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HIGH COURT DIVISION.

CLUTE, J. JUNE 30TH, 1919.

BREWER v. McDOUGAL.

Principal and Agent—Investments Made by Agent for Principal—Liability of Agent's Estate for Losses—Trustee—Dealings in Speculative Stocks—Want of Care in Investing in Mortgages—Absence of Fraud—Honesty and Good Faith of Agent—Account—Reference.

Action by a married woman, living in England, against the executors of Henry I. Matthews, deceased, for an account of the dealings of the deceased with sums entrusted to him by the plaintiff for investment in Canada.

The action was tried without a jury at Cobourg.

W. J. Elliott, for the plaintiff.

F. M. Field, K.C., and W. F. Kerr, for the defendants.

CLUTE, J., in a written judgment, said that fraud was charged by the plaintiff in the pleadings, but the charge was expressly withdrawn at the trial.

There was no formal agreement indicating the terms upon which the plaintiff's moneys were put in the hands of the deceased.

Moneys of the plaintiff were invested by the deceased in the preferred shares of the Mineral Range Iron Mining Company. As to this investment, the learned Judge was of opinion that the deceased was not responsible for the original purchase of shares—he carried out what he and the plaintiff had agreed upon when she was in Canada. He acted in good faith and with the authority of the plaintiff. He exchanged the shares originally purchased for shares in a new company which was formed; and this exchange was wisely made and for the plaintiff's benefit. He acted honestly

in the transaction and with reasonable care. The facts were not such as to render him personally liable for the plaintiff's loss upon this investment; and the finding on this head must be in favour of the defendants.

In January, 1909, the deceased bought for the plaintiff 500 shares of Trethewey Silver Cobalt stock at $1.47 per share and 150 shares of Foster Cobalt stock at 50 cents a share. The learned Judge was of opinion that a case had not been made out against the defendants in respect of these and other purchases of mining stocks, except in the cases (if any) where the plaintiff was not advised of the purchases, as to which there should be a reference if the plaintiff desired.

As to the investments made in land mortgages in or about Edmonton, the plaintiff had made out a prima facie case against the defendants for any loss sustained, and was entitled to hold the defendants liable therefor. The defendants might, if they wished, have a reference to ascertain which of the securities, if any, were good and sufficient at the times of the respective investments; and the defendants should have the right to elect to take over these securities, paying the plaintiff the amount of her advances; the plaintiff to have a lien thereon until payment. If the defendants should not, within 30 days, elect to take over the securities, they should be sold, and the sums realised from the sale should be paid to the plaintiff, and the plaintiff should recover from the defendants the amount of the shortage (if any).

There should be a reference to the Master at Cobourg to take the accounts and ascertain the amount due to the plaintiff, having regard to the findings.

The plaintiff should have the costs of the issues upon which she had succeeded, and the defendants the costs of the issues on which they had succeeded. Further directions and subsequent costs should be reserved.

Reference, among other cases, to Banbury v. Bank of Montreal, [1918] A.C. 626.

SUTHERLAND, J. JUNE 30TH, 1919.

RE GOODWIN.

Will—Construction—Provisions for Benefit of Widow and Children of Testator—Use of "Residence" and Household Effects—Alternative Provisions—Annuity—Income—Deficiency Payable out of Corpus—Distribution of Estate—Part of Estate Undisposed of—Intestacy—Taxes, Repairs, and Improvements Payable out of Corpus.

Motion by the Toronto General Trusts Corporation, trustees under the will of Michael Francis Goodwin, deceased, for the advice and opinion of the Court on certain questions as to the disposition of the estate of the testator, involving the interpretation of the will.

The motion was heard in the Weekly Court, Toronto.

W. Lawr, for the applicants.

W. G. Owens, for Kate Goodwin, widow of the testator, Blanche and Ella Goodwin, children of the testator by his first wife, and William E. Goodwin, only child of the second marriage.

W. H. Gregory, for Mabel, George, and Alexander Goodwin, and (by appointment of the Court) for Frank Goodwin.

F. W. Harcourt, K.C., Official Guardian, for three infant children of a deceased son, Joseph Goodwin.

SUTHERLAND, J., in a written judgment, set out certain relevant paragraphs of the will and codicil. These may be briefly summarised as follows:—

(3) The trustees to allow the widow to occupy "my family residence . . . with my children as a home for herself and them during the term of her natural life, so long as she remains my widow," subject to changes by trustees.

(4) To allow the widow the use, in the residence, of the testator's household effects and furniture for herself and children during her life and widowhood.

(5) To sell or lease the testator's real estate.

(6) To invest the proceeds of sale.

(7) To pay the testator's mother $25 a year during her life.

(8) "To pay until my youngest surviving child attains the age of 21 years, out of the balance of revenue derived from such investments and the rents . . . $800 annually in equal quarterly payments to my wife for the support, maintenance, and education of my children . . . during their minority and for the support and maintenance of my said wife while she

remains my widow and continues to reside in my said family residence or such other residence as my trustees may approve of and provides for and maintains and supports my said children therein."

