Privy Council Appeal No. 68 of 1944

Ethel Quinlan (wife of John Kelly) - - - - *Appellant*

v.

Angus William Robertson and others - - - - *Respondents*

Katherine Kelly (wife of Raymond Shaughnessy) - - *Appellant*

v.

Angus William Robertson and others - - - - *Respondents*

(Consolidated Appeals)

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE, 1947

Present at the Hearing:

LORD DU PARCQ
LORD NORMAND
LORD OAKSEY
LORD MORTON OF HENRYTON

[*Delivered by* LORD MORTON OF HENRYTON]

The first appellant, Mrs. Ethel Kelly (née Quinlan) is one of the eight children of the late Hugh Quinlan (hereinafter called " the testator ") The second appellant, Mrs. Katherine Shaughnessy (née Kelly), is the daughter of the first appellant. The respondent, Angus William Robertson (hereinafter called " Mr. Robertson "), was formerly an executor and trustee of the will of the testator. He resigned from that office on 19th February, 1931, and was succeeded by the respondent, General Trust of Canada (hereinafter called " General Trust "). The respondent, Capital Trust Corporation Limited (hereinafter called " Capital Trust "), has been since the death of the testator, and still is, the other executor and trustee of his will.

Mrs. Kelly appeals as of right from a judgment of the Court of King's Bench of the Province of Quebec dated 30th April, 1943, reversing a judgment of the Superior Court of the District of Montreal dated 26th April, 1940, and dismissing Mrs. Kelly's cross-appeal from the same judgment. She also appeals by special leave from a judgment of the Supreme Court of Canada dated 6th June, 1934. Mrs. Shaughnessy appeals *in forma pauperis* from the former judgment. She was not a party to the latter judgment.

The testator made his last will on the 14th April, 1926, and thereby, after certain specific gifts, gave the entire residue of his estate in trust jointly to his " friend and partner " Mr. Robertson and Capital Trust, appointing them jointly his Trustees and Testamentary Executors with the seizin and possession of all the said residue immediately after his decease. The testator then continued:—

> " I extend the duration of their authority and seizin as such executors and Trustees beyond the year and day limited by law, and I constitute them administrators of my succession and declare

that they and their successors in office shall be and remain from the date of my decease seized and vested with the whole of my said property and estate for the purpose of carrying into effect the provisions of this, my present will, with the following powers in addition to all the powers conferred upon them by law."

A number of very extensive powers are then enumerated including the following:—

"(*a*) Power to collect all property assets and rights belonging to my Estate: power to sell and convert into money all such portions of my property and Estate, moveable and immoveable, as are not herein specially bequeathed, and that they may deem inadvisable to retain as investments as and when they think best, for such prices and on such terms and conditions as they may see fit, to receive the consideration prices and give acquittances therefor; to invest the proceeds and all sums belonging to my succession in such securities as they may deem best but in accordance with Article 981 of the Civil Code of the Province of Quebec, and to alter and vary such investments from time to time.

(*b*) To compromise, settle and adjust or waive any and every claim and demand belonging to or against my succession.

(*c*) To sell, exchange, convey, assign, borrow money, mortgage, hypothecate, pledge, or otherwise alienate or deal with the whole or any part of the property or assets at any time forming part of my succession, either moveable or immoveable, bank or other stocks or bonds and to execute all necessary deeds of sale, mortgage, hypothec and pledge, acquittances and discharges and other documents, in connection herewith, and thus "*de gré à gré*", without judicial formalities and with the express understanding that any third party dealing with my Executors and Trustees shall never be compelled to attend or to control the investment or re-investment (*emploi ou remploi*) of the monies.

