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APPELLATE DIVISION.

MARCH 6TH, 1913.

LECKIE v. MARSHALL.

Judicial Sale—Realisation of Vendor's Lien on Mining Property —Reserved Bid—Date of Sale.

The following are the reasons for the judgment of the Court (the result of which is noted ante 889), delivered by MULOCK, C.J.:—In this case an order was made directing the sale of the property in question, with the approbation of the Master in Ordinary; and the Master, in settling the advertisement, gave two directions: one fixing the date of sale, the 16th June, 1913; and the other, that the property be offered for sale subject to a reserved bid.

The respondents, who had a lien on the property, appealed from these two directions to Mr. Justice Britton; and he (ante 826) allowed the appeal in part, dispensing with a reserved bid, and changing the date of sale from the 16th June to a date not earlier than the 5th nor later than the 12th May, 1913.

The defendants appeal from the order of Mr. Justice Britton, and ask to have the two directions of the learned Master restored.

As to the proper date to fix for the sale, regard should be had to the nature of the property. In this case it consists of some five hundred acres of land in the Temagami Forest Reserve, said to contain valuable minerals, such as gold, copper, and arsenic. The defendants, we are told, have expended a large sum of money, in the vicinity of $50,000, in improving the property, examining and testing, sinking of shafts, etc.

At this moment, it may be assumed, that there is a blanket of snow over the whole 500 acres of land, and that the shafts, which we were told in the argument were sunk in different por-

tions of the land, are at this moment filled with water and ice.

This is the kind of property which is directed to be sold not later than the 12th May.

Certain materials (evidence) not used before Mr. Justice Britton were before us; in their absence we might perhaps have been led to rule as did that learned Judge.

It is the duty of the Court to endeavour to promote a sale to the best advantage of all the parties concerned, and for such end to select a date of sale and prescribe such other proper terms and conditions as are likely to realise the desired results.

During the argument of counsel for the plaintiffs, the respondents, before us, he was asked whether this particular property would not, in all probability, realise a better price if an opportunity were given to contemplating purchasers to examine it, and he admitted that it was much more likely to realise a good price if such an opportunity were given for an inspection. That admission, in our judgment, disposes of the case that went before Mr. Justice Britton. Perhaps the material before him would have led us to the same conclusion that he has reached. But, certainly, all doubt of the wisdom of the course we are taking is removed when counsel opposing this motion tells us that a better price will, in all likelihood, be obtained if an opportunity be given for an inspection by prospective purchasers.

What opportunity would there be to ascertain the mineral value of the land, if there is a blanket of snow over it up to nearly the date of sale, and the test pits are filled with water and ice?

On this point we entertain no doubt that the sale should not take place as early as the 12th May; and we doubt if it should take place as early as the 16th June.

The examination will, naturally, occupy a considerable period of time after the snow disappears; and, thereafter, must follow a period to enable contemplating buyers to arrange for the financing of the amount required in such a proposition as this, involving some hundreds of thousands of dollars.

We, therefore, think that, in addition to restoring the direction of the Master as to the date of sale, there should be included in the order the right to him to postpone the date of sale to a day not later than the 16th July, if he thinks it expedient to do so.

As to the other direction of the learned Master, we are of opinion that this is a property which particularly calls for protection by means of a reserved bid. It is the practice of the

Court to sell subject to a reserved bid. It is a means to protect parties in such matters from having their interests sacrificed; and experience tells us that conditions surrounding a case like the present—a property like this—particularly call for a reasonable date for sale; and it is particularly desirable that the best terms be realised upon such peculiar property as this, inasmuch as the security is of such variable nature; and the more variable the security the more is the need of the protection of the Court to prevent the sacrifice of the property.

We have reason to be aware of the advantage of adopting the policy of protection by the Court, in a recent case that was satisfactorily disposed of in this way, viz, Re Imperial Pulp Mills Co., where a stay of proceedings was asked for until an inspection could be made by contemplating purchasers, and where reserved bids were fixed. On, I think, two occasions at least, the sale was advertised; but the course taken by the Court, of maintaining the reserved bid and giving ample opportunity for it being reached, resulted ultimately in the reserved bid being reached, and there was a successful sale of the property.

It may be that if, at the sale, the reserved bid should prove abortive, later on, if circumstances should so demand, another policy may be prescribed.

Mr. Osler, for the respondents, offered, as an argument against a reserved bid, to give to the Court an undertaking, an unconditional undertaking, that the respondents would, when this property was offered for sale, bid a sum equal to $210,000 and interest; but we are of opinion that we could not accept that undertaking in lieu of the adoption of the safeguard provided by the practice of the Court—a reserved bid. That undertaking, however, may prove of service to the parties concerned. It will also be incorporated in the order.

We think that the appellants are entitled to the costs of this appeal and of the motion below before Mr. Justice Britton.

MARCH 8TH, 1913.

*JOHNSTONE v. JOHNSTONE.

Gift—Evidence—Onus—Failure to Satisfy—Money Deposited for Safekeeping—Confidential Relationship—Finding of Fact—Appeal.

Appeal by the defendant from the judgment of BARRON, Co. C.J., in favour of the plaintiff, in an action in the County Court

*To be reported in the Ontario Law Reports.

of the County of Perth, to recover three sums of money, amounting in all to $800, at one time the property of Mrs. Isabella Johnstone, the original plaintiff, and deposited or given by her to the defendant, her husband's nephew, George Johnstone. After judgment, the original plaintiff died, and the action was revived in the name of her sole executor, Josiah Henry Frost.

In her statement of claim, the plaintiff alleged that the moneys were placed in the hands of the defendant to be repaid when required.

The defendant denied this allegation, and, by way of counterclaim, alleged that the moneys were paid to him as remuneration for services rendered; that he had rendered to the plaintiff all such services as were contemplated at the time of payment; and that, if he should be held liable to her for the moneys received by him, he was entitled to recover $800 as payment for his services.

The County Court Judge found that the money was not a gift to the defendant or his wife; and that the plaintiff was entitle, after giving credit for certain repayments and sums owing for services rendered, to judgment for $325 and costs. From this finding the defendant appealed.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. C. Makins, K.C., for the defendant.

Glyn Osler, for the plaintiff.

MULOCK, C.J.:—From the evidence it appears that the plaintiff and her husband, being childless, adopted one Henry Frost as their son. The husband was a farmer, and died on the 21st December, 1898, owning at the time of his death a farm of 50 acres of land in the county of Perth, which he devised to the plaintiff for life, with remainder in fee to the adopted son, Frost.

The plaintiff, who at the time of her husband's death was about seventy years of age, continued for some years to reside on the farm, Frost managing it for her.

The defendant, George Johnstone, a farmer, was her nephew by marriage, being the son of a brother of her deceased husband, and resided a few miles distant from the plaintiff. He and his wife were apparently on very friendly terms with the plaintiff, and frequently assisted her in the management of the farm and household matters.

The rental value of the farm was from $125 to $150 a year.

In the year 1905, the defendant and his wife were at the plaintiff's, and the plaintiff handed to the wife, but not in the husband's presence, the sum of $410. A year or more later, she handed to her the further sum of $200; and in the year 1907, she sent to the defendant, through Frost, the further sum of $190, making in all the sum of $800, being the money in question in this action.

The plaintiff was not indebted to the defendant, nor was he entitled to any claim upon her bounty. Working their respective farms, they resided several miles apart. As the plaintiff advanced in years, she doubtless became less able to manage her household duties, and at times sought the assistance of the defendant and his wife, who seem to have responded to her wishes, paying her frequent visits and rendering her valuable assistance. These kindly acts appear to have been appreciated by the plaintiff, who came to regard the defendant as taking a substantial interest in her welfare; and it may reasonably be assumed that she reached the conclusion that it would be more to her interest to intrust her money to a tried friend and family connection than to keep it in her own house or elsewhere. Whatever were her intentions in transferring her money to the defendant, no presumption of law arises that she intended to divest herself of her money (everything she owned, except her life interest in the farm, and the chattel property thereon), and make an absolute gift of it to the defendant. Under the circumstances of this case, the onus is on him to shew that the transaction was a gift; and that must be established by proving a clear and unmistakable intention on the part of the plaintiff to make a gift of money to the defendant.

