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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 18TH, 1916.

STOTHERS v. BORROWMAN.

Mortgage—Payment—Second Mortgage — Priority — Master's Report—Appeal.

An appeal by the plaintiff from an order of LATCHFORD, J., in the Weekly Court, 10 O.W.N. 367, dismissing an appeal by the plaintiff from the report of a Local Master allowing a payment of $208.65 made on a first mortgage in priority to the plaintiff's second mortgage.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

P. H. Bartlett, for the appellant.

R. G. Fisher, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 18TH, 1916.

COOPER v. ABRAMOVITZ.

Mortgage—Action for Foreclosure—Motion for Summary Judgment—Defence—Oral Agreement to Take no Proceedings—Effect of—Tenancy—Possession.

Appeal by the defendant Gussie Gross from the order of LATCHFORD, J., in Chambers, ante 35, affirming an order of the Master in Chambers for summary judgment in a mortgage action.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MASTEN, JJ.

W. J. McLarty, for the appellant.

S. M. Mehr, for the plaintiff, respondent.

THE COURT allowed the appeal and set aside the order so far as it permitted the plaintiff to have judgment for possession against the appellant. The parties to go to trial on the question of tenancy if they choose to do so. The appellant to have the costs of the appeals in Chambers and in this Court against the plaintiff. If there are any costs against the appellant, they are to be set off.

SECOND DIVISIONAL COURT. OCTOBER 19TH, 1916.

AGNEW v. EAST.

Payment—Claim for Price of Goods Sold and Delivered—Payment by Promissory Notes and Assignment of Mechanic's Lien—Destruction by Fire of Building on Land Covered by Lien—Application of Insurance Moneys—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 9.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 10 O.W.N. 428.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Frank Denton, K.C., for the appellant.

R. T. Harding, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 20TH, 1916.

*PALMER v. CITY OF TORONTO.

Highway—Nonrepair—Stairway Used as Approach to Foot-bridge Connecting City Streets—"Sidewalk"—Duty of City Corporation to Keep in Repair—Municipal Act, R.S.O. 1914, ch. 192, sec. 460—Snow and Ice—"Gross Negligence"—Evidence—Climatic Conditions—Injury to Person Slipping on Steps and Falling—Liability of Corporation.

Appeal by the defendants from the judgment of CLUTE, J., who tried the action without a jury at Toronto, in favour of the plaintiffs.

The action was brought by a man and his wife to recover damages arising from an injury to the wife by a fall upon the steps of an overhead foot-bridge over railway tracks, connecting two highways in the city of Toronto, the plaintiffs asserting that the steps were in a dangerous condition owing to snow and ice and that the defendants neglected their duty to keep them in proper repair.

The judgment awarded $1,000 to the wife and $100 to the husband, with costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Irving S. Fairty, for the appellants.

W. Proudfoot, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the plaintiffs' claim was based altogether upon an alleged breach of the defendants' duty, under sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192, to keep every highway and bridge, under their jurisdiction, in repair; and the liability, in like manner, imposed upon them, "for all damages sustained by any person" through their "default" in that respect. The duty is to keep such public ways reasonably sufficient for the purpose of the traffic over them; and the defendants are not to be held liable for such damages except upon reasonable proof of damages sustained through "such default." Such a way may be out of repair and damages may be sustained without the municipality being in default. Reasonable opportunity must be afforded for the per-

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

formance of the duty thus imposed. And when a "personal injury" is caused by snow or ice upon a sidewalk there is no such liability "except in case of gross negligence."

Upon a review of the evidence, the learned Chief Justice was of opinion that there was no default on the part of the defendants; that the appeal should be allowed and the action dismissed.

RIDDELL, J., in a written judgment, referred to the contention of the defendants that the foot-bridge was a sidewalk, and that they were not therefore liable except for "gross negligence." In the view the learned Judge took of the case, he did not think it necessary to decide as to this contention. The case, he thought, should be considered as though the defendants should be held liable if the accident happened through their negligence, "gross" or simple.

The duty of the defendants was subject to circumstances; it was not their duty to have any highway at all times such that a person might with reasonable safety travel on it. Snow might fall, ice form, a torrential rain come, rendering a way unsafe for a time. The defendants would not be liable for that—all that they could be called upon to do was to exercise due care in making and keeping their ways reasonably safe.