(*e*) To act for and represent my Estate as a shareholder in any joint stock Company or Corporation in which my Estate may hold stock in the way of applying for authority to increase or reduce the capital stock of such Company or Corporation or of obtaining increased powers to subscribe for any new or additional stock proposed to be issued by any Company or Corporation in which my Estate may hold stock and to agree to any proposed amalgamation or reorganization of any such company or corporation and generally to deal with any and all shares of stock and bonds belonging to my Estate in the fullest and most unrestricted manner, without any personal responsibility, on the part of my Executors and Trustees other than the responsibility imposed by law to administer with the care of a prudent administrator.

(*i*) Generally to administer the property assets and affairs of my Estate and succession."

The testator gave to Mr. Robertson, as well as to each of his successors in office (if any), the right to appoint, himself, by notarial act, or in virtue of his last will, his successor in office, and provided that such successor "shall be vested with the same powers, rights and privileges as those conferred upon my said Executors and Trustees under my present will".

The testator next provided as follows:—

"Notwithstanding the Article 911 of the Civil Code of the Province of Quebec, I do hereby authorize any of my said Executors and Trustees to renounce the office of my Executors and Trustees, even after having accepted said office; I maintain even for this particular case the right and the power hereinabove granted to Mr. Angus William Robertson or any of each of his successors in office (if any) to appoint himself his successor to said office."

After providing for certain annuities in favour of his wife and issue the testator directed his trustees, after the death of his wife, to distribute and divide all the income of his estate equally between the children of

his marriage with his then wife " *par tête* " or the legitimate issue " *par souche* " until the death of the last survivor of his children. After the death of all his said children he directed his Trustees to divide the capital of his estate equally per capita between his grandchildren and great grandchildren then living.

Article 6 of the Will is as follows:—

> " It is my desire that no inventory be made before Notary and that the inventory of my Estate shall be made in the form of commercial inventories, notwithstanding any provisions of the law to the contrary and that no inventory whatsoever of the household furniture, pictures and personal effects of my Estate be made."

Article 13 is as follows:—

> " I expressly declare that no other parties or persons may have the right to endeavour, control, manage and divide the property of my Estate, but my said Testamentary Executors and Trustees and their successors in office, and thus without any intervention of any third party, tutors, curators and so on and so on and that the powers and authority hereinabove given to my testamentary Executors and Trustees shall be interpreted as covering all deeds, documents and proceedings without any special judicial formalities being required and thus notwithstanding any provisions of the law to the contrary."

By Article 14, the testator expressed the wish and desire that the Honourable J. L. Perron should be and continue to be the legal Adviser and Advocate of his Estate.

The testator died on the 26th June, 1927, and Mr. Robertson and Capital Trust accepted office as Executors and Trustees.

The present litigation was begun on the 25th October, 1928, by action instituted by Mrs. Kelly and her sister, Mrs. Margaret Desaulniers, as beneficiaries under the will of the testator, against Mr. Robertson and Capital Trust both personally and in their capacity as Executors and Trustees. For reasons which will appear later, the nature of the action can be briefly stated, although the amended declaration of the plaintiffs contains 80 paragraphs and sets out a number of extensive claims. The plaintiffs complained that the defendants were guilty of fraud in the administration of the estate; that the inventory and financial statement prepared by them were inaccurate, incomplete, false and fraudulent, that the defendants had committed breaches of trust, and that Mr. Robertson had illegally and fraudulently and while an Executor and Trustee purported to acquire from the estate, for the sum of $250,000, shareholdings of the estate in certain Companies which the plaintiffs alleged to be of much greater value. The principal claims were:—

(*a*) that the Executors and Trustees should be removed;

(*b*) that the inventory and financial statement should be annulled and the defendants should be called upon to render full accounts;

(*c*) return of the shareholdings in question, plus dividends and profits or payment to the estate of their value.

