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EDWARD GEORGE McBRIDE and WILMER PRENTICE HOGABOAM, Executors of the Will of Alfred Edward McBride, Deceased (*Defendants*) .APPELLANTS;

AND

DOROTHY BARBARA JOHNSON, also known as BARBARA McBRIDE (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contract—Action for breach of promise of marriage—Cohabitation—Promisee in constant expectation of marriage—Delay on part of promisor—Repudiation not to be readily inferred—Effect of promisor's death—Whether promisor's delay procrastination or fraudulent misrepresentation.

The plaintiff cohabited with the deceased for several years before his death in the constant expectation that he would marry her. The story of their relationship between the time when the deceased obtained a decree absolute dissolving his first marriage and the time of his death disclosed a consistent and continuing belief in, and assertion of, an existing contract of marriage between them on the part of the plaintiff and a consistent attitude of procrastination on the part of the deceased. The trial judge held that the deceased's refusal to marry the plaintiff and also his subsequent continued delay to so marry amounted to breach of promise. The defendants' appeal from that judgment was dismissed by the Appellate Division of the Supreme Court of Alberta and a further appeal was brought to this Court. The defendants contended that the marriage was still in contemplation on the day the deceased was killed and that there was then an existing contract outstanding between the parties which was brought to an end by the deceased's death. The plaintiff contended that there was a breach of contract during the deceased's lifetime, giving rise to a cause of action against his executors.

Held: The appeal should be allowed.

There were findings of fact by the trial judge that the deceased had renewed his promise of marriage, that he indicated his intention of carrying it out and that up to the date of his death no repudiation of this promise was ever communicated by him to the plaintiff. Repudiation of a contract is not to be readily inferred in the case of a promisor who reiterates his intention to carry out his promise and whose conduct, however inconsistent with his intention it may appear to be, has at no time had the effect of communicating such a repudiation to the promisee. *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, considered.

Even if the deceased's behavior was such as to make it entirely apparent that he never had the slightest intention of marrying the plaintiff, it was nevertheless equally clear from the evidence that the plaintiff never accepted his conduct as meaning any such thing, and that notwithstanding his repeated delays she insisted on the continued existence

*PRESENT: Locke, Fauteux, Martland, Judson and Ritchie JJ.

of the contract and was at all times ready to carry out her part of it. The effect of the failure to marry on the day named in the written contract had been erased by the subsequent renewal and by the conduct of the parties, and the promise was one of which performance was currently due from day to day. *Frost v. Knight* (1872), L.R. 7 Exch. 111; *Avery v. Bowden* (1856), 6 E. & B. 953; *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, considered.

The deceased's death was a supervening event not due to his own fault, which brought the contract to an end. *Hall v. Wright* (1859), E. B. & E. 765; *Stubbs (Administrator) v. Holywell Ry.* (1867), 2 Exch. 311; *Robinson v. Davison* (1871), L.R. 6 Exch. 269, applied. The deceased's continued existence was an implied condition of the contract.

The plaintiff's alternative plea, that as a result of the deceased's fraudulent misrepresentation she had cohabited with him, was not supported by the evidence. The deceased's conduct was at least as consistent with honest procrastination as it was with fraudulent misrepresentation, and that of the plaintiff suggested that she was prepared to cohabit in constant expectation of marriage.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of Cairns J. in an action for breach of promise of marriage. Appeal allowed.

T. Mayson, for the defendants, appellants.

MacDonald Millard, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta insofar as it affirmed those portions of a judgment of Mr. Justice Cairns which ordered that the respondent recover $10,000 from the appellants for breach of promise of marriage and that all the furniture and furnishings in a house at 4750 55th Street, Red Deer, Alberta, belonged to the respondent with the exception of one chesterfield, two chairs and one bed. The appellants also appeal from the Orders as to costs in the Courts below.

The appellants are the executors of the will of Alfred Edward McBride who was killed in an automobile accident on February 28, 1959, and who, at the time of his death, was living at Red Deer aforesaid in the same house with the respondent and holding her out as his wife to at least some other members of the community although they were not married.

