HELEN FRANCIS (PLAINTIFF).....APPELLANT;

AND

NORMAN M. ALLAN AND NORMAN M. ALLAN AND C. A. SMITH, EXECUTORS OF THE LAST WILL OF HENRY W. ALLAN (DEFENDANTS)..... RESPONDENTS.

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*June 10, 11.
*Oct. 15.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Agreement for maintenance—Consideration—Abandoning project—Forbearance.

F. to support herself and her mother proposed taking lodgers but was induced to abandon the project by her uncle who agreed to pay her $200 a year while he lived and secure her that income by his will. The annuity was paid, in cash and promissory notes, for four years when the uncle gave F. a note for $1,000, payable five years after date with interest and asked her to consider it "for the present" a settlement of all claims. F. was with her uncle in his last illness when he told her that he had left her $2,000 by his will, but a few days before his death he revoked a will containing a bequest to her and made another in which she was not mentioned. Shortly after his death A., who inherited all his estate, was informed by F. of her claim and the promises, verbal and written, on which it was based and some months later he wrote offering to pay her $3,000 as a settlement in full. F. accepted the offer but it was afterwards repudiated by A.

Held, Anglin J. dissenting, that F's forbearance to press her claim against the estate was a good consideration for the agreement by A. to pay her $3,000.

Held, per Davies and Brodeur JJ. and Falconbridge C.J., Idington J. expressing no opinion and Anglin J. *contra,* that the relinquishment by F. of the project of taking lodgers was a valid consideration for the agreement by her uncle to provide her with a life annuity and she was entitled to recover from his estate the $2,000 promised by her uncle to be given her in his will and the amount due on his notes which she held.

Judgment of the Appellate Division (43 Ont. L.R. 479) reversed.

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*PRESENT:—Davies, Idington, Anglin and Brodeur JJ. and Falconbridge C.J. *ad hoc.*

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial in favour of the appellant.

The action was brought against the respondent, Norman M. Allan, personally to recover the sum of $3,000 which he had agreed to pay appellant in settlement of a claim made against the estate of Henry W. Allan, and also against the executors of that estate for the amount of said claim. The questions raised for adjudication are stated in the above head-note.

Lamport for the appellant.
R. S. Robertson for the respondents.

DAVIES J.—I am of the opinion that this appeal should be allowed and the judgment of the trial judge restored as to the amount adjudged by him as due the plaintiff, but that it should be entered against the defendants, Allan and Smith, as executors of the last will and testament of the late Henry W. Allan and not as against Norman M. Allan in his personal capacity only.

In one respect I differ from the trial judge, who held that the original understanding or agreement between the plaintiff, appellant, and the late Henry W. Allan, her uncle, that if she would abandon her project or intention of making a living for herself and her mother by opening and keeping a boarding-house, he would allow her a certain sum of money for her own and her mother's support

fell far short of amounting to an agreement legally enforceable by plaintiff.

The plaintiff's mother was a sister of the late Henry W. Allan, and in my judgment his arrangement with his sister's daughter, the plaintiff, that if she would abandon her boarding-house project and devote herself

(1) 43 Ont. L.R. 479.

to looking after and keeping her mother he would provide for her as long as she lived and would pay her $50 every four months during her and his lifetime, and would make provision out of his estate to produce the same income during her lifetime, was an agreement enforceable in law.

My brother Idington does not make any specific finding upon this point. In all other respects than these I have mentioned I concur in the reasons he has stated for allowing the appeal.

The judgment of the court will be, therefore, to allow the appeal; to restore the judgment in amount of the trial judge and to award it as against the defendants as executors and not as against Allan personally.

IDINGTON J.—Once more there is raised herein the oft mooted question of what may be interpreted such a forbearance on the part of one claiming it to have been given and duly accepted as a consideration for a contract, such as to satisfy the peculiar requirement of our English law.

