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APPELLATE DIVISION.

SEPTEMBER 21ST, 1915.

CANADA SAND LIME PRESSED BRICK CO. v. ORR BROTHERS.

Sale of Goods—Contract—Evidence—Finding of Trial Judge—Appeal.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of York in an action in that Court brought to recover $145.25 for bricks sold and delivered to the defendants. The judgment appealed from was in favour of the plaintiffs for the recovery of $125 and costs, and dismissing the defendants' counterclaim with costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., and LATCHFORD and KELLY, JJ.

Gideon Grant, for the appellants.

R. D. Moorhead, for the plaintiffs, respondents.

FALCONBRIDGE, C.J.K.B., delivering the judgment of the Court, said that the facts were fully set out in the judgment of the learned County Court Judge, who accepted the evidence of the plaintiffs' agent, Hunter, as to the contract, and refused to accept Orr's evidence. The Judge saw the witnesses, and it was for him to say. It was not a case in which (as in Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502) the finding was based on any misapprehension of the evidence. On the contrary, there were circumstances which amply justified a finding in the plaintiffs' favour both on this point and as to what took place before the bricks over and above the 4,000 were unloaded.

If the defendants had found fault at the proper place (the Bathurst street siding), the plaintiffs could and would have diverted the whole shipment, as they in fact did with the other 3 cars, and the whole trouble would have been avoided.

A great deal was said at the trial about the colour. The

architect's letter of the 14th March made no complaint about colour. This letter the defendants professed to set out in their letter of the 14th March, but part of it was, by accident or design, omitted.

In view of these findings of fact, the legal objections were not tenable.

This costly litigation was all about the sum of $23, as the defendants were willing to pay $102.

The appeal should be dismissed with costs.

SEPTEMBER 22ND, 1915.

BALLANTYNE v. T. J. EANSOR & CO.

Master and Servant—Injury to Servant—Negligence—Finding of Jury—Evidence—Incompetence of Fellow-servant—Common Employment.

Appeal by the plaintiff from the judgment of LENNOX, J., 8 O.W.N. 297.

The appeal was heard by FALCONBRDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellant.

T. Mercer Morton, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

MACLAREN, J.A., IN CHAMBERS. SEPTEMBER 21ST, 1915.

*REAUME v. CITY OF WINDSOR.

Appeal—Supreme Court of Canada—Extension of Time for Giving Security—Supreme Court Act, R.S.C. 1906 *ch.* 139, *secs.* 69, 71—*Special Circumstances.*

Motion by the plaintiffs for an order allowing their appeal to the Supreme Court of Canada from the judgment of the Appellate Division, 8 O.W.N. 505, notwithstanding that it was not brought within the 60 days fixed by sec. 69 of the Supreme Court Act, R.S.C. 1906 ch. 139.

*This case and all others so marked to be reported in the Ontario Law Reports.

A. W. Langmuir, for the plaintiffs.
E. D. Armour, K.C., for the defendants.

MACLAREN, J.A., said that the order sought could be made only in special circumstances: sec. 71 of the Act. There was nothing in the Act to suggest what circumstances were sufficient, and there was a scarcity of authority.

In this case, notice of the intention to appeal was given to the defendants within the 60 days, but security was not given until 13 days after the expiry of the time. The delay was caused partly by the illness of one of the plaintiffs and partly by a mistaken notion in the office of the plaintiffs' solicitors that the time for appealing did not run during long vacation. (The judgment of the Appellate Division was given on the 15th June, 1915.) It was shewn that the plaintiffs had, within the 60 days, given definite instructions to proceed with the appeal.

Reference to Smith v. Hunt (1902), 5 O.L.R. 97; In re Manchester Economic Building Society (1883), 24 Ch. D. 488, 497; Haydon v. Cartwright, [1902] W.N. 163.

The amount in dispute was large enough to allow the case to be taken to the Privy Council.

Order made extending the time, approving of the security, and allowing the appeal. The plaintiffs to expedite the hearing and to pay the costs of the application.

