The
Ontario Weekly Notes

VOL. XVIII. TORONTO, JUNE 25, 1920. No. 15

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 14TH, 1920.

*MASON & RISCH LIMITED v. CHRISTNER.

Damages—Breach of Executory Agreement for Purchase of Piano from Manufacturer—Measure of Damages—Difference between Cost of Manufacture and Sale-price—Loss of Profits—Duty of Vendor to Mitigate Damages—Absence of Open Market—Appeal—Reduction of Amount Assessed.

Appeal by the defendant from the order and decision of MIDDLETON, J., 47 O.L.R. 52, 17 O.W.N. 421, dismissing an appeal from the report of a Local Master.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

J. M. Ferguson, for the appellant.

J. G. Kerr, for the plaintiffs, respondents.

MACLAREN, J.A., reading the judgment of the Court, said, after stating the facts, that, the transaction being one where the consideration consists partly of money and partly of goods, the principles relating to sales apply, and not those relating to barter or exchange: Chalmers' Sale of Goods Act, 7th ed., p. 5; Halsbury's Laws of England, vol. 25, p. 209; Corpus Juris, vol. 7, p. 931; and cases cited.

It is well-established that, when a buyer wrongfully refuses to accept purchased goods, the damages for which he is liable are, if there be a market for them at the place of delivery, the difference between the contract-price and the market or current price after deducting the expenses of the resale: Dunkirk Colliery Co. v. Lever (1878), 9 Ch.D. 20, at p. 25; Joyce on Damages, vol. 2, sec. 1651, p. 1698.

* This case and all others so marked to be reported in the Ontario Law Reports.

According to the evidence, and as found by Middleton, J., there was no open market for player-pianos, in the sense in which the term is used in the cases. They are not sold, like grain or cattle or stock, upon the open market or exchange. Middleton, J., lays down the correct rule—that "the fundamental principle in all cases of breach of contract is that, so far as money can do it, the other party to the contract shall be placed in as good a situation as if the contract had been performed, this principle being subject to the qualification that the plaintiff has cast upon him the obligation of taking all reasonable steps to mitigate his loss consequent upon the breach:" British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London, [1912] A.C. 673; Payzu Limited v. Saunders, [1919] 2 K.B. 581; Leake on Contracts, 6th ed., p. 778; Elbinger Actien-Gesellschaft v. Armstrong (1874), L.R. 9 Q.B. 473, 476.

The onus of proving that there was an open market for this piano at Chatham or elsewhere was upon the defendant, and he made no attempt to prove it.

The Master did not expressly state on what grounds he proceeded in assessing the damages at $391; but it was probably because he knew that there was no open market in Chatham or vicinity for such an instrument, and because the plaintiffs had, on its rejection by the defendant, removed it to their warehouse in Toronto. Assuming that it would be or was resold by another agent for the same amount, and that the agent was paid the same commission as Glassford, who made the sale to the defendant, the proper amount would be that of the actual loss sustained by the plaintiffs according to the foregoing principles.

That amount would be $325, and not $391. The order of Middleton, J., and the Master's report should be varied by reducing the damages to $325, and there should be no costs of the appeal.

Order below varied.

SECOND DIVISIONAL COURT. JUNE 17TH, 1920.

BROWN v. MAWHINNEY.

Fraud and Misrepresentation—Sale of Business—Action for Deceit—Necessity for Proof beyond Reasonable Doubt—Evidence—Failure to Satisfy Trial Judge—Appeal—Claim for Articles not Delivered on Sale—Dismissal of Action without Prejudice to Claim.

Appeal by the plaintiff from the judgment of ROSE, J., at the trial (14th February, 1920), dismissing an action for damages for fraudulent misrepresentations alleged to have been made by the defendant whereby the plaintiff was induced to buy the goodwill, lease, plant, machinery, cars, and general business of the White Swan Laundry Company, in Chatham, Ontario.

The appeal was heard by RIDDELL, SUTHERLAND, KELLY, and MASTEN, JJ.