The learned trial judge held that the appellant had adduced sufficient evidence from which it might fairly be inferred that she had agreed to forbear and that her cousin, the respondent Norman M. Allan, after long and serious consideration of the facts which she had submitted to him in response to his request therefor, had decided to accede to her demands, in part, and promised her accordingly that he or the representative of the ample estate he enjoys as recipient of the testator's bounty, should and would pay three thousand dollars to cover all her claims.

The Court of Appeal for Ontario held the learned trial judge had erred and reversed his judgment.

In doing so it laid stress upon the moderate and

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conciliatory language used by appellant in presenting her claims and pressing them upon the attention of respondent Norman M. Allan, and her equally inoffensive use of the word "allow" in accepting his solemn undertaking to pay what she now claims herein as of right.

It is not necessary in order to establish that one presenting a possibly legal claim, and who actually believed in ultimate success in a court of law as possible, should assert it in offensive language, or even expressly intimate that unless acceded to an action at law would be taken. Nor for the purpose of making the forbearance from such a mode of asserting a claim a valuable consideration, is it absolutely necessary to have everything believed by either party actually expressed in words.

It is, I admit, the plain obvious inference which he, resisting and then yielding, may have drawn from the presentation to him in regard to any honest, or probably honest, belief on the part of him pressing his right of claim thereto, which may become a cause of litigation, and the likelihood of such party being driven to try conclusions at law, that may constitute a perfectly good and valuable consideration for his so yielding and a basis for such obligation, as he, drawing such inference, may have entered into.

Long ago, in the common law courts, there prevailed an impression that unless proceedings had been taken there could *not* be said to have been a compromise in that forbearance which constitutes the valuable consideration.

Therefore in *Cook* v. *Wright* (1), this view seems to have been put an end to by the court holding that the mere threat of legal proceedings, though in law and in

(1) 1 B. & S. 559.

fact there was no valid claim, was sufficient and therefore a promissory note given as result held good.

Indeed it is hard to conceive how any one could have supposed in that case that there was any claim in law, yet the recognition of it and the lapse of time secured thereby to the party who was liable in law, and that to the possible detriment of the party accepting the note, it was held that it must be taken there was valuable consideration.

That case was followed by the case of *Callisher* v. *Bischoffsheim* (1), decided upon the pleadings when Cockburn C.J. made some remarks as did also his colleague Blackburn J. which would go far to support the appellant herein.

These utterances, of Cockburn C.J. especially, were criticised in the later case of *Ex parte Banner* (2), by Brett L.J., who seems to doubt the authority of that *Callisher Case* (1).

That in turn evoked, in the case of *Miles* v. *New Zealand Alford Estate Co.* (3), the opinions of the members of a strong appellate court in approval of what had been said and was so criticized.

It is quite evident that the vews expressed thus, strongly approved of the views expressed in the *Callisher Case* (1).

And of these views one was the expression of Blackburn J.

> that the real consideration depends upon the reality of the claim made and the bona fides of the compromise

which he quoted from his own judgment on behalf of the court in *Cook* v. *Wright* (4).

It is only as giving something shewing the growth of the law as it were, that the *Miles Case* (3) is of any

(1) L.R. 5 Q. B. 449.
(2 17 Ch. D. 480.
(3) 32 Ch. D. 266.
(4) 1 B. & S. 559.

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value herein, for the decision turns upon the finding by a majority that there had not in fact been a compromise though Bowen L.J. dissented.

This opinion contains the following passage worth quoting for its definition of the requirements of the law:—

> It seems to me that if an intending litigant *bonâ fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession.

Now let us see what the appellant claimed from respondent, Norman M. Allan.

The testator was her uncle, a brother of her mother, and had been very kind to both.

He went so far as to dissuade the appellant from taking boarders or roomers and to avert it promised them what was equivalent to an annuity for life which he varied later. He, however, on 1st October, 1912, after continuing the payments, so varied, for some four years, made a promissory note for $1,000 payable to appellant five years after date, with interest at six per cent. to be paid half-yearly on the 1st of April and 1st October, which he enclosed in a letter to her.