HIGH COURT DIVISION.

CLUTE, J. SEPTEMBER 22ND, 1915.

*BRUNSWICK BALKE COLLENDER CO. OF CANADA LIMITED v. FALSETTO.

Sale of Goods—Order for Manufacture by Vendors—Refusal of Purchaser to Accept—Breach of Contract—Damages—Absence of General Market—Profits.

On the 16th June, 1914, the defendant gave a written order for four billiard-tables of the style and kind manufactured by the plaintiffs, as described in the order; price, $985; insurance, $26.16; total, $1,011.16; property to remain in the vendors until notes and lien fully executed; terms, $311.16 cash, balance in 16th months. The defendant paid $50 cash on account. The goods were to be shipped "when notified, about July 10th;" they were ready for shipment on that date: but on the 13th July,

1914, the defendant cancelled the order and asked for a return of the $50. The goods did not leave the possession of the plaintiffs, nor did they sell them or try to sell them. They brought this action to recover damages for the defendant's breach of contract—his refusal to accept.

The action was tried without a jury at Toronto.

A. A. Macdonald, for the plaintiffs.

No one appeared for the defendant.

CLUTE, J., said that the plaintiffs' evidence shewed that the goods might probably have been sold within a short time after the order was cancelled. The actual expense incurred by the plaintiffs in packing and unpacking the goods, storage, insurance, etc., would not exceed $50; and the goods could have been sold at a price equal to the purchase-price. The sum of $50 would thus cover the plaintiffs' claim, unless they were entitled to the profits on the sale. In a case of breach of contract the plaintiff, as a general rule, is entitled to be put in the same position as if the contract had been performed.

Reference to In re Vic Mill Limited, [1913] 1 Ch. 183; Benjamin on Sale, 5th ed., p. 812; Silkstone and Dodsworth Coal and Iron Co. v. Joint-Stock Coal Co. (1876), 35 L.T.R. 668; Todd v. Gamble (1896), 148 N.Y. 382; Cort v. Ambergate etc. R.W. Co. (1851), 17 Q.B. 127.

In the present case it did not appear that there was a general market fixing the price of goods of this kind, but that sales by the plaintiffs were by order; and this case was, therefore, distinguishable from the class of cases where there is a general market price. The plaintiffs could not be placed in the same position that they would have been in if the contract had been performed without taking into account the profits they would have made upon the sale.

Judgment for the plaintiffs for $461.40, with County Court costs, and without a set-off in favour of the defendant.

BOYD, C. SEPTEMBER 23RD, 1915.

RE JACKSON.

Will—Construction—Bequest—Condition—"If Living"—Times Appointed for Payment.

Motion by the executors of George Jackson, deceased, upon originating notice, for an order determining a question arising upon the will of the deceased.

The motion was heard at the London Weekly Court.

J. B. McKillop, for the applicants.

A. M. Harley, for the Trusts and Guarantee Company, Limited, administrator of the estate of Mary Etta K. Milburn, deceased.

THE CHANCELLOR said that the testator (a widower) by will executed on the 12th September, 1913, divided his substance between two sons and two daughters, giving this direction: "Within two months after my death my sons to pay $500 to Miss Etta Milburn, also my daughters to pay to her in three months after my death $500." He was engaged to be married to this lady, and in the last sentence of the will he writes thus: "P.S. The money left to Miss Milburn is intended for her alone and if not living to go back and be divided between my children equally."

The "P.S." might have been a mistake for N.B.; but it gave the key to the testator's intention in benefiting Miss Milburn. The testator died on the 12th December, 1913, and Miss Milburn died on the 7th March, 1914, i.e., more than two months and less than three months after his death. The first $500 was not paid to her by the sons (who were also executors), though she was clearly entitled to receive it. But the question was as to both sums, the executors saying that the effect of the will was to give her only a life estate, which ended with her death, and her representatives claiming an absolute gift, not affected by later words which (they said) were to be treated as repugnant and unlawfully restrictive. It seemed a waste of research to cite cases on other testamentary words to give colour to the ordinary language used by this testator.

