DOMINION OF CANADA

In the Supreme Court of Canada

(OTTAWA)

(On appeal from a judgment of the Court of King's Bench, in appeal)

BETWEEN:

Angus William Robertson,

(Defendant in the Superior Court and
Appellant in the Court of King's Bench, in appeal),

APPELLANT.

— and —

Ethel Quinlan & Vir et al,

(Plaintiffs in the Superior Court, and
Respondents in the Court of King's Bench, in appeal),

RESPONDENTS.

— and —

Capital Trust Corporation Limited,

(Defendant in the Superior Court),

— and —

Dame Catherine Ryan et al,

MIS-EN-CAUSE.

APPELLANT'S FACTUM

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This is an appeal from a judgment of the Court of King's Bench of the Province of Quebec (Appeal side) which has confirmed, with some modifications, (Mr. Justice St-Germain dissident, as to costs), the judgment delivered by Mr. Justice Martineau, sitting in the Superior Court, at Montreal.

THE FACTS

The Respondents are two of the children of the late Hugh Quinlan.

At the time of his death, the late Hugh Quinlan had been engaged in business in partnership with the Appellant, as general contractor, since over 30 years. As early as 1897, they had formed a commercial partnership which had carried on business without interruption nor modifications during about 10 years. (A. W. Robertson, on disc. Vol. I, p. 149, case vol. 4, p. 829, ll. 25 à 35). Then, they converted that partnership in an incorporated company under the name "Quinlan, Robertson, Limited", and, under this new name, the two associates carried on the same operations until July 9th, 1919 (A. W. Robertson, on disc. case, vol. 1. p. 150). At that time, they took a third associate, in the person of Mr. Alban Janin, and re-organized their company under the name of "Quinlan, Robertson & Janin Limited" (see exh. P-65, vol. 5, case, p. 174, ll. 7 to 20); also exh. P-24, vol. 7, p. 575). The capital stock of the new company was equally divided between the three associates, the late Hugh Quinlan, Alban Janin and the Appellant. (A. W. Robertson, on disc. case, vol. 1, pp. 151 and 158; Mr. Alban Janin, case, vol. 4 p. 720, ll. 30 to 48 and p. 721, ll. 1 to 10). As to the first company "Quinlan & Robertson Limited", all its assets were transferred by the late Hugh Quinlan and the Appellant, who were effectively its only shareholders, to a new company, which was organized under the name of "A. W. Robertson Ltd., and the entire capital stock of the new company was also divided between the said Hugh Quinlan and the Appellant, and held either in their own name, or in the name of their nominees. (A. W. Robertson, on disc. vol. 1, p. 162 to 166; Mr. Shannon, case, vol. 3, p. 500, ll. 29 to 35; see also exh. D.R. 37, case, vol. 5, pp. 10 to 15).

The assets which were thus transferred included, amongst other things, certain pieces of land situate in the province of Ontario, and containing pits and sand, gravel and also quarries, wherefrom building materials could be advantageously extracted and for this reason the "A. W. Robertson Ltd" undertook to work these pits and quarries rather than to carry on the business of building contractors. (A. W. Robertson, on disc. p. 161).

In 1924, Mr. Janin decided to extend the field of operations of the firm "Quinlan, Robertson & Janin Ltd". He purchased certain patents for the fabrication of amiesite and other bituminous substances used in the paving of public roads and he transferred them up to a new company organized for that purpose under the name of "Amiesite Asphalt Ltd". This transfer was made, for the nominal price of $100.000.00, consisting in all, of the shares of the capital stock of the new company, namely: 1000 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, vol. 5, p. 120 and foll.; P-9, vol. 5, p. 37; P-10, vol. 5, p. 127; P-11, vol. 5, p. 128; P-14, vol. 5, p.39; A. W. Robertson, vol. 1, p. 109, ll. 3 to 18).

Then, the three partners decided to devote some of their activities to the paving business in the province of Ontario. About April 1928, they organized jointly with two other persons, the company called "Ontario Amiesite Asphalt Ltd.", with a capital stock of $100,000.00, divided into 1000 shares of $100,00 each, which were allotted to the 5 promoters, each receiving 200 shares. (see P-6, vol. 5, p. 186, letter vol. 7, pp. 537 to 538; A. W. Robertson, vol. 1, p. 183, l. 35 to p. 184, l. 40).

About the same time, the late Hugh Quinlan and the Appellant joined for the last time in organizing another company. Amongst the properties that had been transferred to the company, "A. W. Robertson Ltd", when the first company "Quinlan & Robertson Ltd" had ceased to do business, there was a sandy piece of land which was then in operations as a sand pit and which was known as the "Fuller Gravel Plant". It was situate at Ivanhoe, in the province of Ontario. This property had been transferred to the company "A. W. Robertson Ltd", in consideration of a price which had been stipulated payable by equal parts to the late Hugh Quinlan, personally and to the Appellant. By a resolution passed on August the 3rd, 1925, the company "A. W. Robertson Ltd." retroceded this property to the said Hugh Quinlan, and to the Appellant, in satisfaction of the price made payable to them, as aforesaid, and in their turn, the said Hugh Quinlan and the Appellant retroceded the property to a company which they organized to carry on business, under the name of "Fuller Gravel Company Ltd". In consideration of said retrocession, each of the transferors received half of the company's stock, namely: 1000 preferred shares and 500 common shares each, which they caused to be issued either in their name or in the name of their nominees. (See exh. D. R. 38, case, vol. 5, pages 169, 170; also letter of October 30th, 1928, vol. 6, p. 360, ll. 47 to pages 351, l. 4).

As early as 1925, the late Hugh Quinlan began to feel the first attacks of the disease from which he died. (Dr. Hackett, case, vol. 3, p. 658, ll. 40 to 45). In fact, he never returned to his business, after Christmas 1925 (Dame Marguerite Quinlan, case, vol. 3, p. 575, ll. 25 to 28) and, after a series of momentary improvements, and changes for the worst, he died on June the 26th, 1927.

During the 30 years preceding his death, the late Hugh Quinlan had been associated with the Appellant in all his undertakings; together they had done business, as general contractors, through those three companies, to wit: "Quinlan, Robertson & Janin Ltd", "Amiesite Asphalt Ltd", and "Ontario Amiesite Asphalt Ltd";. together they had exploited the properties of the company "A. W. Robertson Ltd", then not very long afterwards, those of the "Fuller Gravel Co. Ltd", and these business relations which had persisted for so many years, had given rise, in these two men to deep and safe reciprocal esteem and affection. (A. W. Robertson, on disc. vol. 2, case, p. 235 to 236; Dr. Connelly, vol. 4, p. 785, ll. 17 to 23; and L. N. Leamy, vol. 4, p. 798, ll. 47 and 48; and p. 799, ll. 1 and 2; also A. W. Robertson, vol. 4, p. 829, ll. 25 to 35).

And there is no better proof of that, than the words contained in the late Hugh Quinlan's last will, to the address of the Appellant.

By his will, which was received before Mtre Biron, notary, on April the 14th, 1926 (exh. P-1, case, vol. 6, p. 229 and foll.) 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" (case, vol. 6, p. 230, ll. 20 to 30). To his trustees who were named, at the same time, testamentary executors, he conferred the most extended powers (case, vol. 6, p. 230, ll. 40, 41; p. 231, ll. 4 and 5; and ll. 46 and 47, and p. 232, ll. 4 and 5); including that of disposing of all the estate properties, in the manner which they would think fit and without any legal formality (case, p. 230, ll. 41 to 47 and p. 231, ll. 1 and 2, and ll. 12 to 22), and also the power "to continue, discontinue or wind up any business, contract or transaction" pending at the time of his death (case, p. 23, ll. 23 and 34). 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, relying to a large extent upon their discretion for the determination of the allowances that should be given to the latter (case, p. 233) and 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 grand children and great grand children, living at the time.

As to the Appellant, in particular, the testator relieved him of all liabilities for the keeping of accounts and for all details of administration, enacting that the Capital Trust Corporation Ltd alone should assume that duty (case, p. 232, ll. 10, 18). Then he gave to "my friend and partner A. W. Robertson the right of renouncing his said office, at any time, and all cases, of appointing his own successor, either by notarial deed or by will, and of transmitting all his powers and privileges to the person which he might choose. (case, p. 232, ll. 23 and foll.).

Then, the testator 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", (case, p. 234, ll. 9, 10, 11) and that no inventory whatsoever should be made of "the household furniture, fixtures and personal effects of my estate" (case, p. 234, ll. 12 and 13). Then, he designated himself the legal adviser of his successors: "I wish and desire that the Honorable J. L. Perron be and should continue to be the legal adviser of my estate (case, p. 236, ll. 15, 16, 17).

The Appellant 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 (See exh. P. C. 25, case, vol. 7, p. 466; also exh. D. R. 47, case, vol. 8, p. 671).

Then, the Appellant, jointly with the "Capital Trust Corporation Ltd" proceeded forthwith to make an inventory of the estate, in the commercial form, according to the wishes of the testator, and the two testamentary executors and trustees took possession of the estate and assumed the administration thereof.

According to the desire expressed on several occasions by the de cujus (A. W. Robertson, on disc. case, vol. 1, page 165), his name was withdrawn from the name of the company " Quinlan,

Robertson & Janin Ltd", and the company became "Robertson & Janin Ltd", (A. W. Robertson, on disc. vol. 1, case, p. 156) Malone, vol. 3, p. 504, ll. 13 to 17). Shortly after, in March 1928, owing to the growth of the business, it was decided to divide the affairs of the company in three different departments, and to organize each of these departments as a distinct company. Thus were created the three following companies, to wit: "Robertson & Janin Paving Company Ltd", the "Robertson & Janin Building Co. Ltd" and the Montreal Construction Supply and Equipment Limited", which were all subsidiaries of the "Robertson & Janin Limited" and whose shares were all held by the latter. (Malone, case, vol. 3, p. 504, ll. 40 and foll.; Janin, case, vol. 4, p. 729, 730, and 733, ll. 20 to 30; A. W. Robertson, on discovery, vol. 1, pp. 154 and 163; see exh. P-30, vol. 4, pp. 575, 576, 577).

As to the company "A. W. Robertson Limited", it was gradually wound-up, for the reason that the Appellant did not want to risk the money of the estate in hazardous enterprises (A. W. Robertson, on disc. case, vol. 1, p. 161). In fact, this said company was put in voluntary liquidation, on October the 9th, 1929, and the winding-up is practically completed (See exh. P-32, case, vol. 5, pp. 61, 65; also exh. D. C. 1, case vol. 8, pp. 751, 759).

About the same time, but outside of the estate, Mr. Alban Janin organized a new company, for the purpose of exploiting a new paving process, under the name of "McCurban Asphalt Co. Ltd". In fact, the organization of this company was five days prior to the death of the late Hugh Quinlan, but he was too sick then to be interested in a new undertaking, and the capital stock of the company was divided between Mr. Janin and the Appellant, in the proportion of 2/3 for the former and 1/3 for the latter. (Janin, case, vol. 4, pp. 727 and 728; see also exh. P-18, case, vol. 6, pp. 290, 291).

The late Hugh Quinlan's will absolutely forbade his children to interfere in the administration of the estate (case, vol. 6, p. 235, ll. 44 to 47, and p. 236, ll. 1 to 10). And, on the other hand, he restricted their rights to an annuity varying from $1,000.00 to $2,000.00 per annum, as may appear proper to his testamentary executors.

Normally, such a will was bound to create animosities against the administrators. In fact, as soon as July 6th, 1928, one of the Plaintiffs, dame Ethel Quinlan, began to ask copies of the will and of the inventory (see exh. P. C. 14, case, vol. 8, p. 641).

A copy of the will was delivered to her, the second day after, and, at the same time, a copy of the inventory was promised to her, as soon as this copy would be prepared. (Case, vol. 8, p. 641). On the first of August, she complained that the copy of the will was not certified and she insisted upon receiving without delay a copy of the inventory (case, p. 642). The copy of the inventory was delivered on August the 7th, and the certified copy of the will, on the 15th of the same month (Case, pp. 643, 644, 645).

Then, the Plaintiffs asked for an accounting and, when they were provided with the financial statements prepared by the auditors, (exh. P-3, P-4), they protested that those statements were not a real rendering of account. The correspondence went on and became more and more acrimonious, until the end of September 1928 (Case, pp. 645 to 647; p. 54 and pp. 659, 660). And, finally, on the 25th of October 1928, the present action was taken, by the Plaintiffs, namely: dame Ethel Quinlan, wife of John Thomas Kelly, and by dame Marguerite Quinlan, wife of Jacques Desaulniers, two of the eight children of the late Hugh Quinlan.

By their declaration, such as finally amended, the Respondents alleged that, on the 22nd of June 1927, to wit: three days before the death of the testator, the Appellant had acquired from the former, at a price unreasonably low 250 shares of the company "Amiesite Asphalt Co. Ltd", as well as a great number of shares, in other various companies, and that this transfer was obtained by deceit and fraud, and at a time when the testator was not able to give a valid consent (par. 11, and 26, of the declaration, case, vol. 1, p. 74, ll. 33, and p. 76, l. 27). They further alleged that during the year 1928, the Capital Trust Corporation Ltd sold illegally, fraudulently and collusively, to his cotestamentary executor and trustee, the Appellant, in the present case, 1151 common shares of the "Quinlan, Robertson and Janin Ltd", at a price of $250,000.00, while these securities were worth over $700.00 each. (See par. 27 to 36 of the declaration, case, vol. 1, p. 76, l. 30 and p. 77, l. 37). Again, the Respondents contend that the "Capital Trust Corporation Ltd", by fraud and collusion, sold to the Appellant, at a nominal price, 1000 preferred shares and 499 common shares of the capital stock of the company "Fuller Gravel Co. Ltd", worth at least $300,000.00, the property of the estate of the late Hugh Quinlan (case, vol. 1, par. 63 to 70; and p. 80, l. 23 to p. 81, l. 10). And, finally, the Respondents complain that the inventory of the estate was made outside the presence of the heirs and without their having been notified of same, that the said inventory is illegal, incomplete and fraudulent; that they were al-

ways kept in the ignorance of the affairs of the estate; that the inventory exh. P-2 was communicated to none of the heirs, except to the Plaintiff Ethel Quinlan, who was given communication thereof only one year after the testator's death; and that the financial statements which were addressed to the Plaintiffs (exh. P-3 and P-4) are not a rendering of account and were, at all events, affected with the same defects which are affecting the inventory (case, vol. 1, p. 76 to 80, par. 24 and 26 and 38 to 51; and 57 and 59 of the declaration).

