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HON. MR. JUSTICE BRITTON. MARCH 10TH, 1913.

NEY v NEY.

4 O. W. N. 935.

Alimony—Desertion of Husband by Wife—Offer to Return—Refusal to Receive—Accusation of Infidelity by Husband—No Evidence Tendered in Support—Custody of Children—Welfare—Prior Conviction of Defendant — Paternal Right — Access by Mother—Terms.

BRITTON, J., *held*, that a wife was entitled to alimony even where she had deliberately deserted her husband and children, where she had been guilty of no other misconduct and offered to return but defendant refused to receive her.

Ferris v. *Ferris*, 7 O. R. 496, followed.

That defendant was entitled to the custody of the two children of the marriage, as he had not disentitled himself in any way, and the welfare of the children would be better served thereby.

Order for access by plaintiff to children at reasonable intervals.

An action for alimony, tried at Toronto without a jury.

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

T. C. Robinette, K.C., for the defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff and defendant were married at Toronto on the 5th day of 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 is a mechanic, and had provided a comfortable residence, well enough furnished.

Very likely both contributed to this.

On one or two occasions the defendant left home, and, according to the plaintiff's evidence, did not, before leaving, or during his absence, provide for his wife and children as well as he should have done.

The house occupied by the parties had been sold, and possession was to be given to the purchaser some time in the autumn of 1909.

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.

While the parties were living together, in the way described, without anything of an exceptionally unpleasant character occurring—so far as appears—a separation was brought about in this way.

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, enquired of the neighbour, and got the information that 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 defendant.

After a little, the plaintiff moved out, stored the furniture in a storage warehouse; 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 dress-maker, 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, 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 that 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 sixth day of 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 this action. 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, with an automobile, and the assistance she had secured, 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.

This action, I will now dispose of.

If the matter had rested, as it was on, and after the 10th day of August, 1909, until the commencement of this action, the question of 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; under 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 under 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.

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

As to 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 day of 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 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 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 organized 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 10th August, 1909, was not a kind or motherly one.

On the other hand, I have considered the argument that defendant admittedly was convicted at Whitby of an offence, which was greatly to his discredit.

The defendant says 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 terms of 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.

Twenty days' stay.

HON. MR. JUSTICE LENNOX. MARCH 10TH, 1913.

WISHART v. BOND.

4 O. W. N. 931.

Vendor and Purchaser — Misrepresentation as to Depth of Lot — Acceptance of Deed—Estoppel—"More or Less"—View of Property—Boundaries Pointed Out by Agent—Rights of Third Parties—Damages.

Action for the rescission of a certain contract for the purchase of a certain house and lot or for damages upon the ground of misrepresentation. Defendant's agent had taken plaintiff to the property, had described it as being 90 feet in depth, more or less, and pointed out certain boundaries which if adhered to would have made the depth of the property 91 feet 7 inches. The deed which plaintiff accepted inadvertently gave only a depth of 75 feet, defendant having conveyed away the balance of the depth of the property subsequent to the making of the purchase agreement. When plaintiff subsequently discovered the shortage in depth, defendant refused to make any amends, relying upon the fact that the contract had been wholly executed and that the agreement of sale provided for a depth of 90 feet "more or less."

LENNOX, J., *held*, that defendant, through his agents had been guilty of material misrepresentation and that plaintiff had not lost his remedy by reason of the fact that he had not discovered the discrepancy until after the contract had been executed.

Wilson Lumber Co. v. *Simpson*, 22 O. L. R. 452; 23 O. L. R. 253, distinguished.

Judgment for plaintiff for $225 with Supreme Court costs.

Action for rescission of a contract for the purchase of certain lands, or for damages upon the ground of misrepresentation and fraud.

A. F. Lobb, K.C., for plaintiff.

A. R. Clute, for defendant.

HON. MR. JUSTICE LENNOX:—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 lines between the property of the defendant and the Coutts property, was fairly well defined upon the ground by the Coutts

buildings—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 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 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 Atcheson 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 ninety feet they paced it off from Hunter street to the northern boundary of 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 agent 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 seventy-five 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." This may be an attitude of unmitigated dishonesty—I think it is—but dishonesty does not necessarily give rise to a cause of action.

The evidence of the defendant in Court was not calculated to leave a good impression. When he swore that the dividing wall was carried to the roof, and a complete separation of the two dwellings effected, the defendant was stating what was not true in fact, he may have honestly believed it to be true, but when he attempted to confirm this by adding that he had actually examined the wall, so as to be sure about it, and found it to be built up and complete, I am not able to think that he believed he was telling the truth.

There are other points upon which I cannot accept the evidence of the defendant. I find as a fact that the conversation he says he had with the plaintiff, did not occur before the making of the contract, and I give credit to the plaintiff's evidence as to what took place. I should not expect that a builder would be likely to make a mistake in measuring a small yard; but whether he made a mistake or not, in saying that there is a depth of 38 feet from the rear of the house to the back of the lot, there is not a depth of 38 feet, as a matter of fact. This was clearly demonstrated by the size of the house, its location, and the size of the lot.

These matters, again, do not determine that the plaintiff should recover, but yet they are perhaps remotely material in considering whether a false representation, if made by the defendant, was made honestly, believing it to be true.

Then is the plaintiff entitled to recover as upon an action of deceit? There are other material facts to be referred to touching the consideration of this question.

Before the defendant employed Woolgar & Atcheson to dispose of street number 56 as a ninety-foot lot—in fact,

before he got his deed—he had pared this lot down to 75 feet by laying off a lot 16 feet 7 inches wide, on Condor avenue. See Exhibit 3, which was evidently prepared for the defendant, on the 4th of April, 1912. And immediately following the conveyance, he had mortgaged the property in question, as a 75 foot lot to Firstbrook, and, quickly following this again, had mortgaged the Condor avenue strip to the same man. Why did he instruct his agents to sell a plot ninety feet deep, with this house?

One other fact, with the law as applied to it. "More or less" tied the purchaser to skimp measurement in *Wilson Lumber Company* 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 ninety feet, is what the plaintiff was entitled to call for, and what the defendant was bound to give, under the agreement.

