his illness certain shares in companies at prices below their real worth; that after the death of Hugh Quinlan the Respondent Capital Trust Corporation Limited, one of the deceased's executors, sold to this Respondent, its co-executor, fraudulently and collusively certain shares belonging to the deceased's estate at prices below their real value, and demanded relief as therein set out. 20

Part I p. 149 p. 150 p. 829, l. 25 p. 275, l. 45

4.—The late Hugh Quinlan and this Respondent Angus William Robertson were both general contractors doing business in the city of Montreal. They were partners since 1897, until the death of the late Hugh Quinlan, which occurred on the 26th of June, 1927. They first formed a general partnership which was converted, in 1907, into an incorporated company, under the name of "Quinlan & Robertson Limited." This company, having acquired all the assets of the original partnership, carried on the same business up to the 9th of July, 1919. 30

Part I p. 151 p. 158 p. 720 p. 721 p. 500

5.—At that time, a third associate, Alban Janin, joined the firm and the company was reorganised under the name of "Quinlan, Robertson & Janin Limited," the capital stock of which was equally divided between the three associates. As to the assets of the first company, "Quinlan & Robertson Limited," they were transferred to a new company, incorporated 40

under the name of "A. W. Robertson Limited," the capital stock of which was equally divided between the late Hugh Quinlan and this Respondent, and was held in their own name, or in the name of their nominees. (Exhibits P. 65, P. 24 and D.R. 37.)

pp. 10 to 15
pp. 162 to 166
Part I, Exh. p. 575

6.—In 1924, Alban Janin, who was a civil engineer by profession, purchased in his own name certain patents for the fabrication of amiesite and other bituminous substances used in the paving of public roads and he transferred them to a new company organised for that purpose under the name of "Amiesite Asphalt Ltd." This transfer was made, for the
10 nominal price of $100.000.00, consisting in all, the shares of the capital stock of the new company, namely, 1,000 shares. Mr. Janin kept half of these shares for himself and ceded the surplus in equal parts to his two associates, the late Hugh Quinlan and the Appellant, namely, 250 shares each. (P. 15, P. 9, P. 10, P. 11, P. 14.)

Part I, Exh. p. 120
p. 37
p. 127
p. 128
p. 39
Part I
p. 109
p. 721

7.—In 1925 the three partners, having decided to extend their activities to the paving business in the adjoining province of Ontario, organised jointly with two other persons the company called "Ontario Amiesite Asphalt Ltd." with a capital stock of $100,000.00, divided into 1,000 shares of $100.00 each, which were allotted to the five promoters,
20 each receiving 200 shares. (Exhibit P. 6.)

Part I
p. 183
p. 184
p. 159
Part I, Exh. p. 186

8.—On the 11th of June, 1925, the three associates, Hugh Quinlan, Alban Janin and this Respondent, entered into an agreement under private writing, providing that in the event of the death of one of them the surviving party should have the right "to acquire to the exclusion "of all others the shares held by the deceased party to the present "agreement, in both Quinlan, Robertson & Janin Limited and Amiesite "Asphalt Ltd." The price was then fixed at $125.00 for each share of Quinlan, Robertson & Janin Limited and at "$25.00 for each share of the "Amiesite Asphalt Ltd." And it was further agreed that, in the future,
30 the price would be fixed at every successive annual meeting of the shareholders and that, should one of the surviving partners not avail himself of his right of pre-emption, the other survivor would be entitled to purchase all the shares. No mention was made of the Ontario Amiesite Asphalt Ltd. for the reason that it had not then begun to operate. (Exhibit C. 4.)

Part I
p. 722, l. 40
p. 726, l. 35
Part I, Exh. p.167
p. 168

9.—The annual meetings of the two companies "Quinlan, Robertson & Janin Limited," and "Amiesite Asphalt Ltd." were generally held in March of each year. In March, 1926, Hugh Quinlan was already sick; he did not return to his office after December, 1925. He was suffering
40 from a heart disease, which prevented him from looking after his business, but not from receiving the visits of his former partners. For the same reason, no meeting was held in March, 1927.

Part I
p. 575

Part II
p. 95, l. 46
p. 96, l. 1

10.—In April, 1927, the condition of Hugh Quinlan became worse. This Respondent was then abroad, on account of the impaired condition of his health. Mr. Leamy, who was attending to the business of both associates, paid a visit to the late Hugh Quinlan and the latter told him that " he wanted to transfer to Mr. Robertson his shares in Quinlan, " Robertson & Janin Limited, Amiesite Asphalt Ltd. and Ontario Amiesite Asphalt Ltd." This was communicated to this Respondent when he came back.

Part I
p. 721
p. 722
p. 723
p. 822
p. 823
p. 824

11.—Upon this information, this Respondent began to consider, jointly with Mr. Janin, the question whether it was advisable to avail themselves 10 of the right of pre-emption contained in the agreement of the 11th June, 1925 (Exhibit C. 4); and, in the affirmative, which one of the two should exercise this right and what price should be paid. Several conferences were held and, during one of these conferences, Mr. Janin expressed the opinion that this Respondent, being the senior partner, should suggest a price. At a further conference this Respondent asked Mr. Janin whether he thought that the sum of $250.000.00 was a fair price. This figure had been obtained by adopting the method used for the fixing of the original price mentioned in the agreement C. 4; it was equal to 85 per cent. of the book value, after deducting the deficit shown by the " Ontario Amiesite 20 Asphalt Ltd." For this reason, Mr. Janin expressed the opinion that the price of $250.000.00 was equitable.

Part I
p. 723, l. 27
Part II
p. 113

12.—This Respondent was, however, reluctant to discuss with the late Hugh Quinlan an agreement made in contemplation of the death of one of them. It was the late Hugh Quinlan himself, who, during a visit paid to him by Mr. Janin in the first part of May, 1927, approached the question. While Mr. Janin was speaking of their common business, Hugh Quinlan suddenly asked him whether it would not be possible for him and this Respondent to purchase his interests in all the companies: " I cannot " be active any more . . . and I would like to retire " said Quinlan. 30

Part I
p. 824, l. 23
p. 724
p. 813
p. 814
p. 668
p. 646, l. 38
p. 647
p. 580, l. 28

13.—At that time, the Honourable J. L. Perron, a leading member of the Montreal Bar and a former Minister of the Crown, had been acting as legal adviser of the three associates for many years, and he was fully conversant with the financial position of the three companies, to wit, " Quinlan, Robertson & Janin Limited," " Amiesite Asphalte Ltd." and " Ontario Amiesite Asphalt Ltd." It was, therefore, decided to seek his advice in the matter. The value of the shares was again considered during the various conferences at which the Honourable J. L. Perron was present. After one of these conferences, the latter said to Mr. Janin that he was going to see Mr. Quinlan, in connection with this matter. In fact, he 40 telephoned to Mr. Quinlan's domicile, in the presence of Mr. Janin, and made an appointment for the next day to see him. The following day, the Honourable J. L. Perron requested his secretary, Miss King, to find him the address of Mr. Quinlan and to call a taxi. He then left, saying

that he was going to Quinlan's home. It is in evidence that he did go to Mr. Quinlan's domicile during the first part of May. Unfortunately he could not give his testimony, having died in the course of the trial.