And the Respondents pray that the "Capital Trust Corporation Ltd" and the Appellant be dismissed and removed from their office and condemned to render an account of their administration, or, in default, to pay to each of the female Plaintiffs the sum of $500,000.00; that the sales and transfers of shares of the "Amiesite Asphalt Co. Ltd", of the "Quinlan, Robertson & Janin Ltd" and of the "Fuller Gravel Co. Ltd", in favour of the Appellant, be annulled, and the Appellant condemned to return the said shares to the estate of the late Hugh Quinlan, or to pay the value thereof, to wit: $1,350,000.00 (case, vol. 1, p. 84, ll. 1 to 14); that the shares in the following companies, to wit: "Ontario Amiesite Asphalt Ltd", "McCurban Asphalt Ltd", "Quinlan, Robertson & Janin Ltd" (London, England), "Crookston Quarries" and "Canadian Amiesite Ltd" be declared to belong in full ownership to the estate of the late Hugh Quinlan, and be returned to the estate, and in default of doing so, that the restamentary executors and trustees be condemned to pay an additional sum of $1,000,000.00; that it be said and declared that the profits made and all dividends paid since the death of the said Hugh Quinlan, by all of the said companies. are the property of his estate and that, finally, the inventory prepared by the testamentary executors and trustees be declared incorrect, illegal, fraudulent and be annulled (case, vol. 1, pp. 84, 85);

In his defence, the Appellant pleaded that, in the month of June 1927, he acquired from the late Hugh Quinlan not only 250 shares of the "Amiesite Asphalt Co. Ltd", mentioned in paragraph 11 of the declaration, but also and, at the same time, 1151 shares of the "Quinlan, Robertson & Janin Ltd", and 200 shares of the "Ontario Amiesite Asphalt Ltd"; that the late Hugh Quinlan had transferred all these shares to him, while in full and complete possession of his mental faculties, and fully conscious of what he was doing, the whole in accordance with the terms of a letter dated June 20th, 1927, and which reads as follows: —

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

"Dear Hugh: —

"This will acknowledge your transfer of the follow-
"ing stocks to me: —

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

"Which stock represented all your holdings in the
"above companies. I have agreed to obtain for you the
"sum of two hundred and fifty thousand dollars
"($250,000.00) for the above mentioned securities, paya-
"ble 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 there-
"on, including interest at 6%.

"Yours truly,

"(Signed) A. W. Robertson".

(case, vol. 1, p. 90, ll. 32 to 45; and p. 91, ll. 1 to 17)

of $250,000.00; that the said amount had been established according to an agreement under private signature, bearing date of the 11th day of June 1925, and to which the late Hugh Quinlan had been a party (see exh. C-4, vol. 5, p. 167); and that, at all events, this amount was a fair and reasonable price for the shares thus transferred; that, furthermore, the Appellant had given an additional consideration, consisting in the fact that he had caused the estate to be relieved from very onerous obligations, which were burdening the estate, at the time of the testator's death, and which had resulted from personal liabilities assumed by the testator, in con-

nection with the business of the companies, whose shares the Appellant had acquired. (See par. 32 and 42 of the declaration, case, vol. 1, pp. 90, 91, 92).

The Appellant formally denied the other allegations of the declaration, adding certain explanations and remarks. The Appellant further added that the Plaintiffs had neither the right, nor the capacity, or status required to pray for the annulment of the said transfers of shares; that, at all events, they could not obtain the annulment of those various transfers, without offering to the Appellant the reimbursement of the price received by the estate, and that they could not make such an offer, in a legal and effective way, since they had not the power to dispose of the assets of the estate.

On the merits, the trial judge held "Que les demanderesses n'ont prouvé contre les défendeurs aucun acte de négligence, ou d'incapacité, pouvant justifier leur destitution". (Case, vol. 8, p. 785, ll. 11, 12, 13); that, particularly: "le défendeur a agi dans ces diverses circonstances, de bonne foi, et sur l'avis de M. Perron; qu'il avait le droit d'agir ainsi" (case, p. 785, ll. 1, 2, 3); and he dismissed the conclusions of the action, praying that the testamentary executors and trustees be removed and dismissed from their office. (case, p. 786, ll. 37, and 38).

The trial judge further held that the conclusions taken by the Plaintiffs to the effect that: "les défendeurs soient condamnés à leur rendre compte, étaient des conclusions accessoires à celles demandant leur destitution, et qui ne peuvent être accordées si la principale est renvoyée"; also "qu'alors même que cette conclusion en serait une principale, elle ne pourrait être accordée; la reddition de compte demandée par les demanderesses ne pouvant être accordée qu'à la fin de la fiducie". (case, p. 785, ll. 16 to 25). And this part of the conclusions was also rejected. Finally, the trial judge dismissed also the conclusions, praying that the inventory be declared erroneous, false and be set aside. (case, p. 786, l. 38).

On the other hand, the trial judge was of the opinion that the Appellant had not shown: "que M. Quinlan avait agréé à sa lettre du 20 novembre 1927 et qu'il n'a pas non plus prouvé qu'il lui avait autrement cédé et vendu ses actions dans les dites compagnies "Quinlan, Robertson & Janin Ltd", "Amiesite Asphalt Ltd" and "Ontario Amiesite Asphalt Ltd" (case, p. 783, ll. 41 to 46); that "quant aux actions de la "Fuller Gravel Co. Ltd", bien qu'elles eussent été transférées à un nommé Tummon, celui-ci n'en avait définitivement acquis que 200 et que l'appelant s'était, en définitive, fait consentir la vente des 400 autres et que pareille vente était illégale et nulle". (case, vol. 8, p. 784, ll. 17 to 27) and that, in consequence, those four groups of shares "sont la propriété absolue de la succession de feu Hugh Quinlan," (case, p. 786, ll. 11 and 12).

Then, the trial judge proceeding to fix the value of these four groups of shares, said:

"Considérant que la valeur des actions de la compa-
"gnie "Quinlan, Robertson & Janin" était de $272,928.00, et
"celles de la compagnie "Amiesite Asphalt" de $100,000.00;

"Considérant cependant que les actions de la com-
"pagnie Ontario Amiesite Asphalt n'avaient aucune va-
"leur par elles-mêmes;

"Considérant que les actions de la compagnie Fuller
"Gravel ne valaient que $50,00 l'action, mais que la suc-
"cession aurait vendu les 400 qui lui appartenaient, mais
" que le défendeur Robertson s'est fait illégalement trans-
"porter, pour $90.00 l'action; (case, vol. 8, p. 784, ll. 31
"to 45).

On the other hand, the defendant Robertson appealed to the Court of King's Bench (appeal side) against that part of the judgment which had condemned him to deliver to the estate of the late Hugh Quinlan the four groups of shares above mentioned, or to pay the value thereof, as determined by the learned trial judge.

The Court of King's Bench confirmed, with certain modifications, the judgment of the Superior Court. In the first place, the Court of King's Bench proceeded to value the above mentioned groups of shares, upon a different basis, and came to somewhat different figures. The learned trial judge had held that these shares were to be valued as of the end of December 1927 (case, vol. 8, p. 800, ll. 20 to 25), and he had fixed the following values: for the 1151 shares of "Quinlan, Robertson & Janin Ltd", $272,928.00; for the 250 shares of "Amiesite Asphalt Ltd", $100,000.00; for the shares of "Fuller Gravel Co. Ltd", $36,000.00. The Court of King's Bench was of the opinion that the shares should have been valued as of the date of the institution of the action (case, vol. 8, p. 810, ll. 33 to 46), and fixed the values as follows: for the 1151 shares of "Quinlan, Robertson & Janin Ltd", $271, 923.75; for the 250 shares of the "Amiesite Asphalt Ltd", $108,032.50; and for the shares of "Fuller Gravel Co. Ltd", $36,000.00 (case, vol. 8, p. 811, ll. 30 to 37).

A further modification was made by the judgment of the Court of King's Bench, as to the profits and dividends that should be paid to the estate by the Appellant. The Court below had declared: —

> "Que tous les profits faits et les dividendes payés "depuis le décès du dit Hugh Quinlan avec et sur les dites "actions sont la propriété de la dite succession" (case, "vol. 8, p. 786, ll. 22, 23, 24).

On the contrary, the Court of King's Bench held: —

> "Que les fruits dont la restitution pourrait être or- "donnée ne doivent s'entendre que des bonis et dividendes; "que, tel que rédigé, ce dispositif pourrait prêter à une "équivoque et susciter des difficultés, s'il s'engageait plus "tard quelque débat pour mettre à effet cette déclaration "de droits; qu'il convient donc de modifier cette rédaction, "pour spécifier que le droit reconnu ne s'applique qu'aux "dividendes et aux bonis déclarés et payés depuis le décès

"de Hugh Quinlan; et que cet amendement apporté au dis-
"positif en vue seulement d'assurer peut-être la régularité
"de débats ultérieurs, sans entraîner nécessairement la
"cassation du jugement, ne constitue pas moins une modi-
"fication assez importante pour justifier une disposition
"spéciale quant aux frais". (case, vol. 8, p. 812, ll. 38 au
"bas de la page et page 813, ll. 1 à 3).

Finally, the Court of King's Bench made a last and most important modification, which had never been suggested, before; it held: —

"Que les actions de la compagnie "Quinlan, Ro-
"bertson & Janin Ltd", de la compagnie "Amiesite As-
"phalt" et de la compagnie "Ontario Amiesite Ltd" doi-
"vent être considérées, ainsi que les parties les ont traitées
"et que les demanderesses en poursuivent la restitution,
"comme un tout, de sorte que l'obligation de les remettre,
"et, à défaut, de les payer, constitue une seule et même
"dette, dont le créancier ne peut être forcé de recevoir le
"paiement en partie (C. Civ. 1149)" (case, vol. 8, p.
"811, ll. 38 au bas de la page).

It is against the judgment of the Court of King's Bench that the present appeal is now taken.

REASONS AGAINST JUDGMENT

We respectfully submit that the judgment of the Court of King's Bench is erroneous and should be reversed, for, amongst others, the following reasons: —

A. The Respondents, Plaintiffs in the Superior Court, do not possess the quality, nor the status to exercise the recourses in nullity that were maintained by the judgment appealed from.

B. The evidence discloses that the shares held in the three companies: "Quinlan, Robertson & Janin Ltd", "Amiesite Asphalt Ltd" and "Ontario Amiesite Asphalt Ltd", by the late Hugh Quinlan, were actually transferred by the latter to the Appellant, in virtue of the letter of the 20th of June 1927.

C. The judgment appealed from, is erroneous inasmuch as it held that parol evidence was inadmissible, for the purpose of establishing the transfer and sale of the said shares.

D. The Appellant did not acquire any portion of the 600 shares of the capital stock of the "Fuller Gravel Co. Ltd" and the purchase of some of these shares from Mr. Tummon was and is regular and valid.

E. The valuation of the shares whose transfer was annulled is excessive and based on a wrong principle.

F. At all events, the holding of the Court of King's Bench that the shares of all three companies, to wit: "Quinlan, Robertson & Janin Ltd", "Amiesite Asphalt Ltd" and "Ontario Amiesite Asphalt Ltd" must be considered as one entity, so that the Appellant could only be relieved from the obligation of paying the entire value thereof, by delivering every one of these shares, is unfounded in law.

ARGUMENT

The nature of the rights vested in the female Respondents under the will of the late Hugh Quinlan, is not doubtful. He bequeathed his entire estate, save and except certain legacies in particular title, "in trust" to his trustees who are" seized and vested with the whole of my said properties and estate (case, vol. 6, p. 230, ll. 33, 34). These seizin of his testamentary executors and trustees is clearly a seizin in property. It comprises the right "to sell, exchange, convey, assign or otherwise alienate or deal with the whole, or any part of the property, or assets, at any time, forming part of my succession; also the right to mortgage, hypothecate, pledge"; and to "execute all necessary deeds of sale, mortgage, hypothecate, acquittances and discharges and all the documents in connection therewith; the whole "de gré à gré", without judicial formalities and with the express understanding that any third party dealing with my executors and trustees shall never be compelled to attend or to control the investment or reinvestment (emploi ou remploi) of the monies. (case, vol. 6, p. 231, ll. 12 to 22).

This seizin is created to last until the death of the last surviving child of the testator, when the trustees will have the

right to act as the testator would have acted himself, if he had then been alive, and "to divide the capital and property of my whole estate" in equal parts and "par tête" between my grand children and great grand children, then living" (case, vol. 6, p. 233, l. 44 and foll.), and as long as this seizin is lasting, it is expressly declared:

> "That no other parties or persons may have the "right to endeavor, control, manage, and divide the pro- "perty 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, cu- "rators and so on and so on and that the powers and au- "thority 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". (case, vol. 6, p. "235, ll. 45 to 48; and p. 236, ll. 1 to 10).