In weighing the conflicting evidence, it is not sufficient that the preponderance of evidence may turn the scale slightly in favour of a gift. The preponderance must be such as to leave no reasonable room for doubt as to the donor's intentions. If it falls short of going that far, then the contention of a gift fails: Lehr v. Jones, 74 N.Y. App. Div. 54; In re Harcourt, Danby v. Maker, 31 W.R. 578; Morse v. Meston, 152 Mass. 157, 24 N.E. Repr. 916; Taylor v. Coriell, 57 Atl. Repr. 810; Sisenwam v. Roque, Q.R. 23, S.C. 115; Hall v. Kimball, 5 App. Cas. 475 (Dist. of Colum.); Pierce v. Giles, 93 Ill. App. 524; Marsh v. Prentiss, 48 Ill. App. 74.

On another ground, also, the onus was, I think, on the defendant to establish the gift. The plaintiff was a widow of 7

years of age, with no means of support excepting a life interest in 50 acres of land, and the money in question; nor had she any children or other near relatives upon whom she could rely to take care of her in case of sickness or inability to manage the farm. Under these circumstances, to denude herself of all her money was improvident; and, having regard to the facts, the case is one entitling her to the protection of the Court.

I do not question the right of a person of competent understanding, and who fully and intelligently appreciates what he is doing, with its probable consequences, to give away all, or a substantial part, of his property, however, unwise such an act may be; but attendant circumstances may be such as call upon the donee to prove to the satisfaction of the Court that the donor fully realised the nature of the transaction and its probable consequences, and was not unduly influenced by the donee or by confidence in him. Acting upon this principle, Courts of equity have not hesitated to set aside transactions for value, unless the party benefiting thereby has proved that everything was right, and fair, and reasonable on his part. . . .

[Reference to Slater v. Nolan, Ir. R. 11 Eq. 386; Waters v. Donnelly, 9 O.R. 401; Beman v. Knapp, 13 Gr. 398; Phillips v. Mullings, L.R. 7 Ch. 244; Rhodes v. Bate, L.R. 8 Ch. 253.]

Here the relationship between the plaintiff and the defendant may fairly be regarded as confidential. The defendant was her nephew by marriage; and she had come to regard herself as entitled to call upon him and his wife frequently to assist her in her various duties. To such appeals they had responded, and their evidence is, that she entertained grateful feelings towards them. Under such circumstances, the defendant was bound to shew, to the satisfaction of the Court, that the transaction in question, in order to amount to a gift, was her free act, and not the result of undue influence.

The evidence is conflicting. . . .

The plaintiff, who was examined de bene esse, at the commencement of her examination maintained that she had deposited money with the defendant for safekeeping; but, as the examination proceeded, her mind wandered, her answers became incoherent, and she was evidently labouring under delusions; saying that she had never possessed any money of her own—that the money she had handed to the defendant was money which she had collected from other persons for him. The defendant admitted that there was no foundation for the latter

statement. Owing to her impaired mental condition, it would not, I think, be safe to attach any weight to her evidence. The learned trial Judge, on the conflicting evidence, has found that the defendant received the money under conditions none of which satisfied him that it was either a gift or in payment for services. We are asked to reverse that finding. The defendant, on the evidence of himself and his wife, has failed, I think, to shew that the transaction was a gift. All doubt, however, on the point disappears if the evidence of Frost and his wife is to be believed. The trial Judge evidently accepted their testimony; and, therefore, an appellate Court is not entitled to discredit them.

For these reasons, I think the judgment of the learned trial Judge should be affirmed.

There is nothing in the evidence shewing any overreaching on the defendant's part, nor any design on his part to induce the plaintiff to intrust him with her money, and he seems to have been kind to her, and rendered to her services in excess of the amount allowed to him at the trial. Under these circumstances, although I think his appeal fails, he should not be visited with the costs.

CLUTE and SUTHERLAND, JJ., concurred.

RIDDELL and LEITCH, JJ., dissented, for reasons given in writing by the former.

Appeal dismissed without costs; RIDDELL *and* LEITCH, JJ., *dissenting.*

MARCH 13TH, 1913.

GALBRAITH v. McDOUGALL.

McDOUGALL v. GALBRAITH.

Contract—Construction — Dealings in Land — Partnership — Joint Venture—Division of Profits—Expenses—Advances.

Appeal by McDougall from the judgment of BRITTON, J., 3 O.W.N. 1655.

McDougall owned a lot in the Whitney district of Algoma, which he expected to become the site of a town, and he made an

agreement with Galbraith, dated at Montreal, the 11th February, 1911, and signed by both parties, as follows: "In consideration of the sum of $1, receipt of which is hereby acknowledged, and for other good and valuable consideration, the said . . . McDougall transfers and makes over to . . . Galbraith one-fourth interest in a certain lot of land containing 160 acres . . . It is understood that this transfer covers all surface, mineral, and other rights on said property. This agreement is conditional on the Temiskaming and Northern Ontario Railway Commission locating their station on said lot. Galbraith is to provide the funds for surveying and laying out the property in town lots and other incidental expenses preparatory to offering said property for sale. Said expenses are to be equally shared by each when the property is disposed of or when a sufficient sum is realised."

A more formal document was afterwards drawn up in Ontario, dated the 29th March, 1911, and signed by the parties, as follows:—

"Whereas the party of the first part (McDougall) is the owner of lot 12 . . . and . . . intends laying out the whole or a portion of the said lot as a town-site and to dispose of lots therein by private sale or otherwise; and whereas it is necessary to secure a survey of and register a plan of the said town-site and to open streets upon the same and in other respects improve the land for the purpose of a town-site; and whereas the party of the second part (Galbraith) has agreed to advance and pay one-half of the total cost of all necessary expenses in connection with the laying out, improvement, and development of the said town-site, together with the survey, plan, and advertisement of the same, in consideration of an undivided one-quarter interest or share in the proceeds of the sale or disposition of the said lot, mining rights, or otherwise:—

"Now . . . in consideration of the premises and the terms, provisions, and conditions herein contained, the parties hereto mutually agree each with the other as follows:—

"(1) The party of the second part (Galbraith) agrees to advance from time to time as may be necessary, or become liable for, one-half of all expenses incurred through the expedient laying out of the said lot . . . into a town-site . . .

"(2) The party of the second part further agrees to devote a reasonable amount of his time and attention to the affairs of the said town-site and to assist in the laying out and improvement of the same and the sale thereof.

(3) In consideration thereof, the party of the first part agrees to and does hereby grant, assign, and give to the party of the second part an undivided one-quarter share or interest in the proceeds arising from the sale of the said town-site, in lots or otherwise, the timber, and mining rights thereon, and in all profits or benefits arising therefrom in any respects whatsoever.

"(4) Proper books of account shall be kept . . .

"(5) A division of the profits, if any, shall be made every six months, until the whole of the interests of the parties hereto are disposed of.

"(6) The party of the first part shall devote his time and attention to the requirements of the said town-site and act in conjunction with the party of the second part."

The land was divided into town lots, and these were rapidly sold, and such part of the proceeds as was thought necessary was used for expenses. The receipts were approximately $30,000, and the expenses $12,000.

Each party brought an action against the other. Of the $18,000 surplus, McDougall claimed $16,500, leaving Galbraith only $1,500. Galbraith claimed $4,500; and the trial Judge gave effect to Galbraith's claim.

McDougall appealed.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

A. G. Slaght, for McDougall.

E. D. Armour, K.C., for Galbraith.

CLUTE, J. (after setting out the facts at length):—It was a joint venture in which one party owned the property, and the other agreed to pay half the expenses of clearing the land, laying out the site, etc., in consideration of one-quarter of the proceeds of the sale. He took a certain risk for a possible gain. . . .

It is open to doubt whether the agreement entered into between the parties constituted a partnership. . . .

[Reference to Stroud's Judicial Dictionary, 2nd ed., p. 1415, "Partnership," II. (2); Lindley on Partnership, 7th ed., pp. 38, 39, 55, 56; Heap v. Dobson, 15 C.B.N.S. 460; Andrews v. Pugh, 24 L.J. Ch. 58.]

But, whether the agreement amounts to a partnership or not, the terms are too clear to leave doubt as to the intention. . . . The transaction must be treated as if the advance which

Galbraith was bound to make had actually been made. Having made the advance, he is entitled to receive one-fourth of the whole of the proceeds, which is $7,500; but, as this would be the total amount which he would have received had he advanced the $6,000, the $6,000 must be deducted from this amount, making his profits in the transaction $1,500.

It ought not to be forgotten that, under the peculiar terms of the agreement, the defendant puts in his land without receiving any special advantage therefrom except his three-fourths of the proceeds of the sales. In a word, the plaintiff ought not to be permitted, not having made his advances, to have them paid out of a fund of which he is entitled to only one-fourth and the defendant to three-fourths.

