The
# Ontario Weekly Notes

VOL. XVI. TORONTO, APRIL 4, 1919. No. 4

## SUPREME COURT OF CANADA.

DECEMBER 23RD, 1918.

### JUDSON v. HAINES.

*Negligence—Collision of Motor-vehicles in Highway—Proof of Negligence—Onus—Evidence—Motor Vehicles Act, sec. 23—Judge's Charge—Findings of Jury—Ultimate Negligence—New Trial.*

Appeal by the plaintiff from the judgment of a Divisional Court of the Appellate Division of the Supreme Court of Ontario dismissing the plaintiff's appeal from the judgment at the trial, upon the findings of a jury, dismissing the action: Judson v. Haines (1918), 42 O.L.R. 629, 14 O.W.N. 131.

The appeal was heard by DAVIES, C.J.C., IDINGTON, ANGLIN, BRODEUR, and MIGNAULT, JJ.

J. P. MacGregor, for the appellant.

W. N. Tilley, K.C., and G. W. Mason, for the defendant, respondent.

ANGLIN, J., read a judgment in which he said that, apart from any presumptions to which sec. 23 of the Motor Vehicles Act, R.S.O. 1914 ch. 207, might give rise, there was evidence on which a jury might find that negligence or fault on the part of the defendant contributed to cause the collision. Moreover, this was not one of the very rare jury cases in which an issue of contributory negligence could properly be disposed of by the trial Judge. Unless, therefore, the findings of the jury justified the judgment of dismissal entered by the learned trial Judge, and sustained by a majority of the Divisional Court, or were so clearly in the plaintiff's favour as to warrant not merely the setting aside of that judgment, but the entry of judgment for the plaintiff, a new trial seemed inevitable.

After setting out the answers of the jury, ANGLIN, J., said that he was unable to accept the contention that the "excessive" speed on the part of the plaintiff, found by the jury in answer to question 3, necessarily meant that he was travelling at a speed beyond the 15 miles an hour limit prescribed by sec. 11 of the Motor Vehicles Act. It was not impossible that this was the jury's view; but they might have meant to find that the plaintiff's speed, although less than 15 miles an hour, was nevertheless unreasonable having regard to the circumstances.

The answers to the 4th and 5th questions, taken with the failure to answer questions 10 and 11, created the real difficulty. The issue of primary negligence on the part of the plaintiff was covered by questions 2 and 3. Unless the trial Judge intended by questions 4 and 5 to cover the issue of "ultimate negligence," it was difficult to appreciate on what ground he held that the findings warranted a judgment dismissing the action.

But for the uncertainty as to the jury's opinion upon the question of "ultimate negligence" on the part of the plaintiff, resulting from the answers to questions 4 and 5, and the failure to answer 10 and 11, the 8th and 9th answers would seem to present a tolerably clear finding of "ultimate negligence" on the part of the defendant, such as would render him liable under the authorities, of which British Columbia Electric R.W. Co. v. Loach, [1916] 1 A.C. 719, and Columbia Bitulithic Limited v. British Columbia Electric R.W. Co. (1917), 55 Can. S.C.R. 1, are recent examples. But, notwithstanding the explanation of the 4th and 5th questions in the charge, the jury might have omitted to answer 10 because they thought they had in their answer to 4 already answered it in the affirmative.

In face of answers 8 and 9 and the omission to answer 10 and 11, the judgment of dismissal could not be sustained; but the jury's reason for failing to answer 10 and 11, their real understanding of 4 and 5, and the true purport and intent of their answers to 4 and 5, were too dubious to permit of the entry of judgment for the plaintiff.

The applicability and effect of sec. 23 of the Act, much debated at the bar, need not now be considered, in view of the result. The scope and purpose of this very special legislation might be made more clear by amendment.

The judgment dismissing the action should be set aside and a new trial directed. The appellant (the plaintiff) was entitled to his costs in this Court and in the Appellate Division, and the costs of the abortive trial should abide the result of the new trial.

On the new trial the attention of the jury should be directed to the rule of the road, to which no allusion was made in the charge at the first trial.

BRODEUR and MIGNAULT, JJ., agreed with ANGLIN, J.

DAVIES, C.J.C., read a dissenting judgment, agreeing with the judgment of the majority in the Divisional Court.

IDINGTON, J., also read a dissenting judgment. He was of opinion that the plaintiff should have judgment upon the findings of the jury, and that there was no legal ground for granting a new trial.

*New trial ordered* (DAVIES, C.J.C., and IDINGTON, J., *dissenting*).

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## APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MARCH 25TH, 1918.

### RE BLACK.

*Will—Construction—Trust Fund—Maintenance of Daughter during Life—Income—Discretion of Trustees—Interference by Court—Costs.*

Appeal by Ethel Martin from the order of MIDDLETON, J., 15 O.W.N. 290.

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

G. W. Morley, for the appellant.

E. C. Cattanach, for the Official Guardian.

G. W. Mason, for the trustees.

D. C. Hossack, for Alena Shipway.

THE COURT dismissed the appeal. The same disposition of the costs of the appeal was made as of the costs of the motion in the order appealed from.

FIRST DIVISIONAL COURT. MARCH 26TH, 1919.

## COTTRELL v. GALLAGHER.

*Negligence—Collision of Vehicles in Highway—Injury to Plaintiff Driving Horse and Waggon by Defendant Driving Automobile—Evidence—Onus—Presumption—Motor Vehicles Act, sec. 23—Verdict of Jury—Appeal—Testimony of Witness at Previous Trial of Defendant for Criminal Negligence—Decease of Witness—Inadmissibility of Transcript of Evidence—Previous Proceeding not between same Parties or Privies—No Opportunity for Cross-examination by Plaintiff—Quantum of Damages.*

Appeal by the defendant from the judgment of LATCHFORD, J., upon the verdict of a jury, in favour of the plaintiff, for the recovery of $975 and costs in an action for damages arising from an injury sustained by the plaintiff upon a highway in the city of Toronto. The plaintiff was driving a horse and waggon upon the highway, when, as he alleged, the defendant, who was driving an automobile, approached the plaintiff from the rear, and, without using proper care and without warning, ran into the plaintiff, who was thrown to the ground and seriously injured.

The defendant had been previously tried for criminal negligence and acquitted. A copy of the stenographer's notes of the evidence given at the trial by one Nicholson, since deceased, was tendered as evidence by the defendant, but the Judge presiding at the trial of this action refused to admit it.