RECORD

14.—On the 21st May, 1927, this Respondent also paid a visit to his partner and, in the course of the conversation, the latter told him that "he had definitely decided to get out of these companies and he wanted me "to take over the stock" and that "he would arrange with Mr. Perron, "as to the value of them."

Part II p. 105 l. 40

15.—During this same visit, the late Hugh Quinlan handed over to this Respondent four certificates endorsed in blank: two of which represented the 1,151 shares he was holding in the "Quinlan, Robertson & Janin Limited," and the two other 50 shares, out of the 250, he was holding in the "Amiesite Asphalt Ltd." All four certificates were endorsed in the presence of one of the nurses then in attendance, Miss Vernie Kerr (Exh. P. 9, P. 10, P. 26 and P. 27.) The authenticity of these signatures is fully established. This Respondent explained to Miss Kerr why her signature was required. "He did make some remarks . . . shares in "the company . . . that they were selling and that was why he "would like my signature to witness Mr. Quinlan's" And further: "it was something about business . . . the selling of the shares " . . . I understood it was Amiesite." And further again "and "Quinlan was selling those shares to Mr. Robertson." As to the additional 200 shares of the "Amiesite Asphalt Ltd.," held by the late Hugh Quinlan, they were represented by one certificate which was then in the name of Mr. Dunlop, the son-in-law and nominee of his father-in-law. Mr. Dunlop was not present at the interview of the 21st May, 1927, and the said certificate for 200 shares could not then be handed over to this Respondent. However, on the same date, Hugh Quinlan dictated to his son, William Quinlan, a memorandum enumerating all the certificates of shares he was holding in "Quinlan, Robertson & Janin Limited" and in "Amiesite Asphalt Ltd.," including the certificate for 200 shares in the possession of Mr. Dunlop. In the memorandum appears, also dictated by Hugh Quinlan, the following note: "Dep. in A. W. R.'s box"; that is to say: "Deposited in A. W. Robertson's box." This last certificate of 200 shares was also endorsed a few days afterwards and deposited with the others in this Respondent's box, as appears from a letter dated the 23rd May, 1927. (Exhibit D.R. 35; P. 66.)

Part I p. 565, l. 40 p. 566 p. 567 p. 568 p. 792 p. 764, l. 1 p. 282 p. 584 p. 585 p. 586 p. 587 p. 588 p. 272 p. 159 p. 273 Part I, Exh. p. 37 p. 127 p. 164 p. 165 p. 282 p. 570A

16.—Owing to the fact that, during the visit of the 21st May, 1927, the late Hugh Quinlan stated that he was relying upon the Honourable J. L. Perron for the fixing of the price of his holdings in the three above mentioned companies, Mr. Janin and this Respondent met again the Honourable J. L. Perron, and, after a further consideration of the financial statements of these companies, the latter came to the conclusion, some

Part I p. 824, l. 23 *et seq.*

RECORD

time prior to the 20th June, 1927, that the sum of $250.000.00 was a fair and equitable price. He was in reality " the deciding voice in it."

Part II p. 90 p. 91 p. 92 p. 93 p. 97 p. 99 p. 100 p. 103 p. 158

17.—There remained the drafting of the agreement. The Honourable J. L. Perron adopted the form of a letter, to be signed by this Respondent and addressed to the late Hugh Quinlan. A few days prior to the 20th of June, 1927, he dictated to his secretary, Miss King, a first draft, substantially similar to the definitive letter, save that the name of the companies, with the exception of the name of the " Quinlan, Robertson & Janin Limited," were left in blank. (Exhibit D.R. 53.) This draft was sent by mail to this Respondent, who made some corrections thereto, and it was the draft thus corrected, which was typewritten by Mr. Leamy, and which is now the original letter D.R. 1. This letter was made in duplicate, each duplicate bearing the signature of this Respondent, and the initials of the witness, Mr. Leamy. Then, this Respondent called the Honourable J. L. Perron by telephone and read to him the letter, as finally drafted. This letter was, as follows. (Exhibit D.R. 1):—

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Part I, Exh. p. 286

" Dear Hugh :

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

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

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" 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%.

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" Yours truly,

" A. W. ROBERTSON."

Part I p. 662 p. 663 p. 760 p. 761 p. 794 p. 819 p. 820 p. 821 Part I, Exh. p. 288

18.—On the said date of June 20th, 1927, between the hours of 11 and 12 o'clock on the forenoon, this Respondent, together with Mr. Leamy, went to the house of the late Hugh Quinlan, where they met Mrs. Quinlan and, after a few moments of conversation, with the latter, they entered into the room of Mr. Quinlan, where Mr. Leamy read to him the letter above recited. During that same visit, this Respondent signed, jointly with Mr. Quinlan, two cheques in the respective amounts of $110.00 and $395.02. (Exhibit D.R. 49—D.R. 50.)

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19.—Hugh Quinlan was undoubtedly fully conscious and of sound intellect at the moment. His mind began to be clouded only on Wednesday the 22nd of June, in the afternoon. He understood perfectly the contents of the letter. Two weeks before his death, he had declared to his physician, Dr. Hackett, who had advised him to put his affairs in order, that he had made his will, but that " there was something else that they " were trying to ascertain, to make valuations or something, but it was " a little difficult." And, after this Respondent's visit, during the evening of the 20th or on the 21st of June, he said to the same witness that " he had " transacted some business " ; referring no doubt to the agreement contained in the letter of the 20th of June, 1927.

Part I p. 660 p. 572 p. 573 p. 794, l. 39 p. 820, l. 49 p. 661

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All these facts were disclosed at the first trial, before Mr. Justice Martineau, and they were not contradicted.

20.—At the second trial, before Mr. Justice Gibsone, after the Supreme Court of Canada, had held that oral evidence was admissible to prove " the answer given by the late Hugh Quinlan, when the letter of " June 20th, 1927, was read to him." Mr. Leamy was asked : " Will you " now state what was the answer, if there was any answer, on the part of " Hugh Quinlan, after you read the letter ? " And the answer was " he " said that was all right."