The story of the relationship between the respondent and McBride between September 18, 1952, when he obtained a decree absolute dissolving his first marriage and the time

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of his death discloses a consistent and continuing belief in, and assertion of, an existing contract of marriage between them on the part of the respondent and a consistent attitude of procrastination on the part of McBride. The respondent's evidence which is uncontradicted is that the couple became engaged to be married in 1953 at which time she was 51 years of age and her fiancé 54. Pursuant to this engagement, she says that they went together on a trip to Idaho in July 1954 for the purpose of getting married, but unfortunately the day which they selected for the ceremony was July 4, and as this was a public holiday they were unable to get blood tests, and so decided that they "would go on to Coulee Dam and come back and get married another day". At this stage there was apparently a quarrel, as a result of which McBride refused to go through with the wedding, and they returned to Red Deer. Shortly after returning home, a contract was prepared by the respondent, signed by both her and McBride and duly witnessed which read as follows:

> I, Alfred Edward McBride & I Dorothy Barbara Johnson the undersigned do solemnly promise that on the 15th day of July, 1954 shall marry each other.
>
> Both of us being of sound mind do declare this covenant. No bills or debts of the other are either of our responsibility. Fat shall do his own business & I shall obey & mind my own.

When July 15 came, the respondent says that McBride "wanted a little more time, and he thought that we would wait until he had time that we could go away again". In preparation for the marriage, the couple went to a clinic and had their blood tests taken on August 19, and the necessary form in this regard, pursuant to *The Solemnization of Marriage Act*, was duly completed by a physician. This initial step having been completed, the respondent says that they "started making preparations to have a honeymoon and go away and get married", and finally in September McBride "booked off" some time from his work and they proceeded to the Court House at Red Deer for the purpose of getting a marriage licence, but when they got there it appeared that McBride did not have "a certificate of no appeal" from the Clerk of the Court in Edmonton where he had obtained his divorce without which certificate a marriage licence could not be obtained. McBride was "quite angry" and seemed to think that "he had paid enough already for a divorce without having to pay any more" and he refused to get the required certificate, but as he was all packed and he had his

time "booked off" the couple decided to go for "a honeymoon" anyway; they proceeded on a trip to the States and on their return the respondent moved in to the house where McBride was living and where she had been keeping house for him, although she had been living elsewhere. She says of this move:

> We were going to get married as soon as we had the furniture and things moved in, and were preparing to get the certificate from Edmonton, he said that when he went up he would go to the Court House and get it.

and again:

> A. Yes, he refused to marry me on the 15th of July when he wouldn't get his certificate, when he postponed the marriage until later on.
> Q. But whatever happened then, you moved in with him later, didn't you?
> A. I had no alternative but to move in with the promise I would be married when we got our house straightened up.

The furniture which was moved was found by the learned trial judge to be the property of the respondent, but in ordering that "all of the furniture and furnishings in the house . . . belong to the Plaintiff with the exception of 1 chesterfield, 2 chairs and 1 bed, ..." he included a stove, a television set and a refrigerator which had been purchased by McBride and which the appellants now claim to have been his property.

From the time of the move in September 1954 until McBride's death he and the respondent appear to have lived happily with each other and to have gone on holidays together. The respondent produced some valentine cards, letters and a photograph indicating that McBride's affection for her continued over the years and in 1957 she adopted her own granddaughter, a child of two years, of whom she says: "I took this child to raise because we loved her and she brought a great deal of comfort and happiness into the home of the deceased and myself." There is evidence that except when McBride was not sober he treated her well, and she says, "He led me to believe that he was going to marry me at all times". The following exchange occurred on the cross-examination of the respondent:

> Q. And he never repudiated his agreement, did he?
> A. He never repudiated his agreement, no.
> Q. And he never said anything to you to lead you to believe that he was misleading you in any way?
> A. No.
> Q. And he continued his promise right up to the time of his death, didn't he?
> A. That's right, Mr. Mayson.