Other facts are attempted to be established, to shew that before the time the plaintiff made complaint, he must have, or at all events, should have, seen that the defendant was encroaching upon this northern strip. I do not think that this attempt was successful. I have no implicit faith in the evidence of the type of man who, as a matter of course, can swear to the hour at which he began to dig a particular post hole. Such men are often honest, but very often mistaken.

But, at all events, 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 ninety-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 contract, as to the actual sub-division 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 A. C. 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 two hundred dollars 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.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 8TH, 1913.

WALLER v. SARNIA.

4 O. W. N. 890.

Negligence — Municipal Corporation — Repair of Pavement—Dangerous Material—Public Place—Lack of Safeguards—Improper Implement — Unskilled Workman—Independent Contractor—Want of Notice of Action—Liability of Corporation.

Action by father on behalf of himself and as next friend of his infant son for damages for personal injuries sustained by the latter through the alleged negligence of defendants. A street of defendant corporation was being repaired by a contractor "to the satisfaction of and under the supervision of" defendant's engineer. The work of repair involved the ladling of melted asphalt from a caldron which was set up upon a street immediately off the street being repaired, which was one of defendants' principal streets. The ladle used had a wooden handle which gradually became charred and broke, scattering the melted asphalt around and severely burning the infant plaintiff, a child under seven years of age. The evidence shewed that the work was not guarded in any way and was calculated to and did, as a matter of fact, attract children. It was further shewn that a ladle with an iron handle instead of a wooden one, should have been used.

LEITCH, J., (23 O. W. R. 831), *held*, defendants guilty of negligence in permitting dangerous material to be handled in a public place without some barrier to keep children away, and in allowing it to be handled by an unskilled workman with an improper implement.

Judgment for father for $200 damages and for infant for $1,000 damages with costs.

SUP. CT. ONT. (*2nd App. Div.*) *held*, that the fact that the work was being done by a contractor did not absolve defendants from liability.

Review of authorities.

That notice of action was only required in a case of non-repair not in an action for negligence in the execution of repairs.

Appeal dismissed with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE LEITCH, 23 O. W. R. 831.

The appeal to the Supreme Court of Ontario (second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE SUTHERLAND.

T. G. Meredith, K.C., and J. Cowan, K.C., for defendants, appellants.

D. L. McCarthy, K.C., for plaintiff, respondent.

HON. MR. JUSTICE SUTHERLAND:—The creosote wood block pavement on Front street, in the town of Sarnia, had become out of repair, and its municipal corporation, the

defendants herein, called upon those who had laid the pavement, and had guaranteed to keep it intact, or in good condition, for a stated period not yet expired, to make it right. The United States Wood Preserving Company, thereupon undertook the work, applying plant and materials, and employing the workmen.

While the work was being done, the caldron, in which the asphalt pitch used in connection therewith was melted was placed on Lochiel street, adjacent to the point on Front street, where the pavement was being repaired. The melted pitch was dipped out of the caldron, into pails by means of an iron ladle, with a piece of pine board nailed on to it to form a handle.

In the course of the work, the pitch would adhere to the ladle, and it was found necessary, from time to time to clean it off. The course pursued by the workman, under instructions from his employers, was to thrust the ladle into the fire, at the base of the furnace, so as to burn off the accumulations. This resulted in the wooden handle catching fire, from time to time, being partly consumed and gradually weakened.

On the 19th April, 1910, the workman "had put out the second batch of pitch for the day." One man was cutting up more barrels of pitch, for the next batch, and the man in charge of the ladle was cleaning it in the manner indicated. He saw its contents burning, and drew or jerked the ladle out of the fire, whereupon the handle and ladle separated, the workman stepped aside to avoid injury to himself, the ladle was rolled over a pile of sand kept on hand to dump the pitch on, when cleaning it, and its melted and blazing contents thrown in the air. Some of these fell upon the face and clothing of the plaintiff, Reginald Waller, a boy of about six years of age, who was a few feet in the rear of the workman, and injured him somewhat severely.

His father brings this action on his own account, for expenses incurred by him, and also as next friend for his son, for damages in consequence of the injuries sustained by him.

The defendants plead that the injuries were not caused by them, or their servants, that no notice in writing of the accident was given, as required by the statute in that behalf, that neither the defendants, nor their servants were guilty of any negligence, and that the accident occurred in

consequence of the negligence of the plaintiff, Reginald Waller, in going where he was injured after being ordered, and directed to keep away from the work being done. The action was tried by Leitch, J., and his judgment dated 29th January, is reported in 23 O. W. R. 831.

The trial Judge finds as follows: "The furnace was just such an object as would naturally attract the attention of a child, and arouse his curiosity. Other children were attracted as well as the Waller boy. The molten asphalt was essentially dangerous. Byron Spark, the man who was handling the pitch, had had no experience in such work. No precaution was taken to prevent any one from going near the furnace, and boiling pitch, or to protect children from accident."

And further "Front street, near where the furnace was placed, and where the pavement was being repaired is a very busy street. I think the corporation was guilty of negligence in allowing the furnace to be placed on Lochiel street, so close to Front street, with its busy traffic. The corporation should have seen that there was a fence, or some barrier to prevent children from going near the furnace, and the hot pitch. They should have seen that the ladle with which the pitch was ladled into the pails had an iron handle, so that it could not be burned off or weakened by fire, and that the handling of such dangerous material as boiling pitch, was done with a proper implement, and by a skilled man. I do not think the corporation can absolve themselves from liability by the contention that the work was being done by an independent contractor." He thereupon gave judgment against the defendants, in favour of the father for $200, and the son for $1,000. There was, I think, ample evidence to warrant the findings of the trial Judge.