In that letter he explained that his state of health was such that he could not stand additional worry, complained of his sons being a burden instead of assistance and then proceeded as follows:—

> I am writing you in this way in order that you may see that I am compelled to make some temporary settlement at least that will help to relieve my mind of the claims that I feel from past promises you have on me.

I am sending you a note for $1,000 upon which I will pay you the interest at six per cent, half yearly for five years. I will pay you the interest on the notes you have and this for the present you will kindly regard as a settlement of all claims.

Now Helen, if things brighten up, I will do the best I can. In the meantime this note for $1,000 outright is absolutely good and as I do not intend to risk what I have it is just as safe as any security you could have and in the event of your death this $1,000 you can do what you like with. Should I die before the note is due, I will instruct my executors to pay in one year from the date of my death.

It is to be observed that he had made a will just four months previously in which he had bequeathed to her $1,500.

That will stood good and unrevoked till six days before his death, which took place in a hospital at Gravenhurst on the 10th of March, 1913, and no mention was made of the appellant in said will, though in most of its features the bequests are chiefly to the same parties as in the earlier will.

Having regard to the expression in the quotation I make from the letter enclosing the note that it was "for the present," this omission is very singular.

The appellant saw him and waited on him at the hospital, next day after this last will was made.

She swears her uncle told her, after his voluntarily going over the subject of what notes he had given her, that he had made a new will and had left her in that $2,000 and that she would have altogether something over $3,000 from him.

She describes him as a man of unimpeachable character whose word was always as good as his bond, and consequently she felt much surprised when she learned, after his death, that she was not even named in the will which seems to have been drawn in a hurried sort of emergency at the request of a doctor in charge of deceased, made to another patient, a barrister by profession, in the same hospital after 10 o'clock at night.

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The barrister in question was a stranger to the testator and when so called asked if the matter could not stand until morning, but was told not. The will, as finally drawn, was executed between two and three o'clock next morning.

Some mistake, or mistakes, in first draft resulted in its being rewritten.

The friends had been phoned to, and as a result of the call appellant hastened to the dying man's aid. She found him apparently able to talk but so weak that he failed to sign cheques, which she had written out for him at his request to pay some accounts he mentioned.

All this led to a correspondence with the respondent, Norman M. Allan, which is in the case and constitutes all there is to inform us of the claims made, the nature thereof, and the resultant undertaking to pay appellant three thousand dollars, and her acceptance thereof with thanks. It is to be observed that this was not done in a hurry, but after months of due consideration of a long statement by appellant of what claims she had, based on correspondence she had had with deceased, of which full extracts were enclosed and her statement of what he had told her, relative to the bequest of $2,000 in his will, that he wrote the letter from Glasgow on the 24th November, 1913, in which he says he had read over very carefully her

> letters and copies of extracts from father's letters

and intimates his father had given him when at home to understand that he intended to give about $1,500 in all and yet he can very easily conceive that he probably increased this in his mind before his death, and he ends that part of the letter by saying

> Therefore you can take it as settled and I undertake that you shall receive $3,000 inclusive of the promissory notes he gave you.

I should attach much more importance to the words "settled" and "undertake," and hold them as much more significant of what was present to the mind of respondent in writing thus than it is possible to find in her expression "allow."

It is not, however, on such like criticism and analysis of the language used that I should care to rely, but upon the broad features of the case as presented.

Did the case which her brief laid before him present to his mind the possibility of litigation ensuing unless he made some settlement; and hence was it to avert such result, no matter how confident he might be of winning out, that he signed the undertaking? If so, then he is bound. And can there be a doubt that he was solely moved by such considerations.?

To assume in face of such a retraction of such promise, fourteen months later, that he had been only moved by moral considerations, seems to me quite absurd.

The possessor of such an ample estate, so easily acquired making such a retraction, and inflicting thereby such a blow of disappointment upon his cousin, who had doubtless for fourteen long months assumed that all her troubles had been so happily ended, was not the man to be moved by any moral or sentimental notions.

I, therefore, have no doubt as to his attitude of mind as having relation only to, and being governed solely by, the possibilities of litigation ensuing unless he settled.