The shareholdings in question included 1,151 shares in Quinlan Robertson and Janin Ltd., 250 shares in Amiesite Asphalt Ltd., 200 shares in Ontario Amiesite Asphalt Ltd., and a number of shares in Fuller Gravel Co. Ltd. By their pleadings the defendants alleged that the first three shareholdings had been purchased by Mr. Robertson for the sum of $250,000 under an agreement made between the testator and Mr. Robertson shortly before the death of the testator. and that the terms of this agreement were set out in a letter addressed to the testator and signed by Mr. Robertson. The terms of this letter were as follows:—

" Montreal, June 20th, 1927.

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 shares Amiesite Asphalt Limited.
200 shares Ontario Amiesite Asphalt Limited.
200 shares 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 per cent. Should your health permit you to attend to business within one year from this date, I agree to return all of the above mentioned stocks to you on the return to me of the monies I have paid you thereon including interest at 6 per cent.

Yours truly,

(Signed) A. W. Robertson."

The defendants alleged that this letter was read to the testator six days before his death, and sought to give evidence at the trial that the testator verbally assented to the contents thereof. They alleged that the shares in the Fuller Gravel Co. Ltd. were sold to third parties, acting in good faith, and payment thereof was received by the estate through the defendant Mr. Robertson.

The action was tried before Mr. Justice Martineau, who gave judgment on the 6th February, 1931. He found that on the 20th June, 1927, the testator was of sound mind and capable of giving a valid assent to the contents of the letter; he also found that the letter was read to the testator in the presence of a Mr. Leamy, but he refused to allow oral evidence to prove what was said by the testator after the letter was read. He dismissed the action, so far as Capital Trust was concerned, but ordered it to pay certain costs as he thought that it should not have supported Mr. Robertson in resisting a claim which, if successful, would enrich the estate. He rejected the allegations of fraud and the claims for removal of the Executors and Trustees, for the delivery of accounts, and for annulment of the inventory. As to the shares already mentioned, the learned Judge held that Mr. Robertson had failed to prove that the testator had entered into any contract for the sale of the shares in Quinlan Robertson & Janin Ltd., Amiesite Asphalt Ltd., and Ontario Amiesite Asphalt Ltd., to Mr. Robertson, and he ordered Mr. Robertson to return these shares to the estate or to pay the value thereof which was fixed at a total sum of $372,928. As to the shares of the Fuller Gravel Co. Ltd., Mr. Robertson was ordered to pay to the estate a sum of $16,000 being the difference between the price of $20,000 at which Mr. Robertson had acquired 400 of these shares from the estate and the price at which these 400 shares were subsequently sold.

The judgment recognized the right of Mr. Robertson to be paid the sums which he had already paid to the estate in respect of any shares, which he might return to the estate. For the sake of brevity, all references to dividends and interest are omitted from this summary of the judgment.

It is quite plain that the learned Judge did not doubt the good faith of Mr. Robertson in any of these transactions. On the contrary, he expressly found that Mr. Robertson had acted in good faith, upon the advice of Mr. J. L. Perron, who had died before the judgment was given.

Mrs. Kelly and Mrs. Desaulniers acquiesced in the judgment of Martineau J., but Mr. Robertson appealed to the Court of King's Bench. Before entering the appeal he resigned from his position as Executor and Trustee of the Estate and appointed General Trust as his successor. This

he did in pursuance of a suggestion by the learned Judge that if Mr. Robertson intended to contest the matter further he ought to retire and appoint an impartial person as his successor. Capital Trust and General Trust filed formal acquiescence in the judgment and agreed to accept the benefits thereof for the estate.

The Court of King's Bench confirmed the judgment of the learned Judge, with certain minor modifications which need not be set out. In the course of his judgment Mr. Justice Howard said: " Fortunately, there is no question of bad faith on anyone's part. Indeed, the appellant's good faith throughout is expressly admitted by the respondents ".

