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HON. MR. JUSTICE RIDDELL. NOVEMBER 4TH, 1912.

TORONTO NON-JURY.

LONG v. SMILEY.

4 O. W. N. 229.

Brokers—Conversion of Mining Shares—Two County Court Actions and One High Court Action—By Consent, Tried Together in High Court—Method of Dealing with Stock—No Evidence of Conversion.

Three actions for the return of moneys entrusted by plaintiff to defendants, brokers, for the purchase of mining stock, which plaintiff claimed had never been so employed. The actions were on similar facts for varying amounts, two being brought in the County Court and one in the High Court, and were tried together in the High Court, by consent. Plaintiff's instructions to the brokers were to purchase the stocks which were chiefly non-dividend paying, and to hold them in a form in which profits could be readily realised in case of enhancement in price. Defendants purchased the stocks in question, but did not allot them to their particular customers, keeping the stock of the one kind of all their customers in one envelope, to draw from when any customer sold.

RIDDELL, J., *held*, that this method of dealing with the stock was the best calculated to carry out plaintiff's wishes, and that, on the facts, there had been no conversion.

LeCroy v. *Eastman*, 10 Mod. 499; Dos Passo, 2nd ed., pp. 255 *sqq.*, referred to.

Actions dismissed without costs.

Two County Court actions and one High Court action brought to recover moneys intrusted by two sisters to a firm of brokers to be invested in mining shares; tried together in the High Court by consent.

A. J. Russell Snow, K.C., for the plaintiffs.

T. N. Phelan, for the defendants.

HON. MR. JUSTICE RIDDELL:—Two sisters Georgina and Kate Long, the former a nurse and the latter a saleswoman, lived together, except when the nurse was in em-

ployment. Hearing much of money made by speculating in mining stocks, they determined to try their luck. They knew McCausland, a member of the defendants' firm of brokers, and entrusted him and his firm with their business.

Not being satisfied with the outcome, Kate brought an action in the County Court of the county of York against McCausland for $192.50, claiming that she had entrusted him with this sum for investment in mining stocks and he had failed to so invest for her. She also brought an action, in the same Court, against the firm for two sums, $152.50 and $132.50, on a like claim. Georgina brought an action in the High Court on a similar claim, but claiming four sums, $192.50, $466.50, $96.25 and $180.50; $935.75 in all (by a clerical error this sum is called, in the record, $855.75).

The High Court case came on for trial before me at the non-jury sittings at Toronto. At that trial it appeared that the transactions referred to in the three actions were inextricably mixed together, and, accordingly, all parties agreed—most sensibly and properly—that I should try all the actions together. At the request, and with the consent of all parties, I did so. There was much confusion in the evidence of the plaintiffs, the two sisters, and it is impossible to place full reliance on their evidence. I do not think they wilfully misstated what they thought they recalled as facts; but intelligent as they probably are in their business of nurse and saleswoman, they seem not to have applied their minds much to any other phase of their dealing in mining stock than the anticipated profits. On one matter they so far disagree as that the one contends that a considerable sum of money handed her by her sister was in repayment of a debt, while the other contends that it was a loan (or a contribution to a joint enterprise). From a consideration of all the evidence I have come to the conclusion that when any stock was ordered to be bought, it was intended to be left in the hands of the brokers in a convenient form for immediate sale, and that both plaintiffs quite understood this and assented to it. Stocks which were paying dividends were, of course, to be transferred into the name of the purchaser, but not others. When dividend paying stock was bought it was so transferred, and I shall pay no more attention to this—all the complaint is as regards the non-dividend paying stock—purely speculative stock.