There was a statutory duty on the part of the defendants to keep the street in repair. The defendants themselves could have undertaken the work of repairing the pavement in question, and if so, would have been under the obligation of taking such precautions in doing it, as not to expose the public to danger of injury. The work of heating the pitch, and handling it when heated, was necessarily dangerous, and required care and precaution. Under such circumstances a duty was cast upon the defendants, the responsibility for which they could not escape by delegating it to an independent contractor. Reference to Halsbury's Laws of England,

vol. 21, in secs. 796 and 797; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 829; *Penny* v. *Wimbledon Urban District Council* [1898] 2 Q. B. 72; In *Holliday* v. *National Telephone Co.* [1899] 2 Q. B. 392, Halsbury, L. C. at 398 says "There was here an interference with a public highway, which would have been unlawful, but for the fact that it was authorized by the proper authority. The telephone company, so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves, or by a contractor, to take care that the public lawfully using the highway, are protected against any act of negligence by a person acting for them in the execution of the works." *Clements* v. *County Council of Tyrone,* [1905] 2 Ir. R., 415, 542; held, per Palles, C.B., "that where a body having lawful authority, authorises an interference with a public road, or authorizes works which, in the natural course of things, will result in such an interference, there is a duty cast upon that body to use due care to prevent danger to the public using the road being caused by the execution of the works authorized; that that duty extends to seeing that the workmen actively engaged are careful; and that such body cannot relieve itself of the obligation by delegating it to another, who fails to perform it."

It was contended on behalf of the defendants that what occurred here was not something in connection with the actual doing of the work, but was of a casual and collateral character. I am unable to agree with this contention. It is perhaps difficult upon the authorities to state in any general way just what is meant by casual and collateral. What the man was doing here, was something necessary to be done in furtherance of the work of repair. See also *Ballentine* v. *Ontario Pipe Line Co.* (1908), 16 O. L. R. 654 at 662; *Hardaker* v. *Idle District Council,* [1896] 1 Q. B. 343; *Kirk* v *Toronto,* (1904) 8 O. L. R. 730; *Valiquette* v. *Fraser,* 39 S. C. R. 1; *Longmore* v. *McArthur Co.,* 43 S. C. R. 640.

As to any necessity for a notice of action, I do not think the cases cited by the appellant's counsel, and referring to actions for damages arising out of the non-repair of streets, apply. This is not an action for damages against the defendant corporation in consequence of its liability to repair highways, but an action for damages in consequence of negligence in the doing of repairs. The defence of negligence on the part of the plaintiff, Reginald Waller, was not made out.

I think the appeal must be dismissed with costs.

HON. SIR WM MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL, agreed.

HON. R. M. MEREDITH, C.J.C.P. MARCH 4TH, 1913.

RE EMPIRE ACCIDENT AND SURETY CO. (FAILL'S CASE.)

4 O. W. N. 926.

Company—Contributory—Evidence—Onus—Estoppel.

MEREDITH, C.J.C.P., dismissed with costs the appeal of an alleged contributory from the decision of the Official Referee, holding that he was a shareholder of the company upon the ground that the evidence shewed that the appellant had some two years after the date of allotment assumed to deal with the shares allotted him as a shareholder, he having attempted to transfer the same and given proxies in respect thereof.

An appeal by Faill against the ruling of His Honour Judge Macbeth 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 HON. R. M. 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.

HON. R. M. MEREDITH, C.J.C.P.:—The appellant appeals against the ruling of the referee, that the appellant is liable, as a shareholder of the company, and properly on the list of contributories, as such, in these winding up proceedings.

The grounds of his appeal are (1) that he 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 would 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 enquiry 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 cer-

tificate No. 180, shewing six thousand dollars 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 contentions; 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, 3 Edw. VII. C; 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 hands 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 not 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.

HON. R. M. MEREDITH, C.J.C.P. MARCH 4TH, 1913.

THE EMPIRE ACCIDENT & SURETY CO. (BARTON'S CASE.)

4 O. W. N. 929.

Company—Contributory—Evidence—Receipt of Dividends.

MEREDITH, C.J.C.P., dismissed with costs an appeal from the Official Referee placing appellants upon the list of contributories of a company as executors of one Barton, holding that the evidence had fully established that Barton had been a shareholder of the company.

An appeal Barton's executors as in previous case. Argued at the same time by same counsel.

HON. R. M. 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, 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 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 seventy-five and of twenty-five shares; and that case was not contradicted or met in any way in evidence by the appellants.

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

HON. R. M. MEREDITH, C.J.C.P. MARCH 4TH, 1913.

RE SUGDEN AN INFANT.

4 O. W. N. 924.

Infants—Sale of Lands of—Practice—1 Geo. V. c. 35—2 Geo. V. c. 17, s. 31—Con. Rules 960-970, 1308.

MEREDITH, C.J.C.P., *held*, that upon an application for the sale of an infant's lands the practice as laid down by the statute and the Consolidated Rules must be strictly followed, and in particular the application must be made by the guardian, the infant if over 14 produced for private examination by the Court and the deponents in support of the motion examined *viva voce*.

An application on petition for an order for the sale of the land of Vera Gladys Sugden, an infant, heard by HON. R. M. MEREDITH, C.J.C.P., on 1st March, 1913, at London, Ontario.

J. MacPherson, for the petitioners.

Coleridge, for the Official Guardian.

HON. R. M. 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 (Ont.); see also 2 Geo. V., ch. 17, sec. 31 (Ont.); the mode of procedure in such a case being provided for in the consolidated 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 someone 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. 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 14 or upwards, to the application, is necessary, "unless the Court otherwise directs or allows."

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

Rule 966 provides that if the infant be above the age of 14 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 very weighty reasons should ever prevent, or indeed excuse, it.

Then, under the 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.

HON. MR. JUSTICE MIDDLETON. MARCH 8TH, 1913.

RE SAMUEL WILSON ESTATE.

4 O. W. N. 906.

Will—Construction — Particular Land Charged With Portion of Debts—Exoneration pro tanto of Residue—Special Fund Created —Expense of Administration to be Borne by Fund Itself.

MIDDLETON, J., *held*, that the cost of creation of a certain trust fund of an estate must be borne by the estate, but thereafter the costs of investment and distribution must be borne by the fund itself. *Re Church*, 12 O. L. R. 18, followed.

Motion by the executors of the will of the late Samuel Wilson for an order under Con. Rule 938, determining two questions arising upon the construction of said will.