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

Frank Arnoldi, K.C., for the defendant, the appellant, argued that the trial Judge erred in not allowing Nicholson's evidence to be read, as the issues in the criminal and civil cases were practically the same, referring to Phipson's Law of Evidence, 5th ed., p. 416, and to Town of Walkerton v. Erdman (1894), 23 Can. S.C.R. 352. He also argued that on the evidence at the trial the verdict should have been for the defendant, and that in any case the damages were excessive.

A. G. Slaght, for the plaintiff, contra.

MEREDITH, C.J.O., delivering the judgment of the Court at the conclusion of the argument, said that counsel for the appellant had failed to satisfy the Court that the verdict was one that should be set aside, having regard to the principles upon which the Courts now act in dealing with the findings of a jury.

There was evidence which, if believed, warranted the con-

clusion to which the jury came, and there was, in addition to that, a presumption the burden of rebutting which was on the appellant (Motor Vehicles Act, R.S.O. 1914 ch. 207, sec. 23). The case was one in which, upon the facts, the Court could not interfere. Other minds might have come to a different conclusion upon the evidence, but the judgment of the Court could not be substitutsd for that of the jury.

It could not be said that the damages were excessive. There was evidence that the respondent had a broken arm, and there was evidence which, if believed, shewed that he was entitled to something for the pain and suffering, and that he had lost time and had been put to expense for medical and other services.

With regard to the rejection of the evidence of the witness who was called in the criminal proceeding against the appellant arising out of the same accident, in which he was charged with criminal negligence, the learned trial Judge was right in ruling that it was not admissible. It was given in proceedings not between the same parties or their privies, and there was no opportunity on the part of the respondent to cross-examine. These are two essentials to make admissible the evidence in former proceedings.

*Appeal dismissed with costs.*

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FIRST DIVISIONAL COURT. MARCH 28TH, 1919.

## ROUNTREE v. WOOD.

*Contract—Underwriting Preference Shares of Company—Consideration—Commission Paid in Part in Ordinary Shares—Undertaking of Promoters to Buy Shares from Underwriter at Reduced Price—Alternative Provision as to Sale of Shares in Event of Underwriter "Retaining" them —Election—Evidence—Receipt —Reasonable Time for Making Request to Buy—Release.*

An appeal by the defendants from the judgment of MASTEN, J., 15 O.W.N. 264.

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

Wallace Nesbitt, K.C., for the appellants.

J. R. Roaf and A. C. McMaster, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, referred to the agreement between the parties, which shewed that the

plaintiff had agreed to underwrite 25,000 preferred shares at 92' carrying a bonus of 50 per cent. or 1,250 shares of common, and to resell the preferred to the public at 96 with a bonus of 30 per cent. common, so that, on the completion of the underwriting, he had on hand a profit of $3 on each preferred share, or $8,750, and a surplus of 500 shares of common. In addition to this profit, the defendants agreed to pay the plaintiff $14,000 and to transfer to him 925 common shares. The plaintiff was to have the privilege of selling to the defendants all or any part of the 925 shares at $15 a share. Any of the shares that the plaintiff did not sell to the defendants and retained for himself were not to be offered except through the defendants for 6 months from the 1st October, 1914.

Manifestly, the parties contemplated that for the 6 months' period their rights would be altered. Up to that time the plaintiff could sell his shares in such manner as he pleased; and the plaintiff contended that the only change made by the agreement was to force him, if he wished to sell, during that period, any of the 925 shares to outsiders, to make the sale through the defendants.

The learned Justice of Appeal did not agree with the view of the trial Judge that a reasonable time was to be fixed byr eference to the date of the completion of the building. Such a reasonable time must be fixed, if at all, by reference to the facts and circumstances present to the minds of the contracting parties at the time the contract was made, and must be such a time as the parties to the agreement would, in the opinion of the Court, have fixed if the question had arisen at the time the contract was made. The extreme limit of such a time would be the 1st October, 1914; but it was not necessary to fix a reasonable time, for the words "and retain for yourself" (i.e., the plaintiff) could not be treated as superfluous and as adding nothing to the meaning of the preceding words. The true meaning of the agreement was, that all shares that had not been sold before the 1st October should be considered as retained by the plaintiff. The nature of the transaction was such that the provisions for payment and the stipulation for sale should be read as referring to separate and distinct transactions. The stipulation for sale was intended to provide an alternative mode of payment of the commission. The election as to whether the payment should be in cash at $15 a share or in shares was to be with the plaintiff; and, when he elected to take shares, he thereby terminated his right to cash.

The receipt or release of the 24th September was clear evidence of an election and an intent to release any claim the plaintiff had, not only for the shares, but for a money payment instead of the shares.

The appeal should be allowed with costs and the action dismissed with costs.

*Appeal allowed.*

FIRST DIVISIONAL COURT. MARCH 28TH, 1919.

## PEEL v. PEEL.

*Husband and Wife—Alimony—Husband Leaving Wife—Allegations of Acts of Cruelty by Wife—Evidence—Right to Alimony—Judicature Act, R.S.O. 1897 ch. 51, sec. 34.*

An appeal by the defendant from the judgment of LATCHFORD, J., at the trial, awarding the plaintiff alimony at the rate of $7 a week.

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

Edward Meek, K.C., for the appellant.

W. J. McLarty, for the respondent, plaintiff.

HODGINS, J.A., reading the judgment of the Court, said that the law to which counsel for the defendant appealed was not applicable because the facts did not support the argument.

The learned trial Judge was not impressed with the seriousness of the attacks on the appellant by his wife. There were only two, both arising over interference with what the learned Judge described as "the apparatus over which she is especially fitted to preside," i.e., the kitchen-stove.

The appellant himself in answer to the question, "What did you leave for?" says, "Because Mrs. Peel made it so uncomfortable and intolerable—I couldn't live there in peace and happiness. She stated we couldn't live in happiness. Unfortunately we were temperamentally unsuited to one another."

This was not in harmony with the idea that the appellant left because he was in danger of life or limb, or even that it was her physical violence that brought about the move.

Nothing happened on these two occasions that would in itself absolutely deprive the wife of her right to alimony under the concluding words of our statutory enactment—the Judicature Act as found in R.S.O. 1897 ch. 51, sec. 34, preserved by the present Judicature Act, R.S.O. 1914 ch. 56, sec. 3.