Upon all the evidence, it was impossible to say that the defendants' duty was not done; and, therefore, the appeal should be allowed and the action dismissed.

MASTEN, J., in a written judgment, said that it was established by the evidence: (1) that the foot-bridge, including the steps by which it was approached, was between 200 and 300 feet long; (2) that the defendants employed a competent man to keep the bridge and steps in proper condition for the use of passengers; (3) that at 8.15 a.m. on the day of the accident, this man was seen engaged in clearing the snow from the steps; (4) that during the storm which then occurred two and a half inches of snow fell, and the storm lasted from some time in the night before the accident till about the time when the accident happened; (5) that at the time of the accident there was about half an inch of snow on the steps where the plaintiff fell; (6) that, by inference, the steps were cleared between 8 and 9 on the morning of the accident, and afterwards snow continued to fall. The conclusion from these facts was that the defendants could not be held guilty of negligence, gross or otherwise, and that the appeal should be allowed and the action dismissed.

LENNOX, J., dissented, for reasons stated in writing. He was of opinion that in the city of Toronto, where snow-storms are frequent, the defendants, maintaining a stairway-highway of the character described in the evidence, must be taken to have notice in advance that dangerous conditions must from time to time arise if the steps are allowed to become covered with snow or ice, and are called upon to exercise exceptional vigilance by reason of the exceptional and quasi-dangerous character of the structure they have provided for public use, and are bound to take effective measures to prevent the occurrence of conditions such as confronted the plaintiff and occasioned her injuries on the 13th December, 1915. The defendants wholly failed to discharge these obligations, and—whether the stairway was a sidewalk or not—were guilty of gross negligence. The appeal should be dismissed.

Appeal allowed; LENNOX, J., *dissenting.*

SECOND DIVISIONAL COURT. OCTOBER 20TH, 1916.

*KILLELEAGH v. CITY OF BRANTFORD.

Highway—Nonrepair—Dangerous Condition—Sidewalk in City Street below Level of Ground—Snow and Ice—Duty of City Corporation—Municipal Act, R.S.O. 1914 ch. 192, sec. 460—"Gross Negligence"—Injury to Person—Cause of Injury—Absence of Contributory Negligence—Climatic Conditions—Liability of Corporation.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Brant, who tried the action without a jury, in favour of the plaintiff.

The action was for damages for injury (broken arm) sustained by the plaintiff by a fall upon an icy sidewalk in the city of Brantford on the 22nd December, 1915—the plaintiff asserting that the sidewalk was in a dangerous condition by reason of nonrepair. The trial Judge gave judgment for the plaintiff for $250 and costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. J. Wilkes, K.C., for the appellants.

W. M. Charlton, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read the judgment of the Court. He said that the plaintiff, in order to recover, must prove that the injuries she complained of were caused by the gross neglect by the defendants of their duty to keep the highways and bridges under their jurisdiction in repair; and (2) that notice of her claim and injury was given to the defendants in writing within seven days after the happening of the injury: Municipal Act, R.S.O. 1914 ch. 192, sec. 460.

The appellants contended that the requisite notice was not given, and that the plaintiff's injury was not caused by the gross negligence of the defendants.

The first objection to the notice was, that it did not state the day on which the accident happened. The statute, the learned Chief Justice said, does not require that the time of the injury shall be stated in the notice; the defendants were not misled or prejudiced; and the trial Judge was right in refusing to give effect to this objection.

The second objection was, that in the notice the accident was said to have happened on the south side of the street, whereas in fact it happened on the north side. The defendants had sufficient information as to the place of the accident from a description in the notice; and there was no pretence that they were misled or prejudiced. This objection also failed.

The place where the accident happened was part of a sidewalk in the city of Brantford; and at this place it had been either so constructed as to be, or was allowed to become, through disrepair, lower than the ground beside it, with the result that water from rain or melted snow flowed upon the sidewalk, and, there freezing in cold weather, made a dangerous spot, unobservable when fresh snow had fallen, and so a dangerous place, something in the nature of a trap, sometimes. According to the evidence, the sidewalk had been left in that state of disrepair for three years. The trial Judge was right in his finding that the defendants were guilty of gross negligence.