I. F. Hellmuth, K.C., for the appellant.

R. L. Brackin, for the defendant, respondent.

RIDDELL, J., in a written judgment, said that the action was for damages for deceit—a simple common law action, based upon alleged fraud.

The plaintiff must, in such cases, prove his case beyond reasonable doubt. Here the learned trial Judge was not convinced, on the evidence adduced, that the plaintiff had been wronged. An appellate Court does not abdicate its right and duty to reverse the judgment of a trial Judge in a proper case; but, to do so, it must be satisfied that he was wrong.

In the present case, RIDDELL, J., was not only not convinced that the trial Judge was wrong, but a perusal of the evidence led him (RIDDELL, J.) to the same conclusion as that of the trial Judge.

A few articles, said to have been claimed by a third person, should have passed to the plaintiff in the sale, as was made to appear by an affidavit filed since the trial The dismissal of this appeal was not to prejudice the plaintiff in any action he might be advised to bring against the defendant upon the contract, express or implied, that the plaintiff should have these articles.

KELLY, J., agreed with RIDDELL, J.

MASTEN, J., was also of opinion, for reasons given in writing, that the appeal should be dismissed with costs.

SUTHERLAND, J., agreed with MASTEN, J.

Appeal dismissed with costs.

HIGH COURT DIVISION.

ORDE, J. JUNE 14TH, 1920.

*WAMPLER v. BRITISH EMPIRE UNDERWRITERS AGENCY.

Insurance (Accident)—Policy Insuring against Loss in Respect of Motor-car—Peculiar Accident not Covered by Terms of Policy—Construction of Policy—Absence of Ambiguity—Conduct of Adjuster—Estoppel—Provision of Policy Guarding against Waiver—Powers of Adjuster—Absence of Authority from Insurers.

Action to recover the loss sustained by the plaintiff in respect of a motor-car upon which he was insured by the defendants.

The action was tried without a jury at Chatham.

J. G. Kerr and J. A. McNevin, for the plaintiff.

A. C. Heighington, for the defendants.

ORDE, J., in a written judgment, said that the car, at the time of the accident, was in charge of a son-in-law of the plaintiff. The plaintiff's daughter and son-in-law were crossing with the car from the mainland to Walpole Island, upon a ferry which was operated by means of a chain. When the ferry reached the island, the son-in-law was told that "it was all right to go ahead," and he proceeded to drive the car off the ferry on to the land. After the front wheels had reached the land, the ferry began to move away, with the result that the car dropped into the water.

One of the defences was that the loss was not covered by the defendants' policy, not having been caused by the stranding, or sinking, or collision, or burning of the ferry-boat from which the car slipped into the water. The accident was a most unusual one. The ferry-boat apparently was insufficiently moored to the shore, and the weight of the car, or the mere act of propulsion in driving it on to the shore, caused the boat to back away.

The learned Judge said that he was unable to see any ambiguity in the policy; and was of the opinion that the peculiar accident which caused damage to the plaintiff's car was not contemplated by the terms of the policy, and was not covered by it.

The plaintiff further contended that, whether liable upon the policy or not, the defendants were estopped by the consent and admissions of their adjuster, Robert Marsh, who was sent to investigate and adjust the plaintiff's claim, and who, it was said, gave certain directions to the repairers as to what was to

be done with the car, and otherwise acted towards the plaintiff in a way consistent only with the assumption that the insurers were liable. The adjuster denied these assertions; but, apart from his denial, it was fairly clear that, when he was despatched by the insurers to investigate the claim, they could not have been aware of the exact nature of the accident. In fact, it would be one of his duties to investigate this, as well as to ascertain the amount of the damage and to report.