*Appeal dismissed with costs.*

FIRST DIVISIONAL COURT. MARCH 28TH, 1919.

## *PERE MARQUETTE R. W. CO. v. MUELLER MANUFACTURING CO. LIMITED.

*Railway—Carriage of Goods—Freight Rates—Tariff Approved by Board of Railway Commissioners—Railway Act, R.S.C. 1906 ch. 37, sec. 314 (7 & 8 Edw. VII. ch. 61, sec. 11)—Nature of Goods Innocently Misdescribed in Bill of Lading—Rate Fixed according to True Description and Classification.*

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., at the trial, declaring that the plaintiffs were entitled to be paid for the carriage of goods from San Francisco to Sarnia at the tariff rate for the carriage of copper ingots, although the goods carried were not copper ingots, but were in fact scrap-metal, and directing a reference to a Master to find the lawful tariff rate on copper ingots.

The plaintiffs, by way of cross-appeal, asked that the Court should dispense with the reference and itself find the amount to which the plaintiffs were entitled, by consulting the printed tariff in evidence, which was admitted to be the tariff authorised and approved by the Interstate Commerce Commission of the United States and the Railway Board of the Dominion of Canada.

The appeal and cross-appeal were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. Weir and A. I. McKinley, for the defendants.

R. L. Brackin, for the plaintiffs.

FERGUSON, J.A., reading the judgment of the Court, said that the dispute between the parties was as to whether the rate of freight was to be fixed by the description in the bill of lading or by the true description of the commodity carried—the goods were described as copper ingots, but were in reality scrap-metal. The authorised tariff rate on copper ingots was admitted to be $2.20 per hundred and on scrap-metal $76\frac{2}{5}$ cents, making a difference of $6,692.02. The defendants had bought brass ingots and believed the goods shipped to be brass ingots and directed that they should be classified for shipment as copper ingots.

The question to be determined was, whether a common carrier could collect freight rates on metal-scrap at a rate different from the rate established by the Railway Board tariff, simply because the shipper, at the time of the shipment, innocently misrepresented what was in fact metal-scrap to be copper ingots.

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

Section 314 of the Railway Act, R.S.C. 1906 ch. 37 (as enacted by 7 & 8 Edw. VII. ch. 61, sec. 11), prevents a carrier from collecting tolls other than those provided for in a tariff authorised and approved by the Railway Board.

The learned Justice of Appeal, after reviewing the authorities, and referring to secs. 315 and 340 of the Railway Act, stated his conclusion as follows:—

"Both by the statute and the contract of the parties, the rate on the goods carried must be fixed by their actual and proper description and classification, rather than by their description in the bill of lading. It being admitted that the goods actually carried would have been properly described and classified as scrap-metal, and that the description used in the bill of lading—'copper ingots'—was a misdescription, it follows that the plaintiffs' claim for the lawful tariff rate must be limited to the lawful tariff rate on scrap-metal; and, that rate having been paid before action brought, the plaintiffs' action fails."

*Defendants' appeal allowed with costs and plaintiffs' appeal and action dismissed with costs.*

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FIRST DIVISIONAL COURT. MARCH 28TH, 1919.

## RE McLEAN.

*Will — Construction — Legacies — Annuity — Order of Payment— "First Charge."*

An appeal by Isabel Maude Winlow from an order of KELLY, J., of the 17th April, 1918, in the Weekly Court, on a motion by the Imperial Trusts Company of Canada, trustees, for the determination of questions arising upon the will of Allan Neil McLean, deceased.

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

H. J. Scott, K.C., for the appellant.

George Bell, K.C., for Jane W. Connor et al., respondents.

A. McLean Macdonell, K.C., for Mary A. McLean, respondent.

J. W. Carrick, for I. Butler et al., respondents.

A. C. McMaster, for the Imperial Trusts Company of Canada, respondents.

MACLAREN, J.A., reading the judgment of the Court, said that the testator, after giving all his estate and effects to his executors and trustees for distribution, went on to say:—

"I hereby leave to my wife an annuity of $1,500 to be received by her half-yearly during her life and I leave this as first charge on my estate. I then leave to my son and three daughters an annuity of $300 each to be received by them half-yearly; to my granddaughter Maude Brown" (the appellant) "$150 to be paid to her half-yearly; and to my sister Isabella McLean . . . $150 payable half-yearly during her 'ife."

After sundry directions not material to the present appeal, he requested his executors or trustees "to pay the above annuities until the death of my said wife, then I desire that my estate shall be divided share and share alike to my son and his three sisters, or should any one of them die before the said division takes place, then their share to their heirs or as they may desire in writing to leave it to. I leave to Maude Brown, my grandchild" (the appellant), "$4,000."

Kelly, J., held, inter alia, that the annuity to the testator's widow was payable out of corpus, if the income from the estate was insufficient, and that the legacy of $4,000 to Maude Brown was not payable until the death of the widow of the testator, and would only bear interest from the date of that event.

From the latter part of this decision, Isabel Maude Winlow (called in the will "Maude Brown") appealed, contending that her legacy of $4,000 was payable one year after the death of the testator, and that the estate upon which the annuity to the testator's widow was by the will made a first charge was the estate of the testator after payment of her legacy of $4,000, and that in the order of payment her said legacy came first.

The learned Justice of Appeal said that he could find nothing in the will to give even a shadow of substantiation to this claim. The testator left the annuity to his widow as a first charge, not upon the part of his estate but upon his whole estate. If he had stopped there, it would have been quite sufficient; but he strengthened it in the next sentence by the use of the word "then" —"I then leave to my son and three daughters an annuity" etc.— which applies to the remaining bequests in the will.

The scheme of the will is, that the testator, having omitted in the earlier part of the will to mention when the annuity of the appellant should terminate, or to include her name with her uncle and aunts as a residuary legatee, saw fit to compensate her by giving her this specific legacy instead of a fractional part of the residue. The annuity was also, no doubt, intended to be some compensation to her for the postponement of the payment of the $4,000 and to cease when the $4,000 would be paid.

In view of the opinion thus formed as to the time of payment of the $4,000, the question of the applicability of the Statute of Limitations, which was not dealt with in the judgment appealed

from, but was discussed before the appellate Court at considerable length, did not arise.