With deference, I think the judgment of the trial Judge should be varied to conform to the construction put upon the agreement as contended for by McDougall. He is entitled to costs in the Court below and of this appeal.

As under the amendment, full relief can be given in the first action, the second action is dismissed without costs.

MULOCK, C.J., SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J. (after setting out the facts):—Much argument was advanced to us upon the question whether the two documents should be read together, or whether the latter entirely superseded the former. It does not seem to me that, for the purposes of this case, it makes any difference which view is taken; and I do not enter into the inquiry; but I am not to be taken as assenting to the conclusion in that regard of my brother Britton.

Much, too, was said as to whether a partnership was formed or not. That, it seems to me, is also immaterial—a mere matter of terminology. Whether in this case one calls the relations between the two a partnership or a joint enterprise or a common venture, their rights and duties inter se are governed by the document they have signed—and these are the only rights and duties we here consider.

The main reliance of the respondent was upon the use of the words "advance" and "profits"—and, if "advance" always meant "to pay out money which is to be later repaid," and "profits" always meant "gain made on any business when both receipts and disbursements are taken into consideration," there would be foundation for his contention. But "advance" often means "pay" (Words and Phrases Judicially Denfined, sub

voce); and that this is its meaning here is, I think, shewn in the recital No. 4.

Nor is "profit" or "profits" wholly unambiguous. The primary meaning is "benefit or advantage," and that meaning is found very frequently indeed. See Words and Phrases Judicially Defined, sub voce, p. 5661. "There is no single definition of the word 'profits' which will fit all cases:" per Farwell, J., in Bond v. Borrow, [1902] 1 Ch. 353, at p. 366.

From the whole document it is, to my mind, clear that what was intended was this: McDougall, owning the land, agreed that, if Galbraith would pay one-half of the "expenses," he should receive one-fourth of the proceeds of the sales. No doubt, by a minute analysis of the agreement, arguments may be found against this interpretation; but, while we are to examine such a business document with care, we are not to scrutinise it microscopically or dissect it as with a scalpel. Taking the document as a whole and in connection with the circumstances of its formation, I cannot agree with the learned trial Judge.

A confusion of thought sometimes seems to arise by the use of language somewhat metaphorical. Here the land is said to pay the expenses. Strictly the payment is out of money which has been obtained by the sale of land. If I am right in my view, whenever any money was received for the sale of any land, as between the parties one-fourth of that belonged to Galbraith and three-fourths to McDougall—and should have been so credited; whenever any money was paid out for "expenses," one-half should have been debited to Galbraith and one-half to McDougall. Then it became a simple matter of bookkeeping. The whole effect was, that, instead of either procuring money from some other source, money on the spot to which they were entitled was used.

The method followed by the learned trial Judge makes McDougall pay not one-half but three-fourths of the expenses.

I think the appeal should be allowed with costs here and below. If the parties cannot agree, the reference may proceed; but it seems more convenient to order this to proceed before the Master in Ordinary, in Toronto.

Appeal allowed.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P., IN CHAMBERS. MARCH 4TH, 1913.

RE SUGDEN.

Infant—Order for Sale of Land—Practice—Petition—Status of Peitioner—Production of Infant for Examination by Judge—Examination of Witnesses Viva Voce—Infants Act, 1 Geo. V. ch. 35—Con. Rules 960-970, 1308.

Application on petition for an order for the sale of the land of Vera Gladys Sugden, an infant.

The application was heard by MEREDITH, C.J.C.P., at London, on the 1st March, 1913.

J. Macpherson, for the petitioners.

Coleridge, for the Official Guardian.

MEREDITH, C.J.C.P.:—The proper mode of procedure, in such a case as this, is the only question for consideration on this application now: the merits cannot be taken into account before it is first considered whether they are before the Court in the manner prescribed by law.

The application is for the sale of the land of an infant, under the power now conferred on this Court by the Infants Act, 1 Geo. V. ch. 35(O.); see also 2 Geo. V. ch. 17, sec. 31(O.); the mode of procedure in such a case being provided for in Con. Rules 960 to 970 and 1308. The provisions of the Devolution of Estates Act, 10 Edw. VII. ch. 56, are not applicable: the estate has been wound up by the executors; and the land has been conveyed by them to the infant, or to some one in trust for her: and the executors are not in any way parties to, or represented on, this application.

The application is supported by affidavits and by a written consent of the infant, a girl of nearly fifteen years of age; and it was said that applications had been granted in recent years upon such material; but that can hardly be, in the face of the procedure plainly prescribed in the Rules and enactment; notwithstanding the assent of the Official Guardian is given.

The statute, sec. 6, provides that the application shall be made in the name of the infant by her next friend or guardian. Con. Rule 963 provides that the petition shall be presented in the

name of the infant by her guardian, or by a person applying by the same petition to be appointed guardian as thereinafter provided. If there be any conflict in these provisions, the later enactment, the statute, prevails. The mother of the infant is one of her guardians appointed by the Surrogate Court, according to the affidavits filed; but she is not a party to the application in any way: and no explanation of her absence and silence is given.

Under the Rules, the consent of the infant, if of the age of fourteen years or upwards, to the application, is necessary, "unless the Court otherwise directs or allows."

Con. Rule 965 requires that the infant shall be produced before the Judge, or a Master, unless otherwise directed by the Judge.

Con. Rule 966 provides that, if the infant be above the age of fourteen years, he or she "shall be examined apart, by the Judge or officer before whom" he or she "is produced, upon the matter of the petition and as to" his or her "consent thereto."

There is no reason why the infant cannot very well attend before the Judge as the Rules provide; and there would be no excuse, that I can imagine, in this case, for dispensing with any part of the procedure so provided for. The wishes of the infant may have much weight; and in any case there ought to be an opportunity given to express them; none but weighty reasons should ever prevent, or indeed excuse, it.

Then, under Con. Rule 968, "the witnesses to verify the petition shall be examined viva voce before the Judge making the order, or before a Master of the Supreme Court, as to the matter of the petition, and the depositions so taken shall be stated to have been taken under this Rule." This, as I have intimated, has not been done, and is sought to be avoided.

The applicants must conform to the Rules in these respects; I know of no authority for absolving them; and, if there were, there is no good reason why there should be absolution in this case.

The application must stand over until the next sitting of the Court—London Weekly Court—and then the application must be proceeded with, in all respects, in conformity with the practice I have pointed out.

MEREDITH, C.J.C.P. MARCH 4TH, 1913.

RE EMPIRE ACCIDENT AND SURETY CO.

FAILL'S CASE.

Company—Winding-up—Shareholder—Liability as Contributory—Evidence—Onus—Dominion Incorporation—Provisions of Companies Clauses Act—Proxies—Pledgor and Pledgee.

Appeal by Faill against the ruling of MACBETH, Co.C.J., as Referee in a winding-up proceeding, that the appellant was liable as a shareholder of the company and properly on the list of contributories as such.

The appeal was heard by MEREDITH, C.J.C.P., at the London Weekly Court, on the 1st March, 1913.

G. G. McPherson, K.C., for the appellant.

J. O. Dromgole, for the liquidator.

MEREDITH, C.J.C.P.:—The grounds of the appeal are: (1) that the appellant never was a shareholder; and (2) that, if he were, it was in such a capacity that he was not personally liable to pay for the shares.

The evidence adduced before the Referee was not as full as it might have been, and as, under ordinary circumstances, it should have been. The appellant's testimony, perhaps from lack of memory, left much to be desired in the way of light upon the real circumstances of the case: and I cannot but think that more light might have been thrown upon the subject of the missing books and papers of the company. Leitch, who seems to have been practically the company, was not examined as a witness. There can be little doubt that, if he would, he could make quite plain all that is left in doubt as to the stock in question in this appeal. But he is said to be now living in Alberta: and it is added that the amounts in dispute are really so small, though nominally large, that, whatever the result, it might be unprofitable to go to any further expense, such as would be needed in procuring the further evidence I have alluded to; that a call of five per cent. is likely to be all that shall be needed for the satisfactory and complete winding-up of the company.

In support of the first ground of the appellant's contention,

he testified, but only in the half-hearted manner in which all of his testimony was given, that he never signed an application; never made an application for shares in the company; and that he never was a shareholder of the company; never became one.