W. G. Thurston, K.C., for the executors and residuary legatee.

F. L. Button, for adults interested in proceeds of Lot 17.

E. C. Cattanach, for infants interested in proceeds of Lot 17.

HON. MR. JUSTICE MIDDLETON:—Two questions arise on the construction of this will; first, with respect to the sum of $2,000 charged upon the proceeds of lot 17; second, with

reference to the incidence of the executors' compensation and costs regarding the execution of the trusts declared as to the same lot.

The testator gave his farm and certain other lands to his son Robert, charged with the payment of $2,500 to his daughter Mary. He then gave his executors lot No. 17 upon trust, with power to sell, and out of the proceeds to pay to Mary $2,500, "also to pay $2,000 toward paying my just debts"; the residue to be invested for the benefit of the children of the deceased son William, and to be divided between them when they attain age. The residue of the estate, real and personal, after payment of the testator's debts, is then to go to Robert.

At the time of the testator's death he was indebted in a considerable sum, far exceeding the two thousand dollars. He left property of very substantial value other than that specifically devised.

The first question is this: Can Robert, as residuary devisee, call upon the executors for the $2,000 towards the debts, or are the proceeds of that lot only to be resorted to if the residuary estate is not sufficient to pay the debts?

It is said that the words used are not sufficient to charge the proceeds of this realty and to exonerate *pro tanto* the residuary estate, because the residue is to go to Robert "after the payment of my just debts."

I do not think that this is the real meaning of the will. The testator, I think, intended $2,000, part of the proceeds of lot 17, to be applied in and towards payment of his debts, and then gave the residue after the debts had been paid—that is, after the residuary estate had been resorted to to the extent necessary to supplement the $2,000—to his son Robert.

Reading the will as a whole, and without seeking to import into it technical rules that probably were not present to the mind of the testator, his language seems to me plain and sufficient.

The second question depends upon the effect to be given to the principle laid down in *Re Church*, 12 O. L. R. 18. There the testatrix directed her residuary estate to be divided into four equal shares, three of which were to be paid over at once and the fourth to be held upon trusts covering an extended period of time. It was held that the expense of administering the trust after the share in question had been set apart, should be borne by the share itself and not by the general estate.

Applying that principle to this will, the general estate must bear all the costs of the creation of the trust fund arising from lot 17; but the costs of investing this fund during the minority of the beneficiaries, and of its distribution, must be borne by the fund itself. It is just as if the testator had directed his executors to pay the residue of the proceeds of lot 17 to an independent board of trustees. Until the fund should be created and paid over, the expenses would fall upon his general estate. After payment over, the fund would have to bear the cost of its own administration.

Costs of all parties may come out of the estate; of the executors as between solicitor and client.

HON. MR. JUSTICE LATCHFORD. MARCH 10TH, 1913.

RE NICHOLLS ESTATE: HALL v. WILDMAN.

4 O. W. N. 930.

Administration—Continuance of Investment—Loss on Same—Liability of Executors—Bar of Action—10 Edw. VII. c. 34, s. 47—Application Only to "Action"—Reference—Costs.

LATCHFORD, J., *held*, that 10 Edw. VII, c. 34, s. 47, barring claims against trustees only applied to "actions" against trustees and not to a case where the trustees themselves apply for administration and upon the reference admit having received moneys on behalf of a devisee as to which any action by her would be barred.

Motion by way of appeal by the defendant, Marianna Wildman, a devisee under the will of the late Ann Nicholls, from a report of the Local Master at Peterborough, under an order for administration taken out by the executors Hall and Innes, declaring that the executors were not liable to indemnify Mrs. Wildman against a judgment obtained by the Royal Trusts Co. 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 was 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 the report be disallowed.

H. T. Beck, for Mrs. Wildman.

G. H. Watson, K.C., and L. M. Hayes, K.C., for Hall and Innes, executors.

G. B. Strathy, for the Royal Trust Co.

HON. MR. JUSTICE LATCHFORD: 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 Mrs. Wildman 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 Mrs. Wildman to call the executors to account for moneys 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 Mrs. Wildman 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, Mrs. Wildman 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 Mrs. Wildman 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 C. R. 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 hnads after payment of the judgment of the trust company.

HON. MR. JUSTICE LENNOX. MARCH 10TH, 1913.

HONSINGER v. HONSINGER AND SMALL.

4 O. W. N. 945.

Will—Construction—Charge on Lands — Annuity — Provision for Firewood and Medicine—Arrears.

LENNOX, J., gave judgment for plaintiff for $130 and for a declaration that she was entitled to an annuity of $100 and yearly medical expenses not exceeding $25 charged on certain lands in an action brought by the widow of a testator against her son to whom the lands were devised.

Action by Esther Honsinger, widow of John Honsinger, to recover from George Honsinger, a son of deceased, the sums and allowances charged on the lands devised to him by his father in favour of plaintiff, and for a declaration that her claim is a charge on the land in priority to all estates and interests of defendants in the land.

James C. Haight, for the plaintiff.

Nicol Jeffrey, for the defendant Honsinger.

HON MR. JUSTICE LENNOX: The defendant Honsinger derives title to the land in question in this action under the will of his father John Honsinger, deceased. The defendant Small is a mortgagee of these premises under a mortgage from his co-defendant and he takes subject to the terms of John Honsinger's will. Small was served with the writ and appeared by solicitor but did not plead to the statement of claim. The pleadings have been noted closed as against him and proof was given of service of notice of trial upon his solicitors. This defendant was not represented at the trial.

Counsel for defendant Honsinger asked for leave to plead the Statute of Limitations, and I have decided that this is a case proper for such an amendment, and he will be at liberty to set up this defence accordingly.

