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*Feb. 6, 7.
*Mar. 6.
*June 6.

ANGUS WILLIAM ROBERTSON (DEFENDANT) ..... } APPELLANT;

AND

ETHEL QUINLAN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS;

AND

CAPITAL TRUST CORPORATION LTD. (DEFENDANT)

AND

DAME CATHERINE RYAN AND OTHERS (MIS-EN-CAUSE)

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Evidence—Parol evidence—Commencement of proof in writing—What constitutes it—Facts which render alleged fact probable—Arts. 1233 (7), 1243 C.C.*

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 thirty years. In 1897 they had formed a commercial partnership during about 10 years, when they converted it into an incorporated company under the name "Quinlan, Robertson, Ltd." In 1919, they took a third associate, one Alban Janin and reorganized their company

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Hughes JJ.

under the name of "Quinlan, Robertson & Janin Limited." The capital stock of the new company was equally divided between the three associates. About 1925, the late Hugh Quinlan jointly with the appellant and Janin agreed upon the principle 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. Hugh Quinlan died on the 26th of June, 1927, leaving his last will and testament in notarial form, dated 14th April, 1926, by which he bequeathed all his property, apart from a few particular legacies, to his wife, but in trust jointly to the appellant and the Capital Trust Corporation, Limited, appointing them his testamentary executors. A year or so before his death, Mr. Quinlan, on account of failing health, gradually withdrew from active participation in the conduct and control of the various enterprises in which he was interested, leaving the management of them to his associates and especially to the appellant. As the improbability of his recovering his health became apparent, what he ought to do with his shares in the companies in which he and the appellant were interested became of increasing concern to Mr. Quinlan. He discussed the matter from time to time with the appellant and eventually decided that the shares should be sold at minimum fixed prices. The appellant testified that, at his request, the legal advisor of the company and Mr. Quinlan fixed the value of the shares at $250,000 and that, at Mr. Quinlan's demand, he put that decision in the form of a letter from himself to Mr. Quinlan and, three or four days before the latter's death, took it to Mr. Quinlan's house and read it to him before a witness and again discussed with him its subject-matter. The letter, dated 20th of June, 1927, reads partly as follows: "This will acknowledge your transfer of the following stocks to me: (1,601 shares of different companies), which stock represented all your holdings in the above companies. I have agreed to obtain for you the sum of two hundred and fifty thousand dollars ($250,000) for the above mentioned securities, payable one-half cash on the day of the sale, and one-half within one year from this date, which latter half will bear interest at 6%. Should your health permit you to attend to business within one year from this date, I agree to return all of the above mentioned stocks to you on the return to me of the moneys I have paid you thereon including interest at 6%." The appellant also testified that, having been unable to find a buyer for those shares, at the price agreed upon of $250,000, he had been obliged to keep them and had effectively paid to the estate that amount. The evidence also shows that the appellant had in his custody or under his control certificates endorsed in blank by Mr. Quinlan, on the 21st of May, 1927, when the appellant visited the latter, for the greater part if not for all of these shares, and that he, before the death of Mr. Quinlan, had the shares transferred on the registers of the companies respectively in his own name as owner. On that same day, Mr. Quinlan dictated to his son a memo. specifying all the certificates of shares he owned in those companies with the following note: "Dep. in A. W. Robertson's box," with the date of the endorsements, to wit: 21st of May, 1927. The respondents are two of the children of the late Hugh Quinlan; and the material conclusions of their action are that the Capital Trust Corporation, Limited, and the appellant, be dismissed as trustees and executors of the estate (*destitués de leurs fonctions*) for misfeasance in office and be ordered to