When this kind of stock was bought for either plaintiff, a sufficient amount of scrip was placed, probably with other of the same mine, in an envelope; sufficient of the scrip was always held on hand to give every customer the amount held by him. When stock was bought, generally, if not always, in the books of the defendants, certificates of a particular number, or particular numbers, were entered, with the name of a purchaser adjoining. This was mere bookkeeping; the customer was not notified and no attention was paid to keeping the particular certificate or certificates for the particular customer or any customer. When the time came, if it ever came, for the customer to get his stock, it would be by the merest chance that the particular certificate which had been entered near to his name in the books, went out to him. It is admitted by the defendants that they did not keep any particular certificate for the plaintiffs, but sold those which had been first designated with their names in the books.

The plaintiffs contend that this dealing was a conversion; but I do not think so. They quite understood that the stock had to be in such a shape as that it could be delivered on a sale at a moment's notice; they did not know that any particular certificate had been allotted to them; they made no request for any particular certificate —and, until something more was done than was done, I do not think that any particular certificate was theirs, even though they had paid out and out for some stock: *Le Croy* v. *Eastman,* 10 Mod. 499; Dos Passos, 2nd ed., pp. 255, sqq. With some hesitation, I think, I must hold, also, that the dealings of the two sisters were of such a character that transferring stock certificates to one of them, Kate, in such a form as that they could be easily divided between the two sisters, was a sufficient compliance with the duty of the brokers. The trouble has arisen from the fact that stocks bought for them went down in price—the evidence of the plaintiffs, while I do not think it perjured, is not to be relied on at any point.

Taking now the several actions: (1) *Kate Long* v. *McCausland,* in the County Court, for $192.50. This sum went with a sum of $192.50 contributed by Georgina, to buy 500 Otisse and 500 Gifford, which were delivered to Kate September 1st, 1911. This action must be dismissed. (2) *Kate Long* v. *Smiley & Co.,* in the County Court. The

sum of $152.50 went for 500 Gifford, delivered to her in August, 1911. The sum of $132.50 went with $466.50 of Georgina's, to buy 1,000 Peterson Lake and 100 Temiskaming. The Temiskaming was delivered to Georgina and put in her name as it was a producing and dividend paying mine. The Peterson Lake was, with 200 ordered by Georgina in January, 1909, in all, 1,200, delivered to Kate August 15th, 1911.

Kate cannot complain, and this action must also be dismissed.

(3) The High Court action, *Georgina* v. *Smiley & Co.* The first item, $192.50, was for her share of the 500 Otisse and 500 Gifford delivered to Kate.

The second, for the 1,000 Peterson Lake and 100 Temiskaming. The Temiskaming she got, the Peterson Lake was delivered to Kate for her. The third, $96.25 was for 500 Rochester, she says, wholly her own speculation; Kate does not agree. On the whole, I think it was her own. The stock was delivered to Kate for her August 15th, 1911.

The fourth and last, $180.50, was for 200 Peterson Lake and 500 Rochester, which were delivered to Kate for her August 15th, 1911. All this stock was delivered as soon as it was really asked for and, I think, the defendants are not liable. If they did make a mistake in looking upon Kate as an agent for her sister, the sister is not damnified.

I think all the actions must be dismissed, but I shall, if so desired, make a declaration as to the ownership of the stock as between Georgina and Kate.

There will be no costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOVEMBER 4TH, 1912.

OTTAWA WEEKLY COURT.

RE ANNE CAMPBELL, DECEASED.

4 O. W. N. 221.

Will—Construction—Tenants in Common or Joint Tenants—Question as to Which—Costs.

Motion to determine the question whether John Campbell took an interest as joint tenant or tenant-in-common under the following clause in testatrix' will: "I hereby bequeath unto my nephew, John Campbell, and my sister, Martha Campbell, jointly, a piece of land (description), containing 20 acres of land, more or less, and they are to pay my nephew, George Campbell, $200 within 3 years after my decease." John and Martha Campbell, aforesaid, lived together on a farm adjoining the parcel devised, until the latter's death, and the $200 referred to above, was paid by them to George Campbell.

FALCONBRIDGE, C.J.K.B., *held*, that John Campbell took a joint interest, and not a tenancy-in-common, of the lands devised.