Boles, the secretary-treasurer of the company, testified that he had spoken to the appellant about taking stock; and that, though he did not subscribe for him, there was an application on the usual form for 200 shares with the appellant's name signed to it; that it was pasted in the application-book of the company; that a certificate of ownership of the stock was issued by him to the appellant in accordance with the application; and that the appellant's name thereafter appeared, as holder of 200 shares, in the lists of the stockholders made under the requirements of the law.

It is objected that secondary evidence of the application was inadmissible. Though, as I have intimated, I should have preferred better evidence of the loss of the books and papers of the company, I am not prepared to say that the learned Referee erred in admitting the evidence; but, in truth, little turns upon the question, because the fact that the appellant was a holder of the 200 shares of stock is abundantly proved otherwise.

During the inquiry before the Referee, the certificate in the appellant's favour testified to by Boles was found among his papers in the hands of his banker: that might, of course, have happened without his knowledge, though when it was issued it was enclosed by Boles with a letter, addressed to the appellant, in these words: "I enclose herewith stock certificate No. 180, shewing $6,000 paid thereon." But, however that may be, the appellant, nearly two years after the date of his certificate, and over six weeks after the date of the letter with which the certificate was enclosed, signed a paper purporting to assign to Leitch the 200 shares of the company standing in his name in the books of the company; a fact which is quite conclusive against his contention, and his defective memory, that he never was a shareholder of the company.

Nor is that all: the assignment was not acted upon; and, a month after its date, the appellant gave to Leitch a power of attorney and proxy to vote for him upon his shares in the company; and the same thing was done again, about nine months later.

So that I can have no manner of doubt that the appellant was a shareholder of the company for the number of shares in

respect of which he appears upon the list of contributories; and that the onus of discharging himself from the liability which usually flows from the ownership of such shares rests upon him.

The company was created by ch. 118 of 3 Edw. VII. (D.), and by that enactment, sec. 11, the Companies Clauses Act, with some exceptions, is made applicable to it.

Under sec. 30 of that (latter) enactment, every shareholder of the company is liable, individually, to the creditors of the company, until the whole of his stock has been paid-up. But, under sec. 32, no person holding stock as an executor, administrator, curator, guardian, or trustee, is personally liable; the estate and funds in the lands of such persons are. And no person holding stock as collateral security is personally liable, but the person pledging the stock is: sec. 32.

Whilst it is quite clear that there must have been some secret agreement or understanding between the appellant and Leitch as to the stock in question, there is no sufficient evidence to bring the appellant within any of the exceptions from individual liability to which I have referred; and so he has not satisfied the onus of proof which, I have said, rests upon him.

His own testimony is quite too shadowy and uncertain to be the foundation of any legal rights in his favour; he might have made the situation quite clear by the evidence of Leitch, but he did not see fit to adduce it; and so it may fairly be taken that a disclosure of all the facts connected with the shares in question would not have helped him.

There is no evidence upon which it could rightly be found that Leitch is in any way liable to the company, or its creditors, upon the stock in question: there is no sufficient evidence that he ever had any legal or equitable right or title to it, except that which the assignment from the appellant to him may have given; and that assignment was never carried into effect, as the evidence shews, and the appellant's subsequent proxies make plain: proxies which make strongly against the appellant's contention and testimony that he never was a shareholder, as well as against his contention that he was a pledgee only, because it is the pledgor not the pledgee who has the right to represent the stock, and vote as shareholder: sec. 33.

The learned Referee was, I find, right in his conclusion. The appeal is dismissed with costs.

MEREDITH, C.J.C.P. MARCH 4TH, 1913.

RE EMPIRE ACCIDENT AND SURETY CO.

BARTON'S CASE.

Company—Winding-up — Shareholder — Liability as Contributory—Evidence—Onus—Receipt of Dividends—Directors.

Appeal by Barton's executors from the ruling of the Referee as in the previous case, argued at the same time and by the same counsel.

MEREDITH, C.J.C.P.:—The appeal in this case was argued with that in Faill's case, the evidence in the two cases having been taken together, and some of the facts being applicable alike to each case.

The appellant's contention is, that there was not sufficient evidence to warrant the finding of the Referee that Barton was a shareholder of the company; but, upon the evidence adduced before the Referee, it is impossible for me to give effect to that contention.

A certificate, dated the 1st June, 1905, that Barton was the holder of one hundred shares of the capital stock of the company, upon which $2,500 had been paid, was issued, and was produced by Barton's executors upon a subpœna, on the reference: and it was proved, upon the reference, that the executors had received two dividends from the company upon that one hundred shares of stock in the company: so that a case for putting the executors upon the list was quite made out, without taking into consideration the evidence of Boles, and the fact that Barton's name appears upon the copy of the list of shareholders as the owner of 75 and 25 shares; and that case was not contradicted or met in any way in evidence by the respondents.

The appeal must be dismissed; the respondent is entitled to his costs of it from the appellants.

LATCHFORD, J. MARCH 10TH, 1913.

RE NICHOLLS, HALL v. WILDMAN.

Executors — Liability for Loss on Investment — Acting "Honestly and Reasonably"—62 Vict. ch. 15, sec. 1—1 Geo. V. ch. 26, sec. 33—Limitation of Actions—10 Edw. VII. ch. 34, sec. 47—Adminstration Order Obtained by Executors—"Action"—Account—Reference—Reopening — Executors' Remuneration—Solicitors' Commission and Disbursements—Con. Rule 1146—Costs.

Appeal by the defendant Marianna Wildman, a devisee under the will of the late Ann Nicholls, from the report of the Local Master at Peterborough, upon a reference under an order for administration taken out by the executors, Hall and Innes, declaring that the executors were not liable to indemnify the appellant against a judgment obtained by the Royal Trust Company as liquidators of the Ontario Bank, and dismissing her claim that the executors should account to her for $200 which they retained from her in 1881 to meet possible contingencies, and as to which the learned Master held her claim barred by sec. 47, sub-sec. 2, of 10 Edw. VII. ch. 34. The appellant also asked that the commission and disbursements of the executors' solicitors as fixed by the report should be disallowed.

H. T. Beck, for the appellant.
G. H. Watson, K.C., and L. M. Hayes, K.C., for the executors.
G. B. Strathy, for the Royal Trust Company.

LATCHFORD, J.:—The appeal upon the first point fails. In everything relating to the Ontario Bank shares which came into their hands as an investment made by their testatrix, the executors acted "honestly and reasonably," in the exercise of the discretion expressly conferred upon them by the will, and "ought fairly to be excused." They are, therefore, relieved from personal liability for the loss which the apellant has suffered: 62 Vict. ch. 15, sec. 1.

I do not wish to be understood as concurring in the opinion that they are also relieved under 1 Geo. V. ch. 26, sec. 33. The latter enactment has, I think, no application to the present case.

Nor can I agree that the right of the appellant to call the executors to account for money admittedly held by them in 1881,

for her, is barred by 10 Edw. VII. ch. 34, sec. 47. The limitations provided by that enactment apply only to an *action* against a trustee. They have, in my opinion, no application to a case like this, where the trustees themselves come into Court, obtain an order for the administration of the estate in their hands, and upon the reference file an account establishing that at one time they held moneys to which a devisee of their testatrix was entitled. It may well be, as suggested upon the argument, that not only the $200 to which the appellant was apparently entitled, but much more, was properly expended by the executors. They are, however, under the order which they themselves obtained, liable, in my opinion, to account to her for the $200 and for her share as a residuary legatee in so much of the items of $600 and $348.48 as may not have been expended in administering the estate. On these matters, the appellant may have the reference reopened at her risk. In that event, the executors, who have made no charge for their administration, should be at liberty to claim a reasonable commission. If any moneys are found payable to the appellant, she is to have her costs of the reference back; otherwise she is to pay such costs.

In other respects the report appealed from is confirmed. The direction as to commission and disbursements made by the Master is quite proper under Con. Rule 1146.

The only order I make as to costs is, that the executors are to have their costs of this application—including the costs of the trust company, which I fix at $10 and direct the executors to pay—out of the fund in their hands, after payment of the judgment of the trust company.

LENNOX, J. MARCH 10TH, 1913.

WISHART v. BOND.

Vendor and Purchaser—Misrepresentation as to Depth of City Lot Sold and Conveyed—Fraud—Motive—"More or Less"—Executed Contract—Rights of Third Parties—Remedy in Damages—Costs.

Action for specific performance of an agreement for the sale of a house and lot in the city of Toronto by the defendant to the plaintiff, or for damages.

