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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

*CLEMENT v. NORTHERN NAVIGATION CO. LIMITED.

Negligence—Carriers—Waggon Delivered on Government Wharf and Left in Dangerous Position—Direction of Wharfinger—Injury to Child by Overturning of Waggon—Death of Child—Responsibility of Carriers—Nuisance—Action by Parents under Fatal Accidents Act—Damages.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 13 O.W.N. 22, dismissing an action, brought under the Fatal Accidents Act, to recover damages for the death of the plaintiffs' infant son, aged 6 years.

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

J. E. Irving, for the appellants.

R. I. Towers, for the defendants, respondents.

MACLAREN, J.A., reading the judgment of the Court, said that the action was based both on negligence and nuisance. The defendants received at Owen Sound, for carriage to Thessalon, a crated democrat-waggon, weighing more than 800 lbs. They landed it on the Government wharf at Thessalon, about midnight on the 17th September, 1916. The mate of the defendants' steamer which carried the waggon had charge of the men who unloaded it, and he asked the wharfinger where they should place it. The wharfinger directed that it should be deposited

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

leaning against the storehouse on the wharf, which was done—the axles of the waggon protruding through the boards of the crating and resting upon the flooring of the wharf. The following evening, between 6 and 7, the plaintiffs and their children came to the wharf, which was a usual resort for the townspeople; the plaintiffs' son and two other children climbed on the leaning crated waggon, it fell over on them, and the plaintiffs' son sustained injuries from which he died.

The wharf belonged to the Dominion Government, and was under the control of their wharfinger, and was regulated by an order in council which provided that no goods or material of any kind should be landed or placed upon it unless by permission of the wharfinger and as he might direct.

It was not necessary to consider whether the old maritime rule that consignees are obliged to take delivery of cargoes at the rail of the vessel applied to the case of inland passenger steamers carrying miscellaneous cargoes for private consignees; and it was a matter of common knowledge that local wharfingers do not as a rule handle such freight, but that the men employed on the vessel do so, under the direction of the wharfinger as to location of deposit. In the present case the custom of the port was clearly proved; and this was sufficient to override the rule if otherwise it were in force: Halsbury's Laws of England, vol. 21, p. 267, para. 365; Marzetti v. Smith and Son (1883), 49 L.T.R. 580.

The freight charges on the waggon had been prepaid, and these included the charge for carrying it to the place indicated by the wharfinger. The latter collected from the consignee only the wharfage dues, 25 cents. The wharfinger kept no staff for handling cargoes delivered from vessels. The mere selection of the place of deposit and the indication of it to the mate did not make the men the wharfinger's servants or make him liable for their negligence.

The incident was caused by the crate being left leaning slightly, but too nearly in a perpendicular position. Leaving it in that position, the men were guilty of gross negligence, and thereby created a common nuisance. As left, it was a veritable trap.

The wharf was open to the public, and was a popular resort for rest, recreation, and fresh air.

Reference to Cooke v. Midland Great Western Railway of Ireland, [1909] A.C. 229, 237.

The employees of the defendants having thus been guilty of negligence and having created a nuisance, liability would not terminate with their departure from the premises, but would continue so long as the nuisance was not abated, or until the effects of their negligence ended.

The liability of the defendants being thus established, and there being evidence of a reasonable expectation of pecuniary advantage to the plaintiffs in the future from the continuance of the life of their son, it was the duty of the Court to assess the damages. The damages should be assessed at $600, $200 to the father and $400 to the mother.

The appeal should be allowed with costs, and there should be judgment for the plaintiffs for $600 with costs.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

RE SHIELDS.

SHIELDS v. LONDON AND WESTERN TRUST CO.

Limitation of Actions—Interest in Land—Mortgage—Estoppel—Adverse Possession—Evidence—Family Arrangement—Visits to Property—Findings of Master—Appeal.

Appeal by Andrew J. Shields, the plaintiff, from the order of KELLY, J., 13 O.W.N. 13, dismissing an appeal from the report of a Master.

The appeal was heard by MACLAREN and MAGEE, JJ.A., and RIDDELL and SUTHERLAND, JJ.

W. E. Fitzgerald, for the appellant.

J. C. Elliott, J. D. Shaw, C. St. Clair Leitch, and W. Lawr, for the several respondents.

RIDDELL, J., read a judgment in which he said that the sole question on the appeal was as to the interest of the appellant in what was called "the homestead." The Master found that, subject to a mortgage for $6,000 given to the appellant and subject to the dower-claim of Annie Shields, the equity of redemption was in Jessie Shields, John J. Shields, the estate of William Shields, and Catharine Leitch, as tenants in common.

The late James Shields lived in the township of Mosa with his wife, Annie Shields, and eight children—Jessie, George, Andrew, John, Martha, Catharine, James, and William. James Shields died in October, 1895. For George, his eldest son, he bought a farm and gave him the deed; for Andrew he bought another farm,

but had not given him the deed when death came. James Shields lived in the homestead, and also worked the farm bought for Andrew. The homestead was subject to a mortgage or mortgages. The funeral expenses and some debts were paid by the proceeds of the sale of cattle, and the remainder from the crops raised on the homestead.

For a year or so after the death, the family (except Martha) worked along together "for the benefit of all;" then George left, and Andrew went to the farm bought for him, and remained there at least part of the time thereafter until he sold it, in 1914. In that year he got a conveyance of that farm from the remainder of the family. Andrew having sold his farm, the rest of the family at home borrowed $8,000 from him; and on the 12th May, 1914, a mortgage was given by the widow and five of the children, Jessie, George, John, Martha, and Catharine, to him for $8,000. William had died the previous month, and James had left some years before.

Some argument was based upon this mortgage as operating against the plaintiff's claim; but there was no estoppel—the plaintiff did not execute the mortgage-deed, the action was not brought upon the deed, and there was no recital that the mortgagors had the fee. There was the usual covenant "that the mortgagors have a good title in fee simple to the said lands;" but a covenant that a person has a thing is not equivalent to a positive statement that he has it; and an estoppel can arise only if there be an express averment that the person is seised in fee, has the legal estate, etc.: General Finance Mortgage and Discount Co. v. Liberator Permanent Building Society (1878), 10 Ch.D. 15; Right d. Jefferys v. Bucknell (1831), 2 B. & Ad. 278; Heath v. Crealock (1874), L.R. 10 Ch. 22.