Case v. *Owen*, 139 Ind. 22, and *Davis* v. *Smith*, 4 Harrington (Del.), approved.

Costs to all parties out of estate.

Motion by John W. Campbell, a devisee under the will of the late Anne Campbell, upon the return of an originating notice, for an order construing a certain question arising under the terms of said will.

W. S. Hall, for John W. Campbell.

R. A. Pringle, K.C., for administrators of Martha S. Campbell.

Donald W. Fraser, surviving executor of Anne Campbell, though duly notified, did not appear on the motion.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The question to be decided arises under the will of said Anne Campbell, wherein, after certain specific bequests, the following paragraph appears:—

"I hereby bequeath unto my nephew, John Campbell, and my sister, Martha Campbell, jointly, a piece of land situate west side of the south part of Lot No. 5 in the ninth concession of East Hawkesbury, containing twenty acres of land, more or less, and they are to pay my nephew George Campbell, the sum of two hundred dollars within three years after my decease, and the residue of my estate I give and bequeath to my sister, Martha Campbell."

At the time of the death of testatrix, and for some years previous thereto, John W. Campbell resided with his aunt Martha S. Campbell, who is the person referred to in the will as Martha Campbell; and John W. continued to reside with his said aunt Martha until her death (which occurred on or about the 17th day of August, 1910), on an adjoining farm which she owned. The said parcel of 20 acres was cultivated in the ordinary course of the farming operations which Martha and John were then carrying on, and John says that the said Martha and he were thus in joint possession of the said parcel of 20 acres from the date of Anne's death until Martha's death.

The parcel of land mentioned is the only land of which Anne Campbell was possessed at the time of her death.

Neither Martha nor John ever conveyed away or encumbered or otherwise disposed of their interest in the said parcel of twenty acres.

The sum of two hundred dollars, directed by said will to be paid to George Campbell, the nephew, was duly paid to him.

John W. Campbell now contends that, under the devise set forth above, Martha and he became joint tenants of said parcel, and that he, as the survivor, is now entitled to the whole.

I have outlined the situation of affairs as above because, while declarations by the testator of what he intended by his will will not be received, yet extrinsic evidence of surrounding circumstances to shew what he probably intended, is admissible. *Davidson* v. *Boomer* (1868), 17 Gr. 218. It would be entirely reasonable to confer a joint tenancy on a young man and his maiden aunt working and living upon the adjoining farm.

And, I think, apart from circumstances, the use of the word "jointly" in the will creates a joint tenancy, especially when it is coupled with the direction that "they are to pay my nephew, George Campbell, the sum of $200"; not that each of them is to pay the sum of $100 to George Campbell. I find two cases in different States of the Union where the law is practically the same as R. S. O. ch. 119, sec. 11. In *Case* v. *Owen* (1894), 139, Indiana, 22, it was held that the word "jointly" in the addendum of the deed, creates in the grantees a joint tenancy. Coffey, J., says, at p. 24:—

"As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles, the word "jointly" can find no place in describing an estate to be held by them." See, also, *Davis* v. *Smith*, 4 Harrington (Del.), 68.

The four unities which are the requisites of joint tenancy all here exist.

The judgment, therefore, will be that, on the true construction of the will, Martha S. and John W. Campbell became joint tenants, and that he is now solely entitled by *jus accrescendi*.

Costs to all parties out of the estate.

Counsel referred also to the following authorities: Ency. of Laws of England, vol. 7, p. 513; Jarman, 6th ed., 1783, *et seq.*; *Re Gamble*, 13 O. L. R. 299; Wharton, 7th ed., 392; *Kew* v. *Rouse* (1685), 1 Ver., 353; Am. & Eng. Ency., 2nd ed., vol. 17, 658; *Richardson* v. *Richardson*, 14 Sim. 526.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 4TH, 1912.

BAECHLER v. BAECHLER.