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The reading of the letter and the answer took only a few minutes, owing to the fact that everything had been agreed upon previously. After the reading of the letter, Mr. Leamy handed it over to this Respondent. They then went back together to the office, where Mr. Leamy, under the instructions of this Respondent, mailed, on the same day, the double of the said letter to the Honourable J. L. Perron. (D.R. 2.) This double was found during the trial, in the safe of the Honourable J. L. Perron, at his office, where it had been deposited by his secretary, Miss King, at his request.

Part II p. 3 p. 96 p. 97 p. 98, l. 1 p. 100 p. 101 p. 109 p. 103 p. 106, l. 45 p. 107, l. 1 p. 110 *et seq.* Part I p. 664 p. 665

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21.—Two days later, to wit : on the 22nd of June, 1927, the transfer to this Respondent of the shares previously held by the late Hugh Quinlan, in Quinlan, Robertson & Janin Limited and Amiesite Asphalt Ltd., were approved by the Respective Boards of Directors of the two companies. The name of this Respondent was inserted in the forms of transfer, at the back of the certificates, which had been signed in blank by the late Hugh Quinlan, or his nominee, Mr. Dunlop, and the transfers were inscribed in the stock account of both Messrs. Quinlan and Robertson. As to the shares of the " Ontario Amiesite Asphalt Ltd.," it is conceded that they were worthless and their transfer to this Respondent was only recorded in the books of the Company, which had its head office in Toronto, on the 16th of November, 1927, this being the first meeting held after the death of the late Hugh Quinlan. (Exhibit P. 13.)

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Part I p. 166 p. 277 p. 278 p. 279 p. 280 p. 281 p. 147 p. 253 p. 293 p. 546 p. 38 p. 39

22.—The late Hugh Quinlan died on the 26th of June, 1927. By his Will, which was received before Mtre Biron, notary, on April the 14th, 1926,

Part I, Exh. p. 229 *et seq.* p. 466 p. 671

RECORD

the late Hugh Quinlan bequeathed the whole of his estate, save a few legacies by particular title, in favour of his wife, Dame Catherine Ryan, "in trust, jointly with my friend and partner, A. W. Robertson, Esq., "general contractor" . . . and "Capital Trust Corporation Limited." To his trustees who were named, at the same time, testamentary executors, he conferred the most extended powers. To the same trustees, and testamentary executors, he committed the care of distributing the revenues of his estate to his surviving widow and to his children, or to their representatives. He also empowered his trustees and testamentary executors, at the death of his last surviving child of the first degree, to make a partition of his estate, principal and revenues, in equal shares and "par tête," between all his grandchildren and great grandchildren, living at the time.

As to this Respondent in particular, the testator relieved him from all liabilities for the keeping of accounts and for all details of administration, enacting that the Capital Trust Corporation Limited alone should assume that duty. Then he gave to "my friend and partner A. W. Robertson" the right of renouncing his said office, and of appointing his own successor.

The testator further ordered that the inventory of his estate should be made "in the form of commercial inventories notwithstanding any "provisions of the law to the contrary" and appointed a legal adviser to his estate. "I wish and desire that the Honourable J. L. Perron be "and should continue to be the legal adviser of my estate."

Part I, Exh. p. 466 p. 671

This Respondent accepted the office of administrator of his late friend's estate, but he never accepted the fee of $1.000.00 per annum which was attached to same. He divided this sum between those, amongst the children of the late Hugh Quinlan who seemed to be most in need. (Exhibits P. 1, P.C. 25, D.R. 47.)

Part I p. 774, l. 25 p. 775, l. 1 p. 776, l. 1 p. 785, l. 23 p. 786 Part I, Exh. p. 73

23.—On the 9th of July, 1927, this Respondent disclosed to his co-executor, Capital Trust Corporation Limited, represented by Dr. Connolly and Mr. Parent, the existence of the letter of the 20th of June, 1927, and exhibited to them the share certificates endorsed by the late Hugh Quinlan; but he kept these certificates in his possession. And, in a letter bearing date of the 22nd of the same month, he stated that all the shares enumerated in the letter of the 20th of June previous and having belonged to the late Hugh Quinlan "were transferred to me, before his death, except "200 shares of Ontario Amiesite Asphalt Ltd., which Mr. Leamy had "inadvertently overlooked."

Part I, Exh. p. 114 p. 374 p. 479 Part I p. 776 p. 777 p. 781

24.—This Respondent, however, was not desirous of keeping these shares at the price of $250.000.00 if he could avoid it. On the 19th of August, 1927, he wrote to Dr. Connolly, managing director of the Capital Trust Corporation, advising him that Mr. Janin, on the same day "suggested "a purchaser, for the shares of the late Hugh Quinlan, held in the 'Quinlan, "'Robertson & Janin Ltd.' and the paving company." And, after recalling the conditions under which the shares were to be sold, according to the

letter of the 20th of June, 1927, he added: "if this proposition meets "with your approval, kindly write to me and I shall consummate the "transaction at once." The proposition, however, did not materialize. Mr. Janin and this Respondent kept on trying to find a purchaser, at the price of $250.000.00, and interviewed various persons in connection therewith; but no purchaser could be found. The legal adviser of the estate, the Honourable J. L. Perron, was then consulted several times, both by Dr. Connolly and Mr. Parent, and the reply was that the contract contained in the letter had to be respected and enforced.

p. 784, p. 785, p. 787, p. 788, p. 791

25.—This Respondent had no other alternative but to pay the price mentioned in the letter of the 20th of June, 1927. He paid a first instalment of $125.000.00 on the 29th of December, 1927, and paid the balance on the 28th of January, 1928. The Capital Trust Corporation even insisted for the payment of the interests on the total sum of $250.000.00, computed from the 20th of June, 1927, including the few days which had elapsed between the mailing of the cheques or bills of exchange and their reception. (Exhibit D.R. 33.)

Part I, Exh. p. 380, p. 381, p. 382, p. 397, p. 550, Part I p. 756, p. 757

26.—At the time of his death the late Hugh Quinlan was still holding one-half of the capital stock of the Fuller Gravel Co. Ltd., which had been organised on the 18th of November, 1925, to wit: 1,000 preferred shares and 500 common shares. These shares were not included in the transfer evidenced by the letter of the 20th of June, 1927. During the summer of 1927, the Honourable J. L. Perron, having been informed of the conditions of affairs of the said company, had given the advice that these shares should be sold. On the 1st of August, 1927, this Respondent wrote to Dr. Connolly and to the Honourable J. L. Perron, pointing out that this company had never paid any dividends; that it was requiring considerable advances of money, as well as much time and personal attention, and he expressed the opinion that the maximum price that could be expected was $50.000.00, to wit, $50.00 per unit, including one preferred share and one half common share. (Exhibit D.R. 38, D.R. 48.)