A. F. Lobb, K.C., for the plaintiff.
A. R. Clute, for the defendant.

LENNOX, J.:—In the evidence, a Mrs. Coutts is spoken of as being the owner of or in occupation of lot 20 on the west side of Condor avenue, Toronto. On the 1st May, 1912, the defendant procured a conveyance of all the land between the southerly boundary of the Coutts property and Hunter street, that is to say, lots 21, 22, and 23, and the part north of Hunter street of 24, west of Condor avenue—a block of land having a depth from south to north, that is, from Hunter street to the Coutts property, of 91 feet and 7 inches.

Before and at the time of the negotiations and agreement between the plaintiff and defendant, the boundary line betwen the property of the defendant and the Coutts property was fairly well defined upon the ground by the Coutts building—a workshop at the north-west corner of the defendant's property—and, if not by a boundary fence, at all events by a line of old fence posts.

The defendant subdivided the western portion of lots 21, 22, 23, and 24 into four narrow lots, running north and south, having a frontage of about 18 feet each on Hunter street. These lots, if run north to the northern boundary of the defendant's land, would have a depth of 90 feet—or, to be exact, 91 feet 7 inches. On these lots the defendant erected two pairs of semi-detached dwelling-houses, the street numbers being 50, 52, 54, and 56. No. 56 is the one in question in this suit.

The defendant employed Woolgar and Atchison to sell No. 56 for him. He instructed them as to its location and boundaries; and, amongst other things, that it had a depth of 90 feet from south to north. Manifestly he also pointed out to them that the northern boundary would be the southern boundary of the Coutts lot.

The defendant's agents, in pursuance of these instructions, negotiated for the sale of this property to the plaintiff. They represented to the plaintiff that it was a good deep lot; shewed him where the northern boundary ran; and, to assure him that he would have a depth of 90 feet, they paced it off from Hunter street to the northern boundary of the defendant's land as hereinbefore described. Upon this representation and upon this basis, the plaintiff agreed to purchase this specific parcel of land for $2,500. There was then an uncompleted building upon the property, which the defendant was to complete.

On the 31st July, 1912, the defendant's agents drew up an offer for purchase of "street number 56, having a frontage of about 17.6 feet more or less by a depth of about 90 feet more or less," on Hunter street; and this offer having, before the plaintiff signed it, been submitted to the defendant by his agent, H. E. Woolgar, was read over, approved of, and accepted in writing under seal by the defendant; and the offer was thereupon executed under seal by the plaintiff.

The defendant conveyed to the plaintiff a lot or parcel of land having a depth of 75 feet only; and a mortgage was given back for a balance of purchase-money. The plaintiff, at the time his solicitor closed the transaction, knew nothing whatever of the shortage. The plaintiff's solicitor, by the exercise of diligence, could have detected the discrepancy.

The defendant has sold and assigned the mortgage taken from the plaintiff, and has conveyed to his son the northern 16 feet 7 inches of lot 21, pointed out to the plaintiff, which he expected to get, and which he was to get under the written agreement.

The defendant cannot, and practically does not, dispute the facts. He in effect says, "You cannot make me and I won't do anything." . . . The evidence of the defendant in Court was not calculated to leave a good impression. . . .

"More or less" tied the purchaser to skimp measurement in Wilson Lumber Co. v. Simpson, 22 O.L.R. 452, 23 O.L.R. 253. Why? Because the purchaser bargained for a specific lot, with boundaries visible as pointed out, and he took his chances as to how it would measure out—and so did the vendor. Here, too, the contract is for "about ninety feet, more or less;" and the plaintiff had a right to get 91 feet 7 inches. Why? On the same principle as in the Simpson case; because there was a specific plot pointed out, with a northern boundary pointed out, and stepped off as well. Up to that boundary, be it more or less than 90 feet, is what the plaintiff was entitled to call for, and what the defendant was bound to give, under the agreement. . . .

I accept the plaintiff's evidence that he did not actually perceive that he was being cut down to 75 feet until the time when he began a vigorous protest; and he was not bound to be on the alert, to suspect the defendant, or to find out all he might have found out by vigilance—Redgrave v. Hurd, 20 Ch. D. 1, at pp. 14 and 21—if by the defendant's fraudulently false statements he was, in fact, induced to enter into the contract, believing the representations to be true. And it is no answer

that by diligence he might have discovered the fraud earlier: Rawlins v. Wickham, 3 DeG. & J. 304.

It is not disputed that there was a representation by the defendant through his agents, and again by the defendant when he signed the contract and sent it to the plaintiff to be signed, that this house number 56 was on a 90-foot lot and that the northern boundary was the northern boundary of 21 Condor avenue. That the depth was material is manifest; and that it was material to the plaintiff, and induced him to contract, is distinctly sworn. That the conditions of to-day were the conditions at the time of the contract, as to the actual subdivision of this property, is shewn by the plans, abstract, and mortgages referred to. That the representations were false is also beyond dispute; in fact, there is neither a denial nor an explanation.

Was the representation fraudulently, that is, knowingly or consciously, made, and without believing it to be true? I have no doubt of it. There is no explanation attempted; but, if there were, it would invite rigorous scrutiny. The man who cut and carved the original lots, and had already mortgaged the parcels separately, must be taken to know what he was doing when he instructed the agents and signed the agreement. It would be dangerous if men could easily explain away an act such as this.

What motive could he have? Gain, I suppose; but motive is immaterial: Derry v. Peek, 14 App. Cas. 337, at p. 365; Foster v. Charles, 7 Bing. 105. I do not know the motive, or rather the method, by which the defendant hoped to succeed. The house was not nearly finished, but the deed was ready the day after the contract was signed. Difficulties arose which kept the matter open for some time. In the end the defendant stood behind the convenient bulwark of "executed contract" and the two-edged sword of "more or less."

The rights of third parties have intervened, so that the plaintiff's relief will be in the way of damages; and on this branch of the case, I think, $200 will be a fair award. The house has not been finished according to agreement. I will allow the plaintiff $25 under this heading.

There will be judgment for the plaintiff for $225, with costs according to the tariff of the Ontario Supreme Court.

BRITTON, J. MARCH 10TH, 1913.

NEY v. NEY.

Husband and Wife—Alimony—Wife Leaving Husband's House —Offer to Return—Husband's Refusal to Receive her back—Unfounded Charges of Misconduct — Quantum of Alimony—Wife's Ability to Maintain herself—Custody of Children—Paternal Right—Welfare.

Action for alimony.

L. F. Heyd, K.C., for the plaintiff.
T. C. Robinette, K.C., for the defendant.

BRITTON, J.:—The plaintiff and defendant were married at Toronto on the 5th May, 1906, lived together as man and wife, and two children—a boy and girl—were born. Almost from the first, the married life of these parties was not a happy one. The plaintiff in her evidence charges the defendant with cruelty and abusive language; but in her statement of claim the charge is that of abandoning the plaintiff and, without just cause, refusing to live with and maintain her. . . .

The defendant alleges that the plaintiff was of a peculiar disposition, and given to ungovernable fits of temper; that at times she was kind, and at other times abusive, to the children. The plaintiff admitted striking the defendant at least on one occasion, but said that she was provoked to do so by the defendant. There was a great deal of quarrelling between the two, and not wholly the fault of either one. . . .

On the 10th August, 1909, the defendant was due to return home from his work between five and six o'clock in the afternoon. Just before that time, the plaintiff, having given the children their supper, prepared to leave the house. According to her own story, she left the children in a back room, she going to a front room; and, when her husband entered by the back door, she went out of the house by the front door. The plaintiff told a neighbour that she intended to leave her husband. She went to a friend's house and remained away all night. The defendant, not finding the plaintiff, inquired of the neighbour, and got the information that the plaintiff had gone. He did not appear to be at all agitated or concerned, but simply remained all night with his children, and the next morning went with

them to his father's home—both father and mother living not far away.

About 9 o'clock or a little later the following morning, the plaintiff returned to the house, saw neither husband nor children, and she, in turn, did not seem to care about their absence. The plaintiff remained in the house, making her home there, and making no request to or claim upon the defendant. After a little, the plaintiff moved out, stored the furniture . . . and, later on, sold it, not accounting to the defendant for the proceeds. The defendant did not ask her to account.

Ever since, the plaintiff has maintained herself by her work as a dressmaker, and has, apparently, been very comfortable and financially successful. While the plaintiff was living alone, the defendant made no offer to assist her, and did nothing for her support. For a considerable time after the plaintiff left the house, she had no communication with her husband, and made no effort to see him or speak to him.