The policy contained this provision: "This company shall not be held to have waived any provision or condition of this policy, nor of this endorsement, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

In the face of this provision, it was difficult to see how any act of the adjuster could be binding upon the defendants. But, quite apart from this provision, nothing that the adjuster was alleged to have done could estop the defendants from setting up the defence that the loss was not covered by the policy. The power to bind the defendants in this way could not be a necessary incident of the adjuster's duties, and it would require some express authority from the insurers to enable him to waive their rights or to estop them from setting up this defence: see Atlas Assurance Co. v. Brownell (1899), 29 Can. S.C.R. 537; Commercial Union Assurance Co. v. Margeson (1899), 29 Can. S.C.R. 601.

Action dismissed with costs.

MASTEN, J., IN CHAMBERS. JUNE 16TH, 1920.

RE BRITISH AMERICAN FELDSPAR LIMITED.

Company—Winding-up—Petition by Creditor for Order—Winding-up Act, R.S.C. 1906 ch. 144—Previous Assignment for Benefit of Creditors—Substantial Number of Creditors Desiring Winding-up to Proceed under Assignment—Adjournment of Petition—Costs.

Petition by W. Gardner for the winding-up of the company, under the Winding-up Act, R.S.C. 1906 ch. 144, and amending Acts.

T. H. Barton, for the petitioner.
H. S. Fisher, for the company, assignee, and certain creditors.
H. S. White, for certain creditors.

MASTEN, J., in a written judgment, said that the company had made a general assignment for the benefit of its creditors, and the petitioner, being a creditor, would, under ordinary circumstances, be entitled to a winding-up order. A substantial number of creditors appeared on the application and asked that the disposition of the assets of the company might proceed under the assignment and that the application to wind up be refused.

The judgment of the Court of Appeal in the case of In re Strathy Wire Fence Co. (1904), 8 O.L.R. 186, made it plain that there was jurisdiction, in the present circumstances, to refuse the application. Having regard, however, to the suspicions which are put forward on the part of the petitioner and of certain other creditors, the learned Judge did not think it right to refuse the petition, and he exercised the jurisdiction conferred by the Act by adjourning the further hearing of it until the first day after the long vacation. Meantime the assignee would be entitled to proceed with the winding-up of the estate.

In case the winding-up and distribution of the estate should proceed satisfactorily under the assignment, it might become unnecessary to press this petition further, and in that event nothing contained in this judgment should in any way prejudice the claim of the petitioner to costs of the present application so far as it had gone, as there was nothing to indicate that it was not made bona fide and in the honest belief that it was necessary.

SUTHERLAND, J., IN CHAMBERS. JUNE 17TH, 1920.

*MONTREUIL v. ONTARIO ASPHALT BLOCK CO. LIMITED.

Appeal—Proposed Appeal by Plaintiffs to Supreme Court of Canada—Proposed Appeal by Defendants from same Judgment to Privy Council—Motions for Allowance of Security in both Cases—Supreme Court Act, R.S.C. 1906 ch. 139, sec. 75—Privy Council Appeals Act, R.S.O. 1914 ch. 54, sec. 3—Priority of Plaintiffs' Appeal by Earlier Filing of Security—Right of Appeal to Canadian Court—Refusal to Allow Security on Appeal to Privy Council.

Motion by plaintiffs for an order approving of the security furnished by them upon a proposed appeal to the Supreme Court of Canada from the judgment of the First Divisional Court of the Appellate Division, 47 O.L.R. 227, ante 37; and motion by

the defendants for an order allowing the security for costs given by them upon a proposed appeal to the Privy Council from the same judgment.

E. D. Armour, K.C., for the plaintiffs.
A. W. Langmuir, for the defendants.

SUTHERLAND, J., in a written judgment, said that on the 13th May, about 11 a.m., the defendants' solicitors served a notice of their proposed appeal to the Privy Council upon the plaintiffs' solicitors, at Windsor, Ontario, where the solicitors for all parties resided.

Between 3 and 4 o'clock in the afternoon of the same day, the agents of the plaintiffs' solicitors in Toronto, in pursuance of instructions alleged to have been sent to them a day or two before, served on the agents for the defendants' solicitors there a notice of appeal to the Supreme Court of Canada from so much of the judgment of the Divisional Court as declared the defendant company entitled to a lien and directed a reference.