As for the children of the first degree, their rights are strictly limited, until the death of their mother, to "an annual sum not less than one thousand dollars ($1,000.00) and not over two thousand dollars ($2,000.00) payable by monthly instalments in advance as will seem fit to my executors and trustees, and thus until such child or children will not remain with his or their mother" (case, vol. 6, p. 233, ll. 4 to 12). And after the death of their mother, the rights of the children of the first degree are restricted to "all the net income or revenue of my estate", with the stipulation that, in the event of the death of one of them, "his shares in the revenues of my estate shall be added to the shares of his surviving brothers and sisters, per capita (par tête), and nephews and nieces "par souche". (case, vol. 6, p. 233, ll. 30 to 40).

The testator's intention is therefore manifest: the full ownership of his estate is bequeathed to his trustees and to their successors, so that they may keep it intact, without any partition nor devolution, until the death of the last of the surviving children, and that they may then make a partition of the estate between the grand children and great grand children then living. As to the children of the first degree, they will never be vested with a "jus in re", in the property of the estate and their benefit will always be restricted to a more or less extensive portion of the revenues.

The present case seems analogous to the case of Masson vs Masson, decided by the Supreme Court of Canada, (S.C.R. Vol. 47, p. 42) and it can be said, as was said, in the Masson case, by Chief Justice Sir Charles Fitzpatrick, that: "the whole estate "of the deceased, the universality of capital and revenue, "was vested in the fiduciary legatees, as such to admi- "nister and hold indefinitely, or as long as the law will "permit; so that, on the death of the testator they were "seized, alone of the property, rights and actions "of the deceased. (S. C. R. Vol. 47, re Masson vs Masson, "p. 74); and that, each of the children" was merely a creditor of the fiduciary legatees, for the share of the revenues of his father's estate, and had no share in the property of the estate, either as institute, or otherwise" (case, p. 74). Or again, in the words of Chief Justice Anglin, in the same case: "The pur- "pose of the testator was that, as long as the law would "permit, his fiduciary legatees should hold the corpus of "his estate and should pay the revenues to his children "and their descendants. Only when the legal limit had "been reached did he wish the corpus to pass from his "trustees, and then, clearly not as on an intestacy, but "under his will to those whom he intends to benefit as his "legatees. (re case, p. 89). (See also Lavigne, 32 R.J.O.B.R., "p. 1).

The learned trial judge seems to consider that the Respondents, because they are creditors of revenues, should be assimilated to usufructuaries. (case, vol. 8, p. 799, ll. 19 to 37). But there is a fundamental difference between a legacy in usufruct and a legacy in revenue. After having given a definition of a usufruct, Planiol and Ripert add: —

"757 . . . . Cette définition permet de distinguer l'u- "sufruit non seulement de l'emphytéose ou du bail comme "il vient d'être dit, mais aussi de la donation ou du legs "portant sur les fruits ou revenus, qui ne donnent naissan- "ce qu'à un droit de créance, ou du droit de superficie, "qui est perpétuel et ne peut s'éteindre par le non-usage, "réserve faite d'ailleurs des difficultés qui peuvent s'éle- "ver sur le point de savoir si les parties ont entendu cons- "tituer un usufruit ou établir un droit de jouissance diffé- "rent." (Planiol et Ripert, vol. 3, Des Biens, p. 713).

And Laurent, explaining this difference, says: —

"En apparence, les droit des deux légataires sont "identiques, l'un et l'autre profitant des fruits pendant "toute leur vie; mais le légataire de l'usufruit a un droit "réel dans le fonds; il jouit par lui-même, il a un droit "immobilier qu'il peut céder, hypothéquer. Tandis que "le légataire des revenus n'a qu'une action personnelle, "contre le débiteur du legs; la toute propriété du fonds, "sans démembrement aucun, appartient à l'héritier, lequel "peut par suite vendre cette toute propriété et l'hypothé- "quer; le légataire n'a qu'un droit de créance". Laurent, "vol. 6, p. 416, No. 326).

The testator, when enacting that his trustees, at the death of the last surviving child, would have the right "to divide the capital and the property of my whole estate" had no doubt in mind, to use the words of Laurent, that "la toute propriété sans démembrement aucun" should be vested in his trustees. This partition of the estate, by the trustees, at the death of the last surviving child, would have been impossible, if, at the death of the testator, each child had become vested with a "jus in re" of usufruct; in view of the fact that the will provides that the share of a child dying before the partition, must accrue to his brothers and sisters, or to his nephews and nieces, (case, vol. 6, p. 233, ll. 13 to 20 and 37 to 40). And, when the testator granted to his trustees the right to dispose, at their discretion, of the whole estate, he actually vested them with the full ownership thereof, for the purposes of the trust. (Cassation, 14 juin 1899, D. 1900-1, page 353).

In fact, the testator did create, in a particular instance, a usufruct: he gave to his wife the usufruct of the house wherein he was living, (case, vol. 6, p. 230, ll. 1 to 25); but then the words he used were so different from those whereby he determined the rights of his children, that it is impossible to contend that clauses so differently worded, were intended to create rights of similar nature.

We therefore respectfully submit that the Respondents, as well as the other children of the late Hugh Quinlan, have no other right in their father's estate, than a personal claim payable out of the revenues of the said estate.

Mere creditors of revenues, the Respondents are absolutely unable to dispose of the estate, or of any portion thereof.

And, for the same reason, they have no status to take an action concerning the ownership of any property appertaining to the estate.

> "L'action, says Mourlon, naît avec le droit, mais elle "ne peut naître qu'au profit de ceux qui acquièrent le "le droit ou de ceux qui représentent les titulaires". "(Mourlon, Procédures, No. 182, p. 147).

Now, the Respondents, by the present action, pray that various sales and transfers of shares of the capital stock of various companies, be declared null and void, and that it be also declared that these shares belong "in full ownership to the estate of the said Hugh Quinlan". (case, vol. 1, p. 84, ll. 9 and 10; and ll. 19, 20).

But, it is impossible to annul those sales and transfers, without reimbursing the price which was paid for them, to wit: $250,000.00, for the group of shares mentioned in the letter of June 20th, 1927, and $20,000.00 for the shares of the "Fuller Gravel Co. Ltd". It therefore follows that the action, by its very nature, tends to deprive the estate of a total sum of $270,000.00, in return for a certain number of shares. In other words, the Respondents, in order to succeed in their action, must alienate a large portion of the estate. Such an act of alienation appertains only to those who are vested with the ownership of the estate and not to mere creditors of revenues.

In its original form, the action merely prayed that the transfers and sales in question, be declared null, without offering to return the price paid to the estate.

At the hearing, to wit: on the 9th of January 1931, counsel for the Appellant pointed out, that the annulment of these transfers could not be granted without the purchase price being offered back to the Appellant. Thereupon, the Respondents moved for leave to amend a new their declaration, so as to qualify their prayer for nullity, by adding the following: —

> "Subject to the right of defendant Robertson per- "sonally to receive credit by way of compensation or other- "wise, or to be reimbursed for all sums by him in connec- "tion, therewith, on the rendering of the accounts mention- "ed in the present conclusions, and the Plaintiff prays "acte of their willingness to give credit for or to concur in

"the reimbursement of all amounts so received by the esta-
"te of the said Hugh Quinlan, to the extent that shall be
"determined by law and justice in the course of such pro-
"ceedings". (Case, vol. 1, p. 84, ll. 28 to 38).

The Appellant opposed this motion to amend, on the ground that the amendment was such as to change the nature of the demand, inasmuch as it was adding a new element, without which the action should have been declared unfounded and dismissed. But leave to amend was granted. The Appellant again contends that this judgment is erroneous, and that the motion to amend should have been dismissed. At all events, we respectfully submit that the Respondents' offer, even in its actual form, is still illegal and ineffective and that the action remains unfounded in law.

If the transfers of the shares in question are annulled, as prayed for, the Appellant is entitled to be refunded, not at the time of the rendering of accounts, as suggested in the offer, but at the very moment he will deliver the certificates of shares, in compliance with the judgment. The two operations should be simultaneous. (Deslongchamps West Valley Land, C.K.B. 27, L.R.n.s. p. 474).

Again, the Respondents' offer that the Appellant be given credit for the above sum of $270,000.00, or their consent that this sum be refunded to the Appellant, cannot validate the conclusions of the action; because, emanating from mere creditors of revenues, it is necessarily ineffective, and also because it comes from only two of the eight children of the testator.

Under the judgment appealed from, it is declared that the 1151 shares of the "Quinlan, Robertson & Janin Ltd", the 250 shares of "Amiesite Asphalt Ltd", the 200 shares of the "Ontario Amiesite Asphalt Limited" and the 400 shares of the "Fuller Gravel Co. Ltd" are actually the property of the Hugh Quinlan's estate (Case, vol. 8, p. 814, ll. 39 to 40) and on the other hand, that: "Le défendeur Robertson ne sera tenu de remettre à la
"succession de Hugh Quinlan les 1,151 actions de la com-
"pagnie Quinlan, Robertson & Janin Ltd et les 250 actions
"de la compagnie Amiesite Asphalt Ltd., ainsi que les bonis
"et dividendes déclarés et payés sur lesdites actions depuis
"le décès de Hugh Quinlan, que sur remboursement avec
"intérêt de la somme de $250,000.00; et de même les 400 ac-
"tions de la compagnie Fuller Gravel Ltd, ainsi que les bo-

"nis et dividendes déclarés, payés comme susdit, que sur "remboursement avec intérêt de la somme de $20,000.00; "et donne acte aux demanderesses de leur consentement "à ces remboursements." (Case, vol. 8, p. 815, ll. 7 to 20).

But, nobody is ordered to reimburse to the Appellant the two sums of $250,000.00 and of $20,000.00 and no delay is fixed for such a reimbursement. The Appellant will therefore remain under the above condemnation, as long as it pleases the Respondents. During an indefinite period of time, he will have to keep the shares whose transfer have been annulled, at the disposal of the Respondents, and during all that period of time, it will be optional for the Respondents or for the estate to exact the delivery of the shares or to keep the $270,000.00.

And yet during all this time, the shares will be deemed to be the property of the estate. Surely the Appellant should be entitled to some relief.

The Appellant is entitled to complain on another ground. The judgment now under attack will not be "res judicata", against those who will finally be vested with the ownership of the estate, to wit: the grand children and the great grand children of the testator. They will be bound neither by the judgment to which they were not made parties, nor by the choice made by the Respondents. And the Appellant may be faced with new proceedings, whether the Respondents elect to exact the delivery of the shares, or to keep the two sums of $250,000.00 and of $20,000.00.

The learned trial judge has relied upon the English law of trust. And he has quoted Lewin, On Trust, p. 930:

> "It the trust estate has been tortiously disposed of "by the trustee, the cestui que trust may attach and fol- "low the property that has been substituted in the place "of the trust estate, so long as the metamorphosis can be "traded".

The above quotation is manifestly inapplicable to the present case. And, at all events, it has been held by this Honourable Court that our law of trust is fundamentally different from the English law of trust. (Laliberté et Larue Trudel & al, vs. Les Appartements Lafontaine Ltée, failli, Can. L. Rep. 1931, p. 7; also Davis vs Curran, C. L. Rep. 1933, p. 283).

The learned trial judge has also quoted Curaçon, in support of the contention, that a usufructuary is entitled to take a possessory action (case, vol. 8, p. 799, ll. 20 to 38).

But, the Respondents are not usufructuaries, and the present action is not a possessory action, but a petitory action, since it tends to obtain a declaration that the estate is the real owner of a large number of securities.

The learned trial judge admits, in his notes, that "les demanderesses, en effet, ne peuvent autoriser la défenderesse à rembourser à Robertson" (case, vol. 8, p. 798, ll. 44 to 45). But he adds that the court can authorize such a refund.

We respectfully submit that the court could validly authorize such a reimbursement, only at the request of those who are qualified to submit such a demand, and that an order obtained at the request of a mere creditor of revenues would be ineffective, as to the real owners, of all the properties comprised in the estate.

— B —

Then comes the next question: did the late Hugh Quinlan, a few days prior to his death, actually transfer to the Appellant all the shares which he held in the three companies "Quinlan, Robertson & Janin Ltd", "Amiesite Asphalt Co. Ltd" and "Ontario Amiesite Asphalt Ltd"? The Appellant contends that these shares were transferred to him for the price and at the conditions stated in a letter of June 20th, 1927 (exh. D.R.I., vol. 6, p. 286). But, as the court below had refused to admit direct evidence of the consent of the testator, it remains to be seen if that consent had been proved by some other mode of evidence admitted by the law.

As early as June 11th, 1925, the late Hugh Quinlan jointly with Mr. Alban Janin and the Appellant, had agreed upon the principal that, in the event of the death of one of them, the survivors would buy the shares owned by the predeceased partner in the various companies organized for the carrying on of their joint undertakings. This appears from the agreement under private writing filed as exhibit C-4 and D-R-3 (case, vol. 5, p. 167). This agreement, it is true, mentioned only the shares of "Quinlan, Robertson, & Janin Ltd" and of "Amiesite Asphalt Co. Ltd", but it was because at the time the "Ontario Amiesite

Asphalt Ltd'' was not yet in operation. (Janin, case, vol. 4, p. 722, ll. 35 to 43). And, if the prices at which those shares could be bought, had been fixed for a period of time which was expired at the death of the testator, the agreement, in all other respects, was in force, subject to the fixing of new prices, by mutual consent. This was the reason why, as early as April 1927, Mr. Janin and the Appellant began to consider the advisability of purchasing the shares of the late Hugh Quinlan, and to discuss the price that should be fixed, according to the basis established by the agreement of June the 11th, 1925. (Janin, case, vol. 4, p. 722, ll. 1 to 43; and p. 723, ll. 27 to 49; A. W. Robertson, case, vol. 4, p. 822, ll. 25 to 45). And, in view of the fact that the Honourable J. L. Perron had been the legal adviser of them all, and was perfectly aware of the financial condition of these companies which he had himself organized (A. W. Robertson, vol. 4, case, p. 824, ll. 21 to 35), he was invited several times to express his opinion (Janin, case, vol. 4, p. 724, ll. 1 to 25).

