hands belonging to the defendant, cannot avail; neither considered the balance the money of the defendant, and, after payment, it was undoubtedly the money of the plaintiff and not that of the defendant.

The argument, which might be made, that the defendant, in making the excess payment, did so under the option given him of paying more than $4,000 in November, 1912, does not assist him. The application made by the plaintiff of the money has precisely the same effect as though he had been, in February, 1913, allowed to exercise the option he had in November, 1912.

None of the circumstances succeeding February, 1913, has displaced the right of the plaintiff to appropriate the payment as he has done, and I do not see anything inequitable or unfair in his insisting on his rights when he made a conveyance of the land at the request of the defendant.

Whether the defendant has any rights against the plaintiff not raised by his pleadings, we need not consider.

I think the appeal should be dismissed with costs.

HON. SIR WM. MULOCK, C.J., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

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HON. MR. JUSTICE LENNOX. JUNE 16TH, 1914.

## KINSMAN v. TOWNSHIP OF MERSEA.

6 O. W. N. 597.

*Highway—Non-repair—Death of Child by being Thrown from Waggon—Liability of Township Corporation—Neglect to Fence Ditches—Evidence—Action by Parents under Fatal Accidents Act—Damages.*

LENNOX, J., *held*, that failure on the part of a municipality to fence a highway 16 feet in width on either side of which was a deep ditch constituted non-repair, and allowed the plaintiff $1,400 damages for the loss of his son who was thrown from a carriage and killed by reason of the negligence of said municipality in failing to erect fences at the sides of the highway.

Action by the father of a boy who was killed by being thrown from a waggon on a highway in the township of Mersea, to recover damages, under the Fatal Accidents Act, for the death of the boy, the plaintiff alleging that the high-