The plaintiff is not bound to reside in the house mentioned in the second paragraph of her husband's will in order to be entitled to the benefit of paragraph three any more than she would be compelled to live there to entitle her to get the $25 a year—they are both in addition to the house and independent of it. It may well be that she would have to accept delivery of the wood upon or within a reasonable distance of the farm. If she is not keeping house at all she is not entitled

to the wood because she has no house to heat and does not need it. I entirely agree with all that is said in *Re O'Shea*, 6 O. L. R. 315. I am urged to give effect to "the intention of the testator." Quite so! But I must not confuse the testator's presumed intention with what would probably have been his intention in fact, if he had engaged a competent solicitor and had all the possibilities and contingencies brought before him. But instead he went to an innocent promoter of law suits, with the result that it cannot be gathered from the will that either the testator or his scribe intended to limit the provisions of paragraph three as contended for by defendant's counsel. All the same this is a cruel case. This old lady instead of insisting upon her pound of flesh with accessories might very well live with her son who for nearly twenty of the best years of his life made common cause with his father to make a home for the family upon this wretched farm. When all were done with him he married, and he appears to have married well; and at all events the plaintiff swears that her daughter-in-law has always been kind to her and always wants her to live with them—as to arrears the plaintiff has not shewn that she is in debt or has been in need of anything not furnished her and she made no demand until recently. I don't think I am bound to give arrears and I know it is a case in which I ought not to direct payment of arrears if not compelled to. The parties do not desire a reference. There are $50 in the bank in the name of the plaintiff. The defendant if necessary will facilitate the giving of this out and it will be applied on the judgment. There will be judgment for this $50 and $130 on the promissory note with interest.

Under paragraph three of the will I think the defendant Honsinger should pay the plaintiff $100 a year and her expenses for medicine and medical attendance not exceeding $25. He must also furnish her with wood if and while she resides in the house given her by paragraph two of the will. I would give her wood, delivered at the farm, even if she should be keeping house elsewhere, but the contingency is so remote that I think it need not be provided for. The provisions in this paragraph are a charge upon the land and bind the estate of the defendant Small. The $100 for maintenance should run from the date of the writ and be payable half-yearly.

MASTER IN CHAMBERS MARCH 11TH, 1913.

JARVIS v. LAMB.

4 O. W. N. 945.

Discovery—Further Affidavit on Production—Material in Support of Motion.

MASTER-IN-CHAMBERS dismissed plaintiff's motion for a further and better affidavit on production upon the ground that the material filed in support of the motion was insufficient.

Ramsay v. *Toronto Rw. Co.*, 23 O. W. R. 513, referred to.

Motion by plaintiff for further and better affidavit on production by defendant company.

Grant Cooper, for the motion.

W. D. McPherson, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The plaintiff's claim arises out of a purchase of shares of mining stock, which he says he was induced to buy in May, 1911, by the untrue representations of the agents or officers of the company, who are made defendants. The cause was at issue more than a year ago; and the president of the company was examined for discovery on 8th May last. On 28th February of this year, the plaintiff moved for a further affidavit on production by the 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 alleging 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 will be shewn by the entries in the company's books, and that these contracts formed the basis of the manipulation of the stock of which he complains, but which in the statement of claim are charged as made by the co-defendants who deny all connection with the matter.

The plaintiff also relies on the examination of the president. On reading the whole material there does not seem to be any ground for making the order asked for.

The president admits the existence of a contract on 17th May, 1911, with some one (but not with any of the defendants) for the sale of stock of the company; but he says this had nothing to do with what is called "supporting the market" and contained nothing of the kind 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 now stand there is no ground for the order asked for. What is necessary for that purpose is stated in Bray's Digest of Discovery, article 39, p. 10 and p. 26, cited in *Ramsay* v. *Toronto Rw. Co.*, 23 O. W. R. 513. Here the whole allegations of the plaintiff are denied and particularly the alleged manipulation of the market for the stock in question under an agreement for that purpose or otherwise howsoever.

The motion must be dismissed with costs to defendant in any event.

HON. MR. JUSTICE LENNOX. FEBRUARY 20TH, 1913.

SCULLY v. RYCKMAN.

4 O. W. N. 850

Moneys Lent—Action to Recover—Betting Transactions—Illegality—Evidence—Receipt.

LENNOX, J., gave judgment for plaintiff for $2,000 and interest and costs in as action for $2,250, moneys alleged to have been lent to defendant which defendant denied had been so lent.

Action to recover $2,000 alleged to have been lent by plaintiff to defendant on September 28th, 1908, $250 advanced in respect of certain betting transactions and interest, tried at the Non-Jury Assizes, Toronto, February 14th, 1913.

J. P. MacGregor, for the plaintiff.

K. F. Mackenzie, for the defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff is not entitled to recover in respect of the $250 alleged advances made for defendant in connection with betting at the Woodbine. The plaintiff was not able to say whether the advances he claims to have made were of the class recoverable at law, and failing by reason of this uncertainty, I have not been compelled to weigh the testimony of the plaintiff and defendant upon this branch of the case. I am of opinion that the plaintiff is entitled to recover in respect of the balance of his claim, namely, for an alleged loan of $2,000 and interest.

A formal receipt is produced by the plaintiff for $2,000 dated the 28th of September, 1908, filled up and signed by

the defendant. The defendant admits that he got $2,000 from the plaintiff at this time but says it was not a loan, it was a dividend on bookmaking transactions.

The decision, to my mind, does not hover so close over the boundary line of uncertainty as to invite a critical tracing out of the shifting positions of the onus of proof. Nor is it necessary for me to weigh carefully who comes nearest the facts as regards the discount of the two promissory notes, save as hereinafter referred to. It is enough for me that, upon the main question, the evidence, the manner in which it was given, and the surrounding circumstances, force a clear conviction upon my mind that the plaintiff is telling the truth when he swears that he loaned the defendant $2,000 on the 28th day of September, 1908, and that at that time, whether truthfully or merely as a means of obtaining a share of money which he says had been made through timely information given the plaintiff, the defendant obtained this money by representing himself as being hard pressed.

The receipt of the money is admitted, but the defendant says he had loaned the plaintiff $1,000 in the fall of 1907, and the letter enclosing the cheque speaks of it as a loan, but the defendant admits that this letter was inaccurate and was worded to conceal his partnership with the plaintiff from his office staff and legal partners. He says he was to get a share of profits proportioned to his investment and was guaranteed against loss. The guarantee is denied. The plaintiff swears that this money, and $1,500 with it, was lost in the fall of 1907 on the Woodbine and at Hamilton, and that the transaction was thus at an end.

The plaintiff swears that the loan was made in the defendant's office and that defendant then insisted upon giving a receipt. The receipt produced is upon a form printed by Grand & Toy, from whom defendant's firm bought some of their forms.