Another deed produced was a conveyance, dated the 17th January, 1914, to one Wilson, of the trees and timber on the north half of the homestead lots, executed by the widow, George, Andrew, Jessie, Martha, Catharine, and James. This was ineffective as an estoppel, for similar reasons.

There were only two things to be considered: (1) the real substance of the arrangement whereby Andrew got his deed in 1914; (2) the effect of the occasional visits of Andrew to the homestead during the 10 years before the beginning of this proceeding.

Enough appeared to indicate that—George having already got his farm—all parties intended that the deed to Andrew should be in full of his share of the estate, and that such was the understanding implied if not expressed.

But the Master had found against the plaintiff on the facts;

Kelly, J., had sustained the finding; and there was ample evidence to support it.

The appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., and SUTHERLAND, J., agreed in the result—MAGEE, J.A., giving reasons in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

*ORTH v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R.W.CO.

Negligence—Collision of Electric Car with Automobile Crossing Line of Railway—Dangerous Crossing—Want of Reasonable Care on Part of Driver of Automobile—Findings of Jury—Failure to "Stop Dead"—Circumstances Demanding more than Ordinary Care.

Appeal by the plaintiff from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, dismissing the action with costs.

The action was brought to recover damages for personal injuries sustained by the plaintiff and injury to his automobile by being struck on a crossing of the defendants' railway by a car of the defendants.

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

T. S. Elmore, for the appellant.

S. F. Washington, K.C., and A. H. Gibson, for the defendants, respondents.

HODGINS, J.A., reading the judgment of the Court, said that there was a stone-road parallel to the right of way; the road which crossed the defendants' railway led from the stone-road, and itself made an acute angle with the stone-road, so that, in order to make the turn into it, if coming from the south, it was necessary to swerve towards the ditch on the east and make a wide circle, bringing the automobile almost facing the direction from which it came. The collision occurred on a dark night.

The questions put to the jury and their answers were as follows:—

(1) Was the accident to the plaintiff caused by the negligence of the defendants? A. Yes.

(2) If so, in what did such negligence consist? A. In our estimation according to the evidence that there was no light on the front of the car at the time of the accident.

(3) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. We think he did not use enough care.

(4) If so, in what did such want of care consist? A. In not stopping dead at before a dangerous crossing.

(5) What damages did the plaintiff sustain by reason of the accident? A. $500.

There was practically nothing to obstruct the view of any one desiring to cross, either up or down the line. The plaintiff, however, did not see the car, and he and his automobile were injured.

The Courts have consistently refrained from tying themselves down to the formula "stop, look, and listen," as expressing the whole duty of reasonable care; the extent of the care required depends entirely on the particular conditions of each case.

Reference to Grand Trunk R.W.Co. v. McAlpine, [1913] A.C. 838; Rex v. Broad, [1915] A.C. 1110; Grand Trunk R.W. Co. v. Hainer (1905), 36 S.C.R. 180; and Ramsay v. Toronto R.W. Co. (1913), 30 O.L.R. 127.

In the circumstances of the case, the jury might well have thought that looking was not enough—that on a dark night, at a dangerous crossing, necessitating a wide curve to negotiate it, reasonable care demanded a stop, as listening might be useless if the automobile were in motion.

The answers must be viewed in the light of the circumstances as presented to the jury. Their finding that the plaintiff did not use enough care, and should have stopped dead at a dangerous crossing, indicated that they fully appreciated the circumstances, which apparently, to their minds, demanded something more than was done.

There would be great difficulty in upholding the answer of the jury that the defendants were guilty of negligence in that there was no light in front of the car at the time of the accident; but, as the action was properly dismissed, there was no need to do so.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

PASEL v. HAMILTON STREET R.W. CO. AND GRAND TRUNK R.W. CO.

Damages—Personal Injuries—Direct Money-loss—Loss of Earning Power—Pain and Suffering—Possible Permanent Injury—Evidence—Assessment by Jury of Sum Large but not Excessive.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $3,000 and costs, in an action for damages for personal injuries sustained by the plaintiff, while a passenger upon a car of the defendant street railway company, by reason of a collision between that car and a freight-engine of the defendant the Grand Trunk Railway Company.

The appeal was on the sole ground that the damages were excessive.

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

S. F. Washington, K.C., and A. H. Gibson, for the appellants.

C. W. Bell, for the plaintiff, respondent.

HODGINS, J.A., in a written judgment, said that the plaintiff, a wire-drawer by trade, was a passenger on a street-car which collided with a freight-engine in King street, Hamilton, on the 28th January, 1917. He was thrown under the engine, burned by cinders, scalded by steam, injured on the head, and bruised all over. His right shoulder and arm were hurt, and he could not use them at all for some time; his left arm and shoulder were stiff and sore; his right leg cut from below the knee; and his back bothered him. At the time of the trial (November, 1917), he was still suffering from insomnia, headaches, and inability to use the right arm and shoulder. He was three or four weeks in bed, and at the end of six weeks went to work, sticking to it so as to make a living, but having to be dressed and undressed and assisted at the factory. After a further six or seven weeks, he became better, but found his earning power decreased by one quarter.

Several doctors were called, but did not agree as to the extent of the injury or the time at which complete recovery will be shewn.

The direct money-loss was agreed upon—$500, apart from loss of earning power. That loss would be fairly estimated at $600. There remained as allowed for pain and suffering and pos-

sible permanent injury, $1,900, which it was said was grossly excessive.

There is no certainty of entire recovery in these cases of injuries to joints and nerves, while neuritis has a way of hanging on. Injuries such as the plaintiff suffered might render his life much less useful and pleasant and subject him to a perpetual handicap. It was impossible to say that for the pain and suffering endured and the chance of never fully catching up with his proper earning power the sum of $1,900 was so outrageous as to call for the interference of the Court. It was large, but not so clearly excessive as to necessitate a new trial. Injuries caused by negligence should not be made less expensive than the exercise of reasonable care.

The appeal should be dismissed.

MACLAREN and MAGEE, JJ.A., agreed with HODGINS, J.A.

KELLY, J., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

RACICOT v. OTTAWA ELECTRIC CO.

Street Railway—Injury to Person Falling in Crossing Track—Negligence of Motorman—Distance of Car from Place of Fall—Finding of Jury—Damages—Assessment by Jury of Large but not Excessive Sum—Money-loss—Loss of Earning Power—Pain and Suffering—Permanent Injury—Aged Woman.

