

issue, her share should go to her surviving sisters. Nothing in this conflicted with the theory that the testator's intention was an equal division per capita.

A distribution was contemplated on the death of James; and children who may hereafter be born to Mrs. Peterman can have no claim.

Fund to be distributed per capita among the children of James and the daughters of Mrs. Peterman; costs of all parties out of the fund.

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WATSON v. MORGAN—BRITTON, J.—Nov. 4.

*Fraud and Misrepresentation—Sale of Business—Undertaking of Vendor to Return Purchase-money if Purchaser Dissatisfied and Finds Business not as Represented—Findings of Fact of Trial Judge—Premature Action.*—Action to recover \$1,000 paid by the plaintiff to the defendant as the sale-price of a confectionery business, plant, and stock, owned by the defendant. The sale-agreement contained this clause: "If the purchaser is not satisfied with this business and finds it not as represented the vendor will refund and return to him all the \$1,000 within a period of three months from this 25th day of October, 1915." This action was commenced on the 24th November, 1915, and was tried without a jury at Toronto. In a written judgment, the learned Judge set out the facts and made findings thereon. He found that the plaintiff's demand for a return of the \$1,000 was not because of an alleged misrepresentation as to the amount of the weekly receipts from the business, even if there was in fact such misrepresentation. There was no fraud on the part of the defendant. The onus of establishing misrepresentation was upon the plaintiff. The defendant denied that he stated that his receipts averaged \$200 a week. What he did say, according to the evidence, was that the plaintiff, combining his own bakery business with the confectionery business, was getting a business from which \$200 a week (gross receipts) could be realised. The defendant's version was the correct one, and the action must be dismissed. The action was premature, although no objection was taken as to that. Action dismissed with costs fixed at \$50. W. D. McPherson, K.C., for the plaintiff. H. R. Moses, for the defendant.