4 O. W. N. 226.

Executors and Administrators—Motion under C. R. 938, and Trustee Act, 1 Geo. V., c. 26, s. 75—Deduct Debt from Legacy—Improper Motion under Rule.

Motion by the defendants, the executors of the late Xavier Baechler, under Con. Rule 938, and the Trustee Act, 1 Geo. V., c. 26, s. 75, for an order authorizing them to deduct from a legacy of $1,000, sued for in this action, the sum of $754.56, claimed to be due and owing the estate by the estate of the legatee. Plaintiff, administratrix of the legatee, disputed that any sum was due as claimed by his estate.

SUTHERLAND, J., *held*, that the motion was an improper one under the Rule, and enlarged same until trial.

Costs of motion to be in discretion of trial Judge.

Re Rally, 25 O. L. R. 112, and *Re Turner*, 22 O. W. R. 543, referred to.

J. D. Montgomery, for the defendants' motion.

C. Garrow, for the plaintiff.

J. R. Meredith, for the infants.

HON. MR. JUSTICE SUTHERLAND:—Xavier Baechler, the elder, by his last will, dated February 1st, 1906, bequeathed to his son Xavier Baechler, the younger, the sum of $1,000. The latter died on the 27th September, 1906, and the

plaintiff is his widow and the administratrix of his estate. The father died on the 12th March, 1907, and the defendants are the executors under his will, and letters probate have been duly issued out of the Surrogate Court of the County of Lambton, dated 30th March, 1907.

The plaintiff, on the 18th September, 1912, by writ, commenced an action for the amount of said legacy and in her statement of claim alleges that the defendants have refused to pay it in whole or in part.

The defendants plead that the estate of Xavier Baechler, the younger, was insolvent at the time of his death, and that for the purpose of protecting it Xavier Baechler, the elder, advanced moneys to the First National Exchange Bank of Port Huron, Michigan, and obtained an assignment of certain notes and a chattel mortgage. They further plead that they proved the claim of the father against the estate of the son before the Probate Court of the county of St. Claire in the State of Michigan, that being the Court administering the estate of the son, and received a dividend out of the son's estate which left a balance of $754.56 unpaid.

In their statement of defence they also plead that said balance is now owing by the son's estate with interest, and that they are entitled to apply the legacy in payment of the indebtedness of the son's estate to that of the father. They also say that they have been ready and willing to adjust the accounts between the two estates, but the plaintiff has refused to do this.

This action is coming on for trial at Goderich on the 11th inst.

The defendants are moving under Rule 938 and the Trustee Act, I Geo. V., ch. 26, sec. 75, by way of summary application to the Court for an order authorizing and permitting them to deduct from the legacy the said sum of $754.56.

In answer to the motion an affidavit is filed by the plaintiff in which she states that she has recently learned of facts which lead her to believe that there came into the hands of the father certain assets of the son which he did not account for, and that she would be able to prove that there is no such sum as $754.56 owing by the estate of her husband to his father's estate.

I am not at all sure that a question of this kind can properly be determined on an application for advice in this way. See *Re Rally* (1912), 25 O. L. R. 112; *Re Turner*, 22 O. W. R. 543; 3 O. W. N. 1438. Any disposition, however, which I would make of the motion would not necessarily put an end to the action.

The defendants, in their statement of defence, did not expressly say that they were willing to pay the balance of the legacy after giving credit for the debt. It is true that upon the motion they have now proposed to do this. The plaintiffs are disputing that there is any such sum owing by the son's estate to the father as is alleged by the defendants. Under these circumstances, I think, the proper course for me to take is to enlarge this motion to be disposed of by the presiding Judge at the trial of the action. He will also dispose of the costs incidental thereto.

HON. MR. JUSTICE RIDDELL. NOVEMBER 4TH, 1912.

WEEKLY COURT.

COWIE v. COWIE.

4 O. W. N. 224.

Judicial Sale of Lands—Order of Court—To Satisfy Alimony Judgment—Husband Intimidating Prospective Bidders at Sale—Contempt of Court.