On the 14th May, the plaintiffs' solicitors filed a bond as security upon their appeal, and on the same day served on the agents of the defendants' solicitors in Toronto a notice of the filing of the bond and a notice of motion, returnable on the 17th May, for an order approving of the security. This motion came on for hearing, and was adjourned till the 25th May.

On the 19th May, the defendants' solicitors served on the plaintiffs' solicitors a notice of motion, returnable on the 25th May, for an order allowing the security filed by them on their proposed appeal to the Privy Council.

The two motions were heard together on the 25th May.

The learned Judge said that both parties were, of course, entitled to appeal.

The defendants urged that, if the plaintiffs were permitted to go to the Supreme Court of Canada, and the defendants were subsequently dissatisfied with the judgment of that Court, they could not appeal to the Privy Council without special leave.

Reference to Hately v. Merchants' Despatch Co. (1884), 4 O.R. 723.

It was suggested that, as the defendants had served the first notice of appeal, they had taken the first step. But, whatever might be the case as between different defendants, the Hately case would not necessarily apply to plaintiffs and defendants both desiring to appeal.

By sec. 75 of the Supreme Court Act, R.S.C. 1906 ch. 139, no appeal shall be allowed to the Supreme Court of Canada until the appellant has given proper security.

Section 3 of the Privy Council Appeals Act, R.S.O. 1914 ch. 54, provides that no appeal shall be allowed until the appellant has given security as therein mentioned.

Neither of these Acts expressly requires that a notice of appeal shall be given, in such a case as this. Under both Acts, the first important thing to be done is to furnish the necessary security.

It was the plaintiffs who took the first effective step towards prosecuting an appeal, when they filed their bond and served notice of filing and of an application for its allowance.

Apart from that, where either litigant desires to take an appeal to the final Canadian appellate Court, he should not be deprived of that right except for good reason.

The plaintiffs' application should be granted; and no order should be made upon the defendants' motion.

The costs of both motions should be costs in the cause.

MASTEN, J. JUNE 18TH, 1920.

*GRAHAM & STRONG v. DOMINION EXPRESS CO.

Mandamus—Common Carriers—Express Company—Carriage of Intoxicating Liquors—Motion in Action for Interim Mandatory Order—Motion Turned into Motion for Judgment—Nature of Order—Whether Grantable in Action—Leave to Serve Originating Notice for Order in Nature of Prerogative Writ—Exclusive Jurisdiction of Railway Board over Express Companies—Railway Act of Canada, 9 & 10 Geo. V. ch. 68, secs. 362, 363, 364—Jurisdiction over Tolls and Tariffs—Prohibition of Transportation—Jurisdiction of Court not Ousted—Preliminary Objections Overruled—Consideration of Merits—Judgment for Declaration and Mandamus.

Motion, by the plaintiffs in an action, for an interim mandatory order requiring the defendants until the trial to receive from the plaintiffs and transport shipments of intoxicating liquors sold from the warehouse of the plaintiffs in the town of Kenora, in the Province of Ontario, to persons in other Provinces or in foreign countries permitting such traffic, in bona fide transactions, or, in the alternative, for an injunction restraining the defendants from refusing to receive and transport such shipments.

The motion came on for hearing in the Weekly Court, Toronto, and was turned into a motion for judgment, which was argued.

D. L. McCarthy, K.C., for the plaintiffs.

Angus MacMurchy, K.C., and A. D. Armour, for he defendants.

Edward Bayly, K.C., for the Provincial Board of License Commissioners (intervenants).

The Attorney-General for Ontario was notified, but did not desire to be heard.

MASTEN, J., in a written judgment, said that the defendants raised two preliminary objections: (1) that the mandamus sought was in effect the prerogative writ of mandamus, which cannot be granted in an action; (2) that the defendants were primarily subject to the exclusive control and direction of the Dominion Board of Railway Commissioners, and the jurisdiction of the Court was thereby ousted, or, if not, its jurisdiction was so doubtful that it ought not to be exercised—a mandamus being granted only in the clearest cases.

