1943

*Mar. 2, 3.
*April 2.

ELMER MOTT (DEFENDANT) ..... APPELLANT;

AND

ETHEL TROTT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Action for damages for breach of promise of marriage—Evidence—Statute of Frauds, R.S.O. 1937, c. 146, s. 4—Limitations Act, R.S.O. 1937, c. 118, s. 48 (1) (g)—Corroboration (Evidence Act, R.S.O. 1937, c. 119, s. 10).

The action, brought in 1941, was for damages for breach of promise of marriage. Plaintiff alleged that she and defendant became engaged in 1908, to be married when defendant had improved his prospects in life, and that he broke the engagement in 1941. At trial, Makins J., on motion for non-suit, withdrew the issues from the jury and dismissed the action, holding that there was in 1919, if the engagement still existed, a breach of it; that since that time the parties had not been engaged; and the *Limitations Act* (Ont.) barred right of action; also that the *Statute of Frauds* (s. 4) applied. His judgment was set aside by the Court of Appeal for Ontario ([1942] O.W.N. 513; [1942] 4 D.L.R. 150), which held that, on plaintiff's evidence, if accepted by the jury, the jury might have found that promises were made which would not come within the *Statute of Frauds* and also might have found no breach of engagement before 1941; that there was evidence in support of plaintiff's case that should have been submitted to the jury and, therefore, there should be a new trial. Defendant appealed.

Held: The appeal should be dismissed.

Per the Chief Justice and Davis J.: There was some evidence open to the construction, if the jury so viewed it, that the promise was a continuing one up to shortly before the writ was issued and that the breach first occurred then; or the jury might have inferred from the evidence that the parties mutually abandoned the contract when neither party insisted on its performance for an inordinate length of time; or the jury might have found that a breach occurred at least as early as 1919 when, according to plaintiff's evidence, defendant was in a financial position to marry. These were all questions for the jury, and the direction for a new trial should be sustained.

Per Rinfret, Kerwin and Taschereau JJ.: (1) As to the *Statute of Frauds* (R.S.O. 1937, c. 146, s. 4): However the case might stand in respect to the promise of 1908, there was evidence (for the jury's consideration) of later promises that were not within the statute. (It was pointed out that the rule is that, even if any promise be made in the expectation that it will not be performed within the space of one year, the statute does not apply if it is possible that the promise can be performed, or is not incapable of being performed, within a year).

(2) As to the *Limitations Act* (R.S.O. 1937, c. 118): There was evidence which the jury was entitled to consider, of new promises by words or conduct, and if the jury believed that evidence and if they found that a breach of any one of such new promises occurred within six years before the action was begun, s. 48 (1) (*g*) of the Act would not apply.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Taschereau JJ.

Such a result would necessarily involve a finding that any earlier agreement to marry had been ended by mutual arrangement and therefore s. 54 (1) of the Act could not operate.

(3) As to corroboration (s. 10 of the *Evidence Act*, R.S.O. 1937, c. 119): Corroboration must be evidence of a material character supporting the case to be proved. It may be afforded by circumstances. The evidence relied on as corroborative need not go the length of establishing the promise relied on; it is sufficient if it supports the plaintiff's evidence that the promise was made; and evidence showing that an engagement existed, such evidence being not inconsistent with the precise engagement sworn to by plaintiff, may fulfil the requirement. There was material evidence, other than that of plaintiff, in support of a promise that the jury might find on the evidence was made within the period fixed by the *Limitations Act*.

(4) As to evidence of certain witnesses, it was held that their testimony as to what they observed of the relations between plaintiff and defendant was admissible, but not their statements that plaintiff and defendant were regarded in the community as an engaged couple.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which vacated and set aside the judgment of Makins J. at trial and ordered a new trial.

The action was for damages for breach of promise of marriage. The plaintiff alleged that the original proposal and acceptance of marriage was made in 1908, the marriage to take place when the defendant had succeeded in improving his prospects in life and had obtained a suitable home for himself and the plaintiff; and that the engagement and promise were broken by defendant in September, 1941. The writ was issued on December 2, 1941.