It is the testimony of both sides that the plaintiff made large gains at the Woodbine Autumn Meeting of 1908, and that the defendant, through the plaintiff, individually made some $3,800 which the plaintiff paid him on the 26th of September, 1908.

The defendant's account of the payment of the $2,000 and the giving of the receipt is that two days afterwards, that is, on the 28th, he went to plaintiff's bedroom in the

King Edward hotel and there (originally, he said, in presence of plaintiff's brother) the plaintiff counted out and gave him, from a large amount of money which the plaintiff had in a box in his room, the $2,000 in question as a dividend upon the defendant's $1,000 investment, and offered him $1,000 more. The defendant says that he then insisted upon giving the plaintiff the receipt in question, as otherwise the $1,000 would perhaps be enforced against the plaintiff; and to this end he sent out and procured the printed form used, but he did not at any time make any entry of the receipt of the $2,000. He says he did not accept the additional $1,000 as that would have paid him in full and put him out of the bookmaking profits. I cannot see this, as he was on his own story then entitled to $3,600, or two-fifths of $9,000, in dividends alone. However, in any case I regret to say that I cannot accept the defendant's recollection upon this point.

It was certainly unfortunate—though still consistent with perfect honesty—that the defendant found himself compelled in Court to suggest a modification of his previous testimony as to some of the circumstances attending the payment over of this money. The plaintiff and his brother both swear that all the money was kept in the hotel vault. Be this as it may, the sending out for a receipt, the guarding of the plaintiff's interests, and the neglect to guard his own—and in the same way the calling up from time to time of the letters, telegrams and memoranda calculated to corroborate the defendant, and intentionally, not accidentally, destroying these documents—these doings, while they may all have occurred, are not what I would have looked for to occur.

On the other hand, I believe the plaintiff, corroborated as he is by Fowler, when he swears that this money—the whole $2,500 called "a roll"—was lost at Toronto and Hamilton, at the race meetings in the autumn of 1907, and that the defendant knew it was lost; and further—for it is sworn to and not denied—that the defendant himself, by betting against this "roll," won $2,000, and so helped to bring about the bank's collapse.

I am pressed by the argument that the defendant is and was a wealthy man, and therefore it is almost inconceivable that he would borrow money. I do not know. I have only the same evidence of this that I have in denial of the

loan and in support of the alleged dividend—evidence which I have not seen my way to accept. But in any case, even wealthy men sometimes need, and often want, more money. It proves nothing.

As to the promissory notes, they have no necessary connection with the issues in this case. The indorsements may have grown out of the loan; but the relations between the defendant and the plaintiff were very intimate and cordial in any case.

The notes help me to determine from what date the interest should run. The first note is dated the 29th December, 1909. I am disposed to think that it was not contemplated that this loan would immediately bear interest. There is no evidence that I recall of a demand for repayment until about the date of the first discount.

There will be judgment for the plaintiff for two thousand dollars and interest from 29th December, 1909, with costs.

HON. MR. JUSTICE LENNOX. FEBRUARY 27TH, 1913.

SWALE v. CANADIAN PACIFIC RW. CO. & W. J. SUCKLING & CO. (THIRD PARTIES).

4 O. W. N. 884.

Railways—Action for Conversion of Goods Entrusted to Them—Railway Act (Can.) s. 345—Sale to Realize Charges—Negligence of Auctioneer—Loss—Third Parties—Limitation of Liability—Want of Endorsement of Bill of Lading—Right of Third Parties to Set Up—Damages—Assessment of—Set-off—Costs.

LENNOX, J., gave judgment for plaintiffs against defendants, carriers, for $1066.40 damages for loss or conversion of certain goods entrusted to them and for defendants against the third parties, auctioneers, for the same amount, as the loss had occurred by reason of the negligence of the latter, to whom the goods were entrusted for sale under sec. 345 of the Railway Act, in order to realize certain charges due and owing by plaintiffs to defendants.

Action tried at Toronto without a jury, on 19th November, 1912, and argument heard on 9th January, 1913, for conversion of certain goods entrusted to defendants as common carriers for shipment from Liverpool, Eng., to Toronto, Ont. Defendants claimed relief over against the third parties, the auctioneers who had sold the goods in question as agents for defendants, to pay certain charges of the latter upon them. Vide 20 O. W. R. 997; 21 O. W. R. 225; 25 O. L. R. 492, for interlocutory motion herein as to the addition of the third parties.

Wm. M. Hall, for the plaintiff.

S. Denison, K.C., for the defendants.

W. Laidlaw, K.C., for the third parties.

HON. MR. JUSTICE LENNOX:—The action of the defendants is not complained of, and I may say at once that throughout they treated the plaintiff with great patience and leniency. The liability of the defendants, if any, arises out of the conduct of the third parties, the auctioneers employed to dispose of the plaintiff's goods.

As the third parties are said to be a well established firm, doing a large business, I will assume that, generally speaking, their business may be well conducted. In this instance, however, their method of handling, caring for, keeping track of, and accounting for the goods entrusted to them by the defendants was negligent and unbusinesslike to a marked degree. Their records are inaccurate, and the account rendered to the defendants was in fact, and I am afraid intentionally, inaccurate and misleading. No account was taken of the goods as they were taken in or when they were unpacked and distributed about the warehouse, although there were goods of other customers there as well. No effort was made to care for the smaller articles—many of them now missing—although this firm were not in exclusive occupation, and although the premises were during business hours open to the public.

It is said there were men taking care of the goods. There was no specific evidence of this, and I cannot find that any men were there outside the regular staff of porters and clerks. No catalogue of the goods was ever made. They were advertised as ninety instead of ninety-seven cases; as the goods of parties who had no interest in them; the list of the goods sold cannot be found; and Mr. Suckling now admits that in one instance at all events, out of many similar errors claimed, they credit less than thirty per cent. of the amount actually received.

But the worst feature is the manner of keeping the accounts. Here, in their account with the defendants, one item of receipt $90, is altogether omitted; and although their ledger without this item shews total receipts of $1,855.20, their statement to the defendants shews total receipts of only $1,790.20—a shortage of $65.

