

1885 •May. 21. •Nov. 16. —	DENIS O'SULLIVAN (by original bill) (PLAINTIFF)..... }	APPELLANT.
	AND	
	WILLIAM HARTY AND CHARLES } W. WELDON (DEFENDANTS)..... }	RESPONDENTS.
	AND	
	<i>By order of Revivor.</i>	
	JOHN KEHOE, EXECUTOR OF THE } LAST WILL AND TESTAMENT OF } DENIS O'SULLIVAN, DECEASED } (PLAINTIFF)..... }	APPELLANT.
	AND	
	WILLIAM HARTY AND CHARLES } W. WELDON (DEFENDANTS)..... }	RESPONDENTS.

Administrator, acts of—Acting by agent—Next of kin—Costs.

The plaintiff wished to administer to the estate of his brother in the County of Westmoreland and Province of New Brunswick,

*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

but was unable to give the necessary administration bond until the defendant W. and one J. agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock which the defendants wished to convert into money, but plaintiffs would not assist them in doing so.

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In passing the accounts of the estate in the Probate Court of Westmoreland County, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the court.

Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally, the plaintiff filed a bill to compel the defendants to pay him his portion of the estate, with \$1,000 which he claimed as commission, and also to hand over to him the shares of the next of kin.

At the hearing a decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs, as between solicitor and client, which could be retained out of the plaintiff's share of the estate.

On appeal Proudfoot J. reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendant's costs, but the Court of Appeal restored the original judgment.

On appeal to the Supreme Court of Canada :

Held, affirming the judgment of the court below, that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of the costs.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing a judgment of the Chancery Division of the High Court of Justice.

The facts are sufficiently set out in the above head-note, and more fully in the report of the case in the Court of Appeal.

O'Sullivan for appellant contended that the suit was virtually an administration suit, and that the costs should not have been borne entirely by the plaintiff.

J. MacLennan Q.C. and *Whiting* for respondents, con-

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tended that the respondents had not been guilty of any breach of duty, and they could not in justice be saddled with the costs of a defence of a suit which was not necessary in their interest, and to which they were not parties. The construction put on the decree by the Court of Appeal gave justice to all parties. *Stevens v. Banks* (1); *Creigh v. Hedrick* (2).

Sir W. J. RITCHIE C.J.—I had not on the argument, and have not now, any doubt in this case. I think the Court of Appeal was quite right; the whole difficulty and litigation in this case, arose from the unreasonable and unjust conduct of the original plaintiff. The next of kin are no parties to this proceeding, and as for the two suits with the estate, with them they have no concern; and so, from no principle that I can conceive, can the amount adjudged to them in New Brunswick be now reduced by charging them with the costs of this proceeding. The case of *Boynton v. Boynton* (3) clearly shows that the court did quite right in directing that the costs should be paid by the plaintiff, the executor of the original plaintiff (who also instituted this appeal).

I do not think it necessary to add anything to what was said in the court below.

FOURNIER, HENRY and TASCHEREAU JJ. concurred.

GWYNNE J.—This appeal is founded wholly upon a misconception, namely, that the bill filed by the plaintiff in the Chancery Division of the High Court of Justice in the Province of Ontario was a bill for the administration of the estate of one John F. O'Sullivan, deceased, who died intestate in the Province of New Brunswick, leaving property there to be administered.

(1) 10 Wall. 583.

(2) 5 West Va. 140.

(3) 4 App. Cas. 733.