Motion for an order directing defendant to deliver up possession of certain lands. Plaintiff obtained judgment for alimony, 15 O. W. R. 767, but defendant paid nothing in respect thereof. Plaintiff then obtained an order of the Court directing the sale of defendants' lands to satisfy the arrears of alimony, but defendant appeared at the sale and, by threats and intimidation, was able to prevent any satisfactory bid being received. Plaintiff's material shewed that satisfactory offers could be obtained if the purchasers were assured of peaceable possession.

RIDDELL, J., *held*, there was no precedent for the suggested order, and it could not be made; but that an order be made that the lands be again offered for sale, plaintiff to be at liberty to bid, to apply arrears of alimony and costs upon the purchase-price, and to pay balance into Court, to be paid out as the instalments of alimony should fall due.

Liberty reserved to move for defendant's committal for contempt, in case of further interference with the sale.

Costs to be costs in alimony proceedings.

Motion by the plaintiff in an alimony action, for an order for possession of the defendant's land, judgment having been given in her favour, 15 O. W. R. 767; 1 O. W. N. 635.

J. W. McCullough, for the plaintiff's motion.

The defendant in person, contra.

HON. MR. JUSTICE RIDDELL:—In this case judgment was finally given for the plaintiff, by the Court of Appeal, for alimony. She registered her judgment but the defendant did not pay. On June 24th, 1912, an application was made before me for an order that the lands of the defendant be sold to pay the alimony; he then appeared in person and stated that he could not pay the amount. He claimed, also, that the judgment had been obtained by perjury. I could not entertain this last plea; on the first, and the representation of the plaintiff, I, following the case of *Abbott* v. *Abbott* (1912), 21 O. W. R. 281, made an order for sale of the N. half of lot No. 27, in the 7th concession of Pickering . . . or a competent part thereof . . . for the satisfaction of the arrears of alimony . . . with the approbation of the Master in Ordinary . . .." The Master in Ordinary settled the advertisement; but the defendant attended the sale and stated that he never had a title to the said lands, and title could not be given, etc., etc. The auctioneer did not succeed in getting any reasonable bids—and the land was not sold. After the abortive sale two prospective buyers came to the solicitor conducting the sale, said they wished to buy, but that, under the circumstances, they were afraid of trouble in getting or retaining possession; but, if the defendant were dispossessed, they were prepared to offer a reasonable sum for the land, but would not buy while he was in possession. The solicitor swears that, in his opinion, it is very improbable that a fair price can be realized for the land so long as the defendant is allowed to retain possession. The plaintiff now asks for an order "directing the defendant to deliver up possession of the land to the plaintiff, or to whom she may appoint, and for an order directing him to vacate possession. The defendant attended in person on the return of the motion and again urged that the judgment had been obtained by perjury.

I asked for authority for an order such as is asked for, but none has been furnished, and it is said by plaintiff's counsel that none can be found.

The arm of the law will probably be found long enough to meet such a case as this by extreme measures if necessary.

At present, however, I do not think the order asked for should be made. I shall make an order that the land be again offered for sale, and that the plaintiff be at liberty to bid—the amount of past due alimony and costs to be allowed as part payment, the remainder to be paid into Court payable out to her according as the alimony becomes payable, etc.

The plaintiff is to be at liberty also to serve a notice of motion for an order to commit the defendant for contempt in case of any further interference with the sale. The defendant must be made to understand that no interference with a sale under direction of the Court will be tolerated. His ignorance thus far may excuse him, but his misconduct must cease.

Costs of this application to be considered in all respects costs in the alimony proceedings.

HON. MR. JUSTICE RIDDELL. NOVEMBER 4TH, 1912.

NON-JURY, TORONTO.

SCARBOROUGH SECURITIES LIMITED v. LOCKE.