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render account of their administration of the estate; that the sale and transfer of the shares mentioned in the said letter of the 20th of June, 1927, be annulled and that the appellant be ordered to return them to the estate of the late Hugh Quinlan or to pay to it their value, which the respondents estimate at $1,350,000. At the hearing of the trial, the appeallant proved, by his own testimony and by that of the witness there present that he had communicated the letter of June the 20th, 1927, to the late Hugh Quinlan, at the latter's house, by reading it aloud; but when he proceeded to prove that the late Hugh Quinlan had acquiesced to the contents of the letter and accepted the agreement therein contained, the trial judge refused to allow this evidence and held that the acquiescence and consent of the late Hugh Quinlan could not be proved by parol evidence. The trial judge dismissed the two first claims of the respondent as to the dismissal of the executors and as to the order to render account; he annulled the transfer of the shares by the late Hugh Quinlan to the appellant and he condemned the appellant to retrocede to the estate these various shares, with the profits made and the dividends paid since the death of the late Hugh Quinlan, or to pay their value as determined by him to be $408,728, but, in either case, the respondents were obliged to reimburse the appellant the sum of $270,000 paid by him, $20,000 being an amount mentioned in another transaction. And this judgment, with certain modifications, was affirmed by the appellate court.

*Held* (reversing the judgment appealed from) that, upon the evidence and upon consideration of many other facts stated in the judgment, the transfer of the shares to the appellant bearing the signature of the late Hugh Quinlan, their possession by the appellant, the memo. dictated by Mr. Quinlan to his son and the understanding between the partners in case of death of one of them, were all facts constituting a commencement of proof by writing, and, consequently, parol evidence should have been admitted by the trial judge to prove that the late Hugh Quinlan had acquiesced to the contents of the letter of the 20th of June, 1927. All these facts do not establish the assent of the late Hugh Quinlan to accept the sum of $250,000 for his shares; but they are facts which render probable the fact which the appellant wanted to prove. It is not necessary that facts or writings establish one of the elements of the fact to be proved; it is sufficient that they may constitute a starting point of a reasoning by the trial judge. The probability of an alleged fact is the criterion of the commencement of proof in writing.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, which affirmed the judgment of the Superior Court, Martineau J., and maintained the respondents' action.

*L. E. Beaulieu K.C.* for the appellant.

*H. N. Chauvin K.C.* and *C. Holdstock* for the respondent Ethel Quinlan.

*Ed. Masson* for the respondent Margaret Quinlan.

*Geo. A. Campbell K.C.* for the Capital Trust, defendant.

*P. Couture K.C.* for the other heirs intervenants.

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The judgment of the Court was delivered by

CANNON J.—Les seules parties en présence devant nous sont l'appelant Robertson et l'intimée Ethel Quinlan et la Capital Trust Corporation comme fiduciaire exécutrice testamentaire de la succession de feu Hugh Quinlan, décédé le 26 juin 1927; le procureur de l'intimée Margaret Quinlan nous demande *acte* d'une transaction intervenue entre elle et l'appelant avec le concours de l'exécutrice et à laquelle sa sœur Ethel a refusé d'adhérer. Pour déterminer l'appel entre ces deux parties, sur cette partie du jugement de la Cour Supérieure portée en appel devant la Cour du Banc du Roi et devant nous, la question capitale, comme l'a fort bien dit le juge de première instance, est de savoir s'il y a eu une vente des actions en litige *avant* le décès du testateur. Si cette vente a eu lieu avant son décès, elle est valide, quelle que soit la vilité du prix; car, dit le juge de première instance, le 20 juin, M. Quinlan était en état de consentir à la vente; si, par contre, elle a eu lieu après, elle est invalide, vu la prohibition de l'article 1484 C.C. alors même que le prix représenterait la pleine valeur des actions. Le juge de première instance ne donne pas en détail les raisons pour lesquelles, après avoir permis la preuve que la lettre de Robertson, du 20 juin 1927, à Quinlan avait été lue à ce dernier en présence de M. Leamy, le tribunal a refusé de laisser faire la preuve par témoins de la nature de la réponse de Quinlan, alors que Robertson avait plaidé que ce dernier avait accepté sa proposition.