Mrs. Kelly and Mrs. Desaulniers again acquiesced in the judgment of the Court of King's Bench, but Mr. Robertson entered an appeal to the Supreme Court of Canada. The case was partially argued on the 4th and 5th December, 1933, but the Supreme Court adjourned the case until the February term, in order to enable Capital Trust and General Trust to intervene. During the adjournment an agreement of 31st January, 1934, was entered into in notarial form, with a view to putting an end to the litigation and preventing future litigation. This agreement is of such importance that it is necessary to set it out in some detail. It was made between Mrs. Desaulniers of the first part, all the then living beneficiaries under the testator's will other than Mrs. Kelly, Mrs. Desaulniers, and Mrs. Shaughnessy of the second part, Capital Trust and General Trust of the third part and Mr. Robertson of the fourth part. Clause 1 so far as material is as follows:—" The party of the fourth part hereby elects to keep all the shares mentioned in the judgments above mentioned " (these are the shares in the four companies already mentioned) " and, with this end in view, the said party of the fourth part agrees to purchase, re-purchase and does hereby purchase and re-purchase, so far as may be necessary, all the shares above mentioned, for and in consideration of an additional price of $50,000 to be paid upon the execution of these presents, and he further agrees to pay all such sums as may be necessary to pay and satisfy all claims for taxable Court costs and for all extra judicial costs, disbursements and Counsel fees due to " (here follows a list of names) " being all the Counsel, attorneys and solicitors who have represented the respondent, Margaret Quinlan (i.e., Mrs. Desaulniers). Provision was then made for payment of an additional sum to a certain King's Counsel.

It is to be noted that up to this point Mrs. Kelly and her sister Mrs. Desaulniers had been joint plaintiffs, and the same Solicitors and Counsel had acted for both of them. Thus Clause 1 had the effect of indemnifying Mrs. Kelly completely against all costs incurred by her up to that date.

The remainder of the agreement is as follows:—

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

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

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

5. The parties of the first, second, third and fourth part always, for the same consideration, further renounce to all and every right, claim, action, contention of whatever nature and description which may belong to them or be vested in them or in anyone of them against or in favour of the said A. W. Robertson and reciprocally from whatever source, origin or cause now existing. And without restricting the generality of the above terms, the said parties of the first, second, third and fourth part expressly renounce to all and every right, claim, action, contention of whatever nature or description which may belong to them or to be vested in them against or in favour of the said A. W. Robertson and reciprocally arising from any of the facts disclosed in the evidence adduced in the above case, or from the administration or management of the estate of the late Hugh Quinlan, by the said A. W. Robertson as testamentary executor or trustee, or from the dealings, connections or operations of the said A. W. Robertson with the said late Hugh Quinlan as co-partner, co-shareholder, co-associate or otherwise, or from the dealings, connections or operations of the said A. W. Robertson acting jointly with the said late Hugh Quinlan with third parties, or from the personal acts or deeds of the said A. W. Robertson, in whatever capacity, circumstances or time.

6. The present agreement of settlement, transaction, renunciation, sale and discharge, notwithstanding the fact that the parties hereto have signed it this day, will only come into effect and become binding on the said parties after the same shall have been submitted to the Supreme Court of Canada at its February session, and provided the said Court, before which the litigation 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."

It will be observed that neither Mrs. Kelly nor Mrs. Shaughnessy was a party to this agreement; but assuming for the moment that this agreement was valid and binding between the parties thereto, it clearly had the effect of sweeping away all claims by the estate of the testator against Mr. Robertson. The whole estate was vested in the then Trustees and their Lordships do not doubt that the powers conferred by the will of the testator upon his Trustees, as set out above, enabled them to enter into such an agreement as this. The concurrence of the beneficiaries therein was not, in fact, necessary but it was no doubt a wise precaution on the part of the Trustees to obtain the concurrence of as many beneficiaries as possible. Counsel for the appellants argued that the parties to the agreement could not, without the consent of Mrs. Kelly, put an end to a suit in which she was one of the two plaintiffs. In their Lordships' view, even if the suit technically remained in being, the agreement, unless and until it became or was declared null and void, would effectively prevent Mrs. Kelly from obtaining any relief against Mr. Robertson. She could only put forward her claims as a person beneficially interested in the estate, and the terms of the agreement, already quoted, destroyed all claims by the estate against Mr. Robertson.