He appeared to regard the two sums of $500 as designated out of his general estate for the use of his affianced personally, payment to be made to her of one sum in two months and the other in three months after his death, if she was living at the time appointed for payment: if not, the money was to "go back" and be

divided as part of the general estate. She was alive at the expiry of the two months, and to that $500 she (or her estate) was entitled. She was not alive at the end of the three months, and her estate could not claim that sum.

To which period were the words "if not living" to be referred? As the particular period was not expressed, it must be found out from other parts of the will, if possible. "If" imports a condition, and the condition indicated was, that the money was to be paid to herself only. The only other possible alternative would be that she survived the testator; but the testator knew that she was living, and he said in effect that the money should be paid to her only if she was living at the times appointed for subsequent payment. The last clause was not a repugnant but an explanatory one, and made his meaning clear.

Order declaring that the first $500 belonged to the estate of Miss Milburn and that the last $500 fell to be divided equally between the four children (sons and daughters).

Costs out of the estate.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 24TH, 1915.

*RE PINSONNEAULT.

Life Insurance—Disappearance of Beneficiary — Endorsement Made by Insured in Favour of Beneficiary two Years after Disappearance—Presumption of Death—Trust—Time for Commencement of Seven-year Period—Evidence—Onus.

A benefit certificate or policy upon the life of Napoleon Pinsonneault for $2,000 was issued by the Catholic Mutual Benefit Association in December, 1909, the $2,000 being made payable $500 to Zuluma Pinsonneault, his wife, and $500 to each of his sons, Joseph, Louis, and Hector. By endorsement upon the policy, made shortly after its issue, the direction as to payment was revoked, and the money was made payable to the wife and to Hector, $1,000 each. The insured died on the 8th February, 1912. The association paid the wife her $1,000, and retained the other $1,000, Hector having disappeared in August, 1907, and not having since been heard from, although he had been advertised for. Before leaving his home, he had said to some of his relatives that they might never see him again.

A motion was now made by Zuluma Pinsonneault and the

next of kin of Hector, upon originating notice, for an order determining the question, who is to receive the $1,000.

B. N. Davis, for the applicants.
G. Lynch-Staunton, K.C., for the association.

MIDDLETON, J., said that he was asked to infer that Hector Pinsonneault was dead and to direct payment over of the insurance money as if he were dead.

Reference was made to Halsbury's Laws of England, vol. 13, pp. 500, 502; Watson v. England (1844), 14 Sim. 28; Bowden v. Henderson (1854), 2 Sm. & G. 360; In re Phené's Trusts (1870), L.R. 5 Ch. 139; Willyams v. Scottish Widows Fund Life Assurance Society (1888), 52 J.P. 471; Wills v. Palmer (1904), 53 W.R. 169.

Two years after Hector's disappearance, his father executed the endorsement upon the policy, changing Hector's share from $500 to $1,000. This was in effect a declaration of trust in his favour, he being designated by name; and he must, until the contrary is shewn, be taken to have been living at the date of the endorsement—the onus of proving death before that date being upon the representatives of the settlor: In re Corbishley's Trusts (1880), 14 Ch. D. 846.

Zuluma Pinsonneault stated her belief that the father had no word of his son at any time; but he might have had knowledge unknown to her; and death ought not to be presumed until the lapse of seven years from the date of the endorsement.

An order may issue permitting the money to be paid into Court and discharging the association from all liability; and, if no further information can be obtained, the money will be paid out on the expiration of seven years from the date of the endorsement, and distributed upon the theory that the son did not survive his father; the onus is upon the representatives of a beneficiary to prove that he survived the insured: Re Phillips and Canadian Order of Chosen Friends (1906), 12 O.L.R. 48.

If the insurance money is now paid into Court, the costs of both parties will be paid out of the fund, and the fund will remain in Court until after the 14th December, 1916.

MIDDLETON, J. SEPTEMBER 24TH, 1915.