If proof were needed of this the fact that the $1,000 note his father gave and coupled its giving with an assurance that his executors would be instructed to pay it within one year after his death, yet remains unpaid, supplies ample proof.

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The fact that this assurance, forgotten in the making of the will, was brought to the respondent's mind is clear from his own letter, yet he has not been moved to regard that engagement of his father.

And the omission of all reference thereto in the will doubtless furnished another disturbing proof to him that such a will might not be quite unimpeachable under the distressing circumstances in which it was made.

Convinced as I am by these considerations that respondent was moved solely by one purpose, and that to avert litigation, I ask myself whether he who knew appellant intimately and acted solely on the chances of her entering upon litigation, if he refused to yield, was not more likely to be right in his judgment in that regard than any judge can be when depending only on the written record and rejecting all inferences to be drawn therefrom or other palpable facts.

I have no difficulty in concluding that appellant had present to her mind her own belief in the law being likely to furnish a remedy for what she evidently thought had been a grave mistake in the framing of the will.

The question of whether or not in fact she could have succeeded is immaterial for our present purpose. But after the lapse of two years her difficulties would be much greater and hence his boldness and courage correspondingly enhanced.

Any one of long experience at the bar knows well that cases much more hopeless of success than what she presents, as her basis of possible action in regard to this will and the state of mind of the testator, are often tried.

Again, the fact that proposed litigation was in fact not mentioned in the correspondence goes for little if

we accept the fact that it discloses no intention to bring this action, yet we have it.

The following cases where expected forbearance was the only consideration, and yet not a word of threat or otherwise used relative to proposed litigation, unless a solicitor's conducting the business in one instance or other people's litigation be so taken, are instructive in this connection.

See *Alliance Bank* v. *Broom* (1); *Wilby* v. *Elgee* (2); *Ockford* v. *Barelli* (3); *Oldershaw* v. *King* (4); *Attwood* v. (5); *Lucy's Case* (6).

For these and other considerations presented in the judgment of the learned trial judge I conclude he was right and this appeal should be allowed with costs and his judgment restored.

ANGLIN J. (dissenting)—I would dismiss this appeal for the reasons given by the learned Chief Justice of Ontario.

To whatever sympathy the plaintiff may be entitled and whatever should be thought, if regarded from an ethical point of view, of the conduct of the defendant, Norman M. Allan, in repudiating his promise to her, I cannot find that that promise had either been made or accepted as the compromise of a claim preferred by her as enforceable at law. On the contrary, the sole consideration for it was of a moral character—Norman Allan's belief that his father may have entertained intentions in favour of the plaintiff unfortunately for her not expressed in a form legally binding. There is nothing to shew that either the plaintiff or Norman Allan ever thought that she had, or could have, a legal claim against the late H. W. Allan's estate.

(1) 2 Dr. & S. 289.
(2) L.R. 10 C.P. 497.
(3) 20 W.R. 116.
(4) 5 W.R. 753.
(5) 1 Russ. 353
(6) 4 De G.M. & G. 356

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I agree with the learned trial judge and the Appellate Division that, apart from Norman Allan's promise, the plaintiff had no enforceable claim against his father's estate.

BRODEUR J.—Mr. Henry W. Allan was a man of means, having left an estate of nearly $100,000. He had a sister, Mrs. Francis, who was not in very comfortable circumstances and as she was rather advanced in years she was looked after by her daughter, Miss Helen Francis, the appellant in this case. Mr. Allan was very kind to them and contributed with some other relations to their support.

At one time, however, Mrs. and Miss Francis contemplated keeping roomers and so informed Mr. H. W. Allan, since, on the 7th January, 1909, he wrote to his niece, the appellant, that his sister, Mrs. Francis, had worked hard enough all her life without taking lodgers and he was sure satisfactory arrangements would be made for the mother and the daughter. He entered into an arrangement with the appellant whereby he promised to provide a sum of $200 a year during her lifetime and to make provision out of his estate to produce the same income.