The bill of complaint states that the plaintiff claiming to be sole next of kin of the said John F. O'Sullivan, and residing himself at Montreal, in the Province of Quebec, and being unable to procure the requisite bail to enable him to procure letters of administration of the estate and effects of his deceased kinsman, to be granted to him in the Province of New Brunswick, entered into an agreement with the defendants, bearing date the 2nd Sept., 1876, whereby, after reciting that the said John F. O'Sullivan had then lately departed this life at Moncton, in the Province of New Brunswick, leaving personal property amounting to upwards of nine thousand dollars, and that the plaintiff, claiming to be brother and only next of kin of the said deceased, had applied for letters of administration of his estate, and that the Honorable Thomas R. Jones and the defendant Weldon had agreed to become sureties for the said plaintiff as such administrator upon being indemnified by the defendant Harty and one Patrick Brown, and that the plaintiff would hand over to the said Harty and Weldon the said personal property to be held by them until the final distribution of the estate, it was agreed as follows :

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1st. That the said plaintiff would, as soon as letters of administration should be granted to him, have the said personal property converted into money and deposited in the Bank of British North America at Montreal to the credit of the said defendants.

2nd. That the said defendants should proceed to invest the said monies in good securities to the best advantage, and authorise and empower the said plaintiff to receive the interest and monies arising therefrom.

3rd. That upon the final decree of distribution being made, and no other person successfully disputing the right of the said plaintiff as the next of kin of the said deceased, the said defendants would deliver and pay over to the said plaintiff all the said monies and the securities in which the same might be invested, less expenses.

4th. That the said defendants should not each of them be accountable for the other, or for any loss or damage arising from any invest-

1885 ments or any depreciation thereof, but that each should be liable
 only for his own wilful neglect or default.

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 O'SULLIVAN      5th. That in order to ascertain whether there were any other  
 v.                    persons next of kin of the deceased, the plaintiff should use all  
 HARTY.            diligence in making enquiries for such persons as the defendants  
 Gwynne J.        might direct.

The bill then alleges the granting of letters of administration of the personal estate and effects of the deceased to the plaintiff out of the proper court in that behalf, being the Westmoreland Court of Probate in the Province of New Brunswick; it then sets forth the placing in the defendants' hands certain personal estate of the deceased, in pursuance of the above agreement; it then alleges that upon the basis of the accounts rendered to the plaintiff by the defendants of their dealings with estate so placed in their hands, the plaintiff as administrator of the said estate passed his account in the said Court of Probate. The bill then alleges that on the taking of the said account the plaintiff was charged with the sum of \$10,098.08 and was allowed the sum of \$2,152.31 on account of disbursements, charges, expenses, and compensation in the winding-up of the said estate, and that the said sum of \$2,152.31 included a sum of \$1,000 allowed to the plaintiff by the said court for his commission and other reasonable and necessary expenses as said administrator, leaving a balance chargeable to the plaintiff as said administrator of \$7,945.77, as money in his hands to be divided among the next of kin, consisting of seven persons, including the plaintiff, who were found by the said Court of Probate to be the sole next of kin of the deceased. That immediately after the passing by the plaintiff of his account, the said Court of Probate, by a final order of distribution dated the 16th day of July, 1878, declared that the plaintiff was entitled as one of the next of kin as aforesaid to retain the sum of \$1,135.11 out of the said sum of \$7,945.77, and that the said six other next

of kin, naming them, were each entitled to receive the sum of \$1,135.11 out of the said sum of \$7,945.77, and ordered and decreed distribution of the said last mentioned sum accordingly. That the plaintiff being desirous of receiving his said compensation of \$1,000, so allowed to him as aforesaid, and of receiving his said share of \$1,135.11, and also being desirous of paying the said several next of kin their respective shares so ordered and decreed as aforesaid and of winding-up the said estate, has applied to the defendants to pay over to the plaintiff the said monies in their hands, and the profits thereof, but that the defendants have refused and neglected, and still refuse and neglect, so to do, and the bill prayed that an account might be taken of all sums of money received by, or come to the hands of, the defendants for or on account, or for the use, of the plaintiff, and of the profits thereof and of all dealings and transactions of the defendants respecting the said monies and profits, and that the defendants might be decreed to pay to the plaintiff what, on taking such accounts, should be found due from the defendants to the plaintiff; that the defendants might be ordered to pay the costs of the suit, and for further relief such as the nature of the case might require. The short substance of the defendants' answers to this bill was that they had fulfilled their agreement with the plaintiff set out in the bill in every particular, that they had rendered him full account of all their dealings with the estate of the deceased come to their hands, that, in fact, it was upon such account that the plaintiff had passed his account with the other next of kin in the Probate Court, and that the sole impediment to the decree of that court being executed was that the plaintiff refused to execute a power of attorney to enable certain railroad stock of an English company, part of the deceased's estate, to be realized;