In such a case as this there is some certainty regarding the term "gross negligence:" it means something more than mere default regarding the obligation in general which the statute imposes on municipal corporations to keep highways and bridges in repair.

The fact that, at the time when the plaintiff sustained her injury, weather conditions had made all walks slippery and more or less dangerous, could not relieve the defendants.

The trial Judge was also right in finding that the defendants' gross negligence was the proximate cause of the plaintiff's injury, and that she was not guilty of contributory negligence.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 20TH, 1916.

*HIRSHMAN v. BEAL.

Motor Vehicles Act—Liability of Owner of Vehicle for Negligence of Person Driving without Authority—Servant in Course of Employment—Person in Employ of Owner—Foreman of Repair-shop—Use of Vehicle for his own Purposes—"Stolen it from the Owner"—R.S.O. 1914 ch. 207, sec. 19—Amendment by 4 Geo. V. ch. 36, sec. 3—Statutory Criminal Offence—Amendment to Criminal Code by 9 & 10 Edw. VII. ch. 11—"Theft"—Marginal Note in Statute-book.

Appeal by the plaintiff from the judgment of KELLY, J., 10 O.W.N. 411.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

E. F. Singer, for the appellant.

T. N. Phelan, for the defendant, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the question as to the negligence of the driver of the motor vehicle by which the plaintiff was injured was left to the jury, and the questions whether the driver of the car, at the time when the plaintiff was injured, was in the employment of the defendant, the owner, and whether the driver had stolen the car, were withdrawn from the jury and left to be determined by the Judge. The defendant, in endeavouring to support the judgment in his favour, contended that there was no evidence upon which the jury could properly find that any negligence of the driver of the car was the cause of the plaintiff's injury. The learned Judge was of opinion that there was ample evidence to support the jury's finding of negligence.

The trial Judge had found that the defendant was not liable

as owner for the negligence of the driver, because the latter had "stolen" the car (see the amendment made by 4 Geo. V. ch. 36, sec. 3, to sec. 19 of the Motor Vehicles Act, R.S.O. 1914 ch. 207). The driver was the foreman of a repair-shop, and the defendant had left the car there for repairs. The driver properly took the car out, after it had been repaired, to test it; but, having done that, instead of returning the car to the shop, he made an expedition in it on his own business or pleasure, and the negligence occurred while he was so using the car. In these circumstances, the learned Chief Justice said, he could not agree that the man had stolen the car.

The Parliament of Canada, by the Act of 9 & 10 Edw. VII. ch. 11, had made it a minor offence to take a motor car for use without the consent of the owner; but that did not make the taker a thief; indeed the enactment itself refuted the argument that theft was pointed at. The marginal note to the statute used the word "theft," but that did not affect the interpretation. Reference to Attorney-General v. Great Eastern R.W. Co. (1879), 11 Ch.D. 449, 461.

That the plaintiff was not entitled to recover on the ground that his injury was caused by the negligence of a servant of the defendant in the course of his employment was obvious. Reference to Halparin v. Bulling (1914), 50 S.C.R. 471.

The trial Judge had found that the driver was not in the "employ" of the defendant within the meaning of the words "in the employ of the owner" contained in the amending Act, 4 Geo. V. ch. 36, sec. 3; and in that finding the learned Chief Justice agreed.

The appeal should be allowed, and judgment entered for the plaintiff for $800, the damages assessed by the jury, with costs of the action and of the appeal.

RIDDELL and MASTEN, JJ., were of the same opinion, for reasons stated by each in writing.

LENNOX, J., concurred.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 20TH, 1916.

*CLERGUE v. PLUMMER.

Evidence—Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser against Executors of Vendor for Specific Performance—Issue as to whether Sale of Whole or Half of Vendor's Interest in Land—Written Document Delivered to Purchaser and Produced at Trial—Entries in Book and Memorandum of Agreement Found among Papers of Deceased Vendor—Admissibility—Specific Performance—Weight of Evidence—Delay—Costs.

Appeal by the defendants from the judgment of MIDDLETON, J., 10 O.W.N. 356.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. N. Tilley, K.C., for the appellants.