Appeal by the defendants from the judgment of MULOCK, C.J. Ex., upon the findings of a jury, in favour of the plaintiff, for the recovery of $3,000 and costs, in an action for damages for personal injuries sustained by the plaintiff by reason of his having fallen when crossing the defendants' tracks and being run over by a car of the defendants.

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

Taylor McVeity, for the appellants.

A. E. Fripp, K.C., for the plaintiff, respondent.

HODGINS, J.A., in a written judgment, said that the plaintiff was a widow, a charwoman, 72 years of age, earning $1 a day from the Government. The accident caused the loss of the left leg above the knee, and cost in money (including loss of wages for about 8 months) $875 down to the trial.

The plaintiff was crossing a street in Ottawa, between 6 and 7 p.m., on a rainy, freezing day in March, 1917, in order to board a street-car. Having crossed the tracks, she slipped on the icy slope and fell back on them, struggled several times to rise, but failed, and was then struck and injured by the car.

There was a direct conflict of evidence on the point whether the car was 15 feet or 147 feet away when the plaintiff fell. The jury adopted the latter figure. It was impossible, on the evidence, to set aside their finding, in view of the sharp difference which existed on that vital point. Nor, having regard to it, could any one come to a different conclusion as to the negligence of the motorman. That was inevitable if the distance was 147 feet, because the motorman testified that he could have stopped in 20 or 30 feet at the rate he was going—8 miles an hour.

The plaintiff, whose daughter was living with her, had lost her situation, said that she could now do nothing—not even household work—and had not been out of the house in 8 weeks save when driven. She had not yet got an artificial leg, which in itself promised to be quite a problem. She had a spinal injury, which resulted in an abscess, not quite closed at the time of the trial, and was then still under her doctor's care. She suffered severely. Her doctor expressed the hope that nature would close the wound in the back, but said she would be under his care until he could see the effect of the artificial limb upon the wound.

Injuries caused by negligence should not be made less expensive than the exercise of reasonable care. One might almost go further and say that the only way to ensure the safety of the public was to exact a high penalty for the careless disregard of it.

In this case, the jury had said that $2,125, or about 7 years' earnings, was not too much to give for so severe an injury, for pain and suffering, and for the lifelong discomfort it entailed. The jury had the right to give an amount for suffering, and it was impossible to attribute the whole sum to inability to earn money.

Viewed in any light, the Court could not say that the sum was grossly excessive.

MACLAREN and MAGEE, JJ.A., agreed with HODGINS, J.A.

KELLY, J., agreed in the result, for reasons briefly stated in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

McMILLAN v. PINK.

Vendor and Purchaser—Agreement for Sale of Land not in Ontario—Covenants for Payment of Purchase-money—Action upon—Defence—Fraudulent Representations and Promises—Failure to Prove—Equitable Defence—Hardship—Want of Mutuality—Relief against Enforcement of Agreement by in Effect Awarding Specific Performance—Modification of Judgment for Payment of Purchase-money by Providing that upon Payment Title must be Shewn.

Appeal by the defendant from the judgment of SUTHERLAND, J., at the trial, in favour of the plaintiff, for the recovery of $1,118.04, principal and interest, upon the covenants in an agreement under seal for the sale of land in Manitoba.

The defence was, that the defendant was induced to enter into the agreement by fraudulent misrepresentations and promises of the plaintiff and his agent.

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

F. M. Field, K.C., for the appellant.

G. W. Morley, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the trial Judge had found against the defendant on all the questions raised by him in his defence, and had also found that the defendant had adopted and ratified the agreement sued upon, by making a payment on account of the agreement after he had, according to his own testimony, raised the issues set up by him.

The learned Justice of Appeal saw no reason to disagree with any of the conclusions of the trial Judge.

In addition to arguing the defences raised, the appellant now urged that the action was one for specific performance and one in which the Court should, in the exercise of its equitable jurisdiction, refuse to enforce the contract sued upon, contending that the defendant had been overreached in the making of the agreement, that there was hardship, and there was want of mutuality.

The plaintiff, however, was not asking for equitable relief. The action was one at common law to enforce the promises to pay set forth in the covenants. There was no want of mutuality in the agreement, and the defendant was not overreached in the making

of it. There was no hardship in calling upon the defendant to carry out the agreement executed by both parties under seal.

The appeal failed; but, in view of the fact that the plaintiff was out of the jurisdiction and that the land was in Manitoba, the judgment in appeal should, if the defendant desired it, be amended by inserting therein provisions which would secure to the defendant, on payment of the purchase-money, a good title to the land: see Thompson v. Gatchell (1918), 13 O.W.N. 449.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

*GOODWIN v. TAYLOR.

Master and Servant—Injury to Servant Working on Farm—Defective Condition of Appliances in Silo—Action for Damages for Injury—Findings of Jury—Negligence—Contributory Negligence—Employment of Competent Workmen to Build Silo—Judge's Charge—Nondirection—New Trial—Damages—Prejudice to Defendant.

Appeal by the defendant from the judgment of MULOCK, C.J.Ex., upon the findings of a jury, in favour of the plaintiff, for the recovery of $4,000 and costs, in an action for damages for injury sustained by the plaintiff, while employed as a labourer on the defendant's farm, by falling from the top of the defendant's silo, by reason of the giving way of the supporting plank, which condition was caused by the negligence of the defendant, as the jury found.

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

Hugh Guthrie, K.C., S.-G. Can., for the appellant.

M. A. Secord, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that the questions left to the jury and their answers were as follows:—

(1) Was the defendant guilty of any negligence which caused the accident? A. Yes.

(2) If yes, then what did such negligence consist of? A. Of not having the plank properly secured.

(3) Was the plaintiff guilty of any negligence which caused or contributed to the accident? A. No.

The damages were assessed at $4,000.

The duty that a master owes to his servant with regard to the place in which and the appliances with which they are called upon to do their work was considered by this Court in Junor v. International Hotel Co. Limited (1914), 32 O.L.R. 399, 408, 409. See also Halsbury's Laws of England, vol. 20, para. 234, pp. 119, 120; Beven on Negligence, Can. ed., p. 306; Wilson v. Merry (1868), L.R. 1 H.L.Sc. 326, 332; Cole v. De Trafford, [1918] 1 K.B. 352.

From these authorities it is clear that the master is not an insurer of his servant's safety, but is required to exercise only such ordinary care and diligence as may be reasonable in view of the work performed, the danger incident to the employment, and the surrounding conditions and circumstances.