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In support of the argument that McBride did not intend to marry the respondent after September 1954, counsel laid great stress on the fact that he made no provision for her in the will which he made in 1956, but in my view this falls into the same category as the evidence to the effect that the respondent would have lost her widow's pension of $90 a month if she had married. Both are circumstances from which inferences could be drawn but neither is of sufficient weight to support a conclusion as to the intention of the parties.

It is contended on behalf of the appellants that on February 28, 1959, the marriage was still in contemplation and that there was then an existing contract outstanding between the parties which was brought to an end by McBride's death on that date. The respondent, on the other hand, contends that there was a breach of the contract during McBride's lifetime, giving rise to a cause of action against his executors.

If there had been a breach of the contract during McBride's lifetime, it is not disputed that in accordance with the decision of this Court in *Smallman v. Moore*[1], an action could be maintained against his executors. That was an action brought against the administrator of a deceased promisor and the jury had expressly found that the deceased was in breach of his promise to marry and that the parties had not afterwards agreed to a postponement of the marriage. As to the contention that such an action could not be brought against the administrator, Mr. Justice Locke said:

> That the breach of a contract of this nature is a mere personal wrong is . . . concluded by authority: the injury occasioned is a personal injury to the plaintiff. Such an injury is . . . a wrong to the plaintiff "in respect of his person" within the meaning of the section [s. 37(2) of the *Trustee Act*, R.S.O. 1937, c. 165] whether it results from a breach of contract or is occasioned by a tort.

Although these observations were directed to the Ontario *Trustee Act, supra,* they apply with equal force in my opinion to the equivalent provision of the Alberta *Trustee Act,* R.S.A. 1955, c. 346, which reads as follows:

> 33. (1) Where any deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of libel and slander, the person so wronged may maintain an action against the executors or administrators of the deceased person who committed the wrong.

[1] [1948] S.C.R. 295, 3 D.L.R. 657.

In the present case, however, it is contended on behalf of the appellants that there had been no breach of McBride's promise, that the respondent never recognized any repudiation by him being at all times ready, willing and anxious to carry out her part of the bargain, and that the obligations incidental to such a promise must, in the nature of things, be brought to an end by the death of the promisor.

The following paragraph in the reasons for judgment of the learned trial judge contains the essence of his finding on this branch of the case, and as the Appellate Division gave no reasons for dismissing the appeal these observations must be taken to have been adopted by that Court:

> The plaintiff was very frank to say that he intended to marry her as far as she knew to the date of his death and there is no doubt that he indicated this to her, but I am completely convinced from all of the evidence, excluding certain hearsay evidence at the trial, on which point I have considerable doubt, that he never had the slightest intention of marrying her after September, 1954, even though he did indicate his good intentions to her to such an extent that he convinced her of his sincerity. In my view, a breach of the contract occurred in 1954 when he refused to marry her and that breach continued until his death in spite of his protestations of love for her and his good intentions. Even though he did heal the breach as far as she was concerned, to some extent, by promises of marriage later, to the extent that he deceived her completely, his continued delay of four and a half years, in my view, also amounts to a breach of his contract, and that prior to his death he had completely repudiated his contract, if not expressly, at least by his conduct although this had not been communicated to the plaintiff. McBride had a scheme to maintain the status quo without incurring the obligations incident to marriage. There is no doubt that where the breach occurred prior to the death, a cause of action for breach of promise of marriage will lie against the representatives. Smallman v. Moore, [1948] S.C.R. 295.

This statement is a long way from the clear-cut findings of fact made by the jury in *Smallman v. Moore, supra,* and the analysis of what was passing through McBride's mind over the years must be based almost entirely on inference. There are nevertheless included in this forceful expression of the learned trial judge's deductions certain findings of fact which are directly supported by the respondent's evidence, namely, that McBride renewed his promise of marriage after September 1954, that he indicated his intention of carrying it out, and that up to the date of his death no repudiation of this promise was ever communicated to the respondent by him.