Il me paraît essentiel, avant de discuter les autres points soulevés, d'étudier d'abord le bien ou mal fondé de cette décision à l'enquête qui, d'après les notes de l'honorable juge Martineau, a entraîné comme conséquence cette partie du jugement final dont l'appelant se plaint. La situation des parties avant l'enquête me semble bien résumée comme suit par l'honorable juge Surveyer, dans son interlocutoire du 7 janvier 1929:

Considering that in paragraphs 11 to 25 of their declaration, plaintiffs allege in substance:

(11) that on or about the 22nd day of June, 1927, three days before the said testator died, said Angus William Robertson, one of the defendants, personally and for his own benefit, acquired a number of shares, the property of the testator, in different companies;

(12) that the said transfer of said shares to defendant Robertson is due to fraud on the part of said defendant Robertson and to collusion by him with others;

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(13, 14, 15, 16) that said transfer was made when said Hugh Quinlan was not *compos mentis;*

(17, 18, 19) that it was clandestine and made for less than the real value of the said shares;

(20, 21, 22, 23) that in order to conceal said transfer, said defendant Robertson has assigned some of these shares to *prête noms* of his, unable to pay for same;

(24) that the said transfer was not mentioned in the inventory sent by defendants to plaintiff Ethel Quinlan on August 8, 1928;

Considering that the allegations of defendant Robertson's plea are in the following terms:

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

(38) Said letter reads as follows:

MONTREAL, June 20th, 1927.

Mr. HUGH QUINLAN,
357 Kensington Ave.,
Westmount, Que.

DEAR HUGH,—This will acknowledge your transfer of the following stocks to me:—

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

Which stock represented all your holdings in the above companies. I have agreed to obtain for you the sum of two hundred and fifty thousand dollars ($250,000) for the above mentioned securities, payable one-half cash on the day of the sale, and one-half within one year from this date, which latter half will bear interest at 6 per cent. Should your health permit you to attend to business within one year from this date, I agree to return all of the above mentioned stocks to you on the return to me of the moneys I have paid you thereon including interest at 6%.

Yours truly,

(Signed) A. W. ROBERTSON.

(39) At the time the contract and agreement evidenced by the above letter was entered into, the said H. Quinlan was in full and complete possession of his faculties and thoroughly capable, in all respects, of passing upon the propriety and sufficiency of said transaction; and the defendant Robertson agreed to send the above letter only after he had been repeatedly and urgently requested to do so by and on behalf of the said late H. Quinlan;

(40) After the death of the late H. Quinlan, the defendant Robertson endeavoured strenuously to find some buyers, for said shares, at the price mentioned in the above letter, but was unable to do so, and finally he paid himself to the estate of the said late H. Quinlan, in fulfilment of his obligations, $250,000, as agreed upon between himself and the said late H. Quinlan;

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

(44) It was an error on the part of a subordinate employee of defendant "Capital Trust Corporation Ltd." who helped prepare the statement of assets and liabilities constituting the estate of the said late H. Quinlan and filed as plaintiffs' exhibit P-2, that the said 1,151 shares of Quinlan, Robertson & Janin Ltd. (erroneously called "Hugh Quinlan & Janin Co.") were entered as an asset of said estate, the said shares being at the time of the death of the said Hugh Quinlan transferred and delivered to defendant Robertson with said other shares on terms of the agreement aforesaid, and all that should have been entered as an asset of the estate of the said late H. Quinlan was the claim against the said Robertson and of others to obtain payment of the price of said shares as and when it became payable in terms of said agreement;

Le défendeur Robertson fournit ensuite les détails suivants quant au paragraphe 37:

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

B. The agreement was in writing;

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

D. The said agreement was signed by A. W. Robertson, the defendant, and by him delivered to Hugh Quinlan, who, in turn, delivered to the said defendant Robertson his certificate for said shares, endorsed in blank;

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

De sorte que l'on peut dire que l'action a été prise par deux légataires pour mettre de côté l'acquisition qu'elles allèguent avoir été faite le 20 juin, avant la mort du testateur, pour le motif que le transport des actions aurait été consenti alors que ce dernier, ne jouissant pas de la capacité mentale requise, aurait été victime des manœuvres dolosives de Robertson, son associé, qui aurait abusé de sa confiance en lui payant un prix insuffisant. Il semble donc que le litige entre les parties ne mettaient pas en doute l'existence d'une vente à cette date; mais il s'agissait simplement de prouver en quelles circonstances elle avait eu lieu et quelle était la capacité mentale de Quinlan lors de la transaction alléguée de part et d'autre dans les procédures.