Part I, Exh. p. 169, p. 170, p. 318, p. 319, p. 320, p. 321, p. 458, p. 360, p. 361, Part I p. 800 *et seq.*, p. 825, l. 25

27.—Dr. Connolly took the advice of the Honourable J. L. Perron and this Respondent was authorised to find a purchaser at the suggested price. Between the months of August and October, 1927, this Respondent sold 200 preferred shares to Mr. McCord and 200 shares to Mr. Rayner, at the price of $50.00 each, with the boni above mentioned of one half common share. The purchasers paid 25 per cent. cash and agreed to pay the balance within three years, with interest at 6 per cent. per annum. This Respondent kept his co-executor, as well as the Honourable L. J. Perron, fully informed of all the negotiations, as well as of the conditions of the sale, stating at the same time that he was willing to assist these purchasers financially, because they were selling the company's products. (Exhibits P.C. 25, D.R. 5, D.R. 8.)

Part I, Exh. p. 350, p. 351, p. 462 *et seq.*, p. 322, p. 447, p. 487 *et seq.*, p. 523 *et seq.*, Part I p. 825, p. 826, pp. 670 to 690

Part I
p. 787
Part I, Exh.
p. 784, l. 14
p. 797, l. 1

28.—It is not disputed that the price of $50.00 represented the full value of these shares at the time. It was so found by the learned trial Judge, Mr. Justice Martineau.

Part I
p. 683
p. 684
p. 685
p. 688
p. 838
p. 839
p. 778
Part I, Exh.
p. 521
p. 578 *et seq.*

29.—The remaining 600 preferred shares were sold to Mr. Tummon, at the beginning of August, 1927. But Mr. Tummon stated that he had only purchased 200 shares for his own account; that 200 shares of the remaining shares were purchased for Mr. Miller and the balance for a friend whose name was not given, but who was not this Respondent, as formally declared by Mr. Tummon. The latter was unable, financially, to pay cash, out of his own money, the price of $10.000.00, for the 200 shares he had purchased for his own account. He, therefore, obtained a loan from this Respondent, and gave his cheque for the sum of $10.000.00. Two weeks later, Mr. Tummon came back to this Respondent and represented to him that he was sick; that he had a large family; that he did not know how he could fully discharge his obligation and that, finally, he could only afford to pay the price of $50.00 per share, to wit: $2.500.00. Mr. Tummon had been manager of the Fuller Gravel Co. Ltd., for over 30 years, and this Respondent, in view of this fact, agreed to take back the shares which Mr. Tummon could not afford to pay. For the 50 shares that he finally kept, Mr. Tummon gave his cheque in the amount of $2.500.00. As to the balance of 400 shares, neither Mr. Miller, nor Mr. Tummon's unknown friend, could be induced to purchase them. During several months Mr. Tummon tried to find other purchasers; but finally this Respondent was again compelled to take them back. (Exhibit D.R. 11, D.C. 9.)

Part I
p. 672
p. 673
pp. 674 to 680
Part I, Exh.
p. 503
p. 602
p. 603
Part I
p. 627
p. 628 *et seq.*
p. 771
p. 628
p. 629
p. 630

30.—But, on the 22nd of May, 1928, a new company was formed, under the name of Consolidated Sand & Gravel Company, for the purpose of creating a merger by purchasing all the shares of the Fuller Gravel Co. Ltd. and of all other companies carrying on similar operations, on the Toronto market. The scheme was conceived on the 7th of April, 1928, and it came to this Respondent's knowledge only ten days later; that is to say more than eight months after the 600 shares had been transferred to Mr. Tummon, and even after this Respondent had taken back from Mr. Tummon 400 of these shares. As a result of the merger, all the shares purchased by Tummon, Rayner and McCord, as well as this Respondent's own shares, were sold at $90.00 a share and the estate was paid in full of the balance due by McCord and Rayner, with interests. (Exhibits P. 40, P. 45, P. 48, D.R. 6, D.R. 7 and D.R. 9.)

Part I
p. 3 *et seq.*
p. 73 *et seq.*

31.—The action which gave rise to the present appeals was originally instituted by two of the eight children of the late Hugh Quinlan: Ethel Quinlan, one of the present Appellants, and Margaret Quinlan, wife of Jacques Desaulniers, a member of the Montreal Bar, against the two testamentary executors of the estate of the late Hugh Quinlan, to wit: this Respondent and the Capital Trust Corporation. By their statement of claim, as finally amended, the original plaintiffs alleged that, on the

22nd of June, 1927, this Respondent fraudulently and collusively acquired from the late Hugh Quinlan, while he was unable to give a valid consent, owing to his illness, besides a great number of other shares, 250 shares of Amiesite Asphalt Ltd., at a price of $100.00 each, while they were worth $1.000.00 each ; that, during the year 1928, Capital Trust Corporation sold to this Respondent, its co-executor, fraudulently and collusively, 1,151 shares of "Quinlan, Robertson & Janin Limited," at a price of $250.000.00, while their value was: $700.000.00 ; that, later on, the Capital Trust
10 Corporation Ltd. sold to this Respondent, fraudulently and collusively, 1,000 preferred shares and 500 common shares of Fuller Gravel Co. Ltd., at a nominal price, while these shares were worth $300.000.00 ; that moreover, the late Hugh Quinlan, at the time of his death, was a shareholder in the following companies, to wit: Ontario Amiesite Asphalt Ltd.; McCurban Asphalt Ltd.; Quinlan, Robertson & Janin Ltd. (London, England); Crookston Quarries, and Canadian Amiesite Asphalt; as well as in other companies unknown to the Plaintiffs and not included in the inventory prepared by the testamentary executors. And the Plaintiffs prayed that :—

(a) The testamentary executors be removed from office and
20 condemned to render an account of their management ;

(b) That the transfers of the shares belonging to the late Hugh Quinlan, in the three companies: Quinlan, Robertson & Janin Limited, Amiesite Asphalt Ltd. and Fuller Gravel Co. Ltd. be declared null and void and that, in the event that Defendants are unable to return the said shares to the estate of the late Hugh Quinlan, they be condemned to pay to the said estate the value thereof, to wit: $1.300.000.00 ;

(c) That it be adjudged that the shares of the following companies, to wit: Ontario Amiesite Asphalt Ltd.; McCurban
30 Asphalt Ltd.; Quinlan, Robertson & Janin Ltd. (London, England); Crookston Quarries and Canadian Amiesite Asphalt Ltd. be declared to belong to the estate of the late Hugh Quinlan, in full ownership, and, in the event that Defendants are unable to return the said shares, they be condemned to pay to the estate of the late Hugh Quinlan the value thereof, to wit: $1.000.000.00.