Their Lordships cannot assent to the contention that the existence of litigation in which Mrs. Kelly was a plaintiff had the effect of suspending the power of sale and the other extensive powers conferred upon the trustees by the testator's will.

If Mrs. Kelly had accepted this agreement, she would have been free of all costs and she would have been the means, together with her sister Margaret, of recovering for the estate a sum of $50,000 over and above the $270,000 ($250,000 + $20,000) which Mr. Robertson had already paid for the shares in question. However, she was very far from accepting the agreement; on the contrary she took up the attitude that it was wholly invalid. In these circumstances, Mr. Robertson proceeded with his appeal, and at the further hearing before the Supreme Court he put forward the agreement and requested that the Court should grant

acte thereof. Capital Trust and General Trust filed written appearances, explaining that they had not appeared before because of the criticism of Martineau J. as to the Capital Trust's previous contestation of Mrs. Kelly's action, and submitting themselves to justice.

The judgment of the Supreme Court was given by Mr. Justice Cannon, who said in regard to the agreement: " 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 and the binding character of the agreement in question, nor deciding whether or not the intervenants acted within their powers and the officers and the intervenants within their authority. As far as Robertson and Margaret Quinlan are concerned, we cannot refuse to find as a fact that they have settled their differences and wish to stop this litigation. 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." It appears to their Lordships that the granting of *acte* by the Supreme Court had the effect of ending the suspensory period stipulated for in paragraph 6 of the agreement. The judgment of the Supreme Court, however, clearly left undecided the contentions raised by Mrs. Kelly as to the validity and binding character of the agreement. These contentions had not yet been incorporated in a formal pleading, and as they raised issues of fact they were no doubt considered unsuitable for determination, in the first instance, by an appellate Court.

The Supreme Court proceeded to quash the judgment of the Court of King's Bench and (in part) the judgment of the Trial Judge as well as certain rulings, including his ruling refusing to admit parole evidence of the testator's words following the reading of the letter of the 20th June, 1927. Finding that parole evidence should have been admitted, the Supreme Court remitted the case to the Superior Court for further enquiry on certain specific issues and a new adjudication thereon. Certain other issues were declared to be *res judicata*. It is unnecessary, in the view that their Lordships take of this case, to set out in detail the matters remitted to the Superior Court. On the 11th January, 1935, before trial on the remitter, Mr. Robertson filed a supplementary plea by which he set up the agreement of 31st January, 1934. Mrs. Kelly answered the supplementary plea and set up a number of objections to the validity of the agreement. By certain proceedings which need not be set out in detail, all the parties who had executed the agreement of January, 1934, were impleaded as defendants in the present litigation and Mrs. Shaughnessy intervened in the action as then constituted and attacked the validity of the agreement.

The case came on for trial on remitter in the Superior Court on the 2nd November, 1938, before Gibsone J. Parole evidence was admitted that when the letter of 20th June, 1927, was read to the testator he remarked: " That is all right ". On 26th April, 1940, Gibsone J. gave a judgment whereby he declined to accept the evidence just mentioned, and held that the agreement of 31st January, 1934, was null and void as against Mrs. Kelly and Mrs. Shaughnessy, as well as against the estate. He ordered Mr. Robertson to pay a sum of $169,842 in addition to the sums already paid by him to the estate in respect of the purchase of the shares already mentioned.