Il nous faut donc décider aux lieu et place de la Cour Supérieure si la preuve déjà faite et les allégués étaient suffisants pour constituer le commencement de preuve par écrit

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exigé par le paragraphe 7 de l'article 1233 du code civil pour permettre la preuve testimoniale. Les faits et écrits devant la cour étaient les suivants:

1. L'entente de 1925, par laquelle Quinlan et ses deux associés, Robertson et Janin, avaient pourvu à l'acquisition par les survivants de la part de l'associé décédé; cet écrit porte la signature de Quinlan et celle de ses associés;

2. L'état de santé précaire depuis plusieurs mois de Quinlan, qui faisait prévoir sa fin prochaine;

3. Les pourparlers au sujet de cette acquisition entre Janin, Robertson et l'honorable M. Perron, avocat de Quinlan, qui lui a continué sa confiance même après sa mort en l'instituant par testament l'aviseur de sa succession;

4. L'entrevue de M. Perron avec Quinlan, au commencement de mai 1927;

5. La fixation du prix de $250,000 par M. Perron comme étant la juste valeur des intérêts de Quinlan dans les différentes compagnies contrôlées par les trois associés;

6. La visite de l'appelant à Quinlan, le 21 mai 1927, au cours de laquelle Quinlan endossa en blanc, en présence de l'appelant et de la garde-malade Kerr, la formule de transport au dos de quatre certificats d'actions, dont deux représentant 1151 actions de Quinlan, Robertson & Janin, et deux certificats de 50 actions de Amiesite Asphalt Co. Ltd.;

7. La témoignage de Mlle Kerr à l'effet qu'à cette occasion l'appelant lui avait expliqué le but de sa visite, qu'il s'agissait de la vente de certaines actions;

8. Le même jour, le testateur dicta à son fils le mémoire qui est devant la cour, énumérant tous les certificats qu'il détenait dans ces deux compagnies, avec la note suivante: "Dep. in A. W. Robertson's box," avec la date des endossements, savoir le 21 mai 1927, ce qui, à mon avis, démontrerait clairement que, dans l'esprit du testateur, ces valeurs devaient être considérées sous le contrôle et en possession de l'appelant à partir de cette date; cet écrit provient certainement du défunt;

9. Après cette livraison et cet endossement, Robertson soumit à M. Janin que le prix de $250,000 serait raisonnable; et ce prix, conformément à l'avis de l'honorable J.-L. Perron, fut fixé comme représentant la valeur réelle de ces actions;

10. Le fait qu'un double de la lettre datée du 20 juin 1927 fut trouvé dans la voûte de l'honorable J.-L. Perron à l'endroit que ce dernier avait indiqué à son secrétaire;

11. La preuve que cette lettre a été lue à Quinlan, qui, d'après le juge de première instance, était parfaitement en état de comprendre son contenu et de donner ou refuser son assentiment au prix proposé.

A part la nature de la contestation liée entre les parties, tel qu'indiqué plus haut, le transport des actions portant la signature de Quinlan et leur possession par Robertson et le mémoire préparé sous la dictée de Quinlan, joints à l'entente qui existait entre les associés, constituent-ils, oui ou non, un commencement de preuve par écrit? Le seul fait qu'il restait à prouver était qu'à cette date du 21 juin Quinlan a bien et dûment, pour le montant de $250,000 mentionné dans la lettre de Robertson, consenti à rendre définitive, suivant les conditions de la lettre de Robertson, l'aliénation des actions dont les certificats endossés par lui étaient déjà physiquement en la possession de Robertson depuis le 20 mai. Ces écrits ne constatent pas le consentement de Quinlan à accepter $250,000; mais constatent-ils des faits qui rendent vraisemblable le fait allégué? Il n'est pas nécessaire que l'écrit établisse un des éléments du fait à prouver; il peut être simplement le point de départ d'un raisonnement pour le juge. 25 Revue Trimestrielle de Droit Civil (1926) p. 410.