The learned Judge was of opinion that what was here sought was the mandatory order grantable in an action, and not the high prerogative writ of mandamus. The plaintiffs sought to enforce a personal right against a private corporation—a right, moreover, arising not from statutory enactment, but by force of the common law rule requiring common carriers to receive and transport goods properly tendered for transportation, provided such goods are of the class customarily carried by them. Further, the jurisdiction depends on the construction of sec. 17 of the Judicature Act, R.S.O. 1914 ch. 56, and not on the historical argument ably advanced by the junior counsel for the defendants. The words of sec. 17 confer a jurisdiction which the Court is bound to exercise if, in its opinion, it is "just or convenient" that a mandatory order be granted.

The plaintiffs should have leave, however, if so advised, to serve nunc pro tunc an originating notice claiming the relief sought; the two motions should then be consolidated, and any order granted should issue both in the action and in the proceeding commenced by originating notice.

The provisions of the Railway Act of Canada, 9 & 10 Geo. V. ch. 68, touching express companies, are to be found in secs. 360 to 366, those especially referred to being 362, 363, and 364.

A consideration of these sections appeared to the learned Judge to indicate that the jurisdiction of the Board over express companies was confined to the question of tolls and tariffs, with accompanying provisions for making the same effective; and it was also to be observed that, while sec. 364 provides that the Board "may order that all such goods as the Board may think

proper shall be carried by express," there is no corresponding section under which the Board may interdict the express company from carrying any particular class of goods.

Reference to Canadian and Dominion Express Cos. v. Commercial Acetylene Co. (1919), 9 Can. Ry. Cas. 172.

The particular merchandise here in question was one gallon of whisky.

The existing express tariff, sanctioned by the Board, expressly deals with the transportation of liquors, and prescribes the rates to be charged for carrying whisky. At the present time the Board has not assumed in any way to prohibit or interfere with the transportation of whisky by the defendants. On the contrary, the implication from item 33 of the tariff is that they are carriers of liquor.

Very clear and express words are necessary to oust the jurisdiction of the Court. Finding nothing to oust the jurisdiction at the present time, the learned Judge felt bound to exercise it.

He expressed no opinion in regard to the situation that might arise if the Board should disallow or suspend (sec. 362 of the Act) the item of the tariff relating to the transportation of liquors.

Both the preliminary objections overruled.

Upon the merits, the plaintiffs were entitled to the relief sought. Reasons for this decision will be given on a later day.

The plaintiffs should have a judgment declaring that the defendants are bound to receive from the plaintiffs and transport shipments of liquor sold from the plaintiffs' warehouse to persons in other Provinces or in foreign countries where such traffic is permitted, in bona fide transactions, and ordering the defendants to receive and transport liquor accordingly, with costs.

ROSE, J. JUNE 18TH, 1920.

DONOVAN v. DONOVAN.

Trusts and Trustees—Will—All Property of Testatrix Given to Daughters—Secret Trust in Favour of Son—Whether Enforceable—Evidence—Agreement of Daughters to Convey House to Son—Possession of House Given to Son—Part Performance—Claim for Specific Performance—Agreement Part of Family Settlement not Carried out—Recovery of Possession of House—Improvements Made and Taxes Paid by Son—Deduction from Occupation-rent.

The plaintiffs, as executrices and sole beneficiaries under the will of their mother, sought to recover from the defendant, their brother, possession of a house in Toronto, which formed part of the mother's estate.

The defendant was let into possession by the plaintiffs after their mother's death. He set up two defences: (1) that the plaintiffs were trustees of the house for him; (2) that he was put into possession in part performance of an agreement settling a family dispute; and he asked to have that agreement enforced.

The action was tried without a jury at a Toronto sittings.

Hamilton Cassels, K.C., for the plaintiffs.