There may have been no sinister reason for omitting the $90 for the clock. I leave this point undetermined. But as to the $65, Mr. Suckling can give no explanation whatever. I think I can. I think it plainly appears on looking at the ledger that the receipts were reduced by $65 to enable the third parties to omit from the debit side of their account, and yet receive payment of, two wholly unjustifiable charges, namely, "Sanderson" (said to be rent) $20, and an item without a name, $45; items which the firm evidently did not think it expedient to refer to in the statement sent the defendants.

Other evidence of want of care is furnished by the fact that articles belonging to this consignment were found in the Suckling warehouse months after the sale. This in addition to the fact that before the sale Tom Swale missed a lot of things, some of which he subsequently found.

I am satisfied that the plaintiff's account of the goods she purchased from the third parties on the 20th October, 1909, exhibit 13, is correct. I am satisfied that the 97 cases delivered to the third parties by the defendants contained all the goods said to have been shipped from England, that they reached the firm in fairly good condition, and that at the time of their receipt, those unaccounted for were probably worth the amount claimed for them by the plaintiff. W. J. Suckling, the head of this firm, says; "whatever goods the shipping bill called for we got."

The list of goods used on the interpleader matter and filed in this action, and the accounts made out at the time of the shipment by the plaintiff's husband and by Davies, Turner & Co., all go to shew what the 97 cases contained. Tom Swale says, "As far as I know, all reached Suckling's, all seemed to be there except the chairs and china," and as it turned out these things were there too; and of the missing things now sued for, this witness saw several before the sale. Rawlinson—an experienced man—examined the cases at defendants' sheds with a view to a loan on them, and says: "the cases were intact and seemingly in good condition," Hall and Dixon are to the same effect, and Bartlett, who delivered the goods at Sucklings saw the nine largest unpacked. There were mirrors and other breakable things, but he says: "the cases were dirty, but in good order. The contents were in good condition, there was nothing broken."

There is some testimony very much the other way. Mr. Suckling says: "The grandfather clock was broken in about one hundred pieces. I could not recognize that it was a clock." The one hundred fragments sold for an average of ninety cents each, and I find it a little difficult to believe that the clock was so much broken up, and very very difficult to believe that an auctioneer of forty years experience would have no idea that it was a clock.

A number of technical objections were raised on behalf of the third parties. Recovery is limited by the bill of lading to $5 a package. I do not think this applies here. This is a sale under sec. 345 of the Railway Act, and under sub-sec. 3; "the company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto."

The defendants do not take this objection; and it is clearly not any objection that the third party can set up against their employers.

The third parties also argue that the bill of lading has never been properly endorsed. The defendants, by their letters, their statement of defence, and otherwise, have over and over again recognized the right of the plaintiff to immediate delivery of the goods on payment of the tolls and storage charges, have settled with Davies, Turner & Co., in full, and obtained an indemnity from them, and have not, and do not raise this objection. And as to both these objections the order made in this action as to the issues to be tried and method of trial does not give liberty to the third parties to dispute the liability of the defendants to the plaintiff or to take part in the trial as between these parties, and there are no such objections attempted to be raised by their statement of defence. On the contrary, so far from setting up an identity of interest, they distinctly plead that the question of their liability is entirely distinct from the questions determining the liability of the defendants. The facts and figures in this case, too, afford cogent reasons against this argument, even if they were technically well lodged.

The defendants were paid in full when the sale was discontinued on the 21st October, 1909, and the plaintiff was entitled to immediate delivery of the goods now sued for; and I may add, incidentally, would have got them at that

time if the third parties had exercised reasonable care, and kept a proper record of their transactions.

After a lot of investigation the true account is shewn to stand as follows:—

The third parties at the time of the sale accounted to defendants for gross receipts amounting to		$1,790 20
They subsequently paid for two chairs		25 00
There is satisfactory evidence of additional receipts at the time of sale, amounting to		84 75
Making the total gross receipts		$1,899 95
The third parties are entitled to be allowed:—		
Commission on $1,899.95, @ 10% ...	$190 00	
For cartage	18 80	
Amount paid Jenkins entered as "cash"	30 10	238 90
Leaving amount to be paid by third parties to defendants. (They have actually paid $1,505.63)		$1,661 05
The defendants' full claim is	$1,657 79	
Leaving a surplus to be paid the plaintiff of	3 26	
	$1,661 05	$1,661 05

This does not take into account $15 worth of goods sold to plaintiff on the 20th October, as there was sufficient to cover everything, and so the third parties treated it, without this item. It does, on the other hand, include $70.28 costs allowed the defendants, for which they had probably only the remedy of an ordinary creditor, or of a judgment creditor at most. I have disallowed the $45 claimed for advertising. The evidence shews that the commission covers this. There were some peculiar transpositions and combinations effected before the statement of the sale was issued to the defendants. The item of $66.75 is one of these. I am not at all sure that any part of it should be allowed; but I allowed $30.10 of it, which was entered as "cash," and said to have been paid Jenkins for unpacking and setting up. Jenkins says nothing about it. The balance of it, $36.65, was claimed from the defendants for "repairing," but there were no repairs. It appears in the ledger as "salary." I have allowed commission upon the total receipts as I make them—thus increasing the commission by $10.98.

Without reference then, to the missing goods now sued for at all, there was, when they stopped selling on the 21st October, in the hands of their agents, the third parties, sufficient, and more than sufficient to satisfy the defendants' claim in full, and this being so, I fail to see the relevancy of the bill of lading or *The Bankers Leather Co.* v. *Royal Mail Steamship Co.*, or *Marriott* v. *Yeoward*, [1909] 2 K. B. 987, or *Glyn Mills and Co.* v. *East and West India Dock Co.*, 7 A. C. 591, or the Merchants Shipping Act to this case. The transit was completed, the bailment was at an end, the money owing the defendants was in the hands of their agents, and the plaintiff thereupon became entitled to an immediate delivery of her goods and payment of the surplus moneys or damages to the extent of their value.

