MICHAEL WILLIAM FOGARTY (PLAINTIFF) ..... APPELLANT;

AND

JEREMIAH FOGARTY (DEFENDANT) RESPONDENT.

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*Mar. 7.

*May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Will—Construction of—Division of estate—Right to postpone.

T. F. F., who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision :—

But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself, in co-partnership under the name and firm of Fogarty & Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years, computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor.

T. F. F. died on the 29th April, 1889.

On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. W. and M. W. F., having agreed upon such statement, the balance shown was equally divided between the parties, viz., $24,146.34 being carried to the credit of M. W. F., in trust, and $24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memo. dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them.

On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to $24,146.34, with interest, from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone pay-

*PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick, JJ.

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ment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming unanimously the judgment rendered in the respondent's favour by the Superior Court.

In March, 1890, the plaintiff, by his action, claimed from the defendant $24,146.34, which he alleged to be his share in the boot and shoe manufactory of Fogarty & Brother, of Montreal, under the last will and testament of Timothy Francis Fogarty, in his lifetime a member of the said firm of Fogarty & Brother, and who, by his said will dated the 28th October, 1887, bequeathed all his rights and interest in the said manufactory to the plaintiff and to the defendant, his brothers, share and share alike, the said plaintiff alleging that there had been a division made between him and defendant of the respective shares and right in the said business, and that the defendant, who was previously a partner with the deceased in the said firm, and who has remained in possession of the whole property ever since, was now bound to pay plaintiff his said share.

To this action the defendant pleaded that under a special clause of the will he had a right to remain in possession of the whole business of the said boot and shoe manufactory during five years to reckon from the death of the testator, which took place in April, 1889.

The following are the material clauses of the will:—

Fifthly. As to the rest, residue and remainder of all my property, whether real or personal, movable or immovable, moneys, stocks, funds, securities for money and effects generally, that I may die possessed of, wherever the same may be found and to whatever the

same may amount, I give, devise and bequeath the same to my brothers, Jeremiah Fogarty and Michael William Fogarty, both of the said city of Montreal, manufacturers, in equal proportions, share and share alike, hereby constituting the said Jeremiah Fogarty and Michael William Fogarty my residuary legatees and devisees.

But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself in co-partnership under the name and firm of Fogarty and Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor.

At the time of the testator's death the appellant was still an employee of the firm.

No difference of opinion appeared to have existed between the appellant and respondent as to the meaning of the clause quoted from the will until after the preparation of a statement in duplicate showing the condition of the affairs of the firm of "Fogarty & Brother," on the 30th April, 1889, at the time of the testator's death. This statement was prepared by Mr. Lindsay the book-keeper of the firm of Fogarty & Brother, and it showed the testator's interest in the business of Fogarty & Brother taking everything into account, to amount to $48,292.69.

After appellant and respondent had opportunity to examine and verify it, they found it correct, and each signed the following entry thereon :—

We approve of and accept the foregoing statement as correct.
MONTREAL, 18th June.

(Signed)
C. CUSHING, N.P.

(Signed) J. FOGARTY.
M. W. FOGARTY.

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The book-keeper also made the following entry at the bottom of the first sheet of the statement:—

In accordance with the provisions of the will of the late Timothy Francis Fogarty, his interest in the business of the firm of Fogarty & Bro., amounting to $48,292.69 (say forty-eight thousand two hundred and ninety-two dollars and sixty-nine cents), as per balance at credit of his capital account on the 30th April, 1889, has this day been distributed as follows:—

Jeremiah Fogarty..... $24,146 35
Michael W. Fogarty..... 24,146 34

MONTREAL, 12th June, 1889.

The principal question which arose on the present appeal was whether the respondent had not waived his right to the postponement of the payment of the bequest by acquiescence in the division and distribution of the estate at once.

C. Carter Q.C. and *Geoffrion* Q.C. for appellant, contended that the division which took place between the parties was a waiver of the delay given to the respondent by the will and the appellant would not have agreed to the division unless it was to be paid over to him at once.

Macmaster Q.C. and *Greenshields* Q.C. for respondent. The delay of five years for payment of the bequest, given by the testator to his partner, in order to give him "ample time to settle the business and make the division contemplated" is an ordinary and prudent provision to make and the courts have properly held that there is nothing on the face of the statement relied on by the appellant to show that, either expressly or impliedly, the respondent waived his right to the period allowed for making the division.

Per Curiam. The judgment appealed from must be affirmed with costs for the reasons given by the courts below.

The judgment of the Superior Court which was unanimously affirmed by the Court of Queen's Bench

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for Lower Canada (appeal side) held that by the will the respondent was entitled to a period of five years to make the division contemplated and that the statement filed of the affairs of the firm as they stood at the demise of the testator, had not the effect of depriving the defendant of the benefit of the said clause, and therefore that the action was premature, but reserved to the plaintiff "all his rights under the will," and specially as to the question of knowing whether during the five years the plaintiff would be entitled to any share in the revenues of the business, and whether he should profit by the increase likely to take place in the value of the real estate engaged in the said business.

Appeal dismissed with costs.

Solicitors for appellant: *Carter & Goldstein.*

Solicitors for respondent: *Greenshields, Greenshields & Mallette.*