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*Nov. 22, 23.

*Dec. 11.

THE HAMILTON BRASS MANUFACTURING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

THE BARR CASH AND PACKAGE CARRIER COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Account — Statute of limitations — Agents or partners—Reference.

By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfillment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments.

Held, reversing the judgment of the Court of Appeal, Girouard and Davies JJ. dissenting, that the accounts should be taken for the six years preceding the action only.

On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.

Held, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Street, who upheld the ruling of the Master in taking accounts.

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*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington, and Duff JJ.

The facts are sufficiently stated in the head-note and in the judgment of Mr. Justice Idington on this appeal.

Lynch-Staunton K.C. for the appellants.

Gamble and *Boultbee* for the respondents.

THE CHIEF JUSTICE and DUFF J. concurred in the judgment of Mr. Justice Idington.

GIROUARD and DAVIES JJ. (dissenting).—For the reasons given by Chief Justice Moss, in the Court of Appeal for Ontario, we are of opinion that this appeal should be dismissed with costs.

IDINGTON J.—These parties entered into the following agreement:

This memorandum of agreement, entered into this 10th day of August, A.D. 1892, between the Barr Cash and Package Carrier Co., of Mansfield, Ohio, hereinafter for brevity called the first party, and the Hamilton Brass Mfg. Co., of Hamilton, Ontario, Canada, hereinafter for brevity called the second party. Witnesseth—

Said first party appoints said second party its sole agent for the sale and lease of the Barr Cash & Package Carriers in the Dominion of Canada, on the terms following, to wit:—

Said second party is to manufacture the Barr Cash & Package Carriers at a cost of not over four dollars ($4.00) per line for Cash Carriers, and not over nine dollars ($9.00) per line for Package Carriers.

Said second party, in addition to the cost of manufacturing as above ($4.00 for Cash Carriers, and $9.00 for Package Carriers), shall charge to the joint account the cost of any material furnished for erection, such as gas pipe, wire etc., but all other expenses, such as salaries and travelling expenses, shall be borne by the said party of the second part.

A report of the business done shall be made quarterly, and at such accounting the balance of profit shewn shall be divided equally, one-half going to the credit of the party of the first part, and the other half to the credit of the party of the second part.

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Said party of the first part to have the right for any representative it may appoint to audit the account of the party of the second part, in so far as any Cash or Package Carrier business may be transacted by said second party.

For the non-fulfillment of any of the requirements of this agreement, either party can annul the same by serving notice on the other party.

THE HAMILTON BRASS CO., LIMITED,
T. J. Carroll,
General Manager.

THE BARR CASH & PACKAGE CARRIER CO.,
F. W. Pierson,
General Manager.

They acted under it, and accounts were rendered as it provides for, and settlements were had of these accounts, up to some time in August, 1895.

This mode of proceeding ceased, and the respondents brought this action on the 13th July, 1900.

The late Mr. Justice Street, who tried the action, referred the taking of accounts to the Master in Hamilton, and he proceeded therewith. By virtue of a clause in the judgment he was entitled and bound to have regard to the defence of the Statute of Limitations, which had been set up by appellants.

He ruled that the Statute of Limitations barred accounting for anything beyond six years next preceding the action.

The appellants had attempted at the trial also to shew that the contract above set forth had been terminated, but this contention was not upheld by the learned trial judge.

Amongst other things he pointed out that the appellants had no right to terminate it save for cause, and then only by electing to do so, and giving notice. The chief cause assigned to justify termination was that respondents had invaded territory covered by the agreement, by making sales directly, from their own office or place of business, and not through the appel-

lants. They had in fact, when complaint was made on this score, agreed to account to and with appellants for profits so received. And I would infer that that branch of the differences between them was at an end, or very easy of solution, if other things had gone forward in an agreeable manner.

At all events, the appellants asked for and got in this action judgment for an account of the dealings they had so complained of.

Without waiting for any further or future breach they wrote, immediately after the judgment, a letter of which the following is a copy:

HAMILTON, November 13th, 1901.