In 1910, it is said, the plaintiff preferred a charge against the defendant for non-support; but nothing came of it.

In 1911 on more than one occasion, the plaintiff desired to see the children, but made no request to the defendant to take her back or for support.

This action was commenced on the 23rd January, 1912, but was not brought to trial until the 6th February last.

In the action the plaintiff complains that the defendant has improperly kept the children from her, and avers that she has done nothing to disentitle her to the custody of the children.

On the 30th October, 1912, the defendant filed his statement of defence. In it he claims the custody and control of the children. After the filing of the statement of defence, and on or about the 31st October, 1912, the plaintiff . . . captured her son Marshall, who has remained in her custody ever since. The defendant thereupon obtained a writ of habeas corpus, addressed to his wife, to bring up the body of the child Marshall. On the 22nd November, 1912, the application of the defendant came before Mr. Justice Middleton in Chambers, and it was ordered that the application be referred to the Judge at the trial of the present action. . . .

If the matter had rested as it was on and after the 10th August, 1909, until the commencement of this action, the question of the plaintiff's right to alimony would have been somewhat difficult, in view of the many decisions in actions for alimony.

The plaintiff voluntarily left her husband's house, in the circumstances mentioned, evidently intending that the defendant should believe that she did not intend to return. She says she only intended to scare the defendant; but the defendant took her at her word. Then the plaintiff has not been in need of assistance from her husband, and has not asked for it. It would be difficult, in these circumstances, to say that the defendant was living apart from the plaintiff without her consent or against her wish.

The case, however, does not rest there. The plaintiff—whether she is to any extent penitent or not, or whether for the sake of her children—now avows that she was always willing to live with the defendant: and, when giving her evidence at the trial, she said that she was willing to return to her husband. It did appear a somewhat reluctant consent, but it was consent, all the same.

The defendant, in his statement of defence, charges the plaintiff with want of chastity, and names a man with whom the plaintiff "had formed an improper intimacy." No evidence was offered to sustain this allegation. The plaintiff denied it.

In these circumstances, with such a charge not withdrawn and not proved, the plaintiff would be entitled to alimony without a willingness to return to her husband. Even if the defendant offered to take the plaintiff back, still persisting in the unproved charges, the plaintiff would be entitled to alimony, and any offer on her part to return would be dispensed with. Ferris v. Ferris, 7 O.R. 496, although reported mainly on the question of costs, bears out my view.

But here the defendant is not willing to take the plaintiff back. He absolutely refuses to do so. He heard his wife's evidence as to her innocence. He was not able to produce any evidence as to her guilt; and yet he refuses. There is here the plaintiff's unqualified consent to return to her husband, and the defendant's unqualified refusal to receive her.

In these circumstances, the plaintiff is entitled to judgment for alimony, with costs.

As to the amount, the plaintiff is not in need; upon her own statement she has earned money and saved it, and can continue to do so. The amount should not be large; and I fix it, until otherwise ordered, at $4 a week.

As to the custody of the children, I am of opinion that in this case the paternal right must prevail. The boy, Marshall, was born on the 6th December, 1906, and so is over six years of age. The girl, Dorothy, was born on the 1st July, 1908, and is

four and a half years old. It is important that these children should, if possible, be kept together and in the house and home where the defendant has his residence. The defendant must so arrange that the children shall be so kept by him. He is able to do it; I believe him quite sincere in his desire to have the children and to maintain and educate them for their good.

I do not doubt the love of the plaintiff for her children; but she is not, at present, in such a home of her own as is necessary for the welfare of these children. To secure such a home and maintain it—as would be necessary—would trench upon the plaintiff's resources to such an extent as greatly to embarrass her. Even with the sacrifices the plaintiff would be willing to make, the children could not be as well cared for with her, working as she must to maintain them, as in a properly organised household, where the defendant would be with them during reasonable hours, apart from his working-time.

Then it must not be forgotten that the plaintiff took the choice of abandoning these children, when much younger than at present, to the defendant. Whether to "scare" her husband or not, the act of the 10th August, 1909, was not a kind or motherly one.

On the other hand, I have considered the argument that the defendant admittedly was convicted at Whitby of an offence which was greatly to his discredit. The defendant says that he was improperly convicted. However that is, I have considered the case as if the offence was committed. This is a painful case; both parties are to some extent under a cloud. Apart from this offence, the defendant's reputation and character are good.

I do not think that the husband, by anything he has done, "has abandoned his right" to the custody of his children.

I have endeavoured to consider the rights and feelings of the mother, as well as of the father, the welfare of the children, their surroundings, the chances for education and improvement —in short, I have looked at this case having in mind the cases cited and other reported cases; and my conclusion is, that the mother must restore the boy to the father; and the order will be that the father will have the custody of the children.

The order will make provision for the access of the mother to the children, so that she may see them at reasonable intervals, and at convenient times.

The children will be maintained by their father in a home where, together, they and their father will reside.

Subject to what may be said in settling the terms of the

order, I think the plaintiff's visits to the children should not be more frequent than once every three weeks, upon twenty-four hours' previous notice, and that the visits should be in the afternoon between 2 and 5.

Full provision will be made in the order and care will be taken to prevent anything being done that will not be for the good of the children.

There will be no costs to either party of the proceedings apart from the alimony action.

MEREDITH, C.J.C.P. MARCH 12TH, 1913.

*HARRIS v. ELLIOTT.

Pleading—Statement of Claim—Motion to Strike out, as Disclosing no Reasonable Cause of Action—Forum—Con. Rule 261—Practice — Excision of Pleading—Con. Rule 298—Raising Point of Law Equivalent to Demurrer—Con. Rule 269 — Claim upon Wager — Enforcement — Illegality at Common Law—Betting on Parliamentary Election—Dismissal of Action—Costs.

Motion by the defendant, under Con. Rule 261, for an order striking out the statement of claim and dismissing the action, on the ground that the statement of claim disclosed no reasonable cause of action, and that the action was frivolous and vexatious.

G. S. Hodgson, for the defendant.
Grayson Smith, for the plaintiff.

MEREDITH, C.J.C.P.:—Consolidated Rule 261 being relied upon as authorising such an order as is asked, the inherent jurisdiction of the Court over all procedure in it is not invoked.

Mr. Smith objects to the motion being made in Court, urging that it should, if regularly made, be made at Chambers; and it is proper that that question of practice should be first considered, even though it may, as to the parties to this action, be one affecting costs only.

The power conferred by the Rule relied upon is conferred upon a Judge of the High Court only, not the Court or a Judge; and so the power of the Master in Chambers is ex-

*To be reported in the Ontario Law Reports.

cluded: Con. Rule 42 (16); although, under the Rule in England from which ours was taken, a Master has such power; and so the application ought to be made at Chambers there.

But the practice here seems to have been, invariably, to hear the motion in Court: a practice doubtless arising on the ruling of Street, J., in the case of Knapp v. Carley, 7 O.L.R. 409.

. . .

That practice ought not to be disturbed by me now, whatever views I might have as to it. Changes are frequently made in the Consolidated Rules; and, if a change in this respect be desirable, it can easily be effected. I treat the application under Con. Rule 261 as a Court motion.

But I am inclined to think that effect ought not to be given to it in the way the parties upon the argument of the motion desired, that is, as a point of law arising on the pleadings; that, more regularly, the case should come under the provisions of Rule 259, which provides for a demurrer in substance, while abolishing a demurrer in name.

The statement of claim was objectionable, and might properly, I think, have been found fault with under Rule 298. The practice, which has done away with great precision, and has allowed much laxity, in pleading, was not intended to permit pleadings to be used for the purpose of disguising the nature of a claim or a defence, nor even for giving as little information as possible regarding it. As long as pleadings are required, they should be made as useful as possible in disclosing the substance of the claim or defence; and, when they are used for any other purpose, there ought to be no hesitation in having them put to their proper uses at the cost of him who misuses them, or, in the alternative, struck out.

But Mr. Smith now says that the claim is for the amount of a bet on a parliamentary election, won by the plaintiff from the defendant; and upon that statement the argument proceeded, and it was argued that the motion is to be dealt with as a point of law properly raised; that is, whether such a claim can be enforced in the Courts of this Province.

Early in my professional experience, the very question was raised before and considered by a careful and able County Court Judge, who decided that such a bet was invalid at common law; and I have always understod the law to be, and to be administered in this Province, in accordance with such ruling: a view of the law which, apparently, was accepted as accurate by the Supreme Court of Canada in deciding the case of Walsh v. Trebilcock, 23 S.C.R. 279.