On a careful consideration of the charge to the jury, in the light of these authorities, it appeared that the learned Chief Justice did not sufficiently explain and point out to the jury the exact duty of the master; that he did not deal with the questions raised by para. 4 of the defence—that the silo was constructed and the planking placed thereon by competent workmen and the defendant was not guilty of any neglect or default in respect thereof—in such a way as to draw them adequately to the attention of the jury in order that they might be considered and passed upon by the jury in arriving at a conclusion as to whether the defendant was or was not negligent.

There was no real dispute as to the condition of the premises. The real issues between the parties were: whether or not the defendant had taken reasonable precautions to prevent that condition; and whether or not the defendant was guilty of contributory negligence. The question of contributory negligence was placed before the jury fully and fairly; but the question whether the defendant did all that should be expected from a reasonably careful and prudent employer of labour to avoid the danger or to discover the danger and remedy it, was not fully and adequately placed before the jury.

There should, therefore, be a new trial.

Had counsel for the defendant objected at the trial or requested the Chief Justice to instruct the jury on the questions referred to, this appeal would probably have been unnecessary; and, for that reason, while the appellant succeeded, he should not be awarded the costs of the appeal.

The appeal should be allowed without costs, a new trial should be directed, and costs of the former trial should be costs in the cause.

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

HODGINS, J.A., also read a judgment. He did not agree that there should be a new trial upon the grounds stated above; but was of opinion that the defendant might have been prejudiced in regard to the amount of the damages found by the jury by something that occurred at the trial when a question was asked by the foreman as to the defendant's financial means. The jury might well have thought, from what was said, that the defendant was of such large means as to prefer not to state his condition. There should be a new trial, confined to an assessment of damages; costs of the former trial and of the new trial to be costs in the cause.

Appeal allowed and new trial directed (HODGINS, J.A., *dissenting*).

FIRST DIVISIONAL COURT. MAY 17TH, 1918.

*DOWSON v. TORONTO AND YORK RADIAL R. W. Co.

Street Railway—Injury to Passenger Alighting—Negligence—Finding of Jury—Explanation to Trial Judge—Reconsideration by Jury—Substituted Finding—Acceptance by Trial Judge—Dangerous Place to Alight—Height of Lowest Step of Car from Ground—Order of Railway and Municipal Board—Non-compliance with—Proximate Cause of Injury.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiffs, for the recovery of $2,901.55 and costs in an action for damages for personal injuries sustained by the plaintiff G. G. Dowson in alighting from a car of the defendants at the corner of Heath and Yonge streets, Toronto, by reason, as the plaintiffs alleged, of the negligence of the defendants' servants in charge of the car, and for money necessarily expended by the plaintiff E. C. H. Dowson, husband of the plaintiff G. G. Dowson, in consequence of her injuries.

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

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

R. H. Parmenter, for the plaintiffs, respondents.

The judgment of the Court was read by FERGUSON, J.A., who said that the accident occurred on the 1st November, 1916, about 7 o'clock in the evening; and it was said that it was caused by the defendants inviting the plaintiff G. G. Dowson to alight from their car at a place known to them to be dangerous, where the step of the car was more than 30 inches above the ground; and that the plaintiff, without negligence on her part, in attempting to alight at this place, fell and sustained the injuries complained of.

The questions put to the jury and their answers were as follows:—

(1) Was the accident to Mrs. Dowson caused by the negligence of the defendants? A. Yes.

(2) If so, in what did such negligence consist? A. In not furnishing proper platform accommodation for the purpose of getting on and off their cars.

(3) Could Mrs. Dowson, by the exercise of reasonable care, have avoided the accident? A. No.

The jury assessed the damages at $2,500 for the wife and $401.55 for the husband.

After a discussion and explanations by the trial Judge, when the jury brought in their findings, they retired and returned with the answer to question 2 struck out and the following substituted:—

"We find that the north end of the car-step was sufficiently shot past the north end of the platform to render it positively dangerous to passengers alighting. We also find that the height of the car-step did not comply with the regulations of the Ontario Railway and Municipal Board, and that these circumstances caused the accident."

The right of the trial Judge to ask the jury to explain their answer, and the effect to be given to an answer by the foreman of the jury, or to an answer made by the jury without retiring, were discussed in Lowry v. Thompson (1913), 29 O.L.R. 478; Gray v. Wabash R.R. Co. (1916), 35 O.L.R. 10; and Townsend's Auto Livery v. Thornton (1917), 13 O.W.N. 237. The learned trial Judge in this case adopted the course found in the Townsend case to be the proper one; and properly accepted and acted upon the substituted answer to question 2; and it was, therefore, upon that substituted answer that this appeal must be disposed of.

It was admitted that the order of the Board had, as against the defendants, the force of a statute. The order directed: "On closed double truck-cars the height of the first steps above the ground shall be not less than 14 inches nor more than 16 inches." The car from which the woman alighted was a double truck-car,

and it was conceded that the lowest step was 21 inches above the crossing or platform at which the car purported to stop, and was 33 inches above the ground at the place where the car overshot the crossing or platform and where she alighted.

It was argued that the statute under which the defendants operated required that the cars should stop when and where directed by the Corporation of the City of Toronto, and that this stopping place was one fixed by the corporation under the Act; and that, there being no power given to the defendants to erect on the highway a platform for its passengers to alight upon, it was not their duty, but that of the city corporation, to see that the proper facilities for passengers to alight were there provided. But the order did not so provide. By force of the statute and order, this obligation was put upon the defendants; and the erection or equipment which it was necessary to provide thereunder was not a platform erected by the city corporation, but a step on the defendants' car meeting the requirements of the order of the Board. The defendants did not furnish such a step; and it must have been apparent to them that, without such a step or a platform, the place where it was admitted the plaintiff was invited to alight was dangerous. The jury had found both the danger and the neglect to provide the step required by the statute, and also that the danger and neglect were the proximate cause of the accident.

The question whether the order of the Board was unreasonable or impossible to comply with was not open for consideration by this Court.

Appeal dismissed with costs.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. MAY 13TH, 1918.

SCOTT v. FISHER.

Sale of Goods—Inferior Quality—Action by Vendee for Damages—Fruit Packed in Baskets—Charge of "Facing"—Failure to Prove—Fruit Sales Act, R.S.O. 1914 ch. 225, sec. 2—Evidence—"Orchard-run."

Action to recover $800 money loss alleged to have been suffered by the plaintiffs in respect of car-loads of peaches bought

from the defendants, and $2,000 for loss of business caused to the plaintiffs by the defendants' alleged deception in "facing" baskets with a better quality of peaches than those underneath.

