

The learned trial Judge to some extent based his conclusions upon the defective eyesight of the plaintiff. But it was not necessary to the affirming of the judgment that the Court should pass upon the questions whether the plaintiff's eyesight was defective and whether his defective eyesight should be accepted as an excuse for his having ridden so close to the embankment as to touch it.

The appeal should be dismissed with costs.

KELLY, J., agreed with FERGUSON, J.A.

MACLAREN and MAGEE, J.J.A., gave a "grudging assent" to the affirmance of the judgment.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT.

JUNE 29TH, 1918.

ROYAL BANK OF CANADA v. JOHNSTON.

Payment—Debt of Company to Bank—Promissory Note Held by Bank as Collateral Security—Deposits Made in Bank by two of the Makers of Sums Equalling whole Indebtedness—Question whether Deposits Equivalent to Payment—Evidence—Finding of Trial Judge—Appeal.

An appeal by the plaintiffs from the judgment of MIDDLETON, J., at the trial, dismissing an action on a joint and several promissory note for \$4,000, made by the defendants and two other persons, Davis and Ryder, and hypothecated to the plaintiffs as collateral security for the indebtedness of the National Toy and Novelties Company. That company became insolvent and made an assignment, owing the plaintiffs \$3,000. The plaintiffs sued the makers Johnston and Fritzken for the \$3,000. These defendants set up that the \$3,000 had been paid to the plaintiffs by Davis and Ryder, and that there was nothing due to the plaintiffs on the note; and they brought in Davis and Ryder as third parties.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

Peter White, K.C., and A. H. Robertson, for the appellants.

H. J. Scott, K.C., and N. Phillips, for the defendant Fritzken, respondent.

R. T. Harding, for the defendant Johnston, respondent.