ANDERSON v. CANADA FURNITURE MANUFACTURERS LIMITED.

Trial—Preliminary Trial of Issue of Law—Refusal of Order for —Convenience—Expense—Delay.

Motion by the plaintiff for an order directing the trial, as a preliminary issue, of the question raised by the pleadings as to the competency of the Legislature of Ontario to pass the Act 4 Geo. V. ch. 128, confirming a resolution of the defendant company, attacked by the plaintiff in this action.

George Bell, K.C., for the plaintiff.
Glyn Osler, for the defendant company.

MIDDLETON, J., said that when demurrers were abolished it was because it was thought that in the great majority of instances questions of law should not be determined until the facts were ascertained. Where, as here, the question of law appears to be quite independent of the questions of fact, the situation is somewhat different; but the separate trial of the two branches of a case may result in two series of appeals, with their incidental delays; and, unless the legal issue is so plain that there is good reason to suppose that it will not be carried beyond the Court of first instance, the order ought not to be made. The desirability of as speedy and final a determination as possible, and the risk of the costs of a double set of appeals, entirely preponderates over any convenience that there might be in avoiding the expense incident to the preparation for trial and the trial of all the issues.

Motion refused; costs in the cause.

MIDDLETON, J. SEPTEMBER 24TH, 1915.

*RE RUTHERFORD.

Executors and Administrators—Claim upon Estate of Intestate —Promise to Provide for Claimant by Will—Corroboration —Services of Claimant—Wages—Statute of Limitations—Waiver by Administrator—Rights of Next of Kin—Allowance of Claim by Surrogate Court Judge—Surrogate Courts Act, R.S.O. 1914 ch. 62, sec. 69 (5)—Contest in Court—Remuneration Confined to six Years.

Appeal by the next of kin from the decision of the Judge of the Surrogate Court of the County of Haldimand, upon passing the accounts of the administrator of the estate of one Ruther-

ford, deceased, allowing with costs the claim of Florence Harding against the estate, to the amount of $2,340, being wages at the rate of $2.25 per week for about 20 years.

The appeal was heard in the Weekly Court at Toronto.

R. S. Colter, for the appellants.

S. E. Lindsay, for the administrator.

H. Arrell, for the claimant.

The widow, in person.

MIDDLETON, J., said that, upon the evidence of the claimant, she remained with the intestate and worked for him in reliance upon his statement and promise "that he had plenty and could do for me as if I were his own girl; he would provide for me, and I did not have to go away and earn." This promise was corroborated; and the Judge was justified in inferring that what was intended was, that the claimant should be provided for, not only during the intestate's life, but also by his will.

The amount allowed was not excessive—it was, no doubt, allowed in addition to whatever the claimant received in clothing or otherwise.

But the Judge should have given effect to the Statute of Limitations—the allowance should have been confined to 6 years. The Surrogate Court Judge was of opinion that the administrator could waive the statute, notwithstanding the wishes of those beneficially interested. If the administrator had paid the debt before any contest had taken place in the Courts, the beneficiaries might be bound; but the matter had been brought into Court, and the beneficiaries had the right to insist upon the statute.

Reference to In re Wenham, [1892] 3 Ch. 59; Midgley v Midgley, [1893] 3 Ch. 282; the Surrogate Courts Act, R.S.O. 1914 ch. 62, sec. 69 (5).

Appeal allowed and amount of claim reduced to the proper amount of remuneration for 6 years; costs of all parties out of the estate.

BRITTON, J. SEPTEMBER 24TH, 1915.

RE WEMP.

Will—Construction—"Proceeds of the said Property"—Rents or Profits from Working Farm—Maintenance of Infant Devisee—Sale of Farm—Executors—Guardian.

Application by the executors of Arthur Duncan Wemp, who died on the 27th March, 1915, for an order determining certain questions as to the construction of the will of the deceased.