Mr. Robertson appealed to the Court of King's Bench from the judgment of Gibsone J., and Capital Trust and General Trust also appealed to the same Court from the dismissal of their contestation of the intervention of Mrs. Shaughnessy and from the Order directing them to pay certain costs. Mrs. Kelly cross-appealed from the judgment of Gibsone J. for a greater and different award, namely, the return of the shares or payment of $1,613,304, after crediting Mr. Robertson with all payments made on account and interest thereon. Mrs. Shaughnessy likewise cross-

appealed. On 30th April, 1943, the Court of King's Bench gave judgment unanimously maintaining Mr. Robertson's appeal and the appeals of Capital Trust and General Trust. The Court reversed the judgment of Gibsone J. and dismissed Mrs. Kelly's action and cross-appeal, and also the intervention and cross-appeal of Mrs. Shaughnessy. The Court held that Mr. Robertson was liable to pay to the estate the sum of $16,000 already mentioned in respect of the Fuller Gravel Company shares plus some interest, although he had acted in good faith in that transaction, but that as he had already paid $50,000 to the estate in pursuance of the agreement of January, 1934, he had more than discharged this obligation. They accepted the evidence that the testator had expressed his assent to the terms of the letter of 20th June, 1927. It is clear that none of the learned Judges of the Court of King's Bench had any doubt that the agreement of 1934 was a valid document.

In opening this appeal before their Lordships' Board, Counsel for the appellants necessarily occupied a considerable time in stating the complicated facts of the various transactions sought to be impeached by the appellants, in reading the judgments delivered in the various Courts in Canada, and in arguing the numerous points which had been decided against the appellants in these judgments. When Counsel for Mr. Robertson rose to reply, he put in the forefront of his argument the agreement of 31st January, 1934, and submitted that this document was fatal to the whole of the appellants' claims. As this argument, if successful, would dispose of the whole of the appeal, their Lordships thought it right to invite Counsel for the appellants to reply separately upon this point, and at the conclusion of his reply it was intimated that their Lordships did not require to hear further argument.

The principal contentions put forward by Counsel for the appellants in attacking the validity of this agreement may be summarised as follows:—

(1) The contention already stated, that the parties to the agreement could not, without the consent of Mrs. Kelly, put an end to the suit. As has already been pointed out, while the suit might technically remain in being, even after the Supreme Court had granted *acte* of the agreement, the terms of the agreement were fatal to claims by any beneficiary against Mr. Robertson, and therefore destroyed the only remaining basis of the suit.

(2) The agreement was before the Supreme Court when its judgment was given. Yet the judgment declares that Mrs. Kelly "has a sufficient interest and status to preserve intact the corpus of the estate". This provision in the judgment (to quote Gibsone J.) "makes it quite certain that the deed of January 31st, 1934, does not operate as a settlement of the suit nor prevent the plaintiff, Mrs. Kelly, from continuing the proceedings."

There are two answers to this contention. First, the Supreme Court had declined to decide whether the agreement of 1934 was valid. Consequently its validity was still an open question. Secondly, this question being still open, the Supreme Court took the view, with which their Lordships agree, that the terms of the Testator's Will gave Mrs. Kelly a sufficient interest and status to preserve intact the corpus of the Testator's estate: but the expression of this view was not a decision upon the vital question whether the agreement, if valid, did or did not operate to destroy all claims by the estate and consequently all claims by any beneficiary.

(3) Mr. Robertson's conduct disqualified him from retiring from his trusteeship, appointing a successor, and thereafter negotiating a settlement with that successor and with Capital Trust, his original co-trustee. In their Lordships' view this argument has no foundation at all. At the time when Mr. Robertson retired and appointed General Trust as his successor, he had been expressly acquitted of bad faith, and Martineau J. himself had suggested that Mr. Robertson should retire and appoint a successor, if he desired to contest further the claims made against him. This Mr. Robertson did, and in retiring and appointing a successor he was acting within the powers expressly conferred

upon him by the Testator's Will. Thereafter, he contested the claims made against him, as he was entitled to do, and the Court of King's Bench, while deciding against him, again affirmed his good faith. At this stage there was no reason why Mr. Robertson should not have entered into a compromise with Capital Trust and General Trust. The situation would have been different if he had resigned from the trust with a view to entering into a collusive compromise with the two Trust Corporations; but of this there is no evidence at all.

