fendant that she was not able to take the 1.55 train or not sending for her trunk when she found she was unable to take that train.

I think the evidence fully justifies the finding that the defendant was guilty of negligence in the performance of his duty to the plaintiff as a common carrier, but, with great respect, I am unable to agree with the view that the plaintiff was also guilty of any negligence. The plaintiff had a right to assume that, in the absence of herself or some one on her behalf to receive the trunk, the defendant would discharge his duty either by placing the trunk in care of some one at the station whose duty it was to look after baggage, or by depositing it in the baggage room provided by the company for receiving baggage.

In Degg v. Midland R. W. Co., 1 H. & N. 781, Baron Bramwell says: "There is no absolute or intrinsic negligence. It is always relative to some circumstance of time, place, or persons." And also, "There can be no action except in respect of a duty infringed, and no man by his wrongful act can impose a duty." So here the wrongful act of the defendant cannot be invoked to impose a duty on the plaintiff to exercise greater care than she would be required to exercise on the assumption that the defendant had properly discharged his duty; and while, no doubt, she would not have suffered the loss if she had taken the precaution of sending for her trunk as soon as she discovered she could not take the 1.55 train, she was not, I think, bound to adopt any such precautionary course, in the absence of knowledge that the trunk had been by the defendant negligently exposed to the risk of loss. In other words, there is not, in my opinion, any absence of such care on the part of the plaintiff as it was her duty to use, and consequently she cannot be charged with an act of negligence.

I think the evidence warrants the conclusion that the trunk was lost solely through the negligence of the defendant.

The learned Judge fixed the plaintiff's damages at $180, and I would therefore allow the appeal with costs and direct judgment to be entered in favour of the plaintiff for $180 with costs.

RIDDELL, J.

OCTOBER 29TH, 1910.

SMITH v. SMITH.

Will—Construction—Devise — Mistake in Description of Land—General Words of Devise—Declaration that Land Owned by Testator Passed by Will.

Motion by the plaintiff for judgment on the pleadings in an action for the construction of the will of Leonard Smith, and a declaration that certain land passed thereby.