(d) The inventory prepared by the testamentary executors be annulled, as false and fraudulent ; and

(e) It be adjudged that all the benefits realised and the dividends paid from the date of the death of the late Hugh
40 Quinlan by all the above-mentioned companies belong to the said estate.

32.—At the first trial, Mr. Justice Martineau found that, on the 20th of June, 1927, the late Hugh Quinlan was of sound mind and capable of giving a valid consent to the contents of the above-mentioned letter; he also found as a fact that the said letter was read to the late Hugh

Part I, Exh. p. 794, ll. 15 to 46
p. 783, l. 40
p. 794, l. 13

Part I
p. 818, l. 21
p. 819
p. 820
p. 665, l. 25

Quinlan, Mr. Leamy being present; but he refused to allow oral evidence to prove the answer given by Hugh Quinlan, after the letter was read, or to prove what took place during the interview of the 21st of May, 1927, and generally, all the circumstances relating to the said letter, or tending to explain the terms thereof.

Part II, Exh.
p. 794, l. 15
p. 796, l. 46
p. 784, ll. 30 to 40
p. 786, l. 15

33.—After dismissing the action *in toto*, so far as Capital Trust Corporation Limited was concerned, the learned trial Judge also dismissed, in so far as this Respondent was concerned, the prayers that he be removed from office and condemned to render an account of his management; that the inventory be annulled and set aside; that the estate of the late Hugh Quinlan be declared proprietor of the shares in the various companies enumerated in the Statement of Claims, save and except the shares mentioned in the letter of the 20th of June, 1927, and a certain number of shares of the Fuller Gravel Co. Ltd. As to the shares enumerated in the above letter, the learned judge, having refused to allow oral evidence to prove the consent of the late Hugh Quinlan found that the late Hugh Quinlan had not assented to the letter above mentioned and that no sale had taken place, He, therefore, condemned this Respondent to return the said shares to the estate, or to pay the value thereof, to wit, $272.928.00 for the 115 shares of the Quinlan, Robertson & Janin Ltd., and $100.000.00 for the 250 shares of Amiesite Asphalt Ltd. As to the shares of Ontario Amiesite Asphalt Ltd., he found that they had no value.

Part II, Exh.
p. 784, ll. 15 to 45
p. 786, l. 1

34.—The trial Judge further found that, with respect to the shares of Fuller Gravel Co. Ltd., this Respondent had no valid title to the 400 shares retroceded to him, by Mr. Tummon; that these shares were only worth $50.00 each, but that they would have been sold at $90.00 like the others if they had remained in the estate, and he condemned this Respondent to pay an additional sum of $16.000.00, besides the $20.000.00 already paid.

Part II, Exh.
p. 786, l. 27

35.—The learned trial Judge further held that this Respondent would be obliged to give up all the above mentioned shares, only after having been reimbursed of the two sums of $250.000.00 and $20.000.00 already paid.

Part II, Exh.
p. 785, l. 1
p. 797, l. 46
p. 798, l. 1

36.—Finally, Mr. Justice Martineau found that, in all the abovementioned circumstances, this Respondent had acted in good faith, upon the advice of the late Honourable J. L. Perron; that he had the right to act as he did and that, in so far as the shares of the Fuller Gravel Co. Ltd. were concerned, fraud could not even be suspected.

37.—Both the present Appellant Ethel Quinlan and Margaret Quinlan acquiesced in the judgment above mentioned and the only appeal to the Court of King's Bench (Appeal Side), was taken by this Respondent. Before entering the appeal, however, this Respondent, in compliance with the direction of the learned trial Judge, resigned his functions as testamentary executor of the estate.

38.—The Court of King's Bench confirmed, with minor modifications, the judgment of Mr. Justice Martineau. The Court, however, found that the value put upon the shares of Quinlan, Robertson & Janin Ltd. was a little too high and the value put upon the shares of Amiesite Asphalt Ltd. was a little too low; but held that, no appeal having been entered by the Plaintiffs, the judgment could not be disturbed. The Court also found that the shares of Ontario Amiesite Asphalt Ltd. had no value.

Part I, Exh. p. 810, l. 9
p. 811, l. 10
p. 812, ll. 1 to 45
p. 811, l. 12

39.—Mr. Justice Howard further said: "Fortunately, there is no "question of bad faith on anyone's part. Indeed, the Appellant's "(Robertson) good faith throughout is expressly admitted by the "Respondent."

Part I, Exh. p. 819, l. 32

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40.—The Plaintiffs again acquiesced in the said judgment, but this Respondent entered an appeal to the Supreme Court of Canada.

Part II p. 224, l. 10

After the case had been argued, during two days, on the 4th and 5th of December, 1933, the Supreme Court adjourned the case to the February term, in order to allow the testamentary executors then in office, to wit, Capital Trust Corporation Limited and General Trust Company of Canada, to intervene. During the adjournment, an agreement was entered into, in notarial form, before Mtre. R. Papineau-Couture, N.P., between the testamentary executors and the beneficiaries, under the will of the late Hugh Quinlan, including the Plaintiff Margaret Quinlan, but without the concurrence of Ethel Quinlan. Under this agreement, this Respondent paid to the estate an additional sum of $50.000.00, plus an amount of $44.000.00 for costs to the estate's attorneys, and, in consideration thereof, the estate resold to this Respondent, in so far as necesary, all the shares in dispute and renounced all its claims whatsoever against this Respondent. The agreement, however, provided that it would take effect only "after the same shall have been submitted to the Supreme "Court of Canada, at its February session, and provided the said Court, "before which the litigation between the parties hereto is still pending, "see no objection to the party of the third part carrying it into effect or "grants acte thereof, and should the said Court decide otherwise, then the "said agreement shall be null and void and deemed never to have been "entered into."

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Part II p. 231, l. 37

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41.—The deed of settlement was filed before the Supreme Court of Canada, at the opening of the February term and, thereupon, Margaret Quinlan desisted from her action. Ethel Quinlan decided, however, to proceed with the case.

42.—By its Judgment dated the 6th of June, 1934, the Supreme Court of Canada reversed and set aside the Judgment of the Court of King's Bench and quashed in part the Judgment of the Superior Court "as well "as certain rulings made by the trial judge, refusing the admission of oral "evidence of the facts and circumstances" which are enumerated in the

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Part II
p. 2, l. 15 *et seq.*
p. 2, l. 23
p. 2, l. 43

RECORD

Judgment. The Court further declared that " seeing the acquiescence of " the Respondent Ethel Quinlan thereto and the acceptance thereof by the " testamentary executors and trustees, it does not, and cannot, disturb " that part of the Judgment of the Superior Court dismissing part of the " Respondent's conclusions, to wit :—

" 1. The prayer that the Appellant A. W. Robertson and the " Capital Trust Company be removed from office.