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that they claimed, as sureties of the plaintiff in his administration bond, to be entitled to relief from all liability upon the monies in their hands under the said agreement passing out of their hands, and the defendant Harty claimed a lien upon the plaintiff's share in the said estate for monies advanced by him to the plaintiff, and disbursed by the defendant Harty at the plaintiff's instance, and due by the plaintiff to him as remuneration for services performed by the defendant Harty in connection with the said estate, at the request of the plaintiff, and by way of cross relief the defendant prayed that the plaintiff might be ordered to specifically perform the said agreement upon his part, and to do and perform all acts, matters and things necessary to have said railway scrip converted into money; that the defendant Harty might be declared entitled to a lien on plaintiff's share of said estate for such remuneration as aforesaid, and that the plaintiff should be ordered to pay the costs of the suit, and that the defendants should have a lien therefor upon the plaintiff's share in the said estate, and that they should be relieved from all liability in respect of the administration bond executed on the letters of administration being granted to the plaintiff.

It will be seen from these pleadings that the subject-matter of this suit was wholly personal between the plaintiffs and the defendants alone, arising out of their contract set out in the agreement of the 2nd of Sept., 1876, and with which the other persons who proved to be next of kin to the deceased had no concern, and whose rights therefore could not be prejudiced by any decree to be made in this suit, to which they were no parties. The bill not only did not contemplate the taking under a decree to be made in this suit an account of the administration of the intestate's estate, for which purpose the other next of kin would be

necessary parties, but on the contrary proceeded upon the basis that that administration account had been taken in the New Brunswick Probate Court, and sought relief personally in aid of the plaintiff against the defendants as his agents in respect of their dealings under the said agreement of the 2nd September, 1876, for the purpose, as was alleged, of enabling the plaintiff as administrator of the intestate's estate to comply with the terms of the order of distribution of the said estate made by the New Brunswick Probate Court. Now the decree made in this suit was to the effect that it should be referred to the Master to take an account of the dealings and transactions of the defendants with the trust estate in the pleadings mentioned since the first day of May, 1878 (that being the day on which the plaintiff passed his administration account in the New Brunswick Probate Court), and to find and state the balance coming to the plaintiff; and the court did order that in passing their said account the defendants should be allowed to retain out of any money in their hands their costs of this suit as between solicitor and client; and the court did further order and decree that the plaintiff should facilitate and assist the defendants in making sale of the railway scrip in the pleadings mentioned, and that all necessary papers and documents for that purpose should be executed, and that the amount realized from such sale should be accounted for in taking the account by the decree directed. And the court did further order and decree that the defendants should within two months after the taking of the said account, settle the claims of the next of kin of the intestate John F. O'Sullivan, other than the plaintiff, and that in default of their so doing the balance of the funds of the intestate's estate in the hands of the defendants should be forthwith, after the expiration of the said two months, paid by

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them into court to the credit of the cause, subject to the further order of the court, and that if, upon the defendants settling with the said next of kin other than the plaintiff as aforesaid any balance of the said estate, after deducting the costs by the decree given to the defendants and making the allowances found in their favor by the Master, should remain in their hands, the said defendants should forthwith thereafter pay such balance to the plaintiff. The Master by his report found, among other things, that the defendant Harty was entitled to be allowed, and that the Master therefore allowed him, the sum of \$500 as a compensation for his personal services in the management of the estate. That he had taxed and allowed to the defendants the sum of \$858.75 for their costs of suit. That on or about the 22nd day of June, 1881, the railway scrip in the decree mentioned was, without the assistance of the plaintiff, sold or otherwise disposed of by the defendants, and that the Master had in the account taken before him charged the defendants with the proceeds thereof, and that on or about the same 22nd of June the defendants had settled with the next of kin of the intestate other than the plaintiff, and had paid to each of them the sum of \$1,135.11 being the amount coming to them respectively on the 1st of May, 1878.