4 O. W. N. 228.

Landlord and Tenant—Verbal Lease—Sale of Premises—Acceptance of Rent by Purchaser—Estoppel of Denying Lease.

RIDDELL, J., *held*, that where a tenant was holding premises under a verbal lease at $200 per annum until the premises should be sold, and the purchaser of the same accepts a quarter's rent from the tenant, he is estopped from denying the tenancy, but the estoppel only extends to the end of the quarter, and, therefore, he may demand immediate possession.

Action to recover possession of land held under a verbal lease.

D. L. McCarthy, K.C., for the plaintiffs.

L. F. Heyd, K.C., for the defendant.

HON. MR. JUSTICE RIDDELL:—The defendant became the tenant of the Toronto Park Co. of certain premises No. 2301 Queen Street E., in the city of Toronto. There was no written lease, but it was agreed that he should be tenant at $200 per annum until the property should be sold. A

further term which he claims, viz., that he was to have the first chance to purchase, I do not find established by the evidence, which I accept. The park company were in low water, and went into liquidation—a sale of the property of the company was made to the Scarborough Securities Company, and approved by the Court, February 11th, 1911. The Scarborough Securities Company were acting simply as agents (and trustees) for the Toronto Railway Company in this purchase.

The sale was made effective by the order of the Court of February 11th, 1911; and I think the tenancy of Locke then ceased unless there was something done by the new owners of the property recognizing a continuing tenancy. The defendant, June 15th, 1911, sent a cheque addressed to the Toronto Park Company (or successors) for $50 "Rent to September 15-11," payable to the Toronto Park Co. (or successors); the Toronto Railway Co. cashed this cheque endorsing it in their own name.

They were the real owners of the land though nominally it was the property of the Scarborough Securities Company; they could, therefore, estop themselves and their agents—trustees—the Scarborough Co.—and I think they have in fact recognized the defendant as a tenant. But as there is nothing else alleged to bind them or their agents, I think the estoppel cannot be extended beyond the date up to which the rent was accepted, viz., September 15th, 1911.

The plaintiffs are accordingly entitled to possession, their action not being brought till May, 1912.

Judgment will go for possession with costs. If *mesne* profits or damages be sought, I may be spoken to again. I do not think any case is made for compensation—the defendant knew what his tenancy was.

HON. MR. JUSTICE RIDDELL. NOVEMBER 4TH, 1912.

WEEKLY COURT AND CHAMBERS.

SMYTH v. HARRIS.

4 O. W. N. 223.

Action—Settlement—Terms of—Embodiment of in Order of Court.

RIDDELL, J., refused to embody the terms of a settlement in an order of the Court where the settlement only provided that an order should be made confirming the same, and made an order in the exact terms of the settlement, "confirming the settlement."

No costs of application.

Motion by the plaintiffs for an order in terms of a settlement of the action made by the parties. See 23 O. W. R. 100.

H. E. Rose, K.C., for the plaintiffs.

E. F. B. Johnston, K.C., for the defendants.

HON. MR. JUSTICE RIDDELL:—In this case reported 23 O. W. R. 100, the parties have come to a settlement. The defendants agree to do certain things and to pay certain costs. If the acts are not done by February 1st, the plaintiffs may "give notice of an application to" myself "to fix a day for trial." "Pleadings to be considered as now closed and no steps except taxation of costs to be taken in action from execution of this consent until service of notice of application . . . to proceed." "(5) Application to be made by the parties to "myself" for an order confirming this settlement."

The parties now attend; and the plaintiff submits a formal order as of the Court directing the defendants to do the acts, etc., which they agreed to do; the defendants say "that is not the bargain, *non haec in foedera veni.*" And I think they are right.

So far as I am concerned, all I am to do under the agreement is to make an order confirming the settlement which I do. The parties have not agreed that I am to determine what the settlement means—very experienced counsel have drawn up the settlement—they no doubt know what it means—at all events, they have not agreed that I shall tell them.