Il ressort des décisions jurisprudentielles (nous disent Planiol & Ripert, 7 Droit Civil, n° 1534) que le fait établi par le commencement de preuve doit rendre à première vue le fait allégué vraisemblable, que la vraisemblance n'est pas l'apparence de la vérité, mais ce qui est probable, mais qu'il ne suffit pas que le fait allégué soit rendu seulement possible. Le juge ne se contente pas de prendre en considération le fait établi et le fait allégué; mais il examine tout le procès en se basant sur ces circonstances extrinsèques.

En appliquant ce critère, il nous semble que le juge de première instance a restreint la portée qu'il fallait donner aux écrits et aux allégués des parties en refusant, comme il l'a fait, de prouver par témoins l'attitude et la conduite de Quinlan en cette circonstance. Il se contente de dire qu'il est *possible* que le prix de $250,000 ait été fixé en vue des conditions énoncées en l'acte d'accord du 11 juin 1925. Nous croyons qu'il aurait dû aller jusqu'à accepter la vraisemblance et la probabilité que ce prix de $250,000, ayant été fixé dans les circonstances plus haut relatées

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après les entrevues de Quinlan avec son homme de confiance et avocat, l'honorable M. Perron, a été accepté par Quinlan comme définitif, lorsqu'il lui fut offert par écrit par son associé Robertson. Or la vraisemblance du fait allégué est le criterium du commencement de preuve par écrit.

Voir *Cox* v. *Patton* (1).

Il a été décidé en revision dans *Lefebvre* v. *Bruneau* (2), que la possession en fait de meubles équivaut à un commencement de preuve par écrit, suffisant pour permettre au possesseur d'expliquer sa possession par une preuve testimoniale.

Le juge Tellier a jugé de même dans *Boucher* v. *Bousquet* (3), que la possession seule d'effets mobiliers fournit en faveur du défendeur une présomption de droit de propriété assez forte pour lui donner droit de prouver son titre par témoins. Or, dans l'espèce, Robertson était en possession des actions depuis mai 1927, et aussi de celles endossées par Dunlop. Voir aussi *Forget* v. *Baxter* (4).

En présence de la plaidoirie écrite résumée plus haut, ne pouvons-nous pas dire, comme feu le juge-en-chef Taschereau, parlant au nom de cette cour dans *Campbell* v. *Young* (5):

> It is not a commencement of proof of a contract that is in question. * * * The appellant had not to prove it, since it is admitted, pleaded by the respondents themselves. * * * Once a contract is admitted, no commencement of proof in writing is required for the admissibility of oral evidence of the amount of the consideration thereof.

Mais, même si l'article 1243 C.C. et la règle de l'indivisibilité de l'aveu s'appliquent, nous dirions, comme dans cette cause:

> The contract must be proved by the opposite party, aliunde of the admission. But *the admission is sufficient as a commencement of proof in writing to legalize oral evidence of it and of its conditions.*

L'honorable juge Howard nous dit:

> The appellant answers: "Well, if the evidence does not amount to complete proof, it constitutes a commencement of proof sufficient to open the door to testimony on the point."
>
> Again I cannot agree. If the evidence were all one way, it would, in my opinion, be sufficient, but it is rebutted by the significant fact that the appellant and his co-executor treated these shares as belonging to the succession of the late Mr. Quinlan, whereas if the proposal had been accepted by Mr. Quinlan and therefore the agreement, whatever it should be called, completed before his death, these shares would have been removed from his succession and their value, that is, the consideration received for them, would have taken their place among its assets. This con-

(1) (1874) 18 L.C.J. 317.
(2) (1870) 14 L.C.J. 268.
(3) (1889) M.L.R. 5 S.C. 11, at 15.
(4) [1900] A.C. 467, at 474, 475.
(5) (1902) 32 Can. S.C.R. 547, at 550.