R. McKay, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he set out the facts and discussed the evidence. He was of opinion that entries in the book of the late W. H. Plummer, the defendants' testator, were properly admitted as evidence at the trial; but he did not agree that the plaintiff was entitled to specific performance of the agreement alleged—an agreement for the sale to him of the deceased's whole interest in certain water lots. There had been very great delay on the plaintiff's part, and no attempt had been made to excuse it. The writing relied upon by the plaintiff and his testimony at the trial did not make a clear and indisputable case for specific performance—the writing was self-evidently of an incomplete, of a preparatory, character, and was not signed by the plaintiff, nor was there any writing signed by him in connection with the transaction.

The appeal should be allowed; and, as the defendants had always been willing to perform the contract as one for the sale of an undivided half of the land or refund the money paid on the contract, as the plaintiff might choose (the plaintiff electing a refund), the action should be dismissed upon payment by the defendants to the plaintiff of $1,000 and interest.

The defendants should have their costs of the appeal, but there should be no order as to costs of the action, the deceased vendor being much to blame for having left the writings in such a state that litigation was encouraged.

RIDDELL, J., read a judgment in which he said that he agreed that the entries in the book of the deceased vendor were competent evidence; but he was unable to agree with the conclusions of the trial Judge as to the weight of evidence.

The learned Judge, after discussing the evidence, said that it seemed to him that the case stood thus: the parties were not at one as to what the contract was—not *ad idem*—or the sale was of a half interest only. The defendants offered to carry out the sale of a half interest or call the deal off. The plaintiff preferred the latter, if he must take either, as he must. There should be judgment declaring that no contract was entered into, with the proper consequences. The defendants should have the costs of the appeal; otherwise, there should be no costs.

LENNOX, J., concurred.

MASTEN, J., in a written judgment, said that he agreed that the entries in the book of the deceased vendor were admissible in evidence; but was unable to agree in the conclusion of the trial Judge that the plaintiff had made out a case justifying specific performance of a contract for the sale of the whole of the deceased's interest in the land.

Appeal allowed.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. OCTOBER 16TH, 1916.

FORBES v. DAVISON.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Practice—Discovery.

Motion by the plaintiff for leave to appeal from the order of RIDDELL, J., ante 61.

Peter White, K.C., for the plaintiff.
T. R. Ferguson, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that no question of principle was involved. An affidavit on production is conclusive unless it appears from the examination for discovery of

the party, or from admissions made by him, that it is untrue, or unless it is made to appear that the affidavit is sworn under a misapprehension as to what was in truth material and therefore proper to be produced.

Riddell, J., having these principles plainly before him, and recognising them, had carefully scrutinised the affidavit in the light of the examination, and come to the conclusion that the production of the diary in question ought not now to be ordered. There was no reason why there should be an appeal from his decision. It must be borne in mind that under Rule 507, governing appeals from the decision of a Judge in Chambers, where the order in question does not finally dispose of the whole or any part of the action, an appeal shall not be had unless, firstly, there are conflicting decisions, and it is, in the opinion of the Judge, desirable that an appeal should be permitted, or, secondly, there appears to be good reason to doubt the correctness of the judgment, and the appeal would involve matters of such importance that, in the opinion of the Judge applied to, leave to appeal should be given.

Here there were no conflicting decisions; and, even if satisfied that there was any reason to doubt the correctness of the judgment in question, that would not be sufficient, for there was no matter of such importance as to justify the granting of leave. In fact, there was no reason to doubt the correctness of the judgment.

In consideration of a motion for leave to appeal from an interlocutory order, the settled policy of our practice is, that the decision of the Judge in Chambers ought to be regarded as final save in very exceptional cases. If there are conflcting decisions and the practice is vague and uncertain, then an authoritative decision from the appellate Court may well be regarded as desirable.

The second provision permitting an appeal is intended to cover exceptional cases where the matters involved are of such unusual importance as to justify an appeal. The cases must be rare indeed in which an appeal can properly be authorised from an interlocutory ruling upon a matter of discovery. It is sufficient that this is not such an exceptional case.

Application dismissed with costs to the defendant in any event.

MIDDLETON, J., IN CHAMBERS. OCTOBER 17TH, 1916.

PORT ARTHUR WAGGON CO. v. TRUSTS AND GUARANTEE CO.

Executors and Administrators—Action against Administrator of Estate of Intestate—Breach of Trust by Intestate—Director of Company—Misfeasance—Quasi-contractual Obligation—Question of Law—Motion for Preliminary Trial—Rule 132.