At the beginning of May 1927, after one of these conferences to which he had taken part, the Hon. J. L. Perron telephoned, requesting an interview with the late Hugh Quinlan, for the purpose of discussing with the latter the whole situation (Janin, case, vol. 4, p. 813, 814, ll. 10 to 25. He asked Miss King to call for a taxi in order to go to the testator's residence. (Helen King, case, vol. 4, p. 668, line 25 to p. 669, l. 15) ; and we know by one of the Respondents, dame Marguerite Quinlan, that effectively he had an interview with the de cujus (case, vol. 3, p. 580, ll. 27 to 31). But the Honourable J. L. Perron, having died before the enquête, his evidence was not available.

On May the 21th, 1927, the Appellant paid a visit to the late Hugh Quinlan, and then and there the latter endorsed in blank in the presence of the Appellant and of the nurse Vernie Kerr, the form of transfer appearing at the back of four certificates of shares, to wit: two certificates representing 1151 shares of ''Quinlan, Robertson & Janin Ltd'', and two certificates representing 50 shares of ''Amiesite Asphalt Co. Ltd'', (case, vol. 3, p. 565, ll. 44 to 48, and p. 566, ll. 1 to 22; p. 566, ll. 1 to 12, Vernie Kerr; A. W. Robertson, case, vol. 4, p. 792, ll. 30 to 43). These four certificates are fyled as the exhibits P-9, P-10, P-26 and P-27. Besides the signature of the testator himself, they bear also that of Vernie Kerr, as witness. (case, vol. 5, pp. 37 127, 164 and 165).

It is true that at a given moment Miss Kerr seemed to put in question, the authenticity of two of these signatures: she pre-

tended that she had signed only two certificates and not four; without however being able to distinguish the supposedly false signatures, from the genuine signatures. (Case, vol. 3, p. 569, ll. 17 to 40); also pages 643, 644). But the genuineness of all four signatures, has been conclusively established by an expert in handwriting, Mr. C. R. Hazen (Case, vol. 4, p. 762 and foll.; also see exh. D.R. 35, vol. 7, p. 570a). This point is no longer in controversy.

The Appellant attempted to explain the circumstances under which these four certificates had been endorsed by the late Hugh Quinlan, but the learned trial Judge refused to allow this evidence. (A. W. Robertson, vol. 4, p. 818, ll. 21 to 35, and pages 819, 820). However, we know from Miss Kerr, who was heard as a witness for the Respondents, that when retiring, the Appellant explained to her the purpose of his visit: "He did "make some remarks - shares of the company, that they were selling and that was why he would like my signature to witness Mr. Quinlan's. (case, vol. 3, p. 567, ll. 35 to 38). And, further on: "It was something about business - the selling of the shares. I understood it was Amiesite". (Case, vol. 3, p. 567, ll. 47 to 48).

At all events, it can be said that those certificates, having been endorsed in blank by the testator, became instruments which, if not negotiable in the proper sense, could be assimilated to negotiable instruments, so far as the parties are concerned. And, upon the delivery of said instruments, endorsed as aforesaid, the Appellant became vested with the virtual ownership of those shares, and entitled to consolidate his title, by inserting on the certificates so endorsed, his own name or the name of a nominee.

> "It has been observed, however, that while certifi-
> "cates of stock are not, strictly speaking, commercial or
> "negotiable paper under the law merchant, like promis-
> "sory notes or bills of exchange, yet the recognized usage
> "of indorsing such certificates in blank and so transfer-
> "ring title to them and what they represent, by delivery
> "has given them a quasi negotiable character to such an
> "extent that they are often held, as they pass from hand
> "to hand, free from undisclosed antecedent equities.
> "They are so far negotiable that a transferee for value in
> "good faith takes a title to the stock free from latent
> "equities between prior parties in the line of transmission,
> "and he may acquire a good title even where his transfe-
> "ror had no title if there are elements of estoppel".

"(Thompson, vol. 5, 3rd ed., p. 331, par. 3491).

"1708. When such formal assignment, and power "of attorney in blank, is signed by the shareholders, "and the certificate is delivered therewith, an apparent "ownership in the shares represented is created in the "holder". (Daniel, On Negotiable Instruments, 6th ed., "vol. 2, No. 1708, G. p. 1917).

"Such a blank assignment of a stock certificate with "an irrevocable power of attorney to transfer the stock on "the corporate books indorsed on the certificate gives the "assignee absolute authority to deal with the certificates "as the owner. The holder of a certificate thus indorsed "obtains a complete legal title by the execution of the "power and the right to execute it will, generally, inure to "each bona fide holder of the certificate. The right of a "holder of a certificate assigned in blank with power of "attorney is not affected by the death of the transferrer."

"(Thompson, 3rd ed., vol. 6, pp. 191, 192, No. 4332).

See (See also laws of England, Banks and Banking, No. 1282; also Buckley, Company Law, 9th ed., p. 471).

"But, the delivery of a share certificate accompa- "nied by a transfer executed in blank by the registered "holder may pass to the person receiving such documents "a title legal and equitable which will enable the holder "to vest himself with the shares, subject only to any right "the company may have to object to register such person "as a shareholder". (Remarks of Mr. Justice Duff., in "re: Castleman vs Waghorn, Gwynne & Co., 41 Supreme "C. Rep. p. 97); See also Lacour, Précis de Droit Commer- "cial, No. 391, alinea 3).

And the testator was fully conscious of his act and of its consequences, when he delivered to the Appellant the above certificates endorsed as aforesaid. This appears from the fact that, on the same day, the testator dictated to his son William Quinlan, a memorandum enumerating all the share certificates he held in the two companies "Amiesite Asphalt Ltd" and "Quinlan, Robertson & Janin Ltd", with the following note: ("Dep. in A. W. R.'s box"; that is to say "Deposited in A. W. Robertson's box"); with the date of the endorsements signed as aforesaid, to wit: the 21st of May, 1927 (See exh. P-66, case, vol. 6, p. 282; Wm. Quinlan, case, vol. 3, p. 587, ll. 47 to 49, p. 588, ll. 1 to 30).

And this clearly shows that, in the mind of the testator the securities above mentioned, were to be considered as in the Appellant's power and possession, from the said date of the 21st of May 1927.

The late Hugh Quinlan had endorsed only two certificates of the "Amiesite Asphalt Co. Ltd", one for one share, and the other for fourty-nine shares; whereas exhibit P-66 mentions a third one which is described as follows: No. 9, Amiesite, Dunlop, 200".

(See exhibit P-11, vol. 5, p. 128).

Dunlop was the testator's son-in-law and, to the knowledge of all the parties, he was also the testator's nominee. It seems that the late Hugh Quinlan had been unable to endorse this last certificate, with the two others, because it was then in Mr. Dunlop's possession. But it appears from exhibit P-66 that it was the testator's intention to transfer the last certificate in the same manner as he had done for the 2 others.

In fact, it was endorsed shortly afterwards by Dunlop (A. W. Robertson, on disc. vol. 2, p. 272, ll. 43 to 48).

The certificates being thus endorsed and delivered, the next step was to fix the value of the shares represented by these certificates, and to submit it to the de cujus. Further interviews and conferences took place. The Appellant submitted to Mr. Janin, that the sum of $250,000.00 would be a fair price and he asked the latter's advice. (Janin, case, vol. 4, p. 722, ll. 1 to 10; A. W. Robertson, vol. 4, p. 823, ll. 9 to 17). Finally, it was the Honourable J. L. Perron who was "the deciding voice in it". And the price of $250,000.00 was fixed, as representing the actual value of those shares. (A. W. Robertson, case, vol. 4, p. 824, ll. 35 to 40).

It was then about June the 20th, 1927. (A. W. Robertson, vol. 4, p. 823, ll. 9 to 17).

Immediately, the letter bearing that date (exh. D-R-1) was drafted. It was typewritten on the same day, by M. Leamy who initialed the document. (Case, vol. 4, p. 759, ll. 23 to 37 and p. 761, ll. 1 to 4). The Appellant attempted to prove that the letter exh. D-R-1 had been copied from an original document prepared by the Honourable J. L. Perron, but this evidence was not allowed. (Miss King, case, vol. 4, p. 665, ll. 27 to 40; Leamy, case, vol. 4, p. 759, l. 37 to p. 760, l. 45).

But it is in evidence that a duplicate of the letter exhibit D-R-1 was found in the safe of the Honourable J. L. Perron, at the very place indicated by the latter, to his secretary, at the time. This duplicate is filed as exh. D-R-2. And it was found in an envelope containing several other documents relating to the estate of the late Hugh Quinlan, and including a duplicate of the agreement of June the 11th, 1925. (Miss King, case, vol. 4, p. 664, ll. 40 to p. 665, ll. 20 and p. 665, l. 40 to p. 666, l. 12).

On this same date, of the 20th of June 1927, the Appellant accompanied by Mr. Leamy who had been at the employ of the late Hugh Quinlan, during twenty-years (Leamy, vol. 4, p. 757, ll. 40 to 47) went to the latter's residence. The date of that visit is fixed without any possible doubt, not only by the testimony of the Appellant and of Mr. Leamy, but also by the fact that two cheques were signed at the same time by Mrs. Quinlan. (Leamy, case, vol. 4, p. 663, ll. 25 to 30; A. W. Robertson, p. 821, case, ll. 9 to 33 and p. 794, ll. 19 to 35. See also exhibit D-R-49 and D-R-50, vol, 6, pp. 288 to 289).

The letter was then read by Mr. Leamy to the testator in the Appellant's presence. (Leamy, case, vol. 4, p. 662, ll. 37 to p. 663, l. 21 and p. 761, ll. 10 to 49; A. W. Robertson, vol. 4, p. 821, ll. 9 to 33).

The testator was undoubtly 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. (Dr. Hackett, vol. 4, p. 660, ll. 20 to 34; Miss McArthur, case, vol. 3, p. 572, ll. 17 to 48).

And the late Hugh Quinlan understood perfectly the contents of the letter (Leamy, vol. 4, p. 794, ll. 39 to 47; and A. W. Robertson, case, vol. 4, p. 820, l. 49). 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" (case, vol. 4, p. 661, ll. 17, 18, 19). And, after the Appellant's visit, he said to the same witness that "he had transacted some business" (case, vol. 4, p. 661, ll. 9, 10). Referring no doubt to the agreement contained in the letter of the 20th of June 1927, and to the valuations contained in that letter.

After having shown that the letter had been read, and that the testator understood the contents thereof, the Appellant offer-

ed to prove by his own testimony as well as by Mr. Leamy's, that the testator had expressly given his consent to the agreement therein contained, but the learned trial judge refused to allow this evidence, (Leamy, case, vol. 4, p. 794, ll. 1 to 20; p. 794, l. 47 to p. 795, l. 19; A. W. Robertson, vol. 4, p. 820, ll. 21 to 45).

But, if there is no evidence showing an express consent on the part of the testator, it can at least be said that there is no evidence wherefrom, it can be inferred that the testator objected to the agreement which was submitted to him. As the record now stands, the testator must be deemed to have remained silent, after having heard, and understood the contents of the letter. Under such circumstances, the testator's silence can fairly be interpreted as an acquiescence.

(22 Q.O.R.K.B., p. 542; 30 Q.O.R.K.B., p. 221; 31 Q.O. R.K.B., p. 382; 39 Q.O.R.K.B., p. 510; 62 Supreme Court Rep. p. 166; Rev. Trim. 1927, p. 422).

We further submit that the agreement of the 20th of June 1927 has been admitted by the Respondents, in their pleadings, par. 11 of the original declaration, states: —

> "11. That on or about the 22nd day of June 1927, "three days before the said testator died, said Angus Wil- "liam Robertson, one of the defendants, personally, and "for his own benefit, acquired a number of shares, the "property of the said testator, in different companies "wherein said testator was interested, to wit: the said De- "fendant Robertson acquired two hundred and fifty com- "mon shares of Amiesite Asphalt Limited, and different "and numerous other shares the property of said Hugh "Quinlan, in different other limited companies, the whole "as hereinafter mentioned." (Factum, p. 27, ll. 20 to 33).

The Respondents have reiterated this allegation, in their amended declaration of the 28th of February 1930 (case, vol. 1, p. 4, ll. 20 to 30) as well as in the amended declaration of the 10th, of January 1931 (case, p. 74, ll. 33 to 43).

The purport of these various paragraphs is clear: it is to the effect that the Appellant had actually acquired for his own benefit 250 shares of the "Amiesite Asphalt Co. Ltd", exactly the number of shares mentioned in the letter of the 20th of June 1927, as well as various other shares, the whole belonging to the late

Hugh Quinlan. It is true that the other shares are not mentioned expressly in these paragraphs, but no one never pretended that other shares besides those of "Amiesite Asphalt Co. Ltd", of "Quinlan, Robertson & Janin Ltd" and of "Ontario Amiesite Asphalt Ltd" have been sold in June by the testator to the Appellant. And furthermore, the Respondents, in a motion to amend, pretended, after the hearing, to have specifically stated that the shares sold in June 1927 included, besides the 250 shares of the "Amiesite Asphalt Co. Ltd" the 1151 shares of "Quinlan, Robertson & Janin Ltd". (case, vol. 1, p. 68, ll. 14 to 30).

In fact, in the written pleadings, all the parties have agreed in saying that, in June 1927, the late Hugh Quinlan transferred to the Appellant the shares which he held in the companies: "Amiesite Asphalt Co. Ltd", "Quinlan, Robertson & Janin Ltd" and in other companies including the "Ontario Amiesite Asphalt Ltd". The Respondents do not contend that there was no transfer, but they claim that the transfer should be annulled, because it was tainted with fraud, and obtained at a time when the testator was not "compos mentis".