The appeal should be dismissed; the appellant should pay the costs of the widow of the testator and of the trust company (the latter as between solicitor and client), and one set of costs to the other respondents.

*Appeal dismissed.*

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FIRST DIVISIONAL COURT. MARCH 28TH, 1919.

## *RE STANDARD LIFE ASSURANCE CO. AND KRAFT.

*Insurance (Life)—Insurance-money Payable to Father of Assured—Assignment by Father of Interest under Policy to Wife of Assured—Subsequent Direction by Assured that Policy to be for Benefit of Father—Death of Assured—Right of Wife—Application of Doctrine of "Feeding the Estoppel."*

An appeal by Flora Elizabeth Kraft from an order, dated the 20th December, 1918, made by MEREDITH, C.J.C.P., on an originating motion for the determination of a question as to the person entitled to the proceeds of a policy of life insurance effected by Irvin Kraft, deceased, the husband of the appellant, on his own life.

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

J. M. Ferguson, for the appellant.

M. A. Secord, K.C., for the respondent Dilman Kraft.

E. C. Cattanach, for the Official Guardian.

MEREDITH, C.J.O., reading the judgment of the Court, said that, by the terms of the policy, the insurance-money was payable to the respondent Dilman Kraft, the father of the deceased. After effecting the insurance, the deceased married the appellant, and what was in effect an assignment of his interest under the policy was made by the respondent Dilman Kraft to the appellant.

Subsequently differences arose between the deceased and his wife, and they separated, and the deceased then made a direction that the policy should be for the benefit of his father. The manifest purpose of this direction was to prevent the appellant from receiving, under the assignment which the respondent Dilman Kraft had made to her, the insurance-money.

The appellant contended that she was entitled to the money; that whatever interest in it passed to the respondent Dilman Kraft, either under the terms of the policy or by virtue of the subsequent declaration, passed by the assignment from him to her.

That contention was not well-founded. All that passed to her by the assignment was what the assignor was then entitled to. If no subsequent direction had been made by the deceased, she would have been the person entitled to the insurance-money; but the deceased, in the exercise of his statutory right, determined that it should not go to her, but should go to his father, and so directed. The right of the father under this subsequent direction was a different right from that which had been assigned to the appellant. There was no room for the application of the doctrine of estoppel; that doctrine is applicable to a case where a person who assigns something that he has no right or title to, subsequently acquires it, and, by the application of that doctrine in such a case, the assignment passes the interest acquired, and it is said to "feed the estoppel," and the assignment then takes effect in interest and not by estoppel. That doctrine has no application where some interest has passed by the assignment, as was the case here.

*Appeal dismissed with costs.*

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FIRST DIVISIONAL COURT. MARCH 28TH, 1919.

## *SPROULE v. MURRAY.

*Executors and Administrators—Accounting by Executors—Legacy Payable at Death of Life-tenant—Payment out of Estate of Life-tenant—Duty of Executors—Release of Legacy for Limited Purpose—Right of Legatee to Shew that Legacy Unpaid—Estoppel—Payments by Life-tenant on Account of Legacy—Conveyance of Land to Legatee—Gift—Evidence—Onus—Corroboration—Deposit in Bank of Moneys of Life-tenant to Joint Account of Life-tenant and Legatee—Retention of Ownership by Life-tenant—Incomplete Gift—Balance Unexpended at Death of Life-tenant Forming Part of his Estate—Small Items in Dispute—Reference—Accounting—Costs of Action and Appeal.*

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action without costs, on payment of certain amounts omitted from the accounts as passed.

The action was for an account of the dealings of the defendants as executors with the estate of Edward McMillan, who died on the 15th August, 1914, and the dealings of the defendant Madill as executor with the estate of Samuel McMillan, who died on the 13th October, 1915.

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

J. E. Anderson and A. M. Fulton, for the appellant.

J. M. Ferguson and M. H. Roach, for the defendants, respondents.

HODGINS, J.A., reading the judgment of the Court, said that a legacy of $5,000 was given by the will of Edward McMillan to the defendant Margaret Murray, payable at the death of Samuel McMillan, to whom the estate was devised, subject to the payment of that legacy and of two others which had been paid in full. Margaret was a niece of both the McMillans, their housekeeper for many years, and held a power of attorney from both of them to do all their business, sign cheques and notes, etc.

Under the will of Samuel, the plaintiff and Margaret Murray took equal shares in the residue.

The $5,000 legacy not being payable until the death of Samuel, to whom the whole estate of Edward was left, it was paid out of the assets of Samuel's estate by the defendant Madill, Samuel's executor.

Margaret being an executrix under Edward's will and also a legatee, it was contended by the plaintiff that it was Margaret's duty to see that sufficient assets of Edward's estate were set apart by Samuel to meet the $5,000 legacy at his death, in which case Samuel's estate would not have been called upon to pay it, so leaving a larger amount as the plaintiff's share. Those interested in Samuel's estate, it was urged, were entitled to treat the legacy as having been paid and to have an accounting on that basis.

It was Margaret's right, if in doubt as to the outcome of the estate in the hands of Samuel, to require her legacy to be secured, but that was a personal right, not a duty owing to those who might become interested in Samuel's estate. They were volunteers, and could take only what was left after the payment of debts; and, if Samuel had failed to retain the amount payable to Margaret, his estate was chargeable with it as a debt arising from his neglect to provide for payment. But the question did not actually arise, for the executor of Samuel received sufficient to pay Margaret, and was entitled and bound to satisfy her legacy; and it was immaterial that Samuel's own estate and what he got

from his brother's estate became mingled, and that payment was in fact made from the combined assets.

Margaret, in order to facilitate a sale by Samuel of the farm which he and Edward jointly owned, consented to release her legacy, which was or might be considered a charge upon the farm. She executed a release, absolute in terms; but no payment was in fact made. She was entitled to shew the true state of affairs and to claim her legacy, notwithstanding the wide terms of the document which she signed. No one now setting up this release had, at its date, any vested interest in Samuel's estate. He himself was a party to its procurement for a limited purpose; and, unless those now claiming the right to take advantage of it were themselves misled or had changed their position, they were not entitled to claim an estoppel against her: Carpenter v. Buller (1841), 8 M. & W. 209, 213.