(10) Provision for the event of the death or remarriage of the wife before the youngest child shall attain majority.

(11) "In the event of my said wife (though remaining my widow) and children disagreeing in such a way that my executors shall think their separation desirable, then I direct them to invest $1,000 in the purchase or erection of a residence for my said wife and allow her the use thereof and of such said furniture as may be reasonable therewith during her natural life and as long as she remains my widow and that they pay her during such period annually . . . $400."

(12) "Upon my youngest child attaining the age of 21 years, then I direct my executors to realise upon two-thirds of the securities in their hands belonging to my estate and to divide the same in equal shares amongst . . . all my children then surviving . . . My executors shall at once upon my decease . . . pay to such of my sons as may then be of the age of 23 years . . . $1,000 on account of the share or shares coming to each of them upon the final distribution . . ."

(14) "Upon the death or remarriage of my said wife and after my youngest child shall have attained . . . 21 . . . and the division . . . shall have been made, I direct my executors to sell said household effects and furniture . . . and said family residence . . . and divide the proceeds . . . in equal shares amongst my then surviving children . . ."

By the codicil, para. 11 of the will was changed by substituting $500 for $400, and para. 12 was changed by reducing the sons' portions from $1,000 to $500.

The first question for determination was, whether the widow was entitled to any of the income from the estate after the youngest child became of age, in July, 1914. Having regard to para. 11 of the will, this question should be answered in the affirmative.

The second question was, whether, in case of there being an insufficiency of income to produce $800 a year for the widow, she was entitled to have the deficiency made up out of the corpus of the estate, and, if so, whether she had a charge upon the real estate until such insufficiency should be made up. Under para. 8 of the will, the annuity of $800 was payable to the widow only until the youngest surviving child should attain 21. In view of the widow and children disagreeing, she was entitled, since that date, under clause 11 of the will, as altered by the codicil, to an annuity for herself of $500 and no more. By reason of para. 12 and the division of two-thirds of the securities, any insufficiency

of income to produce such annuity of $500 would properly be made up out of the remaining corpus, or one-third of the estate, and be a charge upon the real estate until made up: Carmichael v. Gee (1880), 5 App. Cas. 588. In addition to the $500 a year, the widow was entitled, at her election, under paras. 11 and 12, to the use of a residence to cost $1,000, and of such of the furniture as might be reasonable, or the income on $1,500, in lieu thereof.

No provision seemed to have been made in the will as to the distribution of what should remain of the one-third part of the estate; and there was an intestacy as to that.

The taxes on the homestead were payable out of the corpus of the testator's estate; and so were the expenditures for repairs and improvements to the real property of the estate.

Order declaring accordingly; costs of all parties of this application out of the estate.

HUNTER v. PERRIN—SUTHERLAND, J.—JUNE 30.

Arbitration and Award—Enforcement of Award—Delay—Motion for Judgment—Costs.]—Motion by the plaintiffs to enforce an award of the 2nd May, 1902, and for judgment for the amount found due by the arbitrator. The motion was heard in the Weekly Court, Toronto. SUTHERLAND, J., in a written judgment, said that there had been much delay in connection with this litigation, and there should be no more, if the case could now properly be disposed of. Having regard to the terms of the orders of FALCONBRIDGE, C.J.K.B., of the 27th April, 1917, and the 20th January, 1919, the motion was now properly before the Court. The facts stated in the affidavit of Henry A. Lavelle, sworn on the 7th May, 1919, and in the exhibits therein referred to, must be taken to be conclusively established. The motion should be granted, and an order made for the enforcement of the award and for judgment for the plaintiffs for the amount found due by the arbitrator, with costs of the motion, including the costs reserved by the order of the 20th January, 1919. W. La r, for the plaintiffs. H. D. Gamble, K.C., for the defendants.

RE BAILEY COBALT MINES LIMITED—SUTHERLAND, J.—JUNE 30.

Company—Winding-up—Offer to Purchase Assets—Recommendation of Liquidators—Refusal of Master to Approve—Discretion—Appeal—Costs.]—Motion by David Lorsch by way of appeal from a report of the Master in Ordinary, dated the 26th May, 1919, and for an order approving the recommendation of the liquidators for the acceptance of an offer made to them by Alfred J. Young on the 30th December, 1918, to purchase all the assets of the Bailey Cobalt Mines Limited. The Master reported that he had refused to authorise the acceptance of the offer. The motion was heard in the Weekly Court, Toronto. SUTHERLAND, J., in a written judgment, after stating the facts, said that he had come to the conclusion that the Master had exercised a proper and reasonable discretion in refusing to direct that the liquidators accept the offer and carry out the sale. Motion dismissed without costs. T. J. Agar, for the applicant. H. J. Scott, K.C., for a body of shareholders. J. A. Macintosh, for one of the liquidators. R. S. Robertson, for the liquidators, as a body. G. H. Sedgewick, for creditors. F. Arnoldi, K.C., C. W. Kerr, and W. B. McPherson, for several bodies of shareholders respectively. R. McKay, K.C., for a shareholder who had offered to purchase. G. R. Munnoch, for Haines.