(4) In making the agreement of 1934 the Trust Corporations did not exercise any honest and independent judgment. They entered into that agreement either (*a*) in collusion with Mr. Robertson, intending to benefit him and not the estate; or (*b*) under the influence of Mr. Robertson, giving way to his views instead of dealing with him at arm's length; or (*c*) recklessly and improvidently, without weighing the advantages and disadvantages to the estate. Mr. Swards for the appellants naturally pressed these points vigorously, but in their Lordships' view the evidence does not lead to any such conclusion. It is unnecessary to pursue Mr. Sward's able argument through all its intricacies; suffice it to say that the evidence does not establish that the trustees, in entering into this agreement, acted otherwise than in a manner which they honestly and independently believed to be in the best interests of the estate. One important fact may be mentioned; before executing the agreement the Trustees took the opinion of eminent counsel, the late Mr. Aimé Geoffrion K.C. Mr. Geoffrion was well acquainted with all the intricacies of the litigation, in which he had previously been engaged as counsel. Moreover, before writing his opinion he had read and considered two Notarial Protests served by Mrs. Kelly upon Capital Trust. These Protests are dated respectively the 29th September, 1933, and the 16th October, 1933. They set out very fully, *inter alia*, the claims which, in Mrs. Kelly's view, could and should be made by the estate against Mr. Robertson. In an opinion of 7th December, 1933, Mr. Geoffrion had considered these claims very fully. He was thus well equipped to advise whether the Trustees should release and abandon all these claims for the consideration set out in the proposed agreement. In a careful opinion dated 30th January, 1934, Mr. Geoffrion summed up the advantages and disadvantages of the proposed agreement, and concluded:

> " Dans les circonstances, il me parait donc que le règlement désiré par les sept-huitièmes de la succession et que vous paraissiez approuver vous-mêmes est parfaitement justifiable."