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

Avec respect, l'honorable juge nous semble avoir été trop sévère. Le fait que ces actions avaient été, par erreur suivant la prétention du défendeur, mentionnées par sa co-exécutrice testamentaire, exclusivement chargée de la comptabilité, comme faisant partie de l'actif de la succession, aurait parfaitement pu servir à la transquestion de Robertson, mais n'est pas suffisant par lui-même pour détruire la vraisemblance du fait allégué, savoir l'acceptation du prix de $250,000 par Hugh Quinlan. Ce n'est pas d'ailleurs l'acte personnel de Robertson. Il est fort possible que dans l'esprit de ce dernier et de sa co-exécutrice, étant données les conditions de cette acquisition, aussi longtemps que le montant convenu n'avait pas été payé par un acheteur ou par lui-même, la valeur des actions, sinon les actions elles-mêmes, faisaient nécessairement partie de l'actif de la succession. Il s'agit de mots, plutôt que de la substance de la chose: de toutes façons, ces actions ou leur valeur devaient figurer au bilan de la succession Quinlan. Cette erreur, qui a été expliquée, ne devrait pas, à notre avis, suffire pour mettre de côté tous les éléments de preuve énumérés plus haut et qui, d'après le juge Howard, seraient suffisants pour constituer un commencement de preuve par écrit. La nature du contrat intervenu peut expliquer cette attitude de Robertson, que lui reproche M. le juge Howard. Il s'obligeait à payer à Quinlan ou à ses héritiers la somme de $250,000 pour obtenir la propriété des actions énumérées dans la lettre. Il y a donc eu d'après lui, contrat d'aliénation d'une chose certaine et déterminée pour un prix en argent, ou, en d'autres termes, une vente. Le prix devait être payé moitié comptant et l'autre moitié dans l'année. Il s'agit dans l'espèce d'une vente avec "réserve d'élection d'amis" ou de déclaration de "command". Colin et Capitant (Droit Civil, vol. 2, page 429) nous disent à ce sujet:

> L'acheteur se réserve donc, dans le contrat, la faculté de se substituer une autre personne, généralement non désignée, laquelle prendra le marché pour son compte. Si cette personne, appelée command, ne se déclare pas, c'est l'acheteur en nom ou commandé qui reste acheteur.
>
> La vente avec réserve de déclaration de command (ajoutent-ils) est moins une vente conditionnelle qu'une vente affectée d'une alternative, quant à la personne de l'acheteur, l'un des deux acheteurs éventuels étant dès à présent déterminé et l'autre restant encore inconnu. (Voir note de M. Glasson, D.P. 95,2,1.)

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La conduite des intéressés, dès le 22 juin 1927, en enregistrant le transport dans les livres des compagnies, semble confirmer cette interprétation de l'entente alléguée.

Nous sommes donc d'avis de mettre de côté les jugements de la Cour Supérieure refusant cette preuve testimoniale. Vu cependant les frais énormes déjà encourus, nous désirons, avant d'aller plus loin, entendre les parties durant le terme actuel pour décider ce qu'il serait juste et convenable de faire dans les circonstances.

As it appears by the last words of the above judgment, a final judgment was not rendered by this Court, which was desirous, owing to the enormous costs already incurred, to hear later on the parties in order to decide what should be reasonably done under these circumstances. The parties were so heard, and, on the 6th of June, 1934, the following final judgment by the Court was delivered by

CANNON J.—Since the court ruled, on March 6, 1934, that the trial judge misdirected himself when he refused to hear oral evidence of the testator's answer to Robertson's letter of June 20, 1927, the parties were heard and requested to file in writing their views of the proposed settlement and as to what evidence should be allowed, if the case be sent back to the Superior Court. The respondent Margaret Quinlan reiterated her decision not to be any longer involved as plaintiff in this case and prayed that, under the agreement of settlement executed between herself and all parties interested in the estate of the late Hugh Quinlan, excepting only the appellant Dame Ethel Quinlan (Mrs. Kelly) and the tutor, if any, of her minor children, passed before R. Papineau Couture, N.P., on the 31st of January, 1934, whereof a certified copy was left with the Registrar, this court should either declare that it sees no objection to the intervenants carrying it into effect or grant *acte* thereof.