The action was tried without a jury at Sandwich.

J. H. Rodd, for the plaintiffs.

A. C. Kingstone, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the charge against the defendants was "facing" or placing on the top of the baskets good marketable peaches, and filling the remainder of the baskets largely with unsaleable fruit and of a size and quality different from that which appeared on the top—of course with intent to deceive.

This was, by the Fruit Sales Act, R.S.O. 1914 ch. 225, sec. 2, conduct inviting a penalty recoverable under the Ontario Summary Convictions Act.

The evidence, therefore, ought to be so cogent as to satisfy the Court beyond reasonable doubt before such a stigma can be affixed to the reputation of the defendants.

But, so far from such being the case, the evidence was irrefragable that no such thing took place. There was nothing wrong with the fruit when it was shipped at Queenston, where it was delivered f.o.b., and where admittedly the property passed—and where the plaintiff Charles E. Scott had ample opportunity of inspecting at least the first car.

On the evidence of Patrick E. Carey, orchard and packing demonstrator and Inspector for the Dominion Government, and of Frank L. Gabel, Dominion Fruit Inspector at Hamilton, the learned Chief Justice finds that "orchard-run" or "tree-run" means the whole product of the tree, unsorted and ungraded—of course rejecting spoiled or spoiling fruit.

This particular variety of peach (the Jacques R.R.) matures all at once, and there is no second picking.

The Chief Justice said that if he were asked to account for the alleged condition of the fruit when it was unpacked, he could only say that, like numerous other problems in nature (not to mention the supernatural), he could not account for it. There were theories—such as the lack of ice on the cars—and it was pointed out that no witness for the plaintiffs (except perhaps one) identified the baskets as being marked with the defendants' name.

Action dismissed with costs.

MULOCK, C.J. EX. MAY 13TH, 1918.

LATHA v. HALYCZNK.

Marriage—Breach of Promise of—Plea of Infancy—Evidence—Proof of Promise and Breach—Verdict of Jury—Damages—Alien Enemy—Right to Maintain Action.

An action for breach of promise of marriage, tried with a jury at Kitchener.

E. W. Clement, for the plaintiff.
A. B. McBride, for the defendant.

MULOCK, C.J. EX., in a written judgment, said that the plaintiff in her statement of claim alleged that the contract was made prior to December, 1916.

The evidence shewed that, after the promise, the defendant seduced the plaintiff, and that, at the solicitation of friends, she agreed to marry another man; that, whilst the bans for this marriage were being published, the defendant persuaded her to stop their publication, agreeing to marry her. Accordingly she did stop the publication; and, after a short time, he again refused to marry her. This second promise was made after the 17th March, 1917; and the plaintiff should have leave, if desired, to amend her statement of claim by setting up the second promise also.

The defendant denied the promise, and pleaded infancy. The onus of establishing this plea was upon him, and in support of it he said that he would not be 21 years old until April, 1918. It was shewn that on the 24th February, 1916, he had registered as an alien enemy, giving his age then as 22. There was some vague evidence by a witness named Lacharnk as to the comparative ages of himself and the defendant. But the evidence in support of the plea of infancy was so slight that at the trial the defendant's counsel appeared to abandon it. When addressing the jury, he did not allude to it, nor did he ask to have it submitted to the jury; and, accordingly, the learned Chief Justice assumed that he had abandoned the defence of infancy, and submitted to the jury merely the issue in regard to the promise and breach and the question of damages. The jury rendered a verdict for $500.

Counsel for the defence then contended that the plaintiff, being an alien enemy, was not entitled to maintain the action. The evidence shewed that the plaintiff was an Austrian by birth,

and was born in Austria; that her father still resided in Austria; and that she had resided in Canada since the year 1911. She was still an Austrian subject. In Canada she had been pursuing her ordinary calling, that of a domestic servant; and there was no evidence to shew that her conduct entitled her to be deemed an alien enemy.

In these circumstances, being merely the subject of a sovereign with whom His Majesty is at war does not constitute her an alien enemy, and her mere nationality does not deprive her of her civil right to maintain an action in our Courts.

Judgment should be entered for the plaintiff for $500 with costs.

MASTEN, J. MAY 13TH, 1918.

JEFFRIES v. CITY OF TORONTO.

Municipal Corporations—Drainage—Unlawful Interference with Natural Watercourse—Flooding Plaintiff's Premises—Cause of Flooding—Inference of Fact—Finding of Trial Judge—Undertaking to Remedy Difficulty by New Drain—Damages.

Action for damages for interference by the defendants with a natural watercourse, whereby the plaintiff's cellar was flooded and her premises and person damaged.

The action was tried without a jury at a Toronto sittings.
S. W. McKeown and J. W. McCullough, for the plaintiff.
Irving S. Fairty, for the defendants.

MASTEN, J., in a written judgment, said, after stating the facts, that, on the evidence and on his observation of the locus, he was of opinion and found as a fact that the immediate cause of the flooding of the plaintiff's cellar was the interference by the defendants with the natural watercourse.

This conclusion could not be absolutely demonstrated, but was an inference depending upon the inherent probabilities. As was said by Earl Loreburn, L.C., in Richard Evans & Co. Limited v. Astley, [1911] A.C. 674, at p. 678: "Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

Whether these injurious results would have been obviated if that part of the watercourse lying directly to the east of the

plaintiff's lands were open, the learned Judge could not say. The point was not raised on the record, and had not been discussed before him.

Upon these facts, he found it unnecessary to discuss the numerous and interesting cases which were cited and commented on by counsel. He had examined the cases; but the matter appeared to him to turn, not on any fine legal distinction, but on the plain law that the defendants had caused the plaintiff damage by unlawful interference with a natural watercourse. The fact that such interference resulted from the drainage of the surface-water of the defendants' lands seemed to him to make no difference. If the defendants had not interfered, that surface-water would have drained harmlessly into Lake Ontario, and not into the plaintiff's cellar.

The evidence seemed to make it plain that a drain from the plaintiff's cellar, leading into the tile-drain at the back end of her lot, would obviate all difficulty.

Counsel for the defendants undertaking, at their expense, properly to construct and connect such a drain, the learned Judge assesses the plaintiff's damages down to date at $150.

Leave is reserved to the plaintiff to apply in this action for further relief, if the drain does not cure the difficulty.

The plaintiff should have costs on the County Court scale without set-off.