" 2. The prayer that they be condemned to render an account.

" 3.—The prayer that the inventory be annulled :

" 4. The various allegations of fraud against the Appellant " (Robertson), as well as the allegation that the late Hugh " Quinlan was not of sound mind when the letter of the " 20th of June 1927 was read to him, and that the said judgment " of the Superior Court in respect to the dismissal of the above " mentioned conclusion, is now 'res judicata' between the " parties." 10

p. 2, ll. 30 to 37

As to the agreement of settlement passed before Mtre. Papineau-Couture, N.P., on the 31st day of January, 1934, the Court held that it " sees no reason why it should not declare that the said settlement forms " part of the record of this case, and it grants 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, and this " Court accordingly doth so declare within those limits." And the parties were sent back to the Superior Court, to complete the evidence of the facts and circumstances mentioned in the said Judgment. 20

Part II p. 13 *et seq.* p. 245 *et seq.*

43.—Before the Superior Court, this Respondent filed a supplementary plea, alleging, as a further ground, for the dismissal of the action, the deed of settlement of the 31st day of January, 1934, and, in fact, that he had fully paid all the sums mentioned in the said deed. (Exhibit D.R. 64.) 30

Part II p. 17

44.—Dame Ethel Quinlan contested this additional plea, on the grounds that, those who had signed the deed of the 31st of January, 1934, had been induced to do so by fraud and false representation ; that the agreement exceeded the powers of the testamentary executors and that the officers acting for the latter were not properly authorised.

Part II p. 128, l. 17

45.—The case as it then stood, came before Mr. Justice Gibsone. At the trial, Mr. Justice Gibsone held that Dame Ethel Quinlan, not being a party to the agreement of the 31st of January, 1934, could not be allowed to prove that those who had signed it had been deceived by fraud or false representations. In his final judgment, Mr. Justice Gibsone elected to consider the answer of Dame Ethel Quinlan to this Respondent's supplementary plea as an incidental demand. 40

46.—Mr. Justice Gibsone delivered Judgment on the 26th of April, 1940. As to the so-called incidental demand, he held that neither the then living children nor the then living grandchildren of the late Hugh Quinlan, could validly pass the deed of settlement of the 31st of January, 1934; that the Supreme Court of Canada, having acknowledged the right of Dame Ethel Quinlan to proceed with the case, her recourse could not be defeated by any act of the testamentary executors and that, consequently, the said agreement was "null and of no effect against the estate Quinlan and "null and of no effect against the plaintiff." Adjudging upon the merits of the principal action, Mr. Justice Gibsone held that the letter of the 20th of June, 1927, "was not on that date or at any time read to Hugh "Quinlan"; that, even assuming that it was read, "it does not constitute "a title or a transfer of title in the shares of Robertson"; that, as to the shares of Fuller Gravel Co. Ltd., 850 of them, and not only 400, as found by the Trial Judge, were in reality "sold to persons interposed for "Robertson and such sales were, by reason of C. C. 1484, illegal, null and of "no effect, and this Court doth now so declare."

Part II p. 278, l. 45 p. 279, l. 1 et seq. p. 283, l. 1 p. 283, l. 20 Part II p. 285, l. 20

Proceeding to assess the value of these various shares, he found that the 1,151 shares of Quinlan, Robertson & Janin Ltd., belonging to the estate, were worth $289.591.60, including the proportion of a dividend declared, but never paid, to wit: $28.314.60; that the 250 shares of Amiesite Asphalt Ltd. were worth $100.000.00; and that this Respondent was bound to pay to the estate the difference between $50.00 and $90.00 plus 850 shares of the Fuller Gravel Co. Ltd., instead of 400 shares only, to wit: $34.000.00. He, therefore, condemned this Respondent to pay these various amounts, less the sums already paid, without any option to return the shares, and he further ordered this Respondent to return the certificates representing 200 shares of Ontario Amiesite Asphalt Ltd., which, however, he declared to be worthless.

p. 286, l. 33 p. 287, ll. 7 to 31 p. 286, l. 25 p. 288, l. 18

47.—This Respondent entered an appeal against this Judgment and the Appellant Ethel Quinlan entered a cross-appeal, praying that the amount of the condemnation be increased.

48.—By Judgment dated the 30th of April, 1943, the Court of King's Bench (Appeal Side) held that the consent of the late Hugh Quinlan to the contents of the letter of the 20th of June, 1927, was duly proved and that, owing to such consent, the said letter constituted a definitive sale of the shares therein enumerated, for the price of $250.000.00, which this Respondent actually paid to the estate; that, as to the Fuller Gravel Co. Ltd.'s shares, held by Hugh Quinlan, at the time of his death, the testamentary executors, in the exercise of their powers, decided, in July, 1927, to sell them, at the price of $50.00 for each preferred share, with a boni of one-half common share; that the said price represented the full value thereof; and that this Respondent was charged with the sale of the said shares; that he sold 600 of them, by lots of 200, to Messrs. Rayner, McCord and Tummon, and transferred the remaining 400 shares to

Part II p. 409, l. 44 p. 409, l. 48 p. 410, l. 13

RECORD

Mr. Tummon to be sold by the latter to two of his friends ; that Mr. Tummon, having failed to find a purchaser for these 400 shares returned them to this Respondent, who believed that he could rightly keep them by paying to the estate the price previously fixed of $50.00 a share, to wit : $20.000.00 ; that, however, this Respondent being one of the testamentary executors of the estate, could not become purchaser of property in his charge ; that, having later sold these shares at $90.00 each, owing to the unforeseen formation of a merger in May, 1928, this Respondent was accountable to the estate for the benefit of $16.000.00 he had realized ; but that, under the deed of settlement of the 31st of January, 1934, this Respondent had paid a sum of $50.000.00 which was far in excess of what he owed to the estate ; that the deed of settlement of the 31st of January, 1934, could not be annulled, on the grounds invoked by Dame Ethel Quinlan ; that the said deed of settlement was within the powers of the testamentary executors of the estate ; that it had been validly agreed upon and had put an end to the litigation. And the Court of King's Bench allowed the appeal of this Respondent, maintained his supplementary plea and dismissed the action.