T. N. Phelan, for the defendant.

ROSE, J., in a written judgment, said that the testatrix died on the 19th March, 1917, leaving a will, dated the 14th August, 1913, by which she gave all her property, after payment of debts, in equal shares to the plaintiffs, her two daughters, absolutely. She also left, with the will, a letter, dated the 25th May, 1914, addressed to the plaintiffs, as follows: "Amy and Maud. This is my wish that you keep this house for a home as long as the boys will help to keep it going and try and be kind to one another when it has to go Amy and Maud Fred Jack will share and share alike with the proceeds the houses on Lansdowne one for Charlie one for Fred one for Jack subject to the mortgage and do try and be kind to one another."

"Charlie" was the defendant.

The first question to be determined was, whether the declaration, in this letter, that one of the houses in Lansdowne avenue was to be for the defendant was binding upon the plaintiffs—whether the facts brought the case within the rule that, "where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust:" Jones v. Badley (1868), L.R. 3 Ch. 362, 363, 364.

After reviewing the evidence, the learned Judge said that the most that could be taken to be established was, that for some time before their mother's death both the plaintiffs knew that she had made a will by which she had left all her property to them, and that she had written a letter, which they would find with her will, in which she gave some advice or direction for their guidance in dealing with the property disposed of by the will. It was not established that the plaintiffs, or either of them, knew

that it was their mother's wish or intention that one of the houses devised to them should be conveyed by them to the defendant; nor could it be said that the property was left to them upon the faith of any express or implied promise on the part of them, or either of them, that they would carry into effect such intention. The learned Judge, indeed, believed, rather, that the testatrix never made it plain to her daughters, or either of them, that anything in the nature of a binding obligation to hand over any of the property was being imposed upon them; and that, when she last spoke to them about the matter, her intention was, and was expressed to be, that they should have an absolute right to all her property. Upon that finding, notwithstanding the letter, there was no trust.

Even if the finding ought to be that the plaintiffs knew, at one time, that there was a will leaving the property to them, accompanied by a letter which indicated that they were to hold some of such property for their brothers, the evidence fell far short of what would support a finding that they, or either of them, expressly or impliedly promised the testatrix that they would deal with the property in accordance with the intentions expressed in the letter. The learned Judge also thought that, if the testatrix ever intended that the plaintiffs should be bound to hold one of the houses for or convey it to each of the sons, she changed her mind before she died.

The defendant's case, in so far as it depended upon any secret trust, failed.

Shortly after the death of the testatrix, an agreement was prepared providing for a conveyance by the plaintiffs to the defendant of the house in Lansdowne avenue, and for the release by the other sons to the plaintiffs of any claims which they might have upon the estate; and, upon the assumption that this agreement would be executed by all the parties to it, the plaintiffs put the defendant in possession of the house. The other two sons, however, refused to sign, and the plaintiffs did not execute a conveyance to the defendant, which had been prepared. Their refusal to execute the conveyance was not based upon the refusal of their other brothers to sign the agreement, but upon the failure of the defendant to make certain payments which he had agreed to make. But, whatever position the plaintiffs took, they were entitled, in this action—in which the defendant sought specific performance of the agreement, which, as he said, was in part performed by his being put in possession—to rely upon the fact, which was clearly established, that the agreement was merely part of the general agreement for a family settlement, which never became operative.

The defendant, therefore, must give up the house; but, in the belief that the house was his, he made improvements and paid taxes, and for this was entitled for credit against the occupation-rent with which he ought reasonably to be charged.

There should be judgment for the plaintiffs for possession of the house and for $247.23 for occupation-rent, after deducting a sum for improvements and taxes. There should be no costs payable by either party to the other.

MATTHEW ADDY CO. v. CANADIAN MALLEABLE IRON CO.—MASTEN, J., IN CHAMBERS—JUNE 15.