Then there is no provision (as is most usual), that an order of the Court is to be made to carry the settlement into

effect. The parties are of full age, presumably they knew what they wanted, and told their counsel what it was—presumably counsel inserted in the agreement what they intended. It seems from the document itself that the parties were content to rely each upon the promise of the other not accompanied by an order of the Court to implement the promise. No steps are to be taken in the action from execution of the consent, it is said—that also shews that no order of the Court was in contemplation.

If it be necessary a direction will be made to the Taxing Officer to tax the costs—but nothing else further than "an order confirming the settlement."

No costs.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 4TH, 1912.

POLLINGTON v. CHEESEMAN.

4 O. W. N. 248.

Parties—Third Party Notice—Motion to Strike Out—Dismissed—Rights of Parties Should be Left to Trial—Negligence Action—Relief Claimed against Insurance Company.

Motion to strike out a third party notice served upon an insurance company in an action for damages for death of one of defendant's workmen.

The third parties claimed that, by the terms of their policy, they could not be sued until judgment was had against defendant, and that the death of the employee did not occur in the employment insured against. Defendant denied this latter statement.

MASTER-IN-CHAMBERS *held* (23 O. W. R. 40; 4 O. W. N. 92), that the rights of the parties should be left to the trial, and not disposed of on an interlocutory application.

Pettigrew v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23; 16 O. W. R. 989, and

Swale v. *Can. Pac. Rw. Co.*, 25 O. L. R. 492; 20 O. W. R. 997, followed.

Motion dismissed with costs to defendant in third party issue in any event.

SUTHERLAND, J., affirmed judgment with costs.

An appeal by the Travellers Insurance Company of Hartford, Connecticut, from an order of the Master in Chambers, 23 O. W. R. 40; 4 O. W. N. 92, refusing to set aside a third-party notice served upon that company by the defendant.

T. N. Phelan, for the motion.

Frank McCarthy, contra.

HON. MR. JUSTICE SUTHERLAND:—Having carefully read and considered the very full reasons given by the Master

for making the order appealed against, and the authorities referred to by him, I think the order should stand. I can add nothing of value to what has been so well stated by the learned Master in his judgment.

The appeal is, therefore, dismissed with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. SEPT. 27TH, 1912.

ARMSTRONG v. BARRIE.

4 O. W. N. 64.

Negligence — Highway — Non-repair — Person Fell in Hole in Highway—Evidence.

Plaintiff brought action to recover damages for injuries sustained by falling into a hole in a highway.

FALCONBRIDGE, C.J.K.B., *held*, that plaintiff was in error as to the manner in which he met with the accident. Action dismissed with costs, if exacted.

Tried at Barrie and Toronto.

A. E. H. Creswicke, K.C., for the plaintiff.

J. H. Moss, K.C., for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— Even if I were to ignore the testimony of A. E. Patterson, who is said to have a contingent interest in the result of this action, the evidence adduced by defendants is overwhelming as to the condition of the area and sidewalk.

Plaintiff must be quite in error as to the manner in which he met with the accident.

The action will be dismissed with costs, if exacted.

Twenty days' stay.

HON. SIR G. FALCONBRIDGE, C.J.K.B. SEPT. 26TH, 1912.

WALKER AND WEBB v. MACDONALD, G. J. FOY LTD. (THIRD PARTIES).

4 O. W. N. 64.

Costs—Parties Entitled to—Third Parties—Called in for Precaution No Necessity for—Third Parties given Costs.

Further judgment on question of costs. See 22 O. W. R. 964; 4 O. W. N. 22, where this action and the action of Graham against same defendants was disposed of on the issue.

G. F. Shepley, K.C., for the defendants.

E. J. Hearn, K.C., for the third parties.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—As a matter of precaution, defendants claimed indemnity over against Foy & Co. They did this for their own protection. In the result they have not needed that shield.

And, therefore, they ought to pay the third parties' costs in this action—to be set off *pro tanto* against their claim and costs in the Graham suit.