TO THE BARR CASH AND PACKAGE CO.,
Mansfield, Ohio:

Take notice that, whereas it has recently been held in an action in the High Court of Justice wherein you, the Barr Cash and Package Company, are plaintiffs, and we, The Hamilton Brass Manufacturing Company (Limited), are defendants, that the agreement dated the 10th day of August, 1892, made between you of the first part and ourselves of the second part, for the sale and lease of the Barr Cash and Package Carriers, was not annulled, cancelled and put an end to as was by us contended in said action, therefore, although we do not relinquish our contention that the said agreement was put an end to, to protect ourselves against any future claim being made hereafter, we hereby give you notice that we hereby annul, cancel and put on end to the said agreement.

Dated at Hamilton this 13th day of November, 1901.

HAMILTON BRASS MFG. CO., LTD.
T. J. Carroll, General Manager.

They then contended before the Master that this terminated the contract, and also any accounting beyond the date of the service of the letter.

The Master upheld this contention. On appeal to the late Mr. Justice Street against these rulings of the Master, the appeal was dismissed.

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The respondents appealed from that decision to the Court of Appeal for Ontario.

The latter court allowed the appeal, and held that the Master should not have had regard to the Statute of Limitations, but should have taken the accounts from the beginning of the dealings arising out of the above agreement and continued the same to the date of his report.

I have no hesitation in coming to the conclusion that the holding of the Court of Appeal as to the taking of the accounts down to the date of the Master's report is correct.

It is to my mind a matter of practice and procedure. Even though jurisdiction may exist to hear such an appeal, this court has uniformly refused, unless where natural justice was violated, to entertain such an appeal.

The Master would not seem to have had any right to try such an issue as this notice of termination involved. He was merely directed to take accounts, which the court below hold, as matter of practice and procedure of that court, was to extend to the date of his report.

The reasons assigned by the learned Chief Justice on this and other grounds touching this branch of the appeal seem to me entirely satisfactory.

I am not so fortunate in regard to the other branch of this appeal. It is by no means so easily disposed of.

I cannot read the contract between these parties as the learned Chief Justice of the Court of Appeal reads it. Even if I could do so, I am by no means convinced that the case so comes within any exception to the operation of the Statute of Limitations as to enable me to maintain the results arrived at.

With the greatest respect, I must differ, and say I can neither accept the process of reasoning by which the learned Chief Justice comes to the conclusions he does, nor see how that conclusion is a necessary result of the train of reasoning he has adopted and set forth.

The *Pongola Case*(1) seems clearly distinguishable.

The continuous relationship is a feature common to that case and this, but almost all else seems different in the two cases.

It is to be observed that the above quoted agreement makes no reference to patents or rights thereunder.

It may further be observed that there are many posible things respecting which such a contract could have been formed, in the language used, and yet not rest on patent or have anything to do with rights under a patent.

A very slight modification, such as a contract based on a requirement for the use of a piece of wire, made by the respondents, entering into the construction of machines to be made by them, and giving thereto some value they could not otherwise have, though not the subject of a patent, is a conceivable case.

The incorporating in such a contract the use of a label or badge of any kind to identify each machine thus contracted for, as approved by the party of the first part, and give it a standing, so to speak, in the market place, would be another.

How could the relationship this contract before us creates, if based upon some imaginary thing of that kind, apart from patent altogether, constitute a partnership or agency relation of any kind, that would take the periodical breaches of such a contract (no matter how continuing the contract might be or the

(1) 73 L.T. 512.

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relation it created), out of the Statute of Limitations? How much further can an interest in a patent carry it?

The relationship created is not in the ordinary sense a partnership. Nor is it a fiduciary relationship, though as in *Knox* v. *Gye*(1) the elements of faith and trust in the ordinary sense may have existed and may be found provided for, or rather unprovided for.

Where is agency other than that of a fiduciary character or that concrete form of agency that exists in a partnership, excepted from the Statute of Limitations? And how is it there?

The origin of the exception as regards partners is explained by Lord Chelmsford in the case of *Knox* v. *Gye*(1), at p. 684, as follows:

> The statute 21 Jas. 1, ch. 16, sec. 8, which limited actions of account to six years after the cause of action, contains an exception of such accounts as concern the trade of merchandise "between merchant and merchant, their factors and servants", as to which there was no statutory bar till the 19 & 20 Vict. ch. 97, the 9th section of which Act enacts that all actions and suits for such accounts shall be commenced and sued within six years after the cause of such actions or suits. Now, although the action of account at the time of the passing of the statute of James was one of a peculiar description in the courts of common law (which has since become obselete), the courts of equity, upon bills for an account, considered "that they were bound to act"—not merely by analogy to the statute, but, in the words of Lord Redesdale in *Hovenden* v. *Lord Annesley* (2), "in obedience to it"; and he adds: "I think the statute must be taken virtually to include courts of equity, for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also."