These findings of fact standing alone support the contention that McBride at no time repudiated the promise of marriage which he made after September 1954. Repudiation

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of a contract is not to be readily inferred in the case of a promisor who reiterates his intention to carry out his promise and whose conduct, however inconsistent with this intention it may appear to be, has at no time had the effect of communicating such repudiation to the promisee. The nature of the conduct which would justify an inference of repudiation is discussed by Lord Selborne in the case of *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*[1], where he says at pp. 442-443:

> You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract . . . and whether the other party may accept it as a reason for not performing his part.

Even if it is accepted, however, that McBride's behaviour was such as to make it entirely apparent that he never had the slightest intention of marrying her, it is nevertheless equally clear from the evidence that the respondent never accepted his conduct as meaning any such thing, and that notwithstanding his repeated delays she insisted on the continued existence of the contract and was at all times ready to carry out her part of it.

In delivering his well-known decision in *Frost v. Knight*[2], Cockburn C.J. was concerned with the repudiation of a promise to marry before the date due for fulfilment had arrived. The contract in that case was not to be performed until the death of the promisor's father, but the promise had been withdrawn during his lifetime. Under these circumstances, Cockburn C.J. said at pp. 112-113:

> The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.
>
> On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action

[1] (1884), 9 App. Cas. 434, 53 L.J.Q.B. 497.
[2] (1872), L.R. 7 Exch. 111.

he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

The present case, however, is not one in which performance was conditional on the happening of some future event nor is it one of repudiation prior to the time fixed for performance. The effect of the failure to marry on the day named in the written contract had been erased by the subsequent renewal and by the conduct of the parties, and the promise was one of which performance was currently due from day to day.

Before the decision in *Frost v. Knight, supra,* it had been decided in *Avery v. Bowden*[1], that if in a contract which involved the loading of cargo within a certain number of days the party required to load had positively informed the ship's captain that no cargo was to be loaded, then the captain might have treated this as a breach and renunciation of the contract and have sailed away, whereupon he would have had the right to maintain an action on the contract. On the other hand, if he continued to insist upon having a cargo in fulfilment of the contract, the renunciation could not be considered as constituting a cause of action and a declaration of war before the expiration of the period fixed for loading would have brought the contract to an end. The effect of the decision of the Court of Queen's Bench in this case is well summarized in the head-note to the proceedings which affirmed it in the Exchequer Chamber, *supra.* It is there said:

> Held, by the Court of Queen's Bench, that, assuming that the defendant's agent had on his part renounced the contract before the declaration of war, such renunciation, not being accepted by the master, constituted neither a dispensation *nor cause of action.* (The italics are mine.)

This case has come to be taken as a precedent for the proposition which is clearly and authoritatively stated by Viscount Simon in *Heyman v. Darwins, Limited*[2], where he says:

> If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor

[1] (1856), 6 E. & B. 953, 26 L.J.Q.B. 3.
[2] [1942] A.C. 356 at 361, 1 All E.R. 337.

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to the bargain, and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance: a classic example of this is to be found in *Avery v. Bowden* (1855) 5 E. & B. 714. Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation", by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages.

In the present case there was ample evidence that the respondent was insisting on holding McBride to his bargain and that she was continuing until the day of his death to tender due performance of her part of the contract.

Whether or not McBride's conduct amounted to an absolute refusal to perform his contract so as to give the respondent the right to sue for damages, the respondent's conduct in my opinion had the effect of keeping the contract alive, and the only remaining question is whether McBride's death was a supervening event not due to his own fault which brought it to an end. In my opinion it undoubtedly was.

In the case of *Hall v. Wright*[1], which was an action for breach of promise of marriage, the defendant who suffered from severe bleeding from his lungs pleaded that he was incapable of marriage without great danger to his own life. There was a strong difference of opinion between the judges of the Exchequer Court as to the validity of this defence, and although the majority, for varying reasons, held that the plea was bad, none dissented from the view expressed by Pollock C.B. that:

> In the case of the ordinary contract to marry, such as it is presented to the Court by evidence in actions of this sort, I think no one can doubt that the continuance of life is an implied condition.