The plaintiff appealed from this report to the Vice-Chancellor Proudfoot, because the Master had, in taking the accounts directed by the decree, deducted from the amount with which the defendants were chargeable the sums paid to the next of kin other than the plaintiff before the taking of the said accounts, and had charged the defendants' costs and the allowance of the \$500 made to the defendant Harty, against the balance thereafter remaining in the hands of the defendants, whereas, as the plaintiff contended, the shares of all of the next

of kin should have been made to bear a proportion of the said costs and of the said allowance, and because the said Master had by his said report improperly certified that the claims of the next of kin other than the plaintiff were settled by the defendants. The Vice-Chancellor allowed the appeal and made an order to that effect; from that order an appeal was taken to the Court of Appeal for Ontario, which court reversed the order of the Vice-Chancellor and affirmed the Master's report, and it is from this judgment and order of the Court of Appeal for Ontario that this present appeal is taken. In my opinion the appeal must be dismissed with costs. It was contended that upon the true construction of the decree, as it stands, and which, until reversed on appeal, must bind, the defendants' costs of this suit, and the allowance to the defendant Harty, as to the amount of which there is no contest, should be charged rateably to the shares of the whole of the next of kin and not to the share of the plaintiff alone. I have already pointed out that from the frame of the suit no such order could properly have been made, which would have been prejudicial to the interests of the next of kin other than the plaintiff, who were no parties to the suit; but the decree, in my opinion, is not open to any such construction. It contemplated, as it was proper that it should, that the next of kin other than the plaintiff should be paid the full amount found due to them respectively upon the plaintiff having passed his administration account in the New Brunswick Probate Court, and it enabled the defendants, or rather recognized the right of the defendants for their own protection, as sureties for due administration of the intestate's estate by the plaintiff, to settle directly with such next of kin, and all that the decree directed to be paid by the defendants to the plaintiff was the

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balance, if any, there should be after settling with said next of kin other than the plaintiff, and after deduction of the defendants' costs of suit and such allowances as should be made to them by the Master; and this is precisely what has been effected by the Master's report. Neither is there, in justice, any reason, even if the next of kin other than the plaintiff were parties to this suit, why they should contribute to the payment either of the defendants' costs of this suit or of the allowance of the \$500 to the defendant Harty. The defendants do not appear to have committed any default in the performance of the agreement of the 2nd September, 1876, upon their part. The suit, therefore, was not occasioned by any fault of theirs, a fact sufficiently apparent by the decree, which gives to them their costs of suit as between solicitors and client in a suit which was purely personal on the part of the plaintiff and arising wholly out of a contract entered into between him and the defendants. Then as to the \$500 allowed to the defendant Harty, it appears that the plaintiff agreed to give him this amount for services rendered by him, which, if he had not rendered, the plaintiff must needs have rendered himself or have gotten some other competent person to render, to enable him to discharge efficiently the office of administrator which he had assumed. The proper time and place to have had determined whether the other next of kin should contribute to this sum was when the administrator was passing his account in the New Brunswick Probate Court, when the sum of \$1,000, which appears to have been an exceptionally liberal allowance, was made to the plaintiff for all services, commission, &c., which could be claimed by an administrator for the administration of so small an estate as that of the intestate was, and as the defendant Harty acted in such administration solely as the agent of, and under contract with, the

plaintiff, he is the sole person by whom services rendered under such a contract should be paid.

*Appeal dismissed with costs.*

Solicitor for appellant: *Edward Mahon.*

Solicitors for respondents: *Britton & Whiting.*

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