As already intimated, I find that the missing goods were delivered to the third parties as part of the contents of the 97 cases or packages. These are enumerated and described in exhibit No. 14, and are valued at $1,168.75. The third parties called expert witnesses to value a set of china, not now in question, but have not questioned the value put upon these articles by the plaintiff and her husband—except the packing cases, and some papers hereinafter referred to, although I have no doubt that many of these things could, upon the description given of them, be appraised by the experts who were in Court. I might, therefore, be said to be bound to accept Tom Swale's evidence as the only evidence of value before me. Undoubtedly men have a tendency to overvalue their own belongings. This would apply to the ordinary goods. There were a lot of rare and exceptionally valuable things in this list, and these I think he would be liable to undervalue, and I might perhaps safely accept Swale's valuation as a whole, except as to the papers claimed for. There is a possible question of breakage too—though not discussed. The missing articles that could be broken would not represent more than $150—and they were generally small articles not very liable to break—10 per cent. or 15 per cent. would probably be a reasonable estimate, but this is all very speculative. I have given this matter very careful thought, but I cannot overcome altogether the want of evidence.

The total of these articles is $1,168 75

Take off

China case returned $100 00

2 chairs paid for	$25 00	
Overclaim for evidence, letters, etc. ..	90 00	
And general reduction	53 75	268 75
Leaving amount in favour of plaintiff		$ 900 00
Add proceeds of sales not accounted for		84 75
And overcharges conducting sale, $45 plus $36.65 not accounted for		81 65
Making a total claim in favour of plaintiff of ..		1,066 40

The defendants in their statement of defence claim a balance of $177.16. They have since been paid $25, leaving a balance owing them of $152.16. They abandoned this in their settlement with Davies, Turner & Co., agreeing to accept the $600 they received in full. I do not think this should bind them as against the plaintiff. Certain interlocutory costs have been dealt with before trial, and my judgment is not to be read as conflicting with the orders made.

There will be judgment for the plaintiff against the defendants for the sum of $1,066.40 with costs.

Judgment for the defendants against the third parties for $1,066.40, and the costs they pay the plaintiff including the costs to be paid by the defendants to the plaintiff under order made herein on the 4th March, 1912, but not including the costs payable under the order of Mr. Justice Britton of the 13th of March, 1911, together with the defendants costs of defence.

Judgment for the defendants against the plaintiff for $152.16 without costs, as between these parties, to be set off against the plaintiff's judgment against the defendants.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 27TH, 1913.

McFARLANE v. FITZGERALD.

4 O. W. N. 869.

Schools—Township Continuation School—Resolution of Township Council—Guarantee of School Board Debts—Ultra Vires—Injunction—Costs.

MIDDLETON, J., *held*, that a township council had no jurisdiction to pass a resolution guaranteeing the payment of all legal debts incurred by a school board in connection with certain litigation as the township had no right to divert moneys from the School Board or in any way interfere in its affairs and that the council would be restrained by injunction at the suit of a ratepayer from acting upon such illegal resolution.

Motion for an injunction restraining the township council of West Nissouri from acting upon a certain resolution passed by them turned by consent into a motion for judgment.

W. R. Meredith, for the plaintiff.

G. S. Gibbons, for the defendant.

HON. MR. JUSTICE MIDDLETON:—This is another chapter in the unfortunate litigation over the continuation school in West Nissouri. The facts appear sufficiently in the judgments already reported. (*Vide Henderson* v. *West Nissouri*, 20 O. W. R. 50; 24 O. L. R. 517; *Re West Nissouri Continuation School*, 21 O. W. R. 533; 25 O. L. R. 550; *Re West Nissouri Continuation School*, 22 O. W. R. 842; 23 O. W. R. 601.)

Upon a mandamus being sought to compel the school board to apply for the money necessary for the maintenance of the school it was suggested that the county council might repeal the by-law for the establishment of the school, to which it was answered that it would be contended that the county having created could not destroy, and that it was hoped that, even if it had the power the county would not repeal the by-law in question.

When that motion was before me, I refused to delay judgment, as the demand had to be made before a day named in the statute, and being of opinion that the trustees were bound to make the demand, I awarded a mandamus.

An appeal was had and pending the appeal the demand was made without prejudice to the rights of the parties. Upon this appeal judgment was reserved to see what action (if any) the county council might take, and to allow the validity of any repealing by-law to be determined.

The county took no action, and judgment was then given, dismissing the appeal.

In the meantime the township council was doing its best to forward its views and secure a repealing by-law from the county, and those interested in the establishment of the school were opposing any such by-law, both upon the ground of absence of power and inexpediency.

The educational committee of the county council reported against any attempt to repeal "on account of the uncertainty of liability resulting from legal action now pending the judgments already given—but added that "as

soon as the expense and costs are paid by either the school board or municipal council the resolution and by-laws should be repealed."

To fortify its position the township council passed a resolution that the township "guarantee the payment of all legal debts" incurred by the school board "and that the same be deposited with the county treasurer as soon as ascertained."

This meant that the township intended, instead of obeying the mandamus to pay the $2,000 to the school board, to have an enquiry as to the debts of the board and to pay sufficient to the county treasurer to enable him to pay the creditors—as the mandamus was still in the hands of the Appellate Court, this was not intended to be contumacious, and was only intended to be a means of satisfying the county council, that in the event of repeal the debts would be paid.

As a counter-move the plaintiffs brought this suit to restrain any action upon this resolution.

The county council finally determined to take no action upon the request for repeal and returned the resolution to the township. There is, therefore, nothing in the action now—beyond the question of costs.

The township had no power to divert the money from the school board or in any way to interfere with its affairs. The school board has the right to receive the money it calls for and to arrange and liquidate its own debts. What the township sought to do when it proposed to pay to the county, sufficient to pay the debts of the board to be proved before the county treasurer is quite foreign to anything that is authorized by the Municipal Act and *ultra vires*. This *ultra vires* action of the municipality and improper payment of municipal funds, can, I think, be restrained by a ratepayer in a class action.

Looked at from a broader point of view the costs of this action really form part of the expense of an unsuccessful attempt by the township to get free from an obligation imposed by law, and the fairest disposition of costs is to direct payment out of the township funds rather than to impose the burden on the individual.

For these reasons the injunction may be made perpetual and defendant township should be ordered to pay costs.