He proceeds to shew by cases I need not refer to, how this was observed; for the cases are covered by *Knox* v. *Gye* (1), and the discussions therein.

(1) L.R. 5 H.L. 656. (2) 2 Sch. & Lef. 607, 631.

Lord Westbury in the same case referred to the statute as follows (1):

By the Statute of Limitations (21 Jas. 1, ch. 16), it is enacted that all actions of account and upon the case (with an exception which has been since repealed) shall be commenced and sued within six years next after the cause of such action or suit, and not after. This enactment is, in effect, repeated in the 9th section of the 19 & 20 Vict. ch. 97 (passed in 1856), with this additional provision, namely, that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." I deem this provision most material, and therefore I will call your Lordships' particluar attention to it. It forbids any claim in respect of a matter which arose more than six years before the action.

The statutes of limitations having been introduced into Upper Canada (now Ontario), amendments to the law relating to limitations of actions were made from time to time, but without expressly repealing the Statute of James above referred to. These amending enactments are now consolidated in R.S.O., [1897] ch. 72, and the second section thereof contains what is almost identical with section 9 of the "Mercantile Amendment Act" upon which Lord Westbury put such stress in the above quotation.

This section 2 of R.S.O., [1897] ch. 72, is as follows:

2. All actions of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such actions arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter or claim comprised in the same account, having arisen within six years next before the commencement of the action.

It would seem as if very much of the basis, upon which the exception of partnership dealings out of the statute rested, had passed away.

(1) At p. 672.

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It is not necessary to go further just now in regard to that than to say that these considerations of the matter leave the operation of the exception within very narrow limits.

So far as the relations of partners in this regard are concerned, I would adopt the rule laid down by Mr. Justice Lindley in his work on partnership, as follows (p. 552):

> But now by 19 & 20 Vict. ch. 97, sec. 9, merchants' accounts are placed on the same footing as other accounts; and partnership accounts, whether they are or are not merchants' accounts, are within the Statute of Limitations; and those statutes are a bar to an action for an account extending to a period more remote than six years before the commencement of the action, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment, such as required by Lord Tenterden's Act, or unless the partnership articles are under seal. So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run.

I find this last sentence met with the approval of Malins V.C. in *Noyes* v. *Crawley* (1), at p. 39.

Does this last sentence of the quotation from Lindley not mean that there can be no cause of action as between partners *as such* whilst the relation exists? So long as there is no cause of action there can run no time against it. So far from the argument pressed upon us as to the special forms of so called partnerships, that have not in them the usual elements of any legal definition of partnership, supporting any widening of this exception of partnership from the statutes of limitations, it suggests the possibility in these specialized forms, so to speak, of the relation, con-

(1) 10 Ch. D. 31.

taining in them covenants between such partners out of which causes of action might arise and the statute become operative.

I do not express any opinion as to that, but desire by way of noticing the chief argument presented to us, and of illustrating my meaning, to suggest the tendency of the law since the amendment referred to.

This contract now in question, as clearly as possible, anticipates a quarterly reckoning, and accruing liability to pay, and payment, or such a breach, by reason of default of payment or default to report, as will give a right to sue therefor. Each such breach comes within the very words of the section just quoted above.

I think the appeal, so far as it relates to the right of appellants to set up the Statute of Limitations, should be allowed, and effect be given to said statutes. Giving effect thereto does not imply that if there were fraud the account could not go beyond the six years. No case of fraud, however, was presented or pressed on us. It would seem as if the omission to report, or defective report, had arisen from a misunderstanding or misconstruction of the contract.

As success seems thus divided, there should be no costs either here or in the Court of Appeal. And especially so as the ground on which I proceed was not raised or argued.

Appeal allowed without costs.

Solicitors for the appellants: *Staunton & O'Heir.*

Solicitors for the respondents: *Denton, Dunn & Boultbee.*