The relations of those three persons were of the best, and it is no wonder that Mr. Allan, who was occupying a high social standing and had been in public life, would have prevented his sister from taking roomers and would have provided for her and her daughter. He had no daughters himself and was not having, perhaps, from his sons all the consolations which his old age might expect. When he died he would have been alone if the appellant, his niece, had not been at his bedside; his son, the respondent, had left the country and was in Scotland.

The payments agreed upon were duly made from 1909 to 1912, when Mr. H. W. Allan became rather short of funds and gave two notes of $100 and $50 respectively in payment payable at two years from date but with interest. In May, 1912, he made a will with a legacy of $1,500 to the appellant.

In October of the same year, he gave the appellant another note of $1,000 payable in five years also with interest to be paid half yearly.

A few days before his death he said to his niece that he had left her $2,000 in his will and that sum, with the notes, would give her a little more than $3,000, and she would then get about the same income as he had been providing for her mother and herself during the last four years.

When he was very ill and on the point of death, Mr. Allan made another will and no mention is made therein of his niece, the appellant. He was then so weak that the doctor, who requested Mr. Bruce to draft the will, said it had to be made right away during that night for fear the testator could not see the next day.

After his arrival in Canada the respondent, Norman Allan, who was one of the executors, wrote to his cousin, the appellant, that he understood she had a claim against his father in notes and otherwise, and asked for information.

She then told him of the notes she had and the declaration he made to her as to the contents of his will, and she gave him extracts of the letters of Mr. H. W. Allan stating the circumstances under which his obligation had been contracted and the consideration for which he had undertaken to provide for her.

The respondent, after several months, answered that in those circumstances he was willing, though no

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provision was made for her in the will, to pay her $3,000 in satisfaction of her claim. But in January, 1915, he repudiated his obligation and the present action is to recover that amount of $3,000. He says in his plea that there was no consideration for the agreements alleged in the statement of claim, neither on his part nor on the part of his father.

The action was maintained against him personally by the trial judge on the ground that the obligation of the respondent was based on a compromise for a settlement of plaintiff's claims. That judgment was reversed in appeal, but judgment was given against the estate for the two notes then due and for interest.

I am of opinion that the trial judgment should be restored. There is no doubt that the appellant had valid claims for the notes which she had in her hands, namely, $1,150, since the respondents accept the judgment which condemned them to pay the note due and the interest on the other. As to the legacy of $2,000 she had every reason to believe that she had a legitimate claim.

There might be a question, besides, whether the will made in March, 1913, was valid or not. It is rather extraordinary that, willing as he was to provide for a permanent income to his niece of about $200 per year, the testator should have said to the solicitor who prepared the will and who was an absolute stranger to him, and who did not know anything about his affairs, that he had already provided for her by way of notes, when the notes she had would give her only about $60 a year. His mind then was not clear enough to make a valid will, or he was confused as to the amount of his obligation resulting from those notes.

It is no wonder that the son, being appraised of all those circumstances, would be willing to make a settle-

ment and to agree to pay the total sum of $3,000, which was a little less than the amount which was supposed to be in the will and the amount of the notes.

A compromise of a disputed claim which is honestly made constitutes valuable consideration, even if the claim ultimately turns out to be unfounded. Halsbury, vol. 7, p. 387.

The appellant had an undisputed claim for a part of the sum which the respondent undertook to pay and she was in perfect good faith when she was claiming an additional sum of $2,000 under the will; and the facts as then disclosed and known might perhaps have created some difficulty as to the validity of the will. It is no wonder that the respondent, as a son respectful of the wishes of his father, would, in such a case, have agreed to compromise and settle for $3,000; and, as the compromise was made with the evident consent of the two executors, the estate should be held liable.

The judgment *a quo* should be reversed with costs of this court and of the court below and judgment should be rendered against the estate for the sum of $3,000 with costs of this court and of the courts below.

FALCONBRIDGE C.J.—I concur in the opinion of Mr. Justice Davies.

Appeal allowed with costs.

Solicitors for the appellant: *Lamport, Ferguson & McCallum.*

Solicitors for the respondents: *Fasken, Robertson, Chadwick & Sedgewick.*