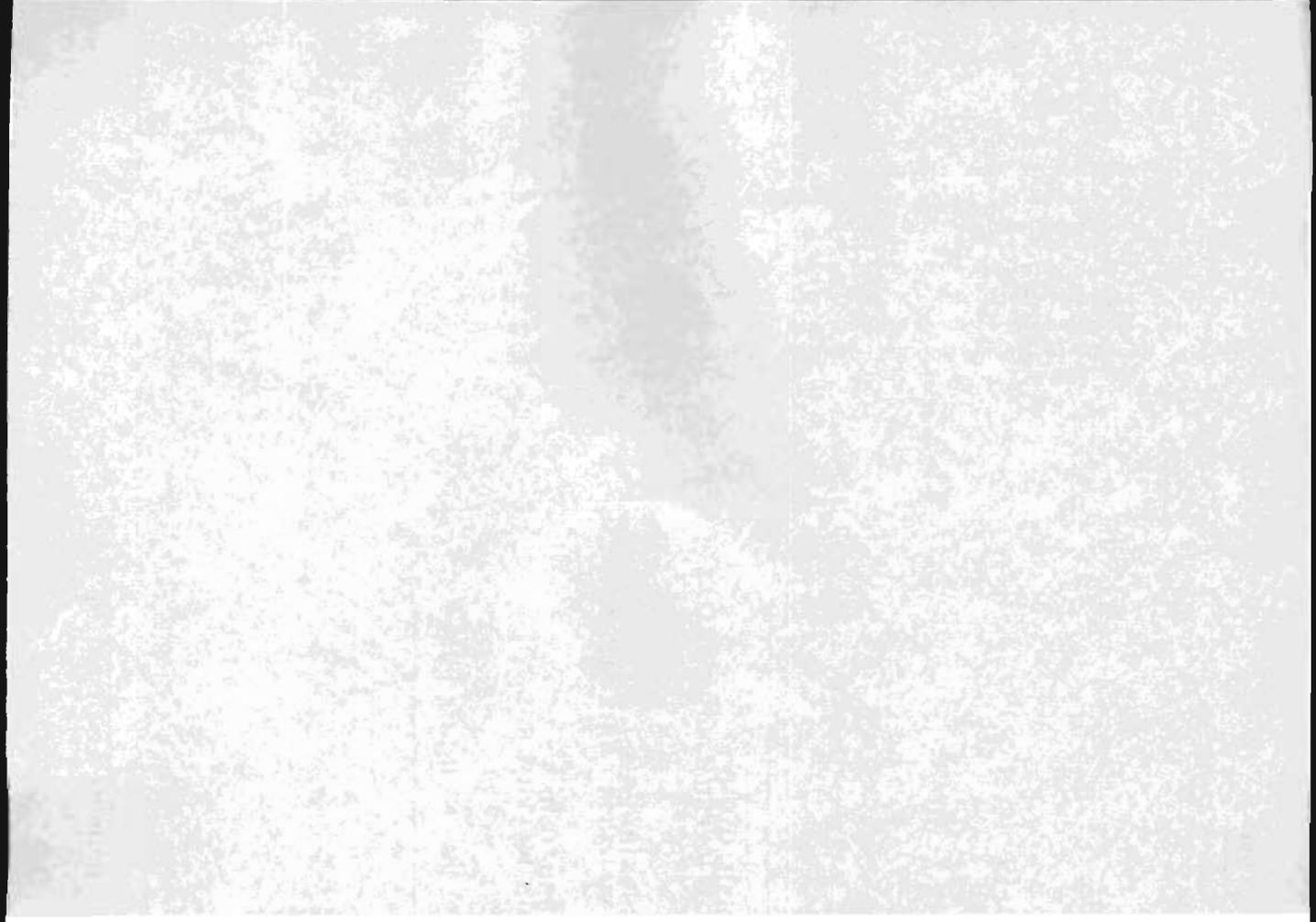
In their Lordships' view, the settlement embodied in the agreement of January, 1934, was one which the Trustees may well have thought to be for the benefit of the estate, from an honest and impartial standpoint. Moreover, they took the advice of counsel of the highest reputation, and their good faith is further evidenced by the fact that, by Clause 6 of the agreement, they provided that it should be of no effect unless and until the Supreme Court of Canada " sees no objection to the party of the third part carrying it into effect or grants *acte* thereof." The Trustees may or may not have been mistaken in thinking that the agreement was for the benefit of the estate; but if they formed an honest and impartial opinion to this effect, the agreement cannot be held invalid, having regard to the very wide powers which the testator thought fit to confer upon them by his will.

(5) Finally Mr. Swards contended that the persons who purported to sign the agreement of January, 1934, on behalf of the two Trust Corporations had no authority to bind them. Their Lordships find it unnecessary to form any view on this point, as it is plain that the agreement was ratified and confirmed by the Board of each of the two Corporations.

The result is that the attack made by the appellants upon the validity of the agreement of January, 1934, wholly fails, and this agreement is fatal to all the claims of the appellants on this appeal. Their Lordships will humbly advise His Majesty that all three appeals should be dismissed.

The appellant Mrs. Kelly must pay the respondents' costs of her two appeals. No order for costs will be made against the appellant Mrs. Shaughnessy, as she is appealing *in forma pauperis*. The orders as to costs in the judgments appealed from will remain undisturbed.

(58171) Wt. 8013—20 120 8/47 D.L. G. 379



In the Privy Council

ETHEL QUINLAN (wife of JOHN KELLY)

v.

ANGUS WILLIAM ROBERTSON
AND OTHERS

KATHERINE KELLY (wife of RAYMOND
SHAUGHNESSY)

v.

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DELIVERED BY LORD MORTON
OF HENRYTON

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DRURY LANE, W.C.2.

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