But, no attempt was made to prove the allegations of fraud and the trial judge admits that on June the 20th, Mr. Quinlan was able to give a valid assent to the transfer. (Case, vol. 8, p. 794, ll. 44 to 47).

But, says the learned trial judge, the above paragraphs do not constitute an admission, because they were drafted when the Respondents had a very incomplete knowledge of the facts, and are therefore the result of an error on their part.

It is true that an admission, even a judicial one, can be revoked if it is made through an error of fact. (1245 C.C.).

But, the revocation should at least be asked, and the error of fact should be proved. In the present case, the Respondents never asked to be relieved from the effect of their admission, and they never attempted to prove that it was made through error.

The learned trial judge further adds that the paragraphs above mentioned do not constitute an admission under the circumstances, because "s'il v a une vente, elle comprend les actions des trois compagnies et elle s'est faite par un seul et même titre, les défendeurs d'ailleurs aussi le plaident formellement" (case, vol. 8, p. 796, ll. 36 to 40).

We submit that the admission contained in the said paragraphs includes the shares in the three companies, because, even though the shares of the "Amiesite Asphalt Ltd" are the only ones mentioned by name, the others are virtually included in the general terms following the name of the said Company.

At all events, if these paragraphs apply only to the shares of the "Amiesite Asphalt Ltd", the Appellant should not be deprived of the benefit of this partial admission. If it is true that, in certain cases, an admission cannot be divided, it does not follow that an admission is without effect, if it covers only a part of the contentions of the adverse party.

We, therefore, respectfully submit that the agreement contained in the letter of June the 20th, 1927, has been legally proved.

It may be asked why the testator never signed a transfer of the 200 shares of "Ontario Amiesite Asphalt Ltd", although these shares are mentioned in the letter of the 20th of June 1927.

The reason is that, at the time the transfers were signed, to wit: on the 21st of May 1927, these shares were considered worthless by everyone.

> "Les actions de la compagnie "Ontario Amiesite "Asphalt Ltd", says the Honourable judge a quo, n'avaient "aucune valeur par elles-mêmes". (Case, vol. 8, p. 784, ll. "35 to 37).

(See also A. W. Robertson, on disc. vol. 1, p. 184, and vol. 2, p. 360, ll. 1 to 27).

No one took the trouble of having them transferred; more particularly, on account of the fact that it would have been necessary to send the certificate to Toronto, at the company's head office, and that nobody seemed to know at the time where this certificate could be found. Not only were the shares of the "Ontario Amiesite Asphalt Ltd" considered worthless, but they were even looked upon, as a burden from which the estate of the de cujus should be freed. The reason was that the company had a deficit, and that the shareholders had been obliged to become sureties to the bank and to various guarantee companies. (See financial statement, case, vol. 5, pp. 186 to 190 and specialy p. 190; see also exh. D-R-51, case, vol. 7, pp. 544 to 545;

letter of November 21st, 1928, case, vol. 7, pp. 540, 541). And they were included in the valuation of $250,000.00 (see deposition Janin, vol. 4, p. 722, ll. 45, to p. 723, l. 25; p. 738, ll. 15 to 22; p. 739, ll. 27 to 46, p. 740, ll. 29 to 39). The Appellant was not acquiring additional assets, when he included these shares in the letter of June the 20th, 1927; he was, on the contrary, accepting a burden.

Some discussion arose as to the name that should be given to the contract contained in the letter of the 20th of June 1927. This, we submit, is immaterial. Under our law, innamed contracts have the same executory force than those known by a special name: in all cases, the intention of the parties is paramount. At all events, this contract is in our opinion a contract of alienation of the nature of a contract of sale, with certain special modalities. Under the said agreement, the Appellant became obligated to pay to the late Hugh Quinlan or to his heirs, the sum of $250,000.00. On the other hand, the Appellant became so obligated in view of obtaining, in return, the ownership of the shares enumerated in the letter. This was the consideration of his obligation and the sum of $250,000.00 became the price agreed upon for these shares. It is therefore a contract of alienation, of a thing certain and determinate for a price in money, or, in other words, a sale. It may be objected that the instrument contemplates a sale to be made at some future date. since the price therein stipulated is payable "one half cash on the date of the sale and one half cash within one year from this date"; and that, consequently, it is not actually a sale. But we submit that this clause should be interpreted jointly with the others (1018 C. C.). Thus interpreted, this clause simply means that the Appellant reserved the right to find a buyer in place of himself, if possible, and, if successful, to disclose, later on, the name of this buyer. A sale coupled with such a modality is known as a sale with "réserve d'élection d'amis ou de déclaration de command."

Explaining this particular sale, Colin & Capitant say: —

"L'Acheteur se réserve donc, dans le contrat, la fa-
"culté de se substituer une autre personne, généralement
"non désignée, laquelle prendra le marché pour son comp-
"te. Si cette personne, appelée command, ne se déclare
"pas, c'est l'acheteur en nom ou commandé qui reste ache-
"teur". (Colin et Cap. vol. 2, p. 429, Dr. Civil).

"La vente avec réserve de déclaration de command,
"ajoute-t-il, est moins une vente conditionnelle qu'une

"vente affectée d'une alternative, quant à la personne de "l'acheteur, l'un des deux acheteurs éventuels étant dès à "présent déterminé et l'autre restant encore inconnu." "Voir note de M. Glasson, D.P. 95, 2, 1)." (re case, p. 430).

"En pareil cas, il n'y a pas double vente et "L'ac- "quisition faite par le commandé ne diffère pas moins de "celle que ferait un mandataire. Dans cette dernière opé- "ration, il y a bien aussi une seule mutation, un seul droit "fiscal; le mandant est bien aussi à l'abri des hypothèques "provenant du chef du mandataire. Mais nul délai n'est "imparti pour la désignation du mandant. Et si celui-ci "n'est jamais désigné, le mandataire qui a acquis ès qualité "ne restera jamais acquéreur pour son compte". (case, p. "430).

Furthermore, the sale is susceptible of other modalities, more or less similar to this "declaration de command". And it can even be validly agreed, in a sale, that the transfer of ownership will remain in suspense for a given period (24 Laurent, No. 4). Assuming that this letter could be said to contain, not an actual sale, but a promise to sell made by the late Hugh Quinlan and a promise to buy made by the Appellant; the result would be the same; it would be a bilaterial promise of sale, with tradition and actual possession, and such a promise of sale is equivalent to sale. (1478 C. C.).

In fact, the parties have interpreted this agreement as a real sale with reserve of "déclaration de command". As early as June 22nd, 1927, the Appellant caused his name to be inscribed on the certificates, transferred in blank to him, by the testator and his nominee, Mr. Dunlop. These transfers were approved on the same date, by the Directors of the companies concerned, and they were registered in the book of transfers and inscribed on the respective share accounts of the late Hugh Quinlan and of the Appellant.

(See P-9, vol. 5, case, p. 37; P-10, case, p. 127; P-11, case, p. 128; P-7, case, p. 38; P-14, case, p. 39; P-8, case, vol. 6, p. 292; P-26, p. 164; P-27, case, p. 165; D-C-2, vol. 5, p. 166; P-12, vol. 6, p. 293; Spellans, vol. 3, p. 491, ll. 35 to 45; Petrie, vol. 4, p. 690, ll. 30 to 35; p. 691, ll. 13 to 48; p. 692, ll. 1 to 48; p. 693, ll. 13 to 45; Malone, vol. 3, p. 505, ll. 10 to 22).

The transfer of the shares of the "Ontario Amiesite Asphalt Ltd" gave rise to some difficulties, owing to the fact that

the late Hugh Quinlan had not, during his life time, endorsed the certificate and these shares being worthless, it was only on November 16th, 1927, that the interested parties realized that they should also be registered in the name of the Appellant. (See exh. P-2, vol. 6, p. 253; P-5, case, vol. 5, p. 147; D-R-14, case, p. 380; Correspondence, vol. 6, p. 359 and vol. 7, pp. 527, 528, 529, 546; Petrie, vol. 4, pp. 693 and p. 694, ll. 12 to 24; also p. 704, ll. 10 to 27).

Then, as early as July the 9th, 1927, the Appellant brought to the knowledge of his co-executor, the letter of June 20th, 1927. (See depos. Connelly, vol. 4, p. 785, ll. 23 to 45; Parent, vol. 4, p. 832, ll. 23 to 43; also letter of July 22nd, 1927, case, vol. 5, p. 73, and letter of August the 24th, 1927, vol. 6, p. 375).

Then, a purchaser was looked for, who would pay the sum of $250,000.00, for the shares enumerated in the letter of June 20th, 1927. (See exh. P-C-15, vol. 6, p. 374 to 378 inclusively). But, as no buyer could be found, the legal adviser chosen by the testator himself, the Honourable J. L. Perron was consulted and he expressed the opinion that the Appellant was bound to buy, according to the agreement contained in that letter (Connelly, vol. 4, p. 787, l. 43 to p. 788, l. 20; Parent, case, p. 776, l. 44 to p. 777, l. 20).

And the Appellant had to keep those shares for himself. He paid the price in two equal payments of $225,000.00 on the 29th of December 1927, and the 28th of January 1928, respectively (See correspondence, case, vol. 7, p. 479; vol. 6, pp. 381, 382, 385, 386; also D-R-33, vol. 7, p. 550 and D-R-34, case, p. 571; W. Miller, vol. 4, p. 756, ll. 23 to 40).

And the Capital Trust Corporation Limited insisted that the interests should be paid, from June 22nd 1927, including those due for the few days, which had elapsed between the sending of the cheques or drafts, and their reception. (see correspondence, and statement, vol. 6, case, pp. 380, 382, 383, 389, 390, 391, 392, 397).

It is objected that, notwithstanding the agreement of the 20th of June, 1927, the shares therein enumerated were described as well in the inventory P-2, as in the financial statements P-3 and P-4, as belonging to the late Hugh Quinlan's estate, that they were again so described in the statements sent to the Collector for succession duties. (See case, vol. 6, pp. 296e, 301 and 312,

vol. 7, p. 413). But the Appellant, who had been relieved by the testator himself from the care of attending to the book-keeping of the estate, took no share whatsoever, in the preparation of these statements: he relied upon the Capital Trust Corporation Ltd and its auditors. (See A. W. Robertson, on disc. vol. 1, pp. 126, 127, 140; vol. 2, p. 423, ll. 1 to 12).

Anyhow, as soon as he noticed that those shares were included in the inventory, he drew the attention of the Capital Trust Corporation Limited upon the fact, and protested against the entries referring to these shares. And Mr. Parent, who was then acting as accountant, for the Capital Trust Corporation Limited, admits that it was through error, that these shares were so included in these various statements (case, vol. 3, p. 637, ll. 17 to 33). And the correspondence also explains, how these various entries in connection with the above shares, came to be made. (case, vol. 6, p. 388 and vol. 8, p. 656).

It may be added that the accountants can hardly be blamed if they were unable to decide in whose name these shares should have been placed, prior to the "déclaration de command".

— C —

Subsidiarily, we respectfully submit that the learned trial judge erred, when he refused to allow in evidence the testimonies of Mr. Leamy, and of the Appellant, when they undertook to explain that the late Hugh Quinlan had given his formal assent to the agreement contained in the letter of June the 20th, 1927, because: —

1° The facts previously analyzed amount, at least to a commencement of proof in writing (art. 1233, par. 7, C.C.)

2° The fact which it was intended to prove by these testimonies, was a fact concerning commercial matters (art. 1233, C. C. par. 1).

— I —

According to Pothier, a commencement of proof in writing "existe lorsqu'on a, contre quelqu'un, par un écrit authenti-
10 "que, où il était partie, ou par un écrit privé, ou signé de "sa main, la preuve non à la vérité du fait total qu'on "avance, mais de quelque chose qui y conduit". (Pothier, "Obligations, No. 801). And art. 1347 C.N. defines the "commencement of proof in writing: "tout acte par écrit "qui est émané de celui contre lequel la demande est for- "mée, ou de celui qu'il représente et qui rend vraisemble- "ble, le fait allégué".

The writing which may serve as a commencement of proof
20 in writing, may emanate from the party itself, or its mandatory, or representatives (Walters vs Cassidy, 3 Q.O.R.K.B., p. 270; Montreal Loan & Mortgage vs Leclerc; Montreal Law Rep. 6 K. B., p. 37; Gaz. Trib. 1922, 1, 267).

Particularly, the statements made by the attorney in judicial proceedings, are considered as emanating from the client. (Juris Classeur, Civil, art. 1347, art. 1348, No. 58).

It is sufficient that a party "en ait pris l'initiative ou la
30 responsabilité comme, par exemple. s'il a été fait sous sa direction, par son commis. Il n'est même pas nécessaire qu'il ait pris aucune part à sa confection, si elle s'est approprié l'écrit depuis, par exemple en l'invoquant à l'appui d'une demande." (Dorion, Preuve par témoins, No. 89, pp. 90 and 91).

"16. Peu importe, au surplus, le but dans lequel "l'écrit ait été rédigé. Il est indifférent qu'il l'ait été en "vue précisément de constater le fait allégué, ou tout autre "qui ne forme le sujet d'aucune contestation. Il n'y a pas
40 "non plus à distinguer entre ce qui n'est mentionné qu'en "termes énonciatifs et ce qui est constaté comme conven- "tion ou disposition formelle. Peu importe même que les "simples énonciations aient un rapport direct avec la dis- "position, ou qu'elles lui soient étrangères. Si, dans le pre- "mier cas, elles font foi, dans le second, elles peuvent "néanmoins, servir de commencement de preuve, (1320)". "Larombière, nouv. éd.. pp. 494, 495; No. 16; Sic. Fuz- "Herm, Code civ. ann. art. 1347, No. 15).