It was contended that payments actually made to Margaret were made in payment or part payment of the legacy. Samuel bought a house for $1,800 and took the conveyance in the name of Margaret. There was nothing in the evidence to support the argument that this was or was intended to be a payment instead of a gift. There was no reason why the Court should not determine whether the conveyance should be treated as a payment and so as a discharge of the legacy pro tanto. The burden of proof was on the plaintiff, and there was no proof. If it were necessary, under the Evidence Act, to corroborate the statement of Margaret that it was a gift, the clear evidence of the solicitor who acted for the vendor, and the circumstances of the parties previous to and at the time, established in material particulars what Margaret deposed to.

On the 25th March, 1915, Samuel deposited about $1,800 in a bank to the joint account of himself and Margaret; Margaret drew cheques on the account for household expenses, and took the balance which remained at Samuel's death, out of which she paid his funeral expenses. The fair conclusion from the evidence was, that Samuel intended that the money should be devoted to his own support and that of his establishment, including Margaret, during his life, and that when he died, and then only, the money was to become hers. It was not intended that she should become jointly interested in it in such a way as to give her the absolute right to dispose of it irrespective of the directions of Samuel—he was to have the real ownership while he lived. It was to be his, but she was free to spend it for certain purposes—she was to pay his funeral expenses, and then to have what remained for her support. There was no evidence sufficient to corroborate the statements of Margaret if her statements went to establish a joint tenancy in the money deposited. The gift was, therefore, incom-

plete, and the residue of the money belonged to Samuel's estate.

Review of the authorities. Hill v. Hill (1904), 8 O.L.R. 710, approved and followed.

The learned Justice of Appeal then dealt with a number of small items in the accounts.

The proper result of what had been said was, that the judgment at the trial should be varied by referring to the Registrar of this Court the items specially mentioned as proper to be dealt with upon an accounting, and by directing payment of them, as well as of the other sums, if any, referred to in the letter of the solicitor for the defendant of the 21st November, 1918, and one-half of the amount properly payable to the plaintiff as her share of the moneys in the joint account at the time of the death of Samuel, less payments properly made thereout ,with interest from the date of the commencement of the action; the amount to be ascertained by the Registrar.

The action was not an unreasonable one; but the plaintiff had failed upon her main contentions, and there should be no costs of the action or of the appeal to or against any of the parties.

*Judgment below varied.*

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## HIGH COURT DIVISION.

KELLY, J. MARCH 24TH, 1919.

## RE JAMES.

*Will—Construction—Devise to Widow for Life for Support of herself and Children—Provision for Maintenance of Minor Children in Event of Death of Widow—Absolute Devise to Children on Death of Widow—Estates Vested in Individuals and not as Members of Class.*

Motion by Ida May James for an order determining certain questions arising upon the will of Thomas James, deceased.

The motion was heard in the Weekly Court, Ottawa.

A. H. Armstrong, for the applicant and all other persons interested except those represented by other counsel.

L. A. Kelley, for Percy Argue, Thomas Herbert Argue, Howard Argue, and Alvy Argue.

A. C. T. Lewis, for the Official Guardian, representing Verlie Annetta Argue and Laura J. Partridge, infants.

KELLY, J., in a written judgment, said that the testator died in January, 1894. By his will, made 4 days before his death, he directed payment by his executors of his debts and funeral and testamentary expenses; he then gave, devised, and bequeathed all his remaining real and personal estate as follows: to his wife the sole use and management of his farm, with everything thereon, to be for the support of herself and all his surviving unmarried children, living at home with her, until his son Samuel should attain the age of 23 years, when his wife should cease to have the use and control of the north-west half of the farm, but should retain the south-east half during her life for her support and the support of all his surviving unmarried children; and, in consideration of "the foregoing bequest," she should make certain provision therein mentioned for two of his daughters. At the decease of his wife, if that happened before his youngest surviving child should have attained the age of 21, the south-east half was to be used for the support and maintenance of "such said child or children until the youngest shall attain to the age of 21." Then the south-east half, together with the personal property thereon, was to be divided among his children, viz., Thomas, William, Samuel, Sara Jane, Mary, Ida May, Gertrude, and Eliza. Then he gave Samuel the north-west half and certain chattel property, in consideration of his remaining with his mother "and work my farm to help and support her and my other children with her until he shall have attained the age of 23, when he shall get, for himself, such said north-west half," he to make certain payments to two of his sisters. Then followed a provision that his sons Thomas, William, and Samuel and his daughters Sara Jane, Mary, Ida May, and Gertrude should pay to his daughter Eliza $100 yearly equally among them during the term of Eliza's life, "whenever they shall have come in possession of their respective shares of the south-east half." Then he declared that the bequest to his wife should be in lieu of dower, and bequeathed the residue of the estate to her.

The widow died, intestate and without having remarried, on the 1st January, 1918, and after the testator's youngest surviving child had attained 21. The executors named in the will did not obtain probate; and on the 10th July, 1918, letters of administration with the will annexed were issued to the son William. At the time this application was made, no caution had been registered by the administrator.

The son Samuel attained 23 and came into possession of the north-west half, but died intestate and unmarried on the 9th May, 1903; his mother remained in occupation of the north-west half from the time of Samuel's death until her own death.

The learned Judge said that the general scheme of the will

indicated a definite provision for the widow for her life for herself and for the support of the testator's unmarried children living at home with her, during the minority; and then, merely to meet the contingency of the widow's death before the youngest surviving child should attain 21, and to provide for their maintenance during their minority, the provision to that effect was introduced. The devise to the 8 named children was not contingent upon the widow dying before the youngest surviving child attained 21—under the will they became entitled in remainder subject to the widow's life interest and to the maintenance until 21 of any child or children under that age at the death of the widow.

The eight children took, at the testator's death, vested interests, subject to the prior interest of the widow and to the provision for maintenance of any children who might be under age at the time of the widow's death; the children took individually and not as members of a class. Reference to Baird v. Baird (1879), 26 Gr. 367, explained in Town v. Borden (1882), 1 O.R. 327; Cooper v. Cooper (1861), 29 Beav. 229.

Order declaring accordingly; costs of all parties to be paid out of the estate—those of the administrator with the will annexed as between solicitor and client.

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KELLY, J. MARCH 24TH, 1919.