ROSE, J. MAY 13TH, 1918.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Municipal Corporations—Contract—Action for Balance of Price of Bridge Built by Plaintiff under Sealed Agreement with Township Corporation—Completion of Work according to Agreement—Executed Contract—Payment of Part of Price—Necessity for By-law—Municipal Act, sec. 249—Use of Bridge by Municipality—Right of Action Defeated by Absence of By-law.

Action to recover $2,500, the balance of the price of a bridge erected by the plaintiff for the defendants.

The action was tried without a jury at London.

T. G. Meredith, K.C., for the planitiff.

J. M. McEvoy and C. St. Clair Leitch, for the defendants.

ROSE, J., in a written judgment, said that there were no pleadings, the action having been commenced by a specially endorsed writ. The defence specifically raised by the affidavit of merits was that the bridge had not been completed according to the agreement between the parties, in that the bridge for which the defendants agreed to pay was to be one of 15 tons' capacity, whereas the bridge erected was not of that capacity. At the trial, an additional defence was raised—that no by-law had been passed by the council of the defendants authorising the order for or accepting the bridge.

There were two agreements between the plaintiff and defendants, both under the corporate seal of the defendants, but no by-law or resolution authorising the execution of either of these agreements was passed.

After stating the facts at length, the learned Judge said that the plaintiff had completed the bridge. There were disputes as to whether it was in accordance with the specifications. Mr. Farncomb, a civil engineer, acting on behalf of the defendants, inspected the bridge and reported that certain work had to be done. This work was done, and the bridge was in good condition and in use by the defendants. It was well above the standard requirements of a class B. bridge, and could safely be crossed by a 15-ton threshing outfit. The defendants had paid part of the price, but refused to pay the balance, $2,500.

If the want of a by-law was not an insuperable difficulty, the plaintiff was well entitled to succeed. He had performed his part. The words "a 15-ton capacity bridge" were susceptible of two meanings—a bridge designed to carry a concentrated live load of 15 tons at 10-foot centres, i.e., a class A. bridge; or a bridge which could safely be crossed by a 15-ton threshing outfit. It was in the latter sense that the parties used them, and the evidence was clear that the bridge answered the description. The plaintiff had done what he contracted to do.

But the decision of the Appellate Division in Mackay v. City of Toronto (1918), ante 155, compelled the learned Judge to hold that, even in the case of an executed contract such as this, the other contracting party could not have judgment against the municipality unless the power of the council to enter into the contract had been exercised by by-law, in accordance with sec. 249 of the Municipal Act, or there had been an adoption of the contract, evidenced by a by-law. In this case there was no difficulty about the seal; it was affixed to the two agreements; but that was not enough. If the power to contract is one that must be exercised by by-law, the use of the bridge by the defendants did not help the plaintiff: see per Patterson, J., in Waterous Engine Works Co. v.

Town of Palmerston (1892), 21 S.C.R. 556, at p. 579; and per Middleton, J., in Mackay v. City of Toronto (1917), 39 O.L.R. 34, at p. 46.

Action dismissed without costs.

MEREDITH, C.J.C.P. MAY 14TH, 1918.

*SHIELDS v. SHIELDS.

Mortgage—Action by Mortgagee for Recovery of Mortgage-moneys and for Possession—Proceedings under Power of Sale—Action to Restrain—Mortgages Act, sec. 29.

Motion by the plaintiffs for an injunction restraining the defendant from proceeding to a sale of mortgaged lands under the power of sale contained in the mortgage-deed.

The motion was heard in the Weekly Court, Toronto.
W. Lawr, for the plaintiffs.
W. E. Fitzgerald, for the defendant.

MEREDITH, C.J.C.P., in a written judgment, said that there was no law, that he was aware of, which prevented a mortgagee of lands, who had brought an action to recover the mortgage-moneys, and for possession of the mortaged lands until paid, also taking proceedings under a power of sale contained in the mortgage. There was nothing inconsistent in the two proceedings. Possession would be needed if the sale should be made; and the amount realised at the sale must be applied towards payment of the mortgage-debt. If enough should be realised upon the sale, the claim upon the covenant to pay the mortgage-moneys would be satisfied; if insufficient, the judgment is needed for the recovery of the amount unsatisfied. The enactment which was at one time commonly called Solomon White's Act—now found as sec. 29 of the Mortgages Act, R.S.O. 1914 ch. 112—had no application to this case; it was not contended that it had; but several cases were relied upon in support of the application: they were all, however, cases very different from this case. In Stevens v. Theatres Limited, [1903] 1 Ch. 857, it was held, by Farwell, J., that, after a foreclosure decree nisi in an action, the mortgagee could not properly sell the mortgaged property under a power of sale contained in the mortgage; and that ruling did not seem to have been questioned

in any other case. But, whether the ruling was based upon a merger of rights under the mortgage in the judgment, or upon an election of one of two inconsistent remedies, or howsoever, it had plainly no effect upon such a case as this. There was no foreclosure judgment or order in this action, nor could there be, as the action was not brought for foreclosure—no such relief was ever sought in it; indeed, no judgment had been pronounced in it; it had been merely referred for trial to a judicial officer of the Court; and, after being in Court for so great a length of time without anything substantial having been accomplished, it was not to be wondered at that the mortgagee should decide to take the matter into his own hands and endeavour to accomplish something in much less time.

It was said for the plaintiffs that the defendant could not sell under the power contained in the mortgage, because it had not yet been decided just by whom and in what shares the lands were owned. But that had nothing to do with the case as a matter of legal right. What the mortgagee desired to sell, and that which alone he could sell, were just such rights and interests in the lands as the mortgage covered.

Application refused with costs.

MEREDITH, C.J.C.P. MAY 14TH, 1918.

*WARD v. SIEMON.

Fraud and Misrepresentation—Contracts to Purchase Company-shares—Payment of Money for Shares—Obligation upon Company to Resell or Buy back Shares—Action for Deceit—Failure to Prove Actual Fraud or Misrepresentation—Claim to Enforce Contracts against Defendant Company and Individual Defendant—Judgment Recovered against Individual Defendant—Election to Affirm Contracts—Bar to Claim against Company—Claim for Money Paid as Money Lent—Powers of Company Incorporated under Laws of Ontario.

Action for damages for deceit and to enforce other claims.

The action was tried without a jury at Hamilton.