Motion by the defendants for an order, under Rule 132, directing the determination of an issue of law before the trial of the other issues in the action.

The plaintiffs were a company in liquidation, and the action was brought by the liquidator. The defendants were the administrators of the estate of one Kloepfer, deceased, who had been a director of the plaintiffs and also of the Speight Waggon Company Limited. The plaintiffs alleged that Kloepfer had been guilty of misfeasance and breach of trust in respect of a sale of the assets of the Speight company to the plaintiffs for certain shares of the plaintiffs and certain sums in cash. It was charged that Kloepfer had paid the price without deducting the amount of an incumbrance on the Speight property and had paid money out of the assets of the plaintiffs without authority. The assets of the Speight company were distributed among the shareholders and creditors of that company, and Kloepfer, it was said, received a portion thereof. The action was brought to recover these moneys.

Kloepfer died on the 9th February, 1913. This action was begun on the 9th October, 1914, more than a year after his death; so that, if the action could be maintained only by virtue of sec. 41 of the Trustee Act, R.S.O. 1914 ch. 121, the time-limit was a bar.

The defendants maintained that, apart from the statute, the action would not lie; this the plaintiffs denied; and the question of law thus raised was that sought to be determined as a preliminary issue.

The motion was heard in the Weekly Court at Toronto.

W. J. Boland, for the defendants.

Peter White, K.C., for the plaintiffs.

MIDDLETON, J., in a written judgment, said that, although an action ex delicto cannot be pursued against the personal

representative of a wrongdoer unless the property of the plaintiff can be traced to the wrongdoer's assets (Phillips v. Homfray (1883), 24 Ch. D. 439), the rule does not apply to case depending on breach of contract. The position of a trustee is one in which there is a quasi-contractual obligation: Concha v. Murrieta (1889), 40 Ch. D. 543; applied to the case of a director in Ramskill v. Edwards (1885), 31 Ch. D. 100.

Upon applications under Rule 132, the leave sought ought not to be granted unless it is made to appear that the point of law is one which it is reasonably clear ought to be resolved in favour of the defendant. The point here being concluded by high authority against the defendants' contention, the balance of convenience is in favour of allowing the action to go to trial in the ordinary way.

Motion refused, without prejudice to the right of the defendants to raise the question at the hearing; costs to the plaintiffs in any event.

FALCONBRIDGE, C.J.K.B. OCTOBER 17TH, 1916.

MILES v. CONSTABLE.

Landlord and Tenant—Lease of House—Want of Repair—Damage to Tenant's Goods by Flooding—Absence of Covenant and of Statutory Duty to Repair—Implied Warranty of Fitness—Representation or Misrepresentation — Evidence — Collateral Warranty—Failure to Shew Authority of Warrantor.

Action to recover $1,500 damages for injury caused by the flooding of a house leased by the defendants to the plaintiff.

The action was tried without a jury at Toronto.

T. F. Slattery, for the plaintiff.

J. H. Moss, K.C., and W. Lawr, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that George W. Constable, who was one of the original defendants, fell fighting for his country in November last, and on the 7th April a consent was signed by the solicitors whereby the action was dismissed as against him without costs, and the action should be proceeded with as against the remaining defendants.

The learned Chief Justice was of the opinion that, as against the defendants still before the Court, the action failed. Their position was that of lessors only, and it is well settled law that, in the absence of an express stipulation or a statutory duty, the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy nor to do repairs during the continuance thereof, nor is there any implied warranty by the landlord that the premises shall be fit for the purpose for which they are taken: Halsbury's Laws of England, vol. 18, p. 501, para. 984; Foa on Landlord and Tenant, 5th ed., p. 140 et seq.

A warranty at or before the making of a lease that a house is in a fit state for habitation, whether as regards repair or drainage, may be given as an express contract, or may be implied from a representation as to the state of the house: Halsbury, vol. 18, p. 502, para. 986; and the plaintiff endeavoured to set up some such case, based upon an alleged conversation with the deceased George W. Constable; but the evidence did not establish any such case, and the plaintiff's solicitor's letters did not allege any such case.

If any such collateral agreement or warranty had been established, it would be only that of George W. Constable; and there was no evidence of any express authority from his co-defendants to make such agreement or give such a warranty, and there was nothing in the case from which any implied authority on his part could be inferred.