Discovery—Production of Documents—Further and Better Affidavit.]—An appeal by the plaintiffs from an order of the Master in Chambers requiring them to file a further and better affidavit of documents. MASTEN, J., in a written judgment, said that a perusal of the file of correspondence submitted to him satisfied him that certain letters (which he specified) should be produced. There must, he supposed, be other letters in existence, letters from the plaintiffs' sub-purchasers to the plaintiffs. These and any other correspondence or written reports not procured specially as evidence for the trial should be produced under a further and better affidavit on production. The appeal should be dismissed with costs to the defendants in any event. M. L. Gordon, for the plaintiffs. G. H. Sedgewick, for the defendants.

RE MCLAUGHLIN—MASTEN, J., IN CHAMBERS—JUNE 16.

Infants—Custody—Separation of Father and Mother—Children of Tender Age—Welfare of—Superior Right of Father.]—An application by the father of the infants Mary Eliza McLaughlin and Beth McLaughlin for an order awarding him the custody of their persons as against their mother, his wife. MASTEN, J., in a written judgment, said that no grave moral fault was imputed by either of the parents to the other; the question of difference in religious faith was not raised; and the difficulty in the continuance of harmonious family relationships appeared to arise principally —if not exclusively—from incompatability of temper and failure to exercise on either side that self-subdual which is so essential to harmonious relationships between any two persons brought into more than usual contact. The eldest child was born on the

17th April, 1917, and the youngest child on the 18th March, 1919. The former was in the custody of the father, the latter in the custody of the mother, and the affidavits disclosed that each of the parents was able and willing to maintain and care for the children, and that arrangements existed on the part of each suitable for that purpose. Having regard to the tender age of the younger child, Beth McLaughlin, the mother should retain her custody of that child; and, having regard to the superior right of the father, as demonstrated in Re Scarth (1916), 35 O.L.R. 312, and Re Mathieu (1898), 29 O.R. 546, he should have the custody of the elder child; and suitable and convenient arrangements should be made whereby each of the parents should be enabled to have access to and visit the infant in the custody of the other parent. In directing such an arrangement, the learned Judge said, he was not without hopes that a reconciliation might result so that a common family relationship might be restored and the two children brought up together, as they should be. There should be no costs to either party. R. C. H. Cassels, for the father, the applicant. George Wilke, for the mother, the respondent.

CLARK v. TORONTO R.W. CO.—LENNOX, J.—JUNE 19.

Fatal Accidents Act—Reasonable Expectation of Benefit from Continuance of Life of Mother and Grandmother of Plaintiffs—Death Caused by Negligence of Defendants—Evidence—Findings of Jury—Damages—Quantum.]—Action by George Clark on behalf of himself and his two infant sons, under the Fatal Accidents Act, to recover damages for the death of Elizabeth Clark, his mother and the grandmother of the infants, who was killed in a collision of a motor-car in which she was being carried with a street-car of the defendants. The action was tried before LENNOX, J., and a jury, at a Toronto sittings. The jury made findings in favour of the plaintiff and assessed the damages of the plaintiff at $1,000 and of the infants at $1,500. LENNOX, J., in a written judgment, said that negligence was admitted, and the question for trial was the right of the plaintiff to recover, either on behalf of himself or of his children, for the death of his mother. The learned Judge said that he was not satisfied that there was evidence to found a reasonable expectation that the plaintiff and his children would have received from the deceased an aggregate sum reasonably approximating the total sum assessed. There was evidence of reasonable ground for the expectation that the plaintiff would continue to be assisted by his mother while the embarrassment of his wife's ill-

ness continued, and perhaps until his finances became normal after her death. This was the cause of her generosity towards her son and grandchildren. The answers of the jury were not consistent, and the conclusions, read together, were not logical. They were not, however, so clearly inconsistent or illogical that they could be ignored by the trial Judge. It could not be said that there was not evidence of a reasonable expectation of some slight benefit from the continuance of the life of Elizabeth Clark. The amount was for the jury. There should be judgment for the plaintiff in accordance with the findings; the infants' money to be paid into Court. T. R. Ferguson, K.C., for the plaintiffs. T. Herbert Lennox, K.C., for the defendants.