The intervenants also explained that the reason why the stipulation of paragraph 6 was inserted in the agreement was because the intervenants, having filed before this court a declaration that they submit to justice, there was at least doubt of their right to enter into a settlement without the acquiescence of the court.

We see no reason why we should not declare that the settlement forms part of the record of the appeal and that

we grant *acte* thereof without passing upon the validity or the binding character of the agreement in question, nor deciding whether or not the intervenants acted within their powers and the officers of the intervenants within their authority. As far as Robertson and Margaret Quinlan are concerned, we cannot refuse to find as a fact that they have settled their differences and wish to stop this litigation.

The filing of the agreement in the record so that it will form part thereof for the future is all that is required and granted by giving "acte" of the production of the settlement.

Therefore, there remains before us only the appellant Robertson, the respondent Ethel Quinlan (Mrs. Kelly) and the two trust companies, who intervened here at the request of the court to watch the proceedings, although they, at first, only appeared to submit to justice, *s'en rapporter à justice,* they having accepted the judgment of the Superior Court.

The appellant's counsel submits that the only additional evidence which should be allowed, if the *enquête* is reopened before the Superior Court, is the evidence which has been offered, and refused by the trial judge. This should include oral evidence to show:

(*a*) the answer given by the late Hugh Quinlan when the letter of June 20, 1927, was read to him, including, of course, the conduct, statements, communications and declarations of the persons present when the letter was so read and of the late Hugh Quinlan himself and generally, all relevant circumstances relating thereto;

(*b*) All the facts, circumstances, statements and communications relating to the drafting of the said letter of June 20, 1927, including the conduct of all those who shared in the drafting of the said letter; and the whereabouts and safekeeping of said letter;

(*c*) All the facts, circumstances, statements and communications relating to the visits of the Honourable J. L. Perron and of the present appellant to the late Hugh Quinlan, during the month of May, 1927, or thereabout, and to the endorsement of the four certificates of shares filed as exhibits P-9, P-10, P-26 and P-27; also to the memorandum of the 21st of May, 1927, P-66; including the conduct of all the participants in these various events;

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

The respondent would also bring new evidence of all facts, declarations and statements which might tend to rebut the evidence to be afforded as aforesaid by the appellant. The respondent in her memorandum does not object to the above suggestions of the appellant's attorney. We must take it that she would be content to reopen the *enquête* within the above mentioned limits, although she has refrained from offering any suggestions in respect thereto.

We believe, however, that we should not send the case back to the Superior Court before deciding the question of the status of the plaintiff Ethel Quinlan, which was strongly attacked and defended before us. It must be borne in mind that the litigation has taken a different aspect since the judgment of the Superior Court, which dismissed a very substantial part of the conclusions, to wit

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

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

3. The prayer that the inventory be annulled;

4. The various allegations of fraud against the appellant, as well as the allegation that the late Hugh Quinlan was not of sound mind when the letter of the 20th of June, 1927, was read to him.

Now, the plaintiff having acquiesced in the judgment of the trial judge, the issue before the Court of King's Bench and before us was limited to the following points:

(*a*) The existence or nullity of the transfer to the appellant of the shares enumerated in the letter;

(*b*) The validity of the transfer to the appellant of four hundred shares of the Fuller Gravel Company Limited;

(*c*) The value of the shares whose transfer has been set aside; and as to the time at which the valuation should retroactively be made;

(*d*) The legality of the finding that the appellant should pay all the profits made and dividends paid since the death of the late Hugh Quinlan.

In this connection, we must take cognizance of the last will and testament of the late Hugh Quinlan, dated April 14, 1926.

The testator empowered his executors and trustees, in part, as follows:

I extend the duration of their authority and seizin as such executors and trustees beyond the year and day limited by law, and I constitute them administrators of my succession and declare that they and their successors in office shall be and remain from the date of my decease seized and vested with the whole of my said property and estate for the purpose of carrying into effect the provisions of this, my present will, with the following powers in addition to all the powers conferred upon them by law:

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

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

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

* * * * *

(*d*) After the death of my said wife, to distribute and divide all the net income or revenue of my Estate equally between my children issued of my marriage with the said Dame Catherine Ryan "par tête" or the legitimate issue "par souche" and thus until the death of the last survivor of my said children at the first degree, it being my wish and desire that should any of my said children die without issue, his share in the revenues of my Estate shall be added to the share of his survivor brothers and sisters per capita "par tête" and nephews and nieces "par souches."