The same remarks would apply to any supposed case of misrepresentation by George W. Constable—that would give rise only to a common law action of deceit. At an early stage of the trouble, the plaintiff might have got relief from his bargain; but he refused the defendants' offer to give him back his money and let him go, and thereby he affirmed the lease.

The action should be dismissed with costs; and there should be judgment against the plaintiff on the defendants' counterclaim for $1,399.62, with costs.

SUTHERLAND, J. OCTOBER 18TH, 1916.

NAIRN v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY.

Negligence — Street Railway — Injury to Automobile — Personal Injuries — Contributory Negligence—Ultimate Negligence—Findings of Jury—Damages—Costs.

Action by the owner of an automobile for damages for personal injuries to himself and injuries to his car as the result of negligence on the part of the driver of a street car of the defendants, which ran into the rear end of the plaintiff's car, which was travelling ahead of it and in the same direction, on the railway track.

The action was tried with a jury at Sandwich, and questions were put to them and answered. They found (1) that the defendants were guilty of negligence which caused the injuries to the plaintiff and his car; (2) that the negligence was that the motorman did not have his car under proper control for the rate of speed he was going in coming to a dangerous crossing; (3) that the plaintiff was guilty of negligence which caused or contributed to the injuries; (4) that this negligence was that the plaintiff did not take proper precaution in looking to see whether or not he could go upon the track in safety; and they assessed the damages at $200.

T. Mercer Morton, for the plaintiff.
M. K. Cowan, K.C., and A. R. Bartlet, for the defendants.

SUTHERLAND, J., in a written judgment, said that it was difficult to determine what the jury meant as to liability by their findings, and to know how they came to fix the damages at only $200 in the light of the evidence. The plaintiff and his chauffeur, who were the occupants of the motor car at the time of the accident, both testified that they had looked when approaching the street intersection in question and saw the track apparently clear of street cars for a reasonable distance to enable them safely to turn the corner and go out upon the track. The evidence was that the street car hit the motor car some little distance from the easterly intersection of the two streets.

In the light of the evidence given at the trial, the learned Judge was inclined to think that the effect of the answers was,

that, though the plaintiff was guilty, in the opinion of the jury, of some initial negligence in going on the track in front of the car without taking some further precautions, the motorman, not having his car under proper control, having regard to the rate of speed at which the street car was going, was guilty of the ultimate negligence causing the accident.

With some hesitation, the learned Judge directed judgment to be entered for the plaintiff on the findings for the $200.

As to costs, the plaintiff might, having regard to his own personal injuries and the incidental expenses and loss naturally flowing therefrom, in addition to the damage to his motor car, reasonably have expected a considerably larger verdict. In the circumstances, the learned Judge fixed the costs to the plaintiff as against the defendants at $200 without set-off.

BALL v. WINTERS—FALCONBRIDGE, C.J.K.B.—OCT. 16.

Master and Servant—Claim for Arrears of Wages—Promise to Increase Wages—Evidence—Failure to Establish Claim.]—Action for arrears of salary. The plaintiff alleged that, on his submitting to a reduction in salary, the defendant promised him that he would make it up to him when he had a "winning season," and on another occasion, "when we get a good time I'll make it all up to you." The defendant stated that all that he ever promised was to put the salary back (to the old figure) as soon as times got better. The action was tried without a jury at Toronto. The learned Chief Justice, in a written judgment, said that not only did the plaintiff not discharge himself of the onus of proof, but the preponderance of testimony was against him. A striking example was the curious, isolated memorandum in his little book—the statement therein made was flatly contradicted by two of three persons mentioned, and the third one did not hear. When his resignation was requested, he wrote a letter in which he acknowledged receipt of $70 salary, and said nothing about this claim. Action dismissed with costs. R. T Harding and W. A. Henderson, for the plaintiff. V. H. Hattin, for the defendant.

RE NESBIT—SUTHERLAND, J.—OCT. 18.