The action was tried before Makins J. and a jury. At the close of the plaintiff's case, counsel for the defendant moved for a non-suit. Makins J. withdrew the issues from the jury and dismissed the action. He held that there was in 1919, if the marriage engagement was then in existence, a breach of it; that since that time the parties had not been engaged; and that the *Limitations Act* (Ont.) barred the right of action; also that the *Statute of Frauds* (s. 4) applied.

The Court of Appeal held that, though the alleged promise made in 1908, according to plaintiff's account of it, might have been one that a jury might find was not to be performed within one year, and however the case might stand in respect to it, yet there was evidence of later promises that were not within the *Statute of Frauds;* that

(1) [1942] O.W.N. 513; [1942] 4 D.L.R. 150.

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the trial Judge, in regarding a conversation in 1919, as related by plaintiff, as evidence of a breach of promise by defendant, seemed to have misunderstood plaintiff's evidence; and that a jury might reasonably regard the conversation as a renewed promise to marry, to be performed within a reasonable time; that if plaintiff's evidence was accepted, the parties' relations continued without any breach until 1941; and she told of numerous other occasions through the long period of the engagement when defendant, by word or conduct or both, might, in the opinion of a jury, if accepting plaintiff's evidence, have renewed his promise to marry; that plaintiff's story was corroborated in a general way by other witnesses, and certain evidence by one of them was of special significance; that there was evidence in support of plaintiff's case that ought to have been submitted to the jury, and therefore there should be a new trial.

The appellant appealed to this Court, asking that the judgment at trial be restored.

H. E. Fuller, K.C. and *R. M. W. Chitty, K.C.* for the appellant.

W. A. Donohue for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—The respondent sued the appellant for damages for breach of promise to marry. By her pleading she fixed the date of the promise as having been made in 1908, and in her evidence she was explicitly asked, "That is the only time that Elmer ever asked you to marry him?" to which she answered, "You usually just ask once, don't you—yes." The writ was not issued until December 2nd, 1941. The defendant, appellant, offered no evidence and I am not surprised that Makins, J., the trial judge, took the case from the jury and dismissed it as statute-barred. I think I might probably have done the same thing. But upon reflection the proper course was, no doubt, to let the case go to the jury on the ground that there was some evidence open to the construction, if the jury thought fit to take that view, that the promise was a continuing one up until a month or two before the issue of the writ and that the breach first occurred then, or the jury might have inferred from the evidence that the parties mutually abandoned the

contract when neither party insisted on the performance of it for an inordinate length of time, although no express agreement to that effect had been made, or the jury might on the evidence have found that a breach of the contract occurred at least as early as 1919 when the appellant was in a financial position to marry, according to the respondent's evidence, the performance of the promise being said by the respondent to have been contingent on the happening of that state of affairs. The statute runs from the breach and not from the date of the making of the contract.

Those were all questions which might have gone to the jury. I should, therefore, not interfere with the order of the Court of Appeal, which directed a new trial.

See *Davis* v. *Bomford* (1), a breach of promise case, where it was held that the case was properly left to the jury. At p. 249 Pollock, C.B., referred to what Lord Mansfield had said in *Lowe* v. *Peers* (2): "These contracts are not to be extended by implication," and added: "It is clear that he [Lord Mansfield] thought that such contracts if not speedily carried into effect might be considered as abandoned."

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The defendant in an action for damages for breach of promise of marriage appeals from the order of the Court of Appeal for Ontario directing a new trial, and asks that the judgment of the trial judge dismissing the action be restored. At the conclusion of the evidence on behalf of the plaintiff, the trial Judge withdrew the case from the jury and dismissed the action without costs, on the ground that it was not maintainable in view of sec. 4 of the *Statute of Frauds*, R.S.O. 1937, c. 146, and that it was barred by *The Limitations Act*, R.S.O. 1937, c. 118.

The original promise of marriage was made in 1908. Chief Justice Robertson, speaking for the Court of Appeal, stated: "However the case may stand in respect to the promise of 1908, there was, in my opinion, evidence of later promises that were not within the Statute of Frauds." With that statement I agree and it is, therefore, unnecessary to consider the appellant's argument that the promise of 1908

(1) (1860) 6 Hurlstone & Norman (Exchequer Reports) 245.
(2) (1768) 4 Burr. 2225, 2230.