"Peu importe aussi que les écrits invoqués soient "plus ou moins récents. Ainsi on peut considérer comme "commencement de preuve par écrit les énonciations con- "tenues dans des actes anciens émanés des parties. Caen, "11 juin, 1807, (S. et P. chr.)". Fuz. Herm, C. civ. ann. "art. 1347, No. 159).

"JUGE, — Le talon d'un mandat-poste, émis par "l'agent de l'administration des postes, ayant qualité "pour le délivrer, constitue un commencement de preuve "par écrit qui, joint à des présomptions graves, peut cons- "tituer une preuve complète. Et il n'est pas nécessaire "que l'écrit établisse un des éléments du fait à prouver: "il peut être simplement le point de départ d'un raisonne- "ment. (Cass, 1er mars, 1926, D. Hebd. 1926, p. 161, Rev. Trim. 1926, p. 410).

A memorandum attached to a parcel found amongst the testator's papers and mentioning that certain securities therein enclosed belong to a third party, may be used as a commencement of proof in writing, justifying the admission of parol evidence. (Cass, 30 juillet 1885. Pand. Fr. Vo. Preuve, Nos. 510, 511).

"527. Il n'est pas rigoureusement nécessaire que "l'écrit invoqué comme commencement de preuve par écrit "s'exprime d'une manière positive et directe sur le fait à "prouver; il suffit que les inductions que l'on peut puiser "dans ces énonciations donnent à ce fait un caractère suf- "fisant de vraisemblance. (Nancy, 19 mai 1894, Rec. arr. "Nancy, 1894, p. 145; D.P. 1895, 2. 94). Pand. Fr. do. "No. 527).

Held that the actual possession of moveable property is equivalent to a commencement "de preuve par écrit", sufficient to allow the possessor to explain his possession by oral evidence. (Lefebvre vs Bruneau, 14 L.C.J. p. 268; Tellier, juge; Boucher vs Bousquet, Montreal Law Rep. 5 S. C. p. 11).

Held also, that an admission "that he employed them as his agent to transact his business; that they bought and sold "something" for him and that he gave them instructions to do "something for him on the markets of New York, Montreal and other places", constituted a commencement of proof sufficient "to entitle the Appellant to shew by oral evidence or to use the language of the code by testimony that the particular transac-

tions were those which the Respondents commissioned the Appellant to carry out on his behalf (Forget vs Baxter, 2 App. Cases, P. C. p. 282).

See also Richer vs Voyer, 30 Law Times, p. 506; Campbell vs Young, 32 Rep. Supreme, C. p. 547).

Moreover, "une fois le commencement de preuve "par écrit établi, les juges peuvent compléter la preuve, "soit par des témoignages, soit par les serments supplé- "toires, soit par des présomptions. (Riom, 22 nove. "1820-P. chr. Toullier, t. 9, No. 123)" Pand. Fr. Vo. Preu- "ve, No. 494).

In this case, the commencement of proof in writing results from, amongst others, the following facts: the endorsement in blank with delivery of these various transfers, bearing upon the very shares the Appellant claims to have purchased. The Appellant's possession of the certificates representing these shares, from the date of the transfers; the admissions contained in the pleadings. All these elements of proof point to the formation of the agreement contained in the letter of the 20th, of June 1927; they prepare, they explain, they confirm this agreement and we respectfully submit that the least that can be said, is that they make it appear probable.

— II —

And now, can it be said that the fact which the Appellant offered to prove by testimony is a fact "concerning commercial matters", within the meaning of par. one of the article 1233 of our Civil Code ?

Nowhere, can we find in our law a definition of what is meant by "commercial matters", nor can we find an enumeration of the matters which should be deemed commercial ? No doubt, reference can be made to the enumeration contained in the French commercial Code, (art. 631 & 632); but we are not restricted by such enumeration.

In this case, the fact to be proved, was the sale of a certain number of shares, of the capital stock of the three companies:

"Quinlan, Robertson & Janin Ltd", "Amiesite Asphalt Ltd" and "Ontario Amiesite Asphalt Ltd". These three companies were undoubtedly commercial companies; they had carried on the business of building contractors in various branches, including public works. That was their main object. Such enterprises are commercial enterprises and those who carry them are traders men (Cass, 3 février 1902, D.P. 1902, ll. 294; Cass, 15 février 1900, D.P. 1900, 1. 97; Morgan & Trunbull, 14 Quebec Law Rep. p. 121; Roy v. Ellis, 7 Q.O.R.K.B. p. 2; Pand. Fr. vo. Acte de Commerce, Nos. 242 and 249).

Furthermore, the shares to be sold were negotiable instruments governed by "le principe de l'incorporation du droit dans l'écrit". (Lacour, Précis de Droit Commercial, 1912, No. 391, alinéa 3). And, endorsed in blank, they became instruments whose title resided in the bearer.

We submit that the juridical fact, consisting in the sale of negotiable shares endorsed to the bearer, and forming part of the capital stock of a commercial company, is per se, a commercial matter. And it must be so specially when the sale is made between two traders, as in the present case. No doubt, one does not become a trader, because he has bought a share of the capital stock of a commercial company. But he, who is the leading mind of such a company; who devotes all his time to its business, and who personally performs the commercial operations which are the object of the company, is necessarily a trader.

The late Hugh Quinlan and the Appellant who had been during eleven years, members of a commercial general partnership, and as such, undoubtedly traders, could not lose their quality of traders, for the only reason that they had changed the form of their association, while pursuing the same operations, performing personally the same, and dividing the profits in the same manner.

> "It is admitted", says Mr. Justice Carbonneau, that "the buying and selling of shares in industrial and com-"mercial companies should be considered as commercial "matters and therefore, are susceptible of parol evidence. "But, says the defendant, this transaction did not take pla-"ce between dealers. I would be inclined to think that when "the transaction in itself is essentially commercial, it does "not matter whether it is made by a regular trader or not, "because, he becomes a trader the moment he enters into a "commercial transaction". (Bonner vs Moray, 22 R. de "Jur. pp. 402 and 403).

And Mr. Justice Lavergne, speaking for the Court of King's Bench, which confirmed the judgment, added: —

> "La souscription et le transport d'actions dans les "dites compagnies est un contrat commercial; c'est ce qui "résulte encore de la jurisprudence dans différentes cau- "'ses. (In re the above case, p. 408).

Moreover, the commercial character of such a sale, results from an express provision of our law. Under art. 2260, par. 5, C. C. are held to be commercial matters, all sales of moveable "effects between traders and non traders, and, a fortiori, "between two traders. And the words "moveable effects" undoubtedly include "shares or interests in financial, commercial and industrial companies"; because such shares are moveable, by determination of law. (art. 387 C.C.), and because all that is moveable is contained in the expression "effets mobiliers". (art. 397 C.C.).

Under the French Code of Commerce, it is conceded that the expression "achat de denrées et marchandises" (632 Code de Commerce) comprises incorporeal things, such as shares. (Lacour, Précis de Droit Commercial, 2nd ed., p. 28, nos. 33 and 34). Our code does not require the intention to resell with profit, in order that a sale be held commercial, and Lacour has defined the "acte de commerce" generally, as being:

> "Le fait de s'entremettre dans la circulation des "produits avec l'intention de réaliser un bénéfice". (La- "cour, vol. 1, No. 28).

But, if the sale of the shares enumerated in the letter of the 20th of June 1927 is a commercial one, does it not follow that paragraph 4 of art. 1235 C. C. is applicable and, that consequently, no action or exception can be maintained, unless there is a writing signed by adverse party. But the provision of this paragraph applies only to the sale of "goods"; it does not apply to the sale of "moveable effects". And shares is a commercial company, if they are "moveable effects" cannot be considered as goods. (6 Mignault, pp. 91 and 92). Moreover, in the present case, the buyer, to wit: the Appellant, has accepted and received the shares. And the delivery as well as the acceptance are susceptible of oral evidence. (6 Mignault, p. 94, Munn v. Berger, 10 Supr. C. Rep., p. 512).

Moreover, the agreement of June 20th, 1927, must not be considered as the sale of a single or a few shares: it is the sale of a partner's interest in a commercial concern to his co-partner. The Appellant, when buying those shares intended to extend his participation in the business of the three companies concerned; to carry on business with one associate instead of two, so as to have a controlling interest and to earn a greater part of the profits. He acted in the interest of his trade, and in fact purchased the late Hugh Quinlan's share, in the stock or "fonds de commerce" of the three companies. And such an act is commercial.

> "Sont commerciaux", says Lacour, "tous les ac-
> "tes qu'il (le commerçant) fait à l'occasion et dans l'inté-
> "rêt de son commerce". (Précis de droit commercial, vol.
> "1, p. 49, No. 64).

Explaining why the purchase of a "fonds de commerce" is a commercial act, Lyon, Caen and Renault say: —

> "Pour le vendeur, la nature de l'opération n'est pas
> "difficile à établir, si l'on admet la théorie de l'accessoire.
> "No. 172); il s'agit d'un acte qui se rattache directement
> "à l'exercice de son commerce et en est la conlusion der-
> "nière. Il en est de même pour l'acheteur, s'il est déjà
> "commerçant et si l'achat a pour but le développement de
> "son commerce." (Lyon, Caen & Renault, vol. 1, No. 175,
> "p. 192, 4th ed.,).

> "Il y a même "acte de commerce" dans l'achat que
> "fait un commerçant d'un fonds de commerce, même pour
> "le fermer et se débarrasser ainsi d'un concurrent dange-
> "reux; c'est bien là une opération accessoire du commer-
> "ce." (Lyon, Caen & Renault, vol. 1, 4th ed., No. 176,
> "p. 194).

— D —

At the time of late Hugh Quinlan's death, the capital stock of the "Fuller Gravel Co. Ltd" was divided equally between the latter's estate and the Appellant. Each owned 1,000 privileged shares and 500 common shares. The said company was then operating a sand and gravel pit, at Ivanhoe, in the province of Ontario.

In August 1927, the Appellant suggested to Dr. Connelly, general manager of the "Capital Trust Corporation Ltd" and to the Honourable J. L. Perron, to sell the shares which the estate held in the "Fuller Gravel Co. Ltd"; he explained that the company had never paid any dividend; that, in order to keep it in operation, the late Hugh Quinlan and himself had to make large advances of money; that the operations were of an extremely hazardous character and required much time and personal attention. The sum of $50,000.00 was, in his opinion, the maximum price to be expected (letter A. W. Robertson, to Dr. Connelly, August 1st, 1927, vol. 6, p. 318; letter of August 16, 1927; A. W. Robertson, to Hon. J. L. Perron, D-R-48, vol. 7, p. 458; letter of August 19th, 1927; A. W. Robertson, to Capital Trust Corporation, Ltd, vol. 6, p. 321).

Dr. Connelly consulted the Hon. J. L. Perron and the suggestion was approved. (Letter of August 22nd, 1927, from Hon. J. L. Perron to Capital Trust Corporation Ltd, exh. P-C-25, vol. 7, p. 463; letter of August 23rd, 1927; Capital Trust Corporation Ltd, to A. W. Robertson, case, vol. 6. p. 382).

The Appellant then, undertook to find a buyer. Realizing that the only persons whom, he could reasonably expect to convince, were those already interested in the enterprise or in similar enterprises, he addressed himself to W. E. Tummon, who had been manager of the plant during thirty years, and to J. W. Rayner and G. S. McCord; the former being commercial traveller in that line of business and the latter a contractor. (A. W. Robertson, case, vol. 4, p. 825, ll. 46 to p. 826, l. 40; Depos. Tummon, vol. 4, p. 682, l. 40 to p. 683, l. 3 and p. 689, ll. 9 to 20).

Between August the 13th and October the 12th, 1927, the Appellant succeeded in selling 600 privileged shares at $50.00 each, to wit: 200 to each of the three buyers: Messrs Tummon, Rayner and McCord. Each privileged share carried with it, as a bonus, one half of a common share. (See exh. P-49, vol. 5, p. 214; P-67 and D-C-8-A case, vol. 7, p. 487, 494. Also corresp. case, vol. 6, p. 330, to p. 342).

There is no doubt that the price of $50.00 was the full value of those shares (Dr. Connelly, case, vol. 4, p. 787, ll. 1 to 27, and p. 789, ll. 25 to 33).

And this is expressly admitted by the trial judge (case, vol. 8, p. 784, ll. 40 to 41, and p. 797, ll. 16 to 23).

Mr. Tummon paid this sum cash, by cheque. (See exh. D-R-11, case, vol. 7, pp. 521, 523).

Messrs McCord and Rayner paid 25% cash and obtained a delay of three years to pay the balance, provided they paid an interest of 6% and under the condition that the certificates should be held by the "Capital Trust Corporation Ltd", until paid in full. (See depos. McCord, p. 671, vol. 4, ll. 10 to 48; Depos. Rayner, p. 678, ll. 23 to 48; see cheque D-R-8, vol. 7, p. 523, and D-R-5, p. 524).

The remaining 400 privileged shares were equally transferred to the same Mr. Tummon, on November the 14th, 1927. (See exh. D-C-8a, case, vol. 7, pp. 487 to 494).

But Mr. Tummon dit not intend to keep these 400 shares for himself; what he intended was to transfer 200 of these shares to a personal friend, whom he wished to interest in the business and to transfer the balance to a contractor by the name of Miller (Depos. Tummon, case, vol. 4, p. 683, ll. 29 to p. 684, l. 10). Unfortunately neither his friend, nor Mr. Miller could be convinced to purchase. Depos. Tummon, case, vol. 4, p. 688, l. 31 to p. 689, l. 25).

After trying in vain during a few months to sell them to others, Mr. Tummon retroceded them to the Appellant, on the 26th of March 1928. (Case, vol. 4, p. 688, ll. 37 to 38; vol. 4, p. 688, ll. 48 to p. 689, l. 10; also exh. P-49, case, vol. 5, p. 213; exh. D-C-9, vol. 7, p. 578 to 579).