## McGIBBON v. NORTHERN NAVIGATION CO.

*Fire—Ship on Fire Placed Close to another Ship—Injury to Latter by Fire Escaping from Former—Directions Given by Owners of Former Ship—Responsibility for Escape of Dangerous Element—Employment of Tug but not so as to Constitute Owner of Tug an Independent Contractor—Abandonment of First Ship to Underwriters—Evidence—Intervention of Owners—Control—Liability for Loss—Assessment of Damages.*

Action for damages for injury to the plaintiffs' steamer "Cataract" by fire alleged to have been caused by the defendants' steamer "Majestic."

The action was tried without a jury at London.

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

R. I. Towers, for the defendants.

KELLY, J., in a written judgment, said that on the 15th December, 1915, the "Majestic," lying at Point Edward, took fire. It

was thought that the fire had been extinguished; but it broke out again on the 19th December, when the "Majestic" was lying about one foot away from the "Cataract;" the latter took fire. It was under the direction of the defendants' representative, in the first instance, that the "Majestic" was removed from where she was lying when the fire first broke out, and was placed in such proximity to the "Cataract" that the latter took fire. When the "Cataract" was in danger, the defendants took no step towards removing the "Majestic," or ensuring the safety of the "Cataract," beyond what they did in endeavouring to extinguish the fire. It was by the positive act of the defendants that the "Cataract" was placed in peril. What was done was not the independent act of the company whose tug towed the "Majestic" to a position near the "Cataract;" the tug company had no such separate control of the operations as made them independent contractors; the defendants did not relinquish, but retained, the control, and so were not relieved from responsibility: Halsbury's Laws of England, vol. 21, pp. 421, 422.

The defendants' liability was not necessarily to be determined by a finding whether or not they were responsible for the origin of the fire; they were accountable for bringing the burning "Majestic" alongside the "Cataract" and so causing the damage: Rylands v. Fletcher (1868), L.R. 3 H.L. 330.

The defendants set up that, at the time the "Cataract" was on fire, they were not the owners of the "Majestic," though they were the owners up to the time when the fire first broke out. They attempted to shew that between the 15th and 19th December they had abandoned the "Majestic" to the Fire Underwriters, and so relieved themselves from all liability.

Upon the evidence, the learned Judge was of opinion that the abandonment was not complete at the time the "Cataract" was damaged. But, assuming that it was complete, the defendants were not, in view of what happened, relieved from responsibility—it was by their direction that the "Majestic," while on fire, was taken from the place where the fire originated and placed in dangerous proximity to the "Cataract," and it would be most unreasonable to hold that, having done this, they could put an end to their liability for the consequences, either by abandoning the vessel altogether or turning her over to the care and control of others.

The "Cataract" was not of much value, and the plaintiffs' damages could not fairly be assessed at more than $500.

Judgment for the plaintiffs for $500 and costs.

MASTEN, J. MARCH 24TH, 1919.

## *BIRDSILL v. BIRDSILL.

*Deed—Construction—Conveyance under Short Forms Act—Release Clause—Effect of—Release of all Rights and Interests of Grantor in Land Conveyed, Including Rights under Executory Devise over in Will—Special Proviso in Deed—Application of—Construction and Effect of Will—Devise Subject to Life-estate and Charges in Favour of Legatees.*

Action to recover possession of the west half of the south half of lot 14 in the 1st concession of Townsend.

The action was tried without a jury at Simcoe.

W. E. Kelly, K.C., for the plaintiff.

T. J. Agar, for the defendant.

MASTEN, J., in a written judgment, said that James Birdsill, the grandfather of the plaintiff and of the defendant, was, when he died in 1866, the owner of the whole of the south half, 100 acres. By his will he devised to his son Edward the east half of the south half, after the death of the testator's wife, on condition that Edward should pay to a brother and two sisters of his (Edward's) each $100 within a year after the death of the wife. The testator devised to his son James the west half of the south half, after the death of the wife, upon condition that James should pay to four sisters each $25 within a year after the death of the wife. If either Edward or James should die "without heirs direct," his portion should go to the other and his heirs and assigns. By an earlier clause, the testator devised to his wife an estate for life in both parcels.

Upon the proper construction of this will, the widow took a life estate in the west half, and the son James took the remainder in fee simple or fee tail, subject to an executory devise in favour of Edward if James should die without heirs direct.

In 1873 the son James, for the expressed consideration of $2,000, quit-claimed to Edward all his interest in the west half. Edward held the title from 1873 to 1877. As to possession during that period, the evidence shewed that Edward and his wife were living on the west half, while James and his mother (who did not die till 1884) and sisters were living on the east half. In 1877 Edward conveyed the west half back to James, for an expressed consideration of $2,000—Edward's wife joining to bar dower. In 1885, the lands were formally discharged from the payments to the brother and sisters.

The son James died on the 19th June, 1918, unmarried, and by his will devised the west half to his nephew, James D., the defendant, son of Edward, subject to a legacy of $2,000 in favour of Charity Allen.

On the 21st June, 1918, Edward, claiming to be entitled under the executory devise in the will of his father, assumed to convey the west half to his son Vernon, the plaintiff.

The plaintiff thus claimed the west half under his father's conveyance, and the defendant claimed under the will of his uncle James.

The decision turned, in the learned Judge's view, upon the legal effect of the quit-claim from James to Edward in 1873 and the conveyance from Edward to James in 1877. By virtue of the quit-claim, the whole remainder after the life-estate became vested in Edward, who held by conveyance from James the remainder in fee simple or fee tail which had been devised to James, and Edward was himself entitled directly under the will to the benefit of the executory devise in case James died without heirs direct. Both these interests were held by Edward from 1873 to 1877. Whether or not there was a technical merger was immaterial.

The conveyance by Edward to James in 1877 was made in pursuance of the Short Forms of Conveyances Act, and purported, by the words of grant, to convey to James the fee simple in the west half. The conveyance contained the usual short form covenants, among others the release clause, which in its expanded form provides: "And the said grantor hath released . . . but the said grantee, his heirs, executors, administrators, and assigns, and the same lands and premises shall from henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said grantor might or could have upon him in respect of the said lands, or upon the said lands."

These words were ample to release to James, the grantee, all and every interest which Edward then had or might thereafter attain in the west half, unless a certain special proviso in the deed made a difference. This was: "Subject also to the terms, conditions, and charges and legacies concerning the same expressed in the . . . will . . . of James Birdsill," that is, the grandfather, who died in 1866.