This reasoning was applied to the case of a contract of personal service in *Stubbs (Administrator) v. Holywell Railway Company*[2], where Martin B. said:

> The contract, no doubt, is ended by the death of Stubbs, but only in this sense, that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done—with what has been actually earned by the deceased.

[1] (1859), E. B. & E. 765 at 794, 120 E.R. 695 at 706.
[2] (1867), 2 Exch. 311 at 314, 36 L.J. Ex. 166.

In the case of *Robinson v. Davison*[1], Kelly B. adopted the following language used by Pollock C.B. in *Hall v. Wright, supra*:

> All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them: and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.

It seems to me to be obvious that McBride's continued existence was an implied condition of the contract in the present case and that the contract ended with his death.

There is included in the Statement of Claim the following alternative plea:

> In the alternative the Plaintiff states that the said Alfred Edward McBride, deceased, fraudulently misrepresented to her that he intended at all times to marry her from the date that he entered into the said Agreement until the date of his death, and that as a result of the said misrepresentation and the fraud which he perpetrated on her, she took up residence in the said premises and kept house for the said Alfred Edward McBride and accepted the responsibilities which she would not otherwise have undertaken and was entirely misled by the representations made by the said Alfred Edward McBride, deceased.

I do not find it necessary to deal with the arguments presented concerning this plea because, with all respect to the learned trial judge, I do not think that it is supported by the evidence. The respondent was the mother of six grown-up children by her first husband and had been a nurse at a provincial training centre, she had known McBride for fifteen years, been engaged to him for six years and had lived with him for the last five years of his life, and I am, with respect, unable to accept as probable the inference that such an experienced woman could be completely deceived from day to day as to the meaning of the words and actions of a man with whom she had been so intimate for so long a time concerning a subject of such vital importance to them both. In my view, McBride's conduct as disclosed by the evidence is at least as consistent with honest procrastination as it is with fraudulent misrepresentation and that of the respondent suggests that although she was apparently ready to put up with the loose arrangement of cohabitation without marriage on a temporary basis, she was in constant expectation of the relationship being regularized by McBride carrying out his continuing promise of marriage which remained unfulfilled and unreleased at his death.

[1] (1871), L.R. 6 Exch. 269, 40 L.J. Ex. 172.

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As has been indicated, the appellants appeal also from that part of the Order of the learned trial judge which awarded a stove, television set and a refrigerator to the respondent. The respondent says that she bought the stove with the house, and as there is no appeal from the finding that she had no interest in the house, I am, with respect, unable to see any ground for declaring that the stove is her property. The television set and refrigerator were purchased by McBride, and although the respondent states that they were both given to her, there is no corroboration of this evidence as required by s. 13 of the Alberta *Evidence Act*, R.S.A. 1955, c. 101, and as there is no presumption of a gift under the circumstances here disclosed I do not think there is sufficient evidence to justify the award of these items to the respondent.

On the evidence I am not satisfied that the learned trial judge was wrong in failing to award damages to the appellants in respect of the respondent's refusal to deliver up the house to them nor do I find any evidence of the appellants having suffered damage by reason of the respondent retaining and using the stove, television set and refrigerator.

Save as aforesaid, I would allow this appeal and set aside the Order appealed from insofar as it awards $10,000 in damages to the respondent and insofar as it adjudges that the three last-mentioned items to be property belonging to the respondent and accords her the right to remove them. The appellants should have their costs of the claim and counterclaim on the trial and their costs of the appeal to the Appellate Division of the Supreme Court of Alberta and to this Court.

Appeal allowed with costs throughout.

Solicitors for the defendants, appellants: Steer, Dyde, Massie, Layton, Cregan & MacDonnell, Edmonton.

Solicitors for the plaintiff, respondent: Millard & Johnson, Calgary.