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was made in the expectation that it would not be performed within the space of one year. It cannot be successfully contended that on the evidence that consideration applied to any one of the later promises that a jury might find was made. However, in the event of a new trial being had, it should be pointed out that the rule is that, even if any promise be made in that expectation, the Statute does not apply if it is possible that the promise can be performed, or is not incapable of being performed, within a year. *Richmond Wineries Western Ltd.* v. *Simpson* (1). The same rule appears to apply in the United States. Williston on Contracts (Revised Edition), section 500.

As to section 48 (1) (*g*) of *The Limitations Act,* it is sufficient that the breach of any promise, which the jury might find existed, occurred within six years of the date of the issue of the writ. On this point also I agree with the Court of Appeal that there was evidence which the jury was entitled to consider, that on numerous occasions by words or conduct there were new promises of marriage. It was pointed out that the Chief Justice of Ontario used the word "renew", thus indicating, it was argued, that it was to the promise of 1908 or at least to some promise the breach of which occurred more than six years before the institution of the action to which he was referring. I do not so read the reasons, and in any event, in my view, there was evidence of new promises which the jury might believe, and if they found that a breach of any one of such new promises occurred within the six years, the section would not apply. Such a result would necessarily involve a finding that any earlier agreement to marry had been ended by mutual arrangement and therefore subsection 1 of section 54 of *The Limitations Act* could not operate.

Finally, it was argued that there was no corroboration as required by section 10 of *The Evidence Act,* R.S.O. 1937, c. 119, which reads as follows: "The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise." It has been held by this Court in *McDonald* v. *McDonald* (2) and *Thompson* v. *Coulter* (3) that, under statutory provisions corresponding in all relevant respects with what is now section 11 of *The*

(1) [1940] S.C.R. 1 at 17. (2) (1903) 33 Can. S.C.R. 145.
(3) (1903) 34 Can. S.C.R. 261.

Evidence Act, corroboration must be evidence of a material character supporting the case to be proved but that such corroboration may be afforded by circumstances.

The same rules prevail in an action such as this. The evidence relied on as corroborative need not go the length of establishing the promise relied on; it is sufficient if it supports the plaintiff's evidence that the promise was made. *Bessela* v. *Stern* (1), *per* Cockburn, C.J., at 271, and *per* Brett, L.J., at 272. In *Smith* v. *Jamieson* (2), Street J. puts the position admirably in a single paragraph which I adopt as applicable to the present case, except that here the appellant did not admit any promise:—

> It was further urged that under sec. 6 of ch. 61 R.S.O. it was necessary that the plaintiff should furnish evidence to corroborate, not only the fact of the promise, but the date when it was made, when the date is material, as it is in the present case. That section provides "that no plaintiff in an action for a breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise." The plaintiff here swore that she and the defendant on the 20th August agreed to marry one another: she produced, in support of this, abundant evidence to corroborate her statement that an engagement to marry existed between her and the defendant, such evidence being not inconsistent with the precise engagement which she swore to. This I think is all that the statute requires, and it was not necessary that the corroborative evidence should go so far as to negative the promise which the defendant admitted he made before his majority.

The evidence of Mrs. Goodfellow relating to the appellant's apparent approval of the proprietary interest which the respondent was taking in the newly purchased house, and her evidence as to appellant's invitation to her (Mrs. Goodfellow) to "come and see us", was some other material evidence in support of a promise that the jury might find on the evidence was made within the period fixed by *The Limitations Act.* That part of the evidence of Burton J. Marriott and Flora Trott in which they testified as to what they observed of the relations between the parties was admissible, but not their statements that the plaintiff and defendant were regarded in the community as an engaged couple.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Pardee, Gurd, Fuller & Taylor.*

Solicitor for the respondent: *W. A. Donohue.*

(1) (1877) 2 C.P.D. 265.

(2) (1889) 17 Ont. R. 626, at 632-3.