Then, on the 22nd of May 1928, a new company, "The Consolidated Sand & Gravel Co. Ltd", which had been created specially for that purpose, bought all the shares of the "Fuller Gravel Co. Ltd", together with the shares of all other companies, doing business on the Toronto market. (Exh. P-49, vol. 5, p. 213, to p. 215). And the balance coming to the estate, in capital, interests, was then fully paid.

It is true that the cheque of $180,000.00 representing the price for all the "Fuller Gravel Co. Ltd" shares, was made payable to the Appellant's order. But the Appellant handed over to Messrs McCord, Rayner and Tummon the amount coming to each one of them, in proportion of the shares held by them. (Tummon, vol. 7, p. 686, ll. 21 to p. 687, l. 23; see also exhibit D-R-11, D-R-12, D-R-13; McCord, vol. 4, p. 673, ll. 20 to 45 and p. 676, ll.

33 to 48; also exhibit D-R-7 Rayner, vol. 7, p. 679, ll. 29 to p. 680, l. 17; also D-R-9 and D-R-10; A. W. Robertson, vol. 7, p. 827, ll. 7 to 27).

The Respondents in their declaration, allege that the estate's shares in the "Fuller Gravel Co. Ltd" were thus sold after the Appellant and his co-executor had come to a collusive and fraudulent understanding, and that the Appellant personally or by his nominees, actually bought those shares (See par. 65, 66, case, vol. 1, p. 80, ll. 30 to 48).

No proof of fraud or collusion was even attempted. The Respondents have suggested that the Appellant possibly knew of the formation of the "Consolidated Sand & Gravel Co. Ltd", when he advised to sell in August 1927, and that Mrssrs Tummon, Rayner and McCord were merely his "prête-noms".

But these three purchasers swear that they knew nothing of the scheme of amalgamation which resulted in the formation of the "Consolidated Sand & Gravel Co. Ltd", when they bought those shares; that they really bought these shares for themselves and kept for themselves the proportion coming to them, out of the $180,000.00. (McCord, case, vol. 4, p. 677, ll. 14 to 23; Rayner, case, p. 678, ll. 29 to p. 679, l. 17; Tummon, vol. 4, p. 687, ll. 17 to 30). Moreover, all those who had any connection with the above merger, declared that the scheme was planned only on April 7th, 1928; to wit: nine months after the Appellant had suggested to sell the shares of the estate, and that the Appellant heard of the plan only ten days later, when the negociations began. (Stewart, vol. 4, page 809, ll. 25 to 45; Tummon, case, p. 688, ll. 24 to 47; A. W. Robertson, case, p. 826, ll. 40 to 45; see also exh. D-R-45, vol. 7, pp. 593, 594, 595 and P-42, vol. 7, p. 604). And, when asked by the trial judge how it was that he had not sold his own shares with those of the estate, the Appellant answered: —

"A.—"If I tried to sell my shares, nobody would "buy any of it; I had to agree to help finance and remain "in company; somewhere there is evidence to that effect; "I had to finance those men to get them in; I told the Ca- "pital Trust and Mr. Perron and they discussed it with "me several times, those men would not have come into the "proportion, I could not say we have made any money, ex- "cept one summer, on a particular contract and so we had "nothing but a very competitive business.

"Q.—And the gentlemen you referred to were in a "position to push the business with you ?

"A.—Tummon was the local manager, and the man "who brought the proposition to us originally.

"Mr. Rayner was the Toronto selling agent.

"Mr. McCord ran a building supply company.

"And Mr. Miller, who was to go in, was a contrac- "tor and user of the material. (case, vol. 2, p. 826, ll. 20 "to 40).

And the learned trial judge was fully convinced of the Appellant's good faith:

"Le défendeur savait-il lorsqu'il avisait la succes- "sion de vendre ces actions qu'un "merger" était à se for- "mer ? Son créateur, M. Stewart, dit que le projet n'a "été connu et exécuté qu'un an après.

"Je sais bien qu'en matière de haute finance, il est "souvent difficile d'arriver à prouver directement la frau- "de, et que pour cette raison, il est permis, non de la pré- "sumer, mais de la deviner, dirais-je, sous les voiles sous "lesquels on prend soin de la cacher (il n'est pas néces- "saire de prouver la fraude, disait M. le juge Gill, quand " on la sent), mais faut-il au moins que le soupçon repo- "se sur quelque chose.". (case, vol. 8, p. 797, ll. 45 to 48, "and p. 798, ll. 1 to 11).

Let us add that the sale of those shares to the merger at $90.00 per share is due mostly to the creation of the merger itself (Stewart, case, vol. 4, p. 810, ll. 13 to 23) and this does not alter the fact that the price of $50.00 represented really the true value of the shares, when the estate sold them.

The judgment appealed from held that the 400 shares transferred to Mr. Tummon on November the 14th, 1927, and retroceded to the Appellant, on the 26th of March 1928, had actually been purchased by the Appellant, not from Mr. Tummon, but from the late Hugh Quinlan's estate. (case, vol. 8, p. 784, ll. 21 to 27; and p. 797, ll. 34 to 38).

While it is true that Mr. Tummon when buying these 400 shares had no intention to keep them, it does not appear that he

had bought them for the Appellant. What Mr. Tummon says is that they were intended for Mr. Miller and for one of his personal friends, who was not the Appellant (Tummon, case, vol. 4, p. 683, ll. 40 to 45; p. 685, ll. 25 to 29). And there was no agreement whereby the Appellant had undertaken to take back these shares, in case Mr. Miller or Mr. Tummon's friend would refuse to buy them.

On the contrary, Mr. Tummon having failed to convince Mr. Miller and his friend, tried during several months to sell his shares to others. And it can be taken as granted that the estate, at the time, would have refused to take back these shares, if Mr. Tummon had offered to return them. The Appellant decided to re-purchase those 400 shares in order to secure for the estate the full payment of the price obtained. And at the same time, he wanted to get out of trouble a person who had been manager of this plant during thirty years.

It must be borne in mind that, in order to obtain from the merger the price of $90 00 per share, the Appellant had to make a double sacrifice: he had to guarantee personally the reimbursement of all the debts of the "Fuller Gravel Co. Ltd" exceeding $7,500.00, and he had also to bind himself to keep out of all organisation doing similar business, within the merger's territory. The debts actually exceeded by $1,184.24 the amount of $7,500.00 and this sum was charged to the Appellant. And the Appellant, when invited to become interested in the same line of business, had to refuse, for the reason that the merger would not relieve him from his undertaking not to become interested in any organization susceptible of coming into competition with the merger above said. (Case, v. 7, exhibit P-40, p. 602; P-44, case, vol. 8, p. 625; P-47, case, p. 683; D-R-45, case, vol. 7, pp. 596, 597, 598.

— E —

The Court of King's Bench, disagreeing upon this point, with the judgment of the lower court, held that the value of the shares in dispute should be fixed as of the date of the institution of the action. (case, vol. 8, pp. 810, ll. 35 to 45). And it further held that, on that date, the shares of "Quinlan, Robertson & Janin Ltd" were worth $236.25 each or a total sum of $271,823.75; the shares of "Amiesite Asphalt Ltd" $432.13, each, or a total sum of $108,032.55, and the shares of "Fuller Gravel

Co. Ltd'' $90.00 each, or a total sum of $36,000.00. As to the shares of ''Ontario Amiesite Asphalt Ltd'', the Court of Appeals agreed with the learned trial judge that they were absolutely valueless.

We respectfully submit that the above valuation of the shares of ''Quinlan, Robertson & Janin Ltd'', of ''Amiesite Asphalt Ltd'' and of ''Fuller Gravel Co. Ltd'' is erroneous and unsupported by the evidence.

In the first place, there is no evidence tending to show what was the value of these shares, at the time the action was instituted, to wit: on the 25th of October 1928. This is conceded by the Court of King's Bench, which proceeded to find out what was the value at the nearest anterior date, to wit: on the 21st of March 1928, as to the shares of ''Quinlan, Robertson & Janin Ltd''; on the 21st of August 1928, as to those of ''Amiesite Asphalt Ltd'', and in March 1928, as to those of ''Fuller Gravel Co. Ltd''. But, if in law, the condemnation must be for the value of the shares at the time of the institution of the action, it is illegal to adopt the value existing two or seven months before. By comparing the statements of the 21st March 1927 (D-R-15, D-R-16 and D-R-17, vol. 6, pp. 272, 273, 274) with those of the 31st of March 1928, one is struck by the wide fluctuation in the values of these shares, within the restricted period of one year. For instance, the financial statement of March 1927 shows a ''book value'' of $165.68 for the shares of ''Amiesite Asphalt Ltd''; while a year later, the ''book value'' appears as being $508.39 for each one of the same shares. This is explained by the highly hazardous character of the operation carried on by building companies generally, and, in particular, by the present companies and also by the essentially inequal trend of their business. In fact, while a big contract can bring in a large profit for a given year, another contract may cause a huge deficit, the following year. And it is in evidence that the late Hugh Quinlan and the Appellant were practically bankrupt, at least twice, in the course of their business (A. W. Robertson, case, on disc. vol. 1, p. 172, 173, 174; Janin, vol. 4, p. 732, ll. 9 to 45; A. W. Robertson, vol. 4, p. 825, ll. 1 to 22).

There is no more reason in law to adopt the value at the nearest anterior date than to adopt the value at the nearest posterior date. And, if the Respondents have failed to put in the record the proper evidence, it might be a good reason to send back the record to the lower Court, for the purpose of completing the evidence, but it does not justify a condemnation based upon a wrong principle.

Furthermore, the Court of Appeals adopts, as a basis of its valuation, the various financial statements of the above companies. But these statements only show the "book value" of the assets of the companies and, as a consequence, of the shares of the capital stock. Now, there is a radical difference between the "book value" and the "actual or cash value" of the companies' shares. This is conceded by all, even by the witness for the Respondents, Mr. Shurman. (Case, vol. 3, p. 620, ll. 45 to 49). And this will also clearly appear from the most superficial perusal of the statements. For instance, amongst the assets, can be found such items as "$100,000.00 for patents, which were expiring in August 1928 and $52,000.00, plus $26,419.22, for claims against the "Ontario Amiesite Asphalt Ltd", which was then, to the knowledge of all concerned, totally insolvent. (Exh. P-68, vol. 6, p. 276). In fact, the evidence, as to the actual value of these shares, consists in a deposition of Mr. Janin, Mr. Pétrie, the auditor of these various companies, and of the Appellant. And they all agree that the sum of $250,000.00 represented the full value of these shares. (A. W. Robertson, vol. 4, p. 824, ll. 35 to 45; Pétrie, vol. 4, p. 697, l. 45, to p. 698, l. 23; Janin, vol. 4, p. 721, ll. 17 to 40).

It is true that the Respondents have produced Mr. Shurman, as a witness, to support their contentions, as to the value of these shares. But Mr. Shurman, who is an accountant, admits that he has no personal knowledge of the business carried on by these companies, and his valuation is entirely based upon what he considers to be an analysis of the various financial statements. But his method of analysing these statements is so peculiar and the conclusions he draws therefrom are so astounding that neither the learned trial judge, nor the Court of King's Bench has felt that is was possible to rely upon his evidence. We do not intend to discuss it any further.

In fixing the value of the shares in dispute, the Court of King's Bench has referred to the method of valuation adopted by the late Hugh Quinlan and his associates, under the agreement of the 11th of June 1925 (Exh. C-4 and D-R-3, vol. 5, p. 167; vol. 8, pp. 810, l. 45 to p. 811, l. 30). But the valuation adopted by the judgment appealed from, is not in accordance with the said agreement. Under the agreement of the 11th of June 1925, the shares of the predeceased partner could be acquired by his co-partners, for a price to be fixed by common consent, at various dates. Moreover, the said agreement had actually fixed a price for the shares of the companies, wherein the late Hugh

Quinlan, Mr. Janin and the Appellant were interested at the time, to wit: "Quinlan, Robertson & Janin Ltd" and "Amiesite Asphalt Ltd". The prices so fixed were $125.00 a share, for the shares of "Quinlan, Robertson & Janin Ltd", and $25.00 a share, for those of "Amiesite Asphalt Ltd". No mention was made of the "Ontario Amiesite Asphalt Ltd", which was not then in operation. It is explained that these prices were arrived at, by taking the "book value" and deducting therefrom 15%. And any of the surviving partners had the right to purchase, as a whole, all the shares of the predeceased partner, for the prices so determined. When it became necessary to fix the value of the shares enumerated in the letter of June 20th, 1927, the same method was adopted. It was felt, said Mr. Janin, that, if the late Hugh Quinlan had been present, he would have accepted a method agreed upon by himself and his associates in 1925. Statements were therefore prepared by the auditor, Mr. Pétrie, for the year ending on the 21st of March 1927. These statements are filed as exhibits D-R-15, D-R-16, D-R-17 (case, vol. 6, pp. 272, 273, 274). These statements showed a "book value" of $165.68 each, for the shares of "Amiesite Asphalt Ltd" and of $231.69 each, for the shares of "Quinlan, Robertson & Janin Ltd", forming a grand total of $308.095.19. From this "book value" a deduction of 15% was made, as in 1925, and this brought the grand total down to $261.880.91. But the financial statement of "Ontario Amiesite Asphalt Ltd", showed a deficit of $74,719.80, equal to $74.21 per share, or $14,942 00, for the 200 shares of the late Hugh Quinlan. And this also was deducted from "the book Value" leaving a balance in favour of the late Hugh Quinlan, of $246,938.91, which was made a lump sum of $250,000.00. (Vol. 4, Janin, p. 722, ll. 45 to p. 723, l. 25; also p. 738, ll. 15 to 22; also p. 739, ll. 27 to 46; and p. 740, ll. 29 to 39; A. J. M. Pétrie, vol. 4, p. 697, ll. 45 to p. 698, ll. 28 and p. 696, ll. 39 to 43; A. W. Robertson, vol. 4, p. 823, ll. 37 to 41; and p. 824, ll. 1 to 21).