At the time of this conveyance (1877), the mother's life-estate was in full force, and the legacies to the sisters had not become payable and had not been paid.

Full effect could be given to the words of the special proviso by applying them to the life-estate of the widow and to the charges in favour of the sisters; and that was the real intention of the parties.

The effect was to transfer to James every interest which inhered in Edward, including the potential rights which Edward possessed under the executory devise, but subject to the life-estate of the mother and the legacies to the sisters.

The Statute of Frauds precluded the establishment of a trust in Edward and a mere reconveyance from him to James. And, if oral evidence were admissible for such a purpose, the evidence failed to prove a trust.

James the younger was then, at his death, entitled to the west half in fee simple, and his will devising the land to the defendant was valid and effective.

*Action dismissed with costs.*

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MULOCK, C.J.Ex. MARCH 27TH, 1919.

## HORNE v. HUSTON AND CANADIAN BANK OF COMMERCE.

*Gift—Deposit of Money in Savings-bank Account to Credit of Depositor and Intended Donee—Terms of Deposit—"Payable to either but only on Production of Pass-book"—Retention of Pass-book by Depositor—Death of Depositor—Imperfect Gift.*

Action by the administrator with the will annexed of the estate of Louisa J. Bement, deceased, for a declaration that certain moneys deposited by her in the Canadian Bank of Commerce were the moneys of the estate and payable to the plaintiff, as administrator.

The action was tried without a jury at Sandwich.

J. H. Rodd and R. S. Rodd, for the plaintiff.

A. St. George Ellis and P. R. Pococke, for the defendants.

MULOCK, C.J.Ex., in a written judgment, said that on the 30th October, 1902, Mrs. Bement opened a deposit-account in the savings-bank department of the Canadian Bank of Commerce at Windsor, in the name of herself and of Henry Boyd Huston, defendant, "payable to either but only on production of pass-book." On that day she deposited to the credit of the account the sum of $1,000, and on the 21st October, 1908, a further sum of $3,000, and the bank credited the account in its ledger and in the pass-book with interest half-yearly until Mrs. Bement's death

in July, 1917. The bank admitted possession of the fund, and agreed to abide by the order of the Court in regard thereto.

It did not appear that Mrs. Bement ever parted with possession or control of the pass-book, and it was found among her papers in her possession in her home at the time of her death. The defendant Huston did not claim to have ever had possession or control of it. Neither Mrs. Bement nor Huston withdrew any of the moneys in question, and the amount now due to the credit of the account consisted of the two sums of $1,000 and $3,000 and accumulated interest.

Huston swore that in 1906, and again in 1913, Mrs. Bement told him that she had deposited money for him in the bank. According to the evidence of Mr. Taylor, the manager of the bank at Windsor, Mrs. Bement, on the 30th April, 1914, called at the bank and told him that "she did not wish H. B. Huston to know at this time that the money is in joint names," and he made a memorandum in those words in the ledger-account.

It is not pretended that Huston gave any consideration for the money in question, and his claim thereto can be established only by it appearing that it was the subject of a perfect gift during Mrs. Bement's lifetime. By the express terms governing withdrawals from the account, Huston, without production of the pass-book, was not entitled to withdraw the fund or any portion of it, and the retention of the pass-book by the depositor was a retention by her of dominion over the fund.

To constitute a valid gift inter vivos there must be an absolute transfer taking effect immediately. Here the fund was never within the control of the defendant. This circumstance alone defeated Huston's claim; and the plaintiff was entitled to judgment declaring the fund to belong to the testatrix's estate. The defendant Huston must pay the costs of the plaintiff and of the bank.

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MIDDLETON, J. MARCH 27TH, 1919.

## ONTARIO POWER CO. OF NIAGARA FALLS v. TORONTO POWER CO. LIMITED.

*Contract—Supply of Electrical Energy—Construction and Operation—Adjustment of Accounts—Findings of Trial Judge.*

Six actions brought by the same plaintiff company against the same defendant company.

The defendant company, incorporated under the laws of Ontario, was engaged in producing and selling electrical energy at Niagara Falls. The plaintiff company, incorporated by the

Parliament of Canada, was also engaged in the production of and sale of electrical energy. By an agreement of the 13th October, 1915, the defendant company agreed to sell to the plaintiff company the electrical energy which would constitute the output of one generator, 10,000 kilovolt amperes, for a period of 5 years. The litigation turned largely upon this agreement. There were other similar agreements between the two companies.

During the war, a great demand for electrical energy existed, and it could be sold for a high price.

The Government of Canada, in its concern to secure the utmost output of munitions, under the wide powers conferred by the War Measures Act took steps to deal with the power situation in Ontario, and on the 5th November, 1917, by an order in council appointed Sir Henry Drayton "Controller of the Production and Distribution of Electrical Energy by Companies Generating and Distributing Electrical Energy in Ontario." Under the wide powers conferred upon him, the Controller gave directions to the companies regarding the distribution of energy.

Accounts for energy supplied were rendered monthly by the defendant company to the plaintiff company; the accounts involved in these actions were those for March, 1918, and subsequent months. The companies were at variance as to the amounts payable. The defendant company demanded payment in accordance with its view of the amount payable for March, 1918. The plaintiff company sent a cheque for the amount it thought to be payable; the defendant company refused to accept it, and in due course served a notice demanding payment, and stating that in default it would exercise its power of cancelling the agreements or ceasing to supply electricity thereunder.

The plaintiff company then began the first action, and obtained an injunction restraining the defendant company from carrying out its threat, upon the plaintiff company paying to the defendant company the amount admitted to be due and paying into Court the amount claimed by the defendant company over and above the amount admitted to be due.

The same performance was gone through month by month, so that issue was joined in six actions, and two more were pending in which pleadings had not been delivered, but which (as agreed) were to abide the result of the six.

The total amount involved in the eight actions was nearly $200,000, apart from the amount to be paid for power supplied under the Power Controller's order.

The six actions were tried without a jury in Toronto.

I. F. Hellmuth, K.C., and G. H. Kilmer, K.C., for the plaintiff company.

R. McKay, K.C., for the defendant company.

MIDDLETON, J., in a written judgment, set out the facts and correspondence very fully, and made the following findings:—

(1) That the final direction of the Controller was made after the fact that the energy was not being delivered to the Union Carbide Company (a customer of the plaintiff company) was ascertained, and that the energy was not ear-marked for that company, but was for the general purposes of the plaintiff company.