C. W. Bell, for the plaintiffs.

L. A. Landrian, for the defendants.

MEREDITH, C.J.C.P., in a written judgment, said that the plaintiffs' claims comprised five different causes of action, namely: (1) for damages for deceit; (2) to set aside the transactions evidenced by the writings set out in the pleadings, on the ground of actual fraud; (3) to set them aside on the ground of misrepresentation without actual fraud; (4) to enforce them; and (5) for money payable by the defendant company to the plaintiffs, for money lent by the plaintiffs to the defendant company: but on none of these claims were the plaintiffs entitled to recover against the defendant company; though the judgment against the defendant Siemon might be supported under the fourth.

As to the first: actual fraud had not been proved; it had been disproved. The sincerity of the defendant Siemon was shewn in his action in becoming personally bound to resell or purchase the shares of the capital stock of the defendant company which were transferred to the plaintiffs. And, if that were not so, yet must the plaintiffs fail on this ground, because they had taken final judgment, against the other defendant, upon the contracts in respect of the shares, and could not both affirm and repudiate them. If obtained by fraud, they were voidable at the plaintiffs' instance, but they were valid until rescinded; and, not only had that not been done, but the plaintiffs had obtained judgment, and issued executions, upon them. The judgment was entered in default of appearance to a specially endorsed writ, which judgment could be entered, if at all, only upon the claim upon the contracts.

As such a judgment could not have been entered upon a claim for damages, the interesting question, referred to in several cases, but actually decided in none, whether a claim for damages for deceit, against several defendants, was merged in a final judgment upon it against one of them, did not arise: it was difficult to see how it could arise in such a case, though in some actions against joint contractors it had arisen: see Dueber Watch Case Manufacturing Co. v. Taggart (1899), 26 A.R. 295, and (1900) 30 S.C.R. 373; Morel Brothers & Co. Limited v. Earl of Westmorland, [1904] A.C. 11; and other cases. In speaking of a judgment, a final judgment was referred to.

The second cause of action also failed, for the like reasons.

The third also failed, first, for want of proof of misrepresentation. And the election of the plaintiffs to affirm and enforce the contracts defeated any action to set them aside: see Morel Brothers & Co. Limited v. Earl of Westmorland, [1904] A.C. 11; Scarf v. Jardine (1882), 7 App. Cas. 345; and Keating v. Graham (1895), 26 O.R. 361.

As to the fourth, Helwig v. Siemon (1916), 10 O.W.N. 296, was

decisive against the plaintiffs. If the recent case of Edwards v. Blackmore (1918), 13 O.W.N. 423, was authority to the contrary—authority for saying that nothing is now *ultra vires* of an Ontario provincial corporation—some other tribunal must say so.

What was said as to the third claim covered the fifth. The plaintiffs were bound by what their adviser knew; they trusted in him, not in their own understanding; he knew all the circumstances; and, acting for them, read the papers evidencing the transactions, and found and pronounced them to be accurate. So that it was not open to them now to contend that the transactions should be treated as loans of money, merely, because they now thought, or even then thought, that was their character.

But upon another ground, resting on admitted facts, the plaintiffs would have been entitled to some other relief in this action if they had not affirmed these transactions as they had.

Each of these contracts was a single one, but they were all alike in all respects: the plaintiffs were, as an essential part of each contract, to have an obligation upon the defendant company to resell or purchase the stock in the manner set out in the writings: if they had the right which such an obligation gave, they were entitled, upon the contracts, to judgment against all the defendants: if they had it not, then the contracts had never been completed, and the plaintiffs were entitled to a return of their money, but from the defendant company only: it was advanced to the company, and the company received it; it was not advanced to the defendant Siemon, and he had not the benefit of it. The defendant company, if they failed to become bound according to the terms upon which they were to get the money, could not retain it; there would no be contract: it would not have been a question of condition precedent or subsequent; it would have been a question of contract or no contract, and it is no contract when an essential part is omitted: see Morris v. Baron & Co., [1918] A.C. 1.

But the plaintiffs could not both approbate and reprobate; they could not have judgment upon the contracts, and also judgment in effect setting them aside.

As the record stood, the action must be dismissed as to the defendant company: but it was not a case for costs: these defendants ought to be under an obligation to resell or purchase, or else should return the money; but—as things now were—circumstances, the effect of which, evidently, was not foreseen, had relieved them from it, and left their co-defendant liable.

Action dismissed as to the defendant company without costs.

MEREDITH, C.J.C.P. MAY 14TH, 1918.

*REINHART v. BURGAR.

Contract—Promise of Gift and Loan of Money to Trustees of Church for Erection of Parsonage—Donor to Have Home in Parsonage—Impossibility of Performance by Reason of Death of Donor—Vis Major—Action against Administrator—Constructive Fraud—Want of Independent Advice—Improvidence—Evidence.

Action by the trustees of a church to recover $2,500 from the administrator of the estate of Salome Morningstar, deceased.

The action was tried without a jury at Welland.

S. F. Washington, K.C., and L. C. Raymond, K.C., for the plaintiffs.

T. D. Cowper, for the defendant.

MEREDITH, C.J.C.P., in a written judgment, said that Salome Morningstar, an aged woman, unmarried, was found dead in her house on a day in midwinter. She was worth about $5,000. A farm, which she had owned and upon which she had lived quite alone, was sold by her in the autumn of 1917 for $2,500, but she continued to live there because the arrangements which she had made with the plaintiffs for a new home had not been carried out.

After the sale of the farm, an agreement was made between her and the plaintiffs, the trustees of a church of which she was a member, that she should contribute $1,000 towards the erection of a parsonage, as a gift, and should lend the trustees $1,500 to be also expended in the erection of the parsonage; that the parsonage should be erected on a certain acre of land, and that the building of it should be "proceeded with at once" by the trustees; that provision should be made, satisfactory to her, for her own quarters in the parsonage; and that she should have the right to occupy them for life; that she should be paid interest half-yearly at 5 per cent., and should have a lien on the parsonage for the payment of it, and for payment of any part of the principal not exceeding $100 a year that she might from time to time require, but that if it were not all thus repaid in her lifetime that which remained should belong to the church; that the deed of the one acre should be made to her; and that, as soon as the deed should be made to her, she would advance the $1,000 to the trustees to enable them to proceed with the erection of the building.

The trustees did not proceed at once with the erection of the building, nor did they procure the making of the deed to the deceased; they took some steps to procure the land, had plans of the building prepared, and some building material delivered upon the site.

By vis major it had become impossible to carry out the agreement for all the purposes and in the manner agreed upon. The deed of the land could not now be made to Salome Morningstar, nor could she have the suitable home which was to be provided for her.