Part II
p. 410, l. 35
p. 410, l. 40
p. 410, l. 43
p. 411, l. 20

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For the same reasons, the Court dismissed the cross-appeal of Dame Ethel Quinlan and the intervention of Dame Katherine Kelly.

p. 411, l. 33

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49.—Mr. Justice Prévost further said that the assent of the late Hugh Quinlan to the tenor of the letter of the 20th of June, 1927, was the logical outcome of all the facts and circumstances disclosed by the evidence ; that there was no reason to doubt the sincerity of the testimony of both Mr. Leamy and this Respondent, when they assert that this consent was given ; that this Respondent was a respectable man, whose good faith had been acknowledged by all the Courts, except by Mr. Justice Gibsone ; and that, irrespective of the name that should be given to it, the agreement contained in the letter of the 20th of June, 1927, was a contract transferring the ownership of the shares therein enumerated for the price agreed upon, subject to the conditions and modalities therein contained, and that his Respondent, having paid the price, validly acquired all the said shares.

p. 422, l. 27
p. 423, l. 40
p. 421, l. 30
p. 424, l. 1
p. 425, l. 1

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50.—Mr. Justice Errol McDougall said : " The proof that such assent " was in fact given has been clearly demonstrated in the terse and " compelling analysis of the evidence made by Mr. Justice Prévost in his " notes, with whose reasons for arriving at this conclusion I am in entire " accord. I am not concerned with the nature of or the name to be given " to the contract thus entered into. It is sufficient for me that it contains " no illegality and, significantly, that the effect thereof is to transfer title " to the property therein described . . ." And further : " Upon the " other branch of the case, having to do with the shares of the Fuller " Gravel Company, I am of opinion that the settlement agreement of " January 31st, 1934, successfully disposes of the Respondent's claim. With " Mr. Justice Prévost, I agree that the Trust Company executors had " power to dispose of the litigation then pending and that their action, on

p. 431, l. 29
p. 431, l. 42

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RECORD

"conjunction with all the interested parties, save the principal Respondent, "and the payment over of a sum amply sufficient to repay the difference "in value between $50.00 and $90.00 per share upon 400 of such shares, "was sufficient to dispose of this feature of the case."

51.—It is respectfully submitted that all the adjudications favourable to this Respondent, in which the Appellant acquiesced and against which no appeal was entered, have now become *res judicata* and cannot be raised in the present appeal, for the reason that an appeal can only benefit the Appellant and that an omission to appeal is an acquiescence. This applies, 10 not only to the matters declared to be *res judicata* by the Judgment of the Supreme Court of Canada dated June the 6th, 1934, but to all other adjudications. Hence the conclusion that, upon the various appeals taken by this Respondent, the value of the various shares could be decreased, but could not be increased, as was expressly held by the first Judgment of the Court of King's Bench (Appeal Side).

Part I, Exh. p. 808

52.—This Respondent respectfully submits that the evidence which was offered and refused by Mr. Justice Martineau should have been allowed; that oral evidence was admissible to prove all the facts and circumstances relating to the drafting of the letter of the 20th of June, 1927, 20 to the reading of the said letter to Hugh Quinlan, and to the answer given by said Hugh Quinlan, when the letter was read to him, and generally, all the facts, circumstances, statements and communications enumerated in the Judgment of the Supreme Court of Canada, as being susceptible of oral evidence; because they constitute presumptions which are always susceptible of oral evidence; because they concern commercial matters and because there existed a commencement of proof in writing.

53.—Sections 1238 and 1242 of the civil code of the Province of Quebec enact:—

"1238. Presumptions are either established by law or arise 30 "from facts which are left to the discretion of the Courts."

"1242. Presumptions not established by law are left to "the discretion and judgment of the Court."

54.—Section 1233 provides:—

"Proof may be made by testimony:

"1. Of all facts concerning commercial matters; . . .

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

55.—Commencement of proof in writing resulted more particularly from the agreement of the 11th of June, 1925 (Exhibit C. 4); from the 40 endorsement in blank on the 21st of May, 1927, and the following day, of the share certificates of the late Hugh Quinlan, coupled with the delivery

Part I, Exh. p. 167

RECORD

of these certificates to this Respondent (Exhibit P. 9, P. 10, P. 26, P. 27); from the memorandum dictated by Hugh Quinlan to his son, William Quinlan, on the same date (Exhibit P. 66), and from the allegations of the Statement of Claim, more particularly from paragraph 11, as originally drafted and as repeated in the various amended Statements of Claim.

56.—It is further submitted that all the evidence, oral and documentary, properly construed, lead to the conclusion that the letter of the 20th of June, 1927, was discussed between the Honourable J. L. Perron and the late Hugh Quinlan, before being drafted; that it was read to the late Hugh Quinlan and accepted by him, at a time when he was fully conscious. 10

57.—It is submitted that the contract evidenced by the letter of the 20th of June, 1927, was a contract for the alienation of a thing certain and determinate, to wit: the shares enumerated therein, within the meaning of Section 1025 of the civil code of the Province of Quebec, enacting, in part: " A contract for the alienation of a thing certain and determinate " makes the purchaser owner of the thing by the consent alone of the " *parties, although no delivery be made . . .*" It possesses all the characters of the sale known under the French law as a sale " avec réserve " de déclaration de command," as was held by the Supreme Court of Canada. 20 The name, however, is unimportant. And the letter evidenced a transfer of property already realized, for a price which this Respondent actually paid and none of the stipulations therein contained was prohibited by law.

58.—The said contract cannot be considered as a mandate to sell, for the reason that this Respondent assumed personally the obligation to pay the price, or to return the stocks, should Hugh Quinlan recover his health, upon the return to this Respondent of the monies paid by him, including the interests at 6 per cent.

59.—It is submitted that, at all events, the sums already paid by this Respondent, to wit: $250.000.00 is at least equal to the full value of all 30 the shares mentioned in the letter of the 20th of June, 1927. In 1925, under the agreement dated June 11th, 1925 (Exhibit C. 4), the associates, including Hugh Quinlan, had adopted the book value, less 15 per cent. as the real value of the shares of Quinlan, Robertson & Janin Limited, and of Amiesite Asphalt Ltd. It is conceded by all the Courts that, in 1927, the shares of Ontario Amiesite Asphalt Ltd., which was organized in 1925, were worthless and the evidence shows that this Company had a large deficit. In 1927, the price of $250.000.00 was arrived at on the same basis: the book value, less 15 per cent., save that the deficit of Ontario Amiesite Asphalt Ltd., was deducted, owing to the fact that the purchaser had to 40 assume the liability of the said Company. Assuming that the letter of the 20th of June, 1927, does not constitute a sale, the acceptance of its contents by Hugh Quinlan, which is now established, was an acceptance of the price of $250.000.00, for all the shares of these three Companies.