The leading case upon the subject is Allen v. Hearn, 1 T.R. 56. . . .

The reasons thus set out are none the less, but indeed may be the more, applicable in a case such as this, in which the bet is not upon the result in one constituency, but in all.

So far as I am aware, there has never been any judgment in the Courts of England or of this Province in conflict with the case of Allen v. Hearn.

Mr. Smith's contention that the bet is enforceable because legislation in this Province lagged long behind Imperial legislation, in making bets generally unenforceable, so that, at the times when the bet in question was made and won, such Imperial legislation had not been adopted in this Province: see 2 Geo. V. ch. 56(O.), and R.S.O., vol. 3, ch. 329; is beside the mark. The want of legislation here making all betting invalid, at the times mentioned, had not the effect of making good that which at common law was bad. The bet in question is not enforceable, quite apart from any legislation on the subject.

It is, therefore, not necessary to consider whether the bet would be void at law under the provisions of sec. 279 of ch. 6, R.S.C. 1906; or unenforceable under 2 Geo. V. ch. 56, because this action was not brought until after that enactment came into force.

My conclusion is, that the plaintiff cannot recover, in the Courts of this Province, upon a claim which he now admits is for the amount of a bet made and won in this Province on the result of a parliamentary election in this Dominion; and so the action will be dismissed, but without costs. The motion as made would not have succeeded to that extent; at the most the plaintiff would have been required to state his case plainly or have his pleading struck out, which relief might have been had on a Chambers motion under Con. Rule 298; and there are other reasons why my discretion on the question of costs should be exercised as I have exercised it.

MEREDITH, C.J.C.P. MARCH 14TH, 1913.

BROWN v. GRAND TRUNK R.W. CO.

Damages—Apportionment—Fatal Accidents Act—Workmen's Compensation for Injuries Act—Widow of Deceased Person—Rights of Infant Step-children—Basis of Division—Allowance for Maintenance of Infants.

Action for damages for the death of the plaintiff's husband.

R. U. McPherson, for the plaintiff.
D. L. McCarthy, K.C., for the defendants.
F. W. Harcourt, K.C., for the infants.

MEREDITH, C.J.C.P.:—This action came on for trial at the Hastings assizes; and, after a jury had been called but before they were sworn, a compromise was effected between the parties out of Court, and judgment was afterwards directed to be entered, in accordance with its terms, for the plaintiff, for $1,500 damages.

The action was brought by the plaintiff as administratrix of her deceased husband, and as his widow, for damages caused by his death, through, it was alleged, the negligence of the defendants; and in the pleadings it was stated that there were no children, the claim being made altogether in the widow's interests. But, after judgment had been directed to be entered in accordance with consent minutes filed, it was stated that there really were four step-children—children of the plaintiff by a former husband—whose right to damages should be taken into consideration.

The plaintiff was thereupon called and heard at length on the subject of the disposition of the damages; and it was thereafter directed that all such questions should stand over for further consideration before me at Chambers, together with an application to be made for an allowance to the mother, out of any part of the damages that might be awarded to the children, for their maintenance, after notice to the Official Guardian, who should represent them; and that has now been done.

The widow is 32 years of age, and the children, 6, 8, 9, and 11, and they all reside with and are supported by her at Belleville. Neither she nor any of them has any other means or any property.

There is nothing to indicate whether the liability of the defendants was a liability directly under the Fatal Accidents Act, 1 Geo. V. ch. 33, or only under the Workmen's Compensation for Injuries enactments; and so there would not be sufficient ground for restricting the rights of the parties to those conferred by the latter enactments, if they be more restricted than the other as to the persons who may recover damages; but I cannot think they are. Under the Workmen's Compensation for Injuries enactments, "any person entitled in case of death shall have the same right of compensation as if the workman had not been a workman . . . " The same right of compensation must mean that which the Fatal Accidents Act alone confers; and, therefore, the provision that the amount recovered "may . . . be divided between the wife, husband, parent, and child" must mean the wife, husband, parent, and child provided for in that enactment; and "child" there includes step-son and step-daughter.

There is no doubt of my power to apportion the damages; that is expressly provided for in the Fatal Accidents Act, sec. 9; but the difficulty of so doing is increased by the fact that the amount recovered is an arbitrary sum.

Different methods have been adopted in dividing money thus recovered: in some cases statutes of distributions of deceased's estates have been taken as the guide, and indeed in some States seem to have been made, by legislation, to govern; but, except where they are made by legislation to rule, they cannot be the best guide; and they would be helpless in this case. That which the law says ought to be done with the property of an intestate is obviously no very strong evidence of that which he would have done with his means if he had not been killed. The true guide must be the actual pecuniary loss of each of the claimants.

The only damages which can be recovered, in such an action as this, are reasonable damages, for pecuniary loss only, sustained by persons coming within the provisions of the Acts giving such a right of action—limited, in some cases, to a maximum fixed amount.

Accordingly, there seem to me to be but two ways in which an apportionment can rightly be made in cases such as this: first, by finding the amount of pecuniary damages which each of the claimants has really sustained, and, if the whole be more or less than the fixed sums, awarding to each his proper proportion; or, second, by finding the proportion which the right of

each bears to the others, and dividing the amount available accordingly; and the latter method is better applicable than the former to the circumstances of this case.

The case would be quite different, in the apportionment of the damages, if the children were the deceased's own. It is improbable that, had he lived, they would have fared, in a pecuniary sense, from his bounty, as they would, by reason of his duty as well as his bounty, had they been his own; and it is quite probable that any of such benefits as they might have received through his earnings would largely have been only indirectly through his wife, their mother.

There is, I think, enough evidence now before me to warrant a finding that the pecuniary losses of the children altogether are equal to no more than one-half of that of the widow.

The children's shares of the damages I apportion among them as follows: the youngest six, the next eight, the next, nine, and the oldest eleven, all thirty-third parts of the fund. The method I adopt in such apportionment, in the circumstances of this case, is: a fixed age applicable to the four when forisfamiliation is probable, and when, at all events, each should be able, and, if the step-father had lived, would probably be obliged, to fare for himself and herself; then allow to each an equal share each year, from the death of the step-father until the fixed age is reached. Taking $500 as the amount available, the shares in money would be about $162, $140, $106, and $92.

Then, in regard to the application for payments to the mother out of the children's shares: the best plan that I can suggest, in the interests of mother and children, is, that the whole amount recovered in the action be paid into Court to their credit, and that half-yearly sums of say $75 be paid out to the widow for their joint support, benefit, and welfare until the fund is exhausted, or until other order shall be made; the mother to satisfy the Official Guardian that all money so received has been so applied before each half-yearly payment shall be made; with liberty to any one interested to apply to vary the order, at any time, should circumstances change in any material way.

If the widow be unwilling to accept this plan, her two-thirds of the net proceeds must, of course, be paid to her when demanded; but the infants' shares must be paid into Court to their credit, in the proportions I have mentioned; and no order will be made at present for payment out of any part of it; it will be better to wait for six months or so to test such method as the mother may see fit to adopt for their and her maintenance and welfare.

HONSINGER v. HONSINGER—LENNOX, J.—MARCH 10.

Will—Construction—Provisions for Maintenance of Widow—Charge on Land Devised to Son—Estate of Mortgagee Bound by Charge.]—Action by Esther Honsinger, widow of John Honsinger, to recover from George Honsinger, a son of the deceased, the sums and allowances charged in favour of the plaintiff on the land devised to the defendant George Honsinger by his father, and for a declaration that the plaintiff's claim was a charge on the land in priority to all estates and interests of the defendants in the land. The defendant Small was a mortgagee of the land, under a mortgage from the his co-defendant. Counsel for the defendant Honsinger asked at the trial for leave to plead the Statute of Limitations, and leave was granted. The learned Judge referred briefly to the facts and the provisions of the will of John Honsinger, and said that the plaintiff was entitled to judgment for $50 deposited in a bank and $130 on a promissory note, with interest; and, under paragraph 3 of the will, the defendant Honsinger should pay the plaintiff $100 a year for maintenance, and her expenses for medicine and medical attendance, not exceeding $25; he must also furnish her with wood if and while she resided in the house given her by paragraph 2 of the will; and there should be a declaration that these allowances were a charge upon the land and bound the estate of the defendant Small; the $100 for maintenance to run from the date of the writ and be paid half-yearly. J. C. Haight, for the plaintiff. N. Jeffrey, for the defendant George Honsinger. No one appeared for the defendant Small.