(*e*) After the death of all my said children at the first degree to divide the capital and property of my whole Estate, with all accrued interests and revenues equally *per capita* "par tête" between my grandchildren and great grandchildren issued of legitimate marriages and then living.

Article Twelfth

In order that all the stipulations of this, my present will, may be respected by all and each of my legatees and beneficiaries, I hereby formerly (sic) declare that should any of them contest any stipulation of

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this, my present will and testament, they shall *ipso facto* lose their rights and titles of legatees or beneficiaries in this, my present will.

Article Thirteenth

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

The nature of the rights vested in the female respondent under the will of the late Hugh Quinlan is not doubtful. He bequeathed his entire estate, save and except certain legacies in particular title, "in trust" to his trustees who are "seized and vested with the whole of my said property and estate."

As to the children of the first degree, their rights are strictly limited, until the death of their mother, to

an annual sum not less than one thousand dollars ($1,000) and not over two thousand dollars ($2,000) payable by monthly instalments in advance as will seem fit to my executors and trustees, and thus until such child or children will not remain with his or their mother.

And after the death of their mother, the rights of the children of the first degree are restricted to "all the net income or revenue of my estate," with the stipulation that, in the event of the death of one of them

his shares in the revenues of my estate shall be added to the shares of his surviving brothers and sisters, per capita (par tête), and nephews and nieces "par souche."

The appellant has submitted to us that the children of Hugh Quinlan have no other right in their father's estate than the personal claim to the revenue payable out of the said estate; that mere creditors of revenues are as such unable to dispose of the estate or any portion thereof and that therefore they have no status to take an action concerning the ownership of any property appertaining to the estate.

The only remaining plaintiff now prays, as above stated, that the various sales and transfers of shares be declared null and void and that it be declared that these shares belong and have never ceased to belong in full ownership to the estate of Hugh Quinlan. As creditors of the revenues of the estate, the plaintiffs certainly had an interest sufficient to sue for the removal of the executors, if

they were acting fraudulently. But now that these conclusions have been refused, and that this issue has been finally determined between the parties, can we say that the sole remaining plaintiff has the right to compel the executors and Robertson to undo what she alleges has been done illegally and return to the "corpus" the shares in question? We believe that Ethel Quinlan Kelly, to the extent that she is entitled to a variable share in the net revenue of the estate of her father, has sufficient interest and "status" to preserve intact the "corpus" of the estate if she can satisfy the court, that the shares mentioned in the letter of June 20, 1927, or that the 400 shares of the Fuller Gravel Company Limited were illegally transferred after the death of her father to the present appellant and should be returned to the estate.

We do not and cannot disturb that part of the judgment of the Superior Court which is now "res judicata" between the parties, since the respondent acquiesced in the dismissal of that part of her conclusion above enumerated, nor can we disturb that part of the judgment accepted by the executors and trustees.

We therefore allow the appeal with costs; quash in part the judgment of the Superior Court and also the rulings during the trial refusing oral evidence of the facts and circumstances hereinabove mentioned under paragraphs A, B, C and D; we declare such oral evidence to be admissible, and we send back the parties to the Superior Court to so complete the evidence already taken by a further *enquête* and then secure a new adjudication on the merits of the issues hereinabove shown as remaining to be decided as between the respondent Dame Ethel Quinlan (Mrs. Kelly) and the appellant Robertson personally. The Court gives "acte" and considers as part of the record of this case the deed or agreement of settlement passed before R. Papineau Couture, N.P., on the 31st day of January, 1934, within the limits above stated.

*Appeal allowed with costs.*

Solicitors for the appellant: *Beaulieu, Gouin, Mercier & Tellier.*

Solicitors for the respondent: *Tanner & Desaulniers.*