(2) That the plaintiff company was bound to exhaust its contract rights under the agreement with the defendant company before resorting to the emergency legislation to supply its needs: the power delivered must in the first place be attributed to the contract, and the excess only to the orders of the Controller.

(3) That all that the contract called for was the output of the generator at normal rating and no more.

(4) That, while the obligation of the defendant company was to maintain an output of the generator rightly described as 10,000 kilovolt amperes, the obligation of the plaintiff company was to pay for "the amount of energy taken;" and thus, as to 75 per cent. of the normal rated capacity, was at a rate "per horse power per year" of this capacity—"kilowatts" and "horse power" are convertible terms, but "kilovolt amperes" and "horse power" are not. The "per cent. of normal capacity" in the table means the per cent. of 10,000 kilowatts for the number of hours in the month. As the power factor will always be below 100 per cent., this means that until the power factor correction for below 90 becomes operative, the difference between kilovolt amperes and kilowatts must be borne by the defendant company.

(5) The payments are to be made each month for energy delivered each month; and the "additional payment" for energy in excess of 75 per cent. of capacity is to be at the rate mentioned in the table—pointing to a monthly determination of one rate applicable for a month. The rate is not to change "whenever" there is a peak.

(6) As to the accuracy of the determination of the power factor, the methods and readings of the defendant company are substantially accurate and should govern.

Upon those findings the accounts should be recast; and, if desired, the learned Judge may be spoken to again.

KELLY, J., IN CHAMBERS. MARCH 28TH, 1919.

## JARVIS v. JAFFRAY.

*Discovery — Examination of Defendant — Scope of — Information Obtainable from Strangers to Action—Examination of Persons for whose Benefit Action Said to be Defended—Rule 334—Persons Living out of Ontario.*

An appeal by the plaintiff from an order of one of the Registrars, sitting in Chambers in lieu of the Master in Chambers, refusing to require the defendant to attend for re-examination for discovery and to answer questions in reference to the dealings of the defendants with brokers on the Montreal Stock Exchange and the dealings of these brokers relative to the sale and purchase of certain stock of the Montreal Light Heat and Power Company purporting to have been sold and purchased by the defendants as the brokers of the plaintiff; or, in the alternative, to allow the plaintiff to examine the Montreal brokers for discovery as persons for whose benefit this action was being defended.

T. R. Ferguson, for the plaintiff.
R. H. Parmenter, for the defendants.

KELLY, J., in a written judgment, said that the defendant Biggar had already been subjected to an exhaustive examination, and therein communications between the defendants and these Montreal brokers were produced. The plaintiff's counsel insisted on the defendants obtaining information as to what actually transpired in Montreal—what the Montreal brokers did; the defendants, while willing and offering to produce and disclose all information within their knowledge relating to these transactions, refused to go further and endeavour to obtain additional information from the Montreal brokers, over whom they had no control. When this was pressed for upon Mr. Biggar's examination, his counsel stated that the defendants had produced all the correspondence they had; and the witness stated that he would make a further search to see if the defendants had any additional correspondence, and, if anything additional were found, he was willing to produce it. In the circumstances, the witness went as far as he was bound to go; assuming, however, that if, on the search he offered to make, he should find further correspondence, he must produce it for the usual purposes under the Rules applicable to discovery.

The plaintiff was not entitled to the alternative order he asked for. Not being parties to the action, the Montreal brokers were

not subject to examination for discovery. It was not shewn, though the plaintiff's counsel urged it, that the action was defended for the benefit of these brokers; and, even if the action were so defended, and if they were, as are persons for whose benefit an action is brought or defended (Rule 334), subject to examination for discovery, they, not being within the jurisdiction, were not subject to the examination which the plaintiff asked for: Perrins Limited v. Algoma Tube Works Limited (1904), 8 O.L.R. 634; Stockbridge v. McMartin (1916), 38 O.L.R. 95.

*Appeal dismissed with costs.*

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KELLY, J., IN CHAMBERS. MARCH 29TH, 1919.

## VIGO v. HAMILTON.

## VIGO v. SCOTT.

*Security for Costs—Plaintiff out of Ontario—Alien Convicted of Crime—Enlistment for Military Service in Canadian Battalion —Discharge from Service—Legality of, Attacked—Deportation from Canada—Right to Remain in Canada and to Prosecute Actions without Giving Security—Denial of.*

Appeals by the plaintiff from orders made in the two actions by the Master in Chambers dismissing the plaintiff's applications to set aside orders for security for costs.

F. Arnoldi, K.C., for the plaintiff.
R. H. Parmenter, for the defendant Hamilton.
M. L. Gordon, for the defendant Scott.

KELLY, J., in a written judgment, said that the main grounds on which the appeals were pressed were that the plaintiff, who when he entered Canada was an alien who had been convicted of crime in the United States and later on was convicted in Canada as well, and who when entering Canada did not comply with the immigration laws, had by his enlistment in a Canadian battalion acquired the status of Canadian citizenship; that his discharge from military service in December, 1918, was illegal; that, by reason of this alleged claim to Canadian citizenship, his subsequent deportation to Italy was improper and should not have been proceeded with; and that, therefore, he had such right to remain in Canada as would relieve him from liability to give security for costs in these two pending actions.

Whether there was or was not any irregularity in the proceedings by which the plaintiff was discharged from the service in which he had enlisted, there was no satisfactory reason advanced for holding that a person with a record such as that of the plaintiff, who, it was not too much to say, could not have obtained naturalisation in the regular way under the Naturalisation Act, acquired by the mere fact of enlistment Canadian citizenship with all its accompanying privileges.

The plaintiff was not now a resident of Canada; even on his own evidence, he was not the sort of person whose return would be for this country's good; there was no suggestion that he contemplated a return to or residence in Canada, or that he would be permitted to remain here if he returned. The circumstances of his deportation were not such as warranted any interference with the orders appealed from.

After a very careful consideration, the learned Judge said, he could find no sufficient ground for not upholding these orders. He did not overlook the objection that the plaintiff's deportation was not of his own volition; but, even assuming that contention to be correct, it did not, in the circumstances, entitle him to succeed.

*Appeals dismissed with costs.*

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## CORRECTION.

In SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LIMITED, ante 39, last two lines, for "J. S. Allan," read "J. B. Allen."


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