JARVIS v. LAMB—MASTER IN CHAMBERS—MARCH 11.

Discovery—Production of Documents—Motion for Better Affidavit from Defendant Company—Dealing in Shares—Pleading—Contract—Grounds for Motion.]—The plaintiff's claim arose out of a purchase of shares of mining stock; he said that he was induced to buy in May, 1911, by the untrue representations of some of the defendants, the agents or officers of the company, also a defendant. The president of the company was examined for discovery on the 8th May, 1912. On the 28th February, 1913, the plaintiff moved for a further affidavit on production by the defendant company. No reason was given for the delay in moving or for the leisurely progress of the action

in other respects. The motion was supported by an affidavit of the plaintiff, making exhibits of the pleadings, and stating that, in his opinion, certain contracts existed between the company and S. T. Madden or others for the sale of treasury shares of the company, as would be shewn by the entries in the company's books, and that these contracts formed the basis of the manipulations of the stock of which he complained, but which in the statement of claim were charged as made by the co-defendants, who denied all connection with the matter. The plaintiff also relied on the examination of the president. The Master said that, on reading the whole material, there did not seem to be any ground for making the order asked for. The president admitted the existence of a contract on the 17th May, 1911, with some one (but not with any of the defendants) for the sale of stock of the company; but he said that this had nothing to do with what was called "supporting the market," nor was that in any way attempted. He had not the contract with him then. He was not asked with whom it was made, nor was he asked to produce it, nor was the examination adjourned with that object. As the pleadings stood, there was no ground for the order asked for. What is necessary for that purposes is stated in Bray's Digest of Discovery, pp. 10 and 26, cited in Ramsay v. Toronto R.W. Co., ante 420. Here the whole of the allegations of the plaintiff were denied, and particularly the alleged manipulation of the market for the stock in question under an agreement for that purpose or otherwise howsoever. Motion dismissed, with costs to the defendants in any event. Grant Cooper, for the plaintiff. W. D. McPherson, K.C., for the defendants.

BISHOP CONSTRUCTION CO. v. CITY OF PETERBOROUGH—MASTER IN CHAMBERS—MARCH 14.

Security for Costs—Action by Company—Winding-up in another Province — Amount of Security — Costs of Motion.]—Motion by the defendants for an order requiring the plaintiff company to give security for costs. The action was to recover from the Corporation of the City of Peterborough $23,524.94 for extra work upon a dam constructed by the plaintiff company under a contract with the defendant corporation. The action was begun in April, 1912, and in September, 1912, the Water Commissioners for the City of Peterborough were added as defendants. Shortly after that, the plaintiff company, having its

head office in the Province of Quebec, went into liquidation there. The defendants did not hear of this until February, 1913, and then launched this motion. The Master distinguished Provincial Assurance Co. v. Gooderham, 7 P.R. 283; and, following Toronto Cream and Butter Co. v. Crown Bank, 9 O.W.R. 718, held that the defendants were entitled to security. As to the amount he referred to Stow v. Currie, 1 O.W.N. 418, 458, 20 O.L.R. 353, and directed that the plaintiff company should give a bond for $1,000 or pay $500 into Court—which would render a further order for security unnecessary. Costs of the motion to be costs in the cause to the defendants, owing to delay in the prosecution of the action. Grayson Smith, for the defendants. Tisdall (C. & H. D. Gamble), for the plaintiff company.

MACDONALD v. TORONTO R.W. CO.—LENNOX, J.—MARCH 14.

Damages—Quantum—Injury to Motor-car in Collision—Negligence.]—Action by a physician for damages for injury to his motor-car by a collision with a tram-car of the defendants, owing to the defendants' negligence. The action was tried without a jury. The learned Judge gave a written opinion dealing solely with the question of the quantum of the plaintiff's damages. Judgment for the plaintiff for $900, with costs on the scale of the Supreme Court of Ontario; the $250 paid into Court by the defendants to be paid out to the plaintiff and applied upon the judgment. C. A. Masten, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendants.

TAYLOR v. GAGE—FALCONBRIDGE, C.J.K.B.—MARCH 14.

Highway—Excavation of Earth—Injury to Adjoining Land—Deprivation of Access—Absence of Municipal By-law—Injunction—Damages—Reference.]—Action by a farmer in the township of Saltfleet against a neighbouring farmer for damages for the excavation and carrying away by the defendant of earth from the road between the two farms, and for an injunction. The learned Chief Justice said that no by-law was passed by the township council authorising the defendant to do the work complained of. There was not even an agreement duly signed or executed between the defendant and the township corporation. There was only what was termed a meeting of

council on the ground, when a verbal resolution was put and declared to be carried. The action was not against the township corporation, and the arbitration clauses of the Municipal Act had no application. The plaintiff had suffered and would suffer damage by deprivation of access and injury to fruit trees by excessive drainage. But (especially in view of the fact that the plaintiff's fence seemed to be 23 or more feet on the road allowance), the question of damage, if any, should form the subject of a reference to the Master. Some witnesses swore that the value of the plaintiff's property had been enhanced by what the defendant had done. Judgment for the plaintiff, with an injunction restraining the defendant from further excavating or removing earth. All questions of costs and further directions reserved until after the Master's report. G. S. Kerr, K.C., and G. C. Thomson, for the plaintiff. W. T. Evans and S. H. Slater, for the defendant.

EAGLE v. MEADE—BRITTON, J.—MARCH 15.

Master and Servant—Injury to Servant—Negligence—Common Law Liability—Workmen's Compensation for Injuries Act—Accident—Evidence.] — Action for damages for injuries sustained by the plaintiff by reason of the defendant's negligence, as alleged. The plaintiff and one William H. Meade were both in the employ of the defendant, who carried on a livery and cartage business in Toronto. On the 8th September, 1912, William H. Meade told the plaintiff to go into the stable and start bedding down the horses. William said that this direction was as to the west stable. After the plaintiff got through in the west stable, he went to the east stable, and William knew, before the accident, that the plaintiff was in the east stable. The plaintiff was at work in rear of a stall, next to the one occupied by one of the defendant's horses. William H. Meade went into the last-mentioned stall, intending to unloose the horse and take him to water. While he was in the act of doing this, and had the knot partly or wholly untied, the horse stepped back, pulling his halter-rope completely away from the hitching-place, thus allowing him to back far enough to step against or upon the plaintiff, which he did, breaking the latter's leg. The trial commenced with a jury. At the close of the plaintiff's case, the defendant's counsel moved for a nonsuit. The learned Judge was of opinion that the plaintiff could not succeed, but reserved

his decision. The defendant called witnesses. At the close of the evidence, counsel for the defendant again asked for a dismissal of the action, but the learned Judge again reserved judgment, leaving it to the jury, in case there was any evidence; and the jury failed to agree. After further consideration, the Judge now rules that there was no evidence of negligence to submit to the jury. The horse was a quiet animal; there was no reason to suppose that the plaintiff would be in a position where he could be hurt by the horse backing out of his stall; and there was no reason to suppose that the horse, if loose, by accident or design would do any injury to any one working in the stable. The plaintiff could not recover at common law. The negligence, if any, was that of William, a fellow-servant of the plaintiff. Nor could the plaintiff recover under the Workmen's Compensation for Injuries Act, for, even if William had any superintendence intrusted to him, it could not be said that his negligence was, or that the accident happened, whilst in the exercise of such superintendence. It could not be said that the injury resulted from the plaintiff's having conformed to the orders or directions of any person to whose orders the plaintiff was bound to conform. The injury to the plaintiff was a mere accident, for which, in the circumstances, no one was answerable in damages. Action dismissed without costs. J. M. Godfrey, for the plaintiff. G. C. Campbell, for the defendant.

BECKMAN v. WALLACE—FALCONBRIDGE, C.J.K.B.—MARCH 15.

Vendor and Purchaser—Contract for Sale of Land—Refusal to Decree Specific Performance—Costs.]—Action for specific performance of an agreement for the sale by the plaintiff to the defendant of a house and lot in the city of Toronto. The learned Chief Justice said that the admitted circumstances of the case were such as to deprive the plaintiff of the equitable right to specific performance. But there were faults both of temper and of judgment on both sides, and some of the defendant's difficulties were of her own invention. She said that she was still satisfied with the price; and there was no reason why the parties might not now agree, with the kind assistance of their respective solicitors, to carry out the contract. Therefore, while the action was dismissed, it was dismissed without costs. George Wilkie, for the plaintiff. C. S. MacInnes, K.C., for the defendant.