The material parts of the will were as follows: "I give devise and bequeath all my real and personal estate . . . in the manner following that is to say: The following property say firstly the north-east half of lot number 31 and the north-east half of number 32 in the 13th concession of the township of Dover East . . . the proceeds of the said property to my daughter Ila May Wemp for her care and education till she attains the age of 21 years. Should she predecease me the property to be equally divided between" (naming certain persons); "and I direct that the north-east half of lot number 33 in the 13th concession shall be disposed of and all mortgages on the aforesaid property paid off and discharged. All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my daughter in care of my executors."

The daughter survived the testator, and was, at the time of the application, about 16 years old. Her grandmother, Catherine Peterkin, was her guardian, appointed by a Surrogate Court.

The application was heard at Chatham.

O. L. Lewis, K.C., for the executors.

J. M. Pike, K.C., for Catherine Peterkin.

S. B. Arnold, for the Official Guardian.

BRITTON, J., said that the main point was whether the executors were bound to sell the land called the homestead farm during the minority of the daughter Ila May Wemp, or whether "proceeds of the said property" meant proceeds resulting from rental of and working of the farm. The learned Judge was of opinion that the words did not mean, in this instance, proceeds resulting from the sale, but meant that the farm should be rented or perhaps worked, and whatever results accrued from such renting or working of the farm, that is to say, the net proceeds,

should be given to the maintenance of the daughter. The executors were not bound to sell at once, nor were they bound to give up the farm to the guardian. If the executors were willing to continue the trust during the lifetime or minority of the daughter, there was no reason why they should not be permitted to do so. The parties were friendly. The daughter was old enough to understand the situation, and apparently she was willing to allow either her guardian or the executors to control the estate during her minority. This, therefore, was practically a friendly application; and the best results would be obtained from what should be regarded as the correct interpretation of the will.

The costs of the application should be paid to all parties to it out of the estate.

MERRIAM v. KINDERDINE REALTY CO.—MIDDLETON, J.—SEPT. 24.

Partnership—Syndicate—Trustee—Removal of—Receiver — Winding-up of Partnership — Action — Parties — Majority of Partners not before Court—Practice—Judgment—Further Directions.]—Motion by the plaintiffs for an order removing the defendant company from its position as trustee for the plaintiff syndicate, for the appointment of a receiver, for a declaration that a certain resolution of the members of the syndicate with regard to the sale of certain of the lands of the syndicate is void, for a declaration that a certain agreement is void, for a declaration that a resolution appointing the Fidelity Securities Company trustee is void, and for payment by the Kenderdine Realty Company to the receiver of all moneys in the hands of the defendant company. The plaintiffs were some only of the members of the syndicate. It was asserted by the defendants and denied by them that they were a dissentient minority only. In the action the plaintiffs claimed many things—among others substantially the relief now sought. At the trial a judgment was given cancelling a conveyance made to the Fidelity Securities Company, and referring it to the Master to take an account of the dealings of the Kenderdine Realty Company with the property held by it in trust for the syndicate. Further directions and costs were reserved. The account was taken, but the report was not yet confirmed, as an appeal was pending to the Appellate Division; so the case was not ripe for a motion upon further directions. Counsel for the plaintiffs practically abandoned all claims for relief save the appointment of a receiver and an order for payment of the assets to the receiver. This relief was sought in

the action, and was not granted; and the learned Judge said that he could not now interfere. It appeared to him that there was no practice which authorised the removal of a trustee and the appointment of a new trustee, or of a receiver in his place, in the absence of all those beneficially interested. One of the cestuis que trust had no right, for any such purpose as this, to assume to represent all. All have a right to be heard before the property is taken from the custody where it has been placed by the joint action. Substantially this syndicate was a partnership. What was really sought was a dissolution of that partnership, and the winding-up of its affairs, in the absence of a majority of the partners. Motion refused, with costs, but without prejudice to any application that may be made in a properly constituted action, and without prejudice to any motion that may be made against the defendant company, if, as was alleged, it had failed to obey any orders that had been made in the action. W. J. McWhinney, K.C., and A. Cohen, for the plaintiffs. C. A. Moss, for the defendants.