We respectfully submit that this deduction of $14,942 00, on account of the deficit of the "Ontario Amiesite Asphalt Ltd", was justified under the agreement of the 11th of June 1925; because what was contemplated under the said agreement was a purchase as a whole of all the shares of the predeceased partner. And the "book value" could only be a fair basis for fixing the purchase price, provided it applied indifferently to all the companies and not only to those which, for a given period, had been prosperous.

Another reason why the deficit of the "Ontario Amiesite Asphalt Ltd" was deducted in 1927 and should also now be de-

ducted, consists in the fact that the three partners, to wit: the late Hugh Quinlan, Alban Janin and the Appellant, had all become sureties for the debts due by the "Ontario Amiesite Ltd" to the banks, and also, on behalf of other companies, who had guaranteed the faithful performance of the contract entered into by the said "Ontario Amiesite Asphalt Ltd". The liabilities to the banks amounted to $161,000.00 and the liabilities to the guarantee companies amounted to $292,325.75 (see depos. Janin, vol. 4, p. 742, ll. 21 to 27, and p. 743, ll. 26 to 43; Peters, vol. 4, p. 752, ll. 25 to 40; see also exh. D-R-32, vol. 6, p. 262 to 266; vol. 8, p. 680; also exhibit D-R-18, vol. 8, p. 677; also exh. D-C-10, vol. 5, p. 170a; also exh. D-C-12, vol. 5, p. 171; also vol. 7, p. 536, 537; and vol. 5, p. 116; see also corresp. vol. 7, p. 540, 541; exh. D-R-51, vol. 4, pp. 544, 545).

Now the partner buying the deceased partner's shares had to relieve the estate from all these liabilities and this was actually done. (See depos. Janin, vol. 4, p. 744, ll. 13 to 20; exh. D-R-28, D-R-29, D-R-30, D-R-31, D-R-32; vol. 8, pp. 755 and foll.; vol. 5, pp. 29, 30; see also corresp, vol. 6, pp. 395, 396; vol. 7, pp. 529, 534, 539; also pp. 541, 542, 543; exh. D-C-11, vol. 4, p. 681; exh. P-C-18, vol. 7, p. 573).

Can it be said that it does not appear that the Appellant was called upon to pay these liabilities, in whole, or in part? But the very fact of becoming a surety, more particularly in favour of an insolvent company, is a heavy burden. And this is shown by what took place when the Appellant asked Mr. Janin to accept a portion of the shares of the late Hugh Quinlan, in the "Ontario Amiesite Asphalt Ltd", with a portion of the liabilities. In order to obtain Mr. Janin's assent, the Appellant had to give him gratuitously 1/2 of the shares of the Amiesite Asphalt Ltd", obtained at the same time from the late Hugh Quinlan.

"I got the good ones, to pay for the bad ones". (Vol. 4, depos. Janin, p. 726, l. 40 to p. 727, l. 33; A. W. Robertson, on disc. vol. 1, pp. 109, 110; vol. 2, p. 214, 215, 219, 220, 224).

The intent and spirit of the agreement of the 11th of June 1925, have therefore been ignored by the Court of King's Bench, when the court adopted the full "book value" and refused to deduct therefrom what should have been deducted, under the agreement.

Again, it must be noted that the deficit of the "Ontario Amiesite Asphalt Ltd" is composed almost entirely of debts due by the latter to the two other companies, to wit: "Quinlan, Robertson & Janin Ltd" and "Amiesite Asphalt Ltd", and that these debts are included for their full value as debts receivable and served to increase the "book value" of the shares of these two companies.

If it is held that the deficit of the "Ontario Amiesite Asphalt Ltd" cannot by itself affect the valuation of the shares of "Quinlan, Robertson & Janin Ltd" and of "Amiesite Asphalt Ltd", the least that can be said is that the debts due by the "Ontario Amiesite Asphalt Ltd" to the two other companies, should be struck out of the debts receivable, and deducted from the assets of these two companies. The reason is obvious: the "Ontario Amiesite Asphalt Ltd" being insolvent, the claims of the "Quinlan, Robertson & Janin Ltd" and of "Amiesite Asphalt Ltd" are of no value and should be considered as such, in the financial statements of these two companies. This would decrease, for so much, the surplus shown for these two companies and consequently the "book value" of their shares. But the Court of King's Bench did nothing of the kind. It allowed the full "book value" of the shares of "Quinlan, Robertson & Janin Ltd" and of "Amiesite Asphalt Ltd" wherein are included the claims of these two companies, against the insolvent "Ontario Amiesite Asphalt Ltd" and refused to consider that the shares of the said "Ontario Amiesite Asphalt Ltd" was actually a burden.

We therefore respectfully submit that the value put upon these shares by the judgment appealed from is unjustified.

We submit also that, under the particular circumstances of the case, and in view of the Appellant's good faith, — which was admitted by the learned trial judge, — the proper value to be put upon these shares should be the value at the time the Appellant thought he had acquired them, to wit: on the 20th of June 1927. Thus, the parties would be replaced in the position in which they were, at the time of the transaction and the status quo antea would be restored. And this is what should be done whenever an agreement is set aside in virtue of a judgment.

"L'annulation d'une convention produit cet effet
"que les parties doivent être remises au même état où
"elles étaient au moment de cette convention, chacune
"d'elles doit reprendre les droits qu'elle avait alors, et

"abandonner ceux qu'on avait voulu lui transmettre. On "conçoit que dès l'annulation de la convention, ce que cha- "que partie détient par suite de celle-ci, elle le détient sans "titre. (Solon, Théorie sur la nullité, Vol. 2, No. 69, pp. "62 et 63).

"La nullité ou rescision prononcée en justice a pour "effet de remettre les choses dans l'était où elles se trou- "vaient avant la formation du contrat . . . . " (Planiol "et Ripert, Dr. Civil, vol. 6, No. 320, p. 437) . . . .

"Les parties doivent se restituer respectivement ce "qu'elles ont reçu ou perçu en vertu du contrat. Faute "pour le demandeur en nullité de pouvoir restituer le "corps certain qui lui a été transmis, l'annulation lui est "refusée. Il n'en pourrait être autrement qu'à titre de "condamnation à des dommages-intérêts, qui doit être jus- "tifiée par une faute établie à la charge de l'autre partie." "(re do, No. 321, p. 437).

"Et la nullité doit être prononcée en justice quelle "qu'en soit la nature" et même si le consentement a été en- "tièrement absent en supposant qu'il y ait eu malgré cela "exécution de l'acte. La nécessité d'un jugement découle "en effet de la règle; nul ne peut se faire justice à soi- "même, (supra, No. 282"). (Planiol et Ripert, No. 297, p. "410).

The judgment appealed from, after having condemned the Appellant to pay the full value of the shares in dispute, as determined by the judgment, including the unpaid portion of a dividend declared in 1925 (case, p. 811, ll. 7, 8, 9), declared further that: "les boni et dividendes déclarés et payés depuis le décès "de feu Hugh Quinlan sur lesdites actions sont la propriété "té de ladite succession". (case, p. 815, ll. 1, 2, 3).

The boni and dividends produced by the shares, in incorporated companies, are civil fruits (art. 447 C. C.; Planiol & Ripert, vol. 3, p. 184, No. 178; also p. 743, No. 792) ; as such they belong, by application of the doctrine of accession, to the mere possessor, provided he possesses in good faith (art. 411, 412 C. C.). The good faith of the Appellant has been expressly found by the learned trial judge.

"Considérant que le défendeur a agi dans ces di-
"verses circonstances de bonne foi et sur l'avis de M. Per-
"ron qu'il avait le droit d'agir ainsi." (case, vol. 8, p. 785,
"ll. 1, 2, 3).

Et, précisant, dans ses notes, il ajoute: "Au fond,
"le tribunal n'aurait-il pas maintenu la validité des ventes
"des trois compagnies, s'il avait admis la preuve testimo-
"niale de la réponse de M. Quinlan, et si cette réponse
"avait été conforme aux allégations de la défenderesse."
"(case, vol. 8, p. 798, ll. 31 to 36).

It therefore follows that the Appellant has become the owner of the boni and dividends produced by the shares in dispute, and cannot be condemned to reimburse them.

Can it be said that, in the present case, the Appellant's title was affected by an absolute nullity, owing to the fact that the consent of the late Hugh Quinlan has not been established ? But the possessor in good faith, under a title which, by its nature, is susceptible of transfering the ownership, is protected without any distinction being made "entre les vices de fond ou de forme,
"ni entre ceux qui affectent l'acte d'une nullité relative
" et ceux qui entraînent une nullité absolue. Dans tous les
"cas , le titre peut servir à justifier la bonne foi du pos-
"sesseur. (Planiol et Ripert, vol. 3, No. 174, p. 181).

Moreover: "le titre en vertu duquel la chose est possédée peut n'exister que dans l'imagination du possesseur. La croyance excusable et plausible à l'existence d'un titre tient lieu du titre lui-même, et autorise la rétention des fruits. Tel est le cas de l'héritier apparent, ou du légataire institué par un testament faux ou révoqué." (Planiol et Ripert, vol. 3, No. 175, p. 181).

— F —

The Court of King's Bench, modifying, upon this point, the judgment of the Superior Court, held: —

"Qu'à défaut de remettre la totalité des actions de
"la companie "Quinlan, Robertson & Janin Ltd" et de la
"compagnie "Amiesite Asphalt Ltd", le défendeur Ro-
"bertson devra payer la totalité de la somme qui se trouve

"déterminée comme représentant la valeur des actions de "l'une et de l'autre compagnie." (case, vol. 8, p. 812, ll. "15 to 19).

The "Quinlan, Robertson & Janin Ltd" and the "Amiesite Asphalt Ltd" are two different and autonomous companies; their shares are distinct entities and the obligation to deliver the shares of one of these two companies is different from the obligation to deliver the shares of the other.

As a result of the above holding, however, these two distinct obligations have been merged into one and have become an indivisible obligation to deliver 1401 shares, to wit: 1151 shares of the "Quinlan, Robertson & Janin Ltd" and 250 shares of "Amiesite Asphalt Ltd".

Under our law, an obligation may be indivisible ex natura, or ex contractu (1124 C. C.).

In the present case, it is plain that the shares belonging to two different companies cannot be considered as one single entity indivisible by its nature and it is equally plain that there exists no contract giving to these shares a character of indivisibility.

The proposition that the obligation to deliver all these shares is an indivisible one, would find some support if it had been held that the Appellant had acquired these shares under one single contract, to wit: the contract contained in the letter of June the 20th, 1927, and for a single price, to wit: $250,000.00. But the judgment appealed from, has found that no such contract ever existed.

Moreover, the adjudication of the Court of King's Bench, upon the point now under discussion, is ultra petita. Neither in the pleadings, nor in the oral argument, did the Respondents pray that the shares of these two companies be considered as forming but one entity and that the Appellant be condemned to pay the entire value of all these shares, in case he would fail to deliver any one of them.

On the contrary, the shares of each company have always been treated as forming a group distinct from the shares of the other company: they have been valued separately in the evidence and the learned trial judge has put a separate value upon each group.

The Court of King's Bench quotes section 1949 C. C. in support of its findings. (Case, vol. 8, p. 811, l. 49). This section reads, in part, as follows: —

"1149. A debtor cannot compell his creditor to re-
"ceive payment of his debt in parts, even if the debt be di-
"visible."

To our mind, this section has no bearing upon the point at issue. It pre-supposes that there is only one debt in existence and it enacts that in such a case payment must be made in full and not in part. But this section does not justify the merging of various debts into one; nor does it enact that the debtor of several debts must pay them all in full, at a time.

We therefore respectfully submit that the findings of the Court of King's Bench, upon this point, is unfounded.

From a practical point of view, it is clear that the position of the Appellant is made much worse by the holding now under discussion. It might be an easy matter, for the Appellant, to regain possession of the 250 shares of "Amiesite Asphalt Ltd" at a price much lower than the values put upon them by the judgment appealed from and, at the same time, an impossibility for the Appellant to get back the 1151 shares of "Quinlan, Robertson & Janin Ltd."

On the whole, we respectfully submit that the judgment appealed from, as well as the judgment of the Superior Court, are unfounded in fact and in law and should be reversed and that the action should be dismissed. Subsidiarily, we respectfully submit that the record should be sent back to the Superior Court and the Appellant allowed to prove by parol evidence that the late Hugh Quinlan assented to the agreement contained in the letter of June the 20th 1927, as well as all the facts and circumstances relating thereto. The whole with costs, before all the Court, against the Respondents.

MONTREAL, 14 October, 1933.

Beaulieu, Gouin, Mercier & Tellier,
Attorneys for the Appellant.

DOMINION OF CANADA

In the Supreme Court of Canada

(OTTAWA)

(On appeal from a judgment of the Court of King's Bench, in appeal),

BETWEEN: —

Angus William Robertson,

(Defendant in the Superior Court and Appellant in the Court of King's Bench, *in* appeal),

APPELLANT.

— and —

Ethel Quinlan & vir et al,

(Plaintiffs in the Superior Court, and Respondents in the Court of King's Bench, in appeal),

RESPONDENTS.

— and —

Capital Trust Corporation Limited,

(Defendant in the Superior Court),

— and —

Dame Catherine Ryan et al,

MIS-EN-CAUSE.

Appellant's Factum

BEAULIEU, GOUIN, MERCIER & TELLIER,
Attorneys for the Appellant.