The case was not one of merely a condition subsequent which could not be performed because of the intervention of vis major. Vis major prevented the plaintiffs from doing that upon which they were to be paid the money, and that which might and ought to have been done before the woman's death. Her death disjointed the whole agreement, its purposes and its performance; and so it was unenforceable on either side. And that which was meant to be charity and that which was meant to be for a consideration could not be separated.

The plaintiffs were not entitled to take anything from the estate of Salome Morningstar. Neither under the words of the agreement, nor by the intention of the parties, to be gathered from these words, read in the light of the surrounding circumstances, were the plaintiffs entitled to the $2,500 or any part of it.

The contract could not be successfully attacked on the ground of constructive fraud—want of independent advice and improvidence were mainly relied upon by the defendant.

Action dismissed without costs.

FALCONBRIDGE, C.J.K.B. MAY 15TH, 1918.

*SMITH v. GOSNELL.

Contract—Deposit Made by Father in Bank to Joint Credit of himself and Son—Document Signed by Both—Provision in Event of Death—Survivorship of Son—Document not Evidencing a Contract—Direction to Bank—Evidence of Intention of Father—Will—Disposition of Estate—Testamentary Gift—Abatement of Legacies.

Action against the executors of Thomas Smith and against William Perrin, a legatee, for a declaration that moneys standing

in a joint account in a branch of the Molsons Bank to the credit of Thomas Smith and Isaac Smith (the plaintiff) had become the absolute property of the plaintiff upon the death of his father, Thomas Smith, and that he was entitled to payment thereof.

The action was tried without a jury at Chatham.

R. L. Brackin, for the plaintiff.

R. L. Gosnell, one of the executors in person and on behalf of his co-executor.

O. L. Lewis, K.C., for the defendant William Perrin.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that on the 9th June, 1917, the plaintiff and his father called at the bank and signed a paper-writing, in the form of a letter addressed to the manager of the branch of the bank, in which it was stated that "the undersigned hereby agree jointly and severally with the Molsons Bank and each with the other that any moneys which may from time to time be placed to the credit of our joint names, and the interest thereon, shall be subject to withdrawal by either of us, and that the death of one of us shall not affect the right of the survivor to withdraw such moneys and interest. And each of the undersigned irrevocably authorises the said bank to pay any such moneys and interest to either one of us and in the case of death to the survivor."

The father took away the bank pass-book, shewing the commencement of the account. It was quite clear that the plaintiff did not contribute to the amount of the deposit—it was entirely the money of the father.

There was now standing to the credit of the account, after adding accrued interest, more than $1,600.

The father died on the 27th August, 1917, having on the 21st August, 1917, made his will, which had been admitted to probate. By the will, which made no mention of the deposit account, after a direction to pay debts etc., he made specific bequests of all his estate, among them a bequest to the plaintiff of $300, and directed that if there was a surplus it should be divided among the legatees proportionately, but if there was a deficiency it should be made up by a proportionate reduction of all the bequests to the legatees except William Perrin, whose legacy, $500, was the largest.

If necessary, the other legatees should now be made parties.

Evidence was admitted as to the intention of the testator; there was some evidence that he wished the plaintiff to have the moneys deposited in the bank. He made his will with full knowledge of what he was doing.

The writing was in no sense a contract between the parties. It was merely a direction to the bank on a printed general form, prepared and supplied by the bank for its protection only. See Southby v. Southby (1917), 40 O.L.R. 429, per Meredith, C.J.C.P., at p. 432.

Some of the evidence for the plaintiff seemed to point to the purpose of the father being to make a gift to the plaintiff in its nature testamentary, which he could not effectually do except by an instrument executed as a will: Hill v. Hill (1904), 8 O.L.R. 710.

As the result of all the cases, the plaintiff could not succeed.

Reference to Halsbury's Laws of England, vol. 22, para. 823; Re Ryan (1900), 32 O.R. 224; Schwent v. Roetter (1910), 21 O.L.R. 112; Everly v. Dunkley (1912), 27 O.L.R. 414.

The plaintiff had presented what he believed to be an honest claim; the costs of all the parties should be paid out of the estate.

The plaintiff's legacy will suffer proportionately, if there should be a deficiency.

MEREDITH, C.J.C.P., IN CHAMBERS. MAY 16TH, 1918.

IMPERIAL BANK OF CANADA v. BOYD.

Attachment of Debts—Payment into Court by Garnishee—Payment out to Sheriff for Distribution—Creditors Relief Act, R.S.O. 1914 ch. 81, sec. 5 (2)—Rule 594—Form 79—Practice.

Motion by the plaintiffs, judgment creditors, for payment out of Court to them of moneys attached in the hands of the Brandon Shell Company, garnishees, and paid into Court by the liquidator of that company.

M. L. Gordon, for the plaintiffs.
G. F. Rooney, for the defendant.
W. J. Beaton, for the Molsons Bank.

MEREDITH, C.J.C.P., in a written judgment, said that the fact that the Creditors Relief Act, R.S.O. 1914 ch. 81, sec. 5(2), requires payment to a sheriff of moneys attached in garnishee proceedings, whilst Rule 594 requires payment into Court—see also form 79—was plainly no ground for this application, which was not for payment of them to the proper person, but for payment of them to the judgment creditors who attached them, and who were entitled to priority over other creditors for their costs of the

garnishee proceedings only: Creditors Relief Act, sec. 5(2); Dales v. Byrne (1916), 35 O.L.R. 495, 9 O.W.N. 419.

But, as the motion had been made, and, apparently, all persons at present directly concerned in the moneys, except the sheriff, were represented on the motion, it would be better to deal with the question of payment out now than to increase costs and delay by waiting until another motion should be made; and, in the view of the learned Chief Justice, that could be safely done without waiting to have the sheriff made a party to this motion.

The provisions of the Act, dealing directly with the moneys and their disposition, should prevail over those of the Rules, dealing generally with the subject of garnishee proceedings, in any case of conflict between them. The Act makes all necessary provisions for the disposition of the money, including payment to the attaching creditors of their costs of the garnishee proceedings in priority to creditors' claims: so that payment into Court and out again to the sheriff seemed a quite needless, roundabout course, for no useful purpose, besides delaying the distribution of the fund, under the Act, as proceedings for that purpose begin only after the moneys come to the hands of the sheriff.

The applicants' motion should therefore be dismissed with costs: but the sheriff might take an order for payment to him of the whole of the moneys in Court, to be dealt with by him in accordance with the provisions of the Creditors Relief Act.