Part I
p. 727
p. 740

60.—It is submitted that the transfer of the 600 shares of Fuller Gravel Co. Ltd., to Messrs. Tummon, McCord and Rayner, was valid and binding and that the question of validity can only be raised with respect to the remaining 400 shares, which were returned to this Respondent, by Mr. Tummon. All the Courts have agreed that the sum of $50.00 per share represented the full value of the preferred shares, including the boni of one-half common share. The increase to $90.00 a share was solely due to the formation of a merger, which came to this Respondent's knowledge, long after Mr. Tummon had returned these 400 shares to this Respondent.
10 Assuming that this Respondent must account to the estate for the difference of $40.00 per share, this difference is more than covered by the additional price of $50.000.00 paid under the agreement of settlement of the 31st of January, 1934.

61.—It is further submitted that the said agreement of settlement of the 31st of January, 1934, was within the powers granted to the testamentary executors, under the Will of the late Hugh Quinlan ; that the Judgment of the Supreme Court of Canada, dated the 6th of June, 1934, and holding that Dame Ethel Quinlan had " a sufficient interest and " status to preserve intact the corpus of the estate " did not take away
20 from them the power to make such a settlement and that the officers of the testamentary executors were fully authorized to sign the deed.

Part I, Exh. p. 234, l. 37

62.—It is respectfully submitted that the Judgment of the Court of King's Bench (Appeal Side), dated the 30th of April, 1943, as well as the Judgment of the Supreme Court of Canada, dated the 6th of June, 1934, were right and should be affirmed and that the action of Dame Ethel Quinlan should be dismissed and that the present appeals should also be dismissed, for the following among other

## REASONS.

1. Because all the adjudications in the lower Courts, in favour of this Respondent, against which no appeal was entered by the Appellant, within the prescribed delay, are now *res judicata* ;
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2. Because oral evidence was admissible to prove that the letter of the 20th of June, 1927, was read to the late Hugh Quinlan and accepetd by him and, generally to prove all the facts, circumstances, statements and communications mentioned in the Judgment of the Supreme Court of Canada, dated the 6th of June, 1934, as being susceptible of parol evidence ;

3. Because in fact the said letter of the 20th of June, 1927, was read and accepted by the late Hugh Quinlan ;
40

RECORD

4. Because all the shares enumerated in the said letter were transferred in full ownership to this Respondent, and the price thereof duly paid ;
5. Because, at all events, the price paid by this Respondent for the shares enumerated in the letter of the 20th of June, 1927, represented the full value of these shares, and was accepted as such, by the late Hugh Quinlan ;
6. Because the transfer of 600 shares of Fuller Gravel Co. Ltd. through the instrumentality of this Respondent, was valid and the sum for which this Respondent may be held liable, with respect to the remaining 400 shares, has been fully paid, under the agreement of the 31st of January, 1934 ; 10
7. Because the agreement of settlement of the 31st of January, 1934, passed before Mr. R. Papineau-Couture, N.P., is valid and has terminated the litigation ;
8. Because of the reasons contained in the factums of this Respondent in the Court of King's Bench (Appeal Side) and in the Supreme Court of Canada ;
9. Because of the reasons given in the Judgment of the Supreme Court of Canada, dated the 6th of June, 1934, and in the Judgment of the Court of King's Bench (Appeal Side) dated the 30th of April, 1943. 20

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# THE APPEAL

## OF THE INTERVENANT KATHERINE KELLY.

Part II
p. 44 *et seq.*
p. 69 *et seq.*

63.—Dame Katherine Kelly was made a party to the case then pending between the Appellant Dame Ethel Quinlan and this Robertson, under a Judgment of the 10th of September, 1935, at the request of Margaret Quinlan. She then filed an intervention, whereby she also attacked the deed of settlement of the 31st of January, 1934, and further proceeded to reopen all the questions already adjudicated upon between the principal parties, even injecting new facts in the case ; but the Court of King's Bench (Appeal Side), upon an exception to the form, filed on behalf of this Respondent, reversed a Judgment of the Superior Court and confined the allegations and prayers of her intervention to the limits of the principal action, as restricted at the time. No appeal was taken from this last decision. 30

64.—Thus modified, the intervention alleges in substance that those who had signed the deed of settlement of the 31st of January, 1934, had

been induced to do so by fraud and false representations; that the agreement exceeded the powers of the testamentary executors and that the officers acting for the latter were not properly authorized.

RECORD

This intervention was contested by this Respondent.

65.—At the trial, Mr Justice Gibsone held that the Intervenant, not being a party to the agreement of the 31st of January, 1934, could not be allowed to prove that the signatories of the said agreement had been deceived by fraud or false representations.

Part II p. 128, l. 27

66.—On the merits, Mr. Justice Gibsone held that, neither the testamentary executors, nor the then living heirs of the late Hugh Quinlan, could validly pass the deed of settlement of the 31st of January, 1934, and he consequently maintained the intervention.

p. 292, l. 30 p. 293, l. 1

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67.—This Respondent entered an appeal against the said Judgment. By its Judgment, dated the 30th of April, 1943, the Court of King's Bench (Appeal Side) maintained this appeal and dismissed the intervention, for the reasons already given, in the Judgment on the main appeal.

68.—It is respectfully submitted that the agreement of settlement of the 31st of January, 1934, was within the powers granted to the testamentary executors, under the Will of the late Hugh Quinlan, and that the officers of the said testamentary executors, to wit: Capital Trust Corporation Ltd. and General Trust of Canada, were duly authorized to sign the said deed.

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69.—It is respectfully submitted that the Judgment of the Court of King's Bench (Appeal Side), dated the 30th of April, 1943, dismissing the Intervenant's intervention, was right and should be affirmed and that the present appeal should be dismissed, for the following amongst other

## REASONS.

1. Because the agreement of settlement dated the 31st of January 1934, passed before R. Papineau-Couture, N.P., is binding and has terminated all litigations;

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2. Because of the reasons contained in the factum of this Respondent, in the Court of King's Bench (Appeal Side);
3. Because of the reasons given in the Judgment of the Court of King's Bench (Appeal Side), dated the 30th of April, 1943.

EMERY BEAULIEU.

# In the Privy Council.

No. 68 of 1944.

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

(Consolidated Appeals)

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BETWEEN

ETHEL QUINLAN (Wife of JOHN 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

ANGUS WILLIAM ROBERTSON, CAPITAL TRUST CORPORATION LIMITED and GENERAL TRUST OF CANADA (*Contestants*) RESPONDENTS.

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# CASE OF THE RESPONDENT
## ANGUS W. ROBERTSON.

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