Executor—Compensation for Services—Quantum.]—Appeal by the Official Guardian, representing Mary Murphy, an infant, from an order of the Judge of the Surrogate Court of the County of Lincoln, made on the passing of the accounts of the executor of the will of John Nesbit, deceased, in so far as it allowed $300 to the executor as commission, on the ground that the amount was excessive. There was also an appeal as to costs, which was not pressed. The estate consisted chiefly of real estate; and the only money realised by the executor was $18.75 from the sale of some personal property. The executor disbursed $694.94, most of which he advanced out of his own money. By the will, all the real estate (a farm) was given to the testator's brother for life; a provision was made for his sister residing upon the farm and being maintained out of its products. At the death of the brother, the whole of the estate was to go to the testator's niece, the infant. The appeal was heard in the Weekly Court at Toronto. The learned Judge, in a written judgment, said that, having regard to the estate as a whole and the small amount of the personal estate, and the short period of time (about a year) during which the executor had the management of the estate, he was of opinion that the sum allowed to the executor was excessive. A commission of $50 and an allowance of $75 for care, pains, and trouble would be ample. Appeal allowed and compensation reduced to $125. Reference, among other cases, to Re McIntyre (1904), 7 O.L.R. 548; Re Godchere Estate (1913), 5 O.W.N. 625; and also to Widdifield's Law and Practice as to Executors' Accounts (1916), p. 221 et seq. The Official Guardian to have his costs of the appeal out of the estate; otherwise no order as to costs. J. Hoskin, K.C., for the Official Guardian. A. C. Kingstone, for the executor.

McARTHUR IRWIN CO. LIMITED v. GAUSBY—SUTHERLAND, J.—OCT. 19.

Title to Goods—Sale of Goods—Delivery of Goods in Excess of Requirements of Vendee—Bailment or Sale—Insolvency of Vendee—Contest between Vendor and Assignee for Benefit of Creditors of Vendee.]—The plaintiffs sued the defendant as the assignee for the benefit of creditors of the Rathbun Match Company Limited to recover the value of 6,648 lbs. of chlorate of potash claimed by the plaintiffs as their property, and said to have been wrongfully

taken by the defendant as part of the assets of the insolvent company. The plaintiffs regularly supplied the insolvent company with potash, but they asserted that the potash in question was not sold to that company. The potash in question was sold pending the litigation under an order of the Court, and the proceeds were paid into Court to abide the result of the action. The trial was before SUTHERLAND, J., without a jury, at Kingston. In a written judgment, the learned Judge set forth the facts of the case and his findings thereon. The potash which gave rise to the contest was stored in the insolvent company's warehouse at Deseronto. The learned Judge's conclusion was, that the delivery and storing of the potash at Deseronto was for the convenience of the plaintiffs as to insurance and freight; and that the ownership of such part of the potash as was not taken out by the insolvent company from the amount on hand remained the property of the plaintiffs; and was, at the time of the assignment, their property as against the claim of the defendant. Judgment for the plaintiffs for the sum of money in Court, with costs. The defendant should have his costs out of the insolvent company's assets. A. B. Cunningham, for the plaintiffs. J. A. McEvoy, for the defendant.

WAKE v. SMITH—FALCONBRIDGE, C.J.K.B.—OCT. 21.

Fraud and Misrepresentation—Exchange of Lands—Damages.] —Action for damages for false representations whereby the plaintiff was induced to exchange his farm for the defendants' farm. The representations alleged were in regard to the defendants' farm. The action was tried without a jury at Woodstock. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defendants were admittedly liable for a deficiency in acreage. Adopting the acreage estimated by the witness Farncombe, a surveyor, the learned Chief Justice put the deficiency at 26 $\frac{1}{10}$ acres and at $50 an acre, making $1,305. The evidence (he continued) was overwhelming, and he found, that the defendant George Smith (whose position as agent of his wife was admitted) represented that there was $1,500 to $2,000 worth of standing timber, whereas $500 was the outside value of it either as timber or wood. And this George Smith knew when he made the representations. The damages on this head should be assessed at $1,000. The same remarks applied to the general representation that the farm was well kept up and in good condition; and for this $500 was allowed. As regards other representations, the plaintiff had

the opportunity of inspection and should have detected the deficiencies—e.g., condition of fences and buildings etc. Judgment for the plaintiff for $2,805 and costs. S. G. McKay, K.C., for the plaintiff. J. Marshall, for the defendants.

RE BROOM—BOYD, C.—OCT. 21.

Police Magistrate—Jurisdiction—Petty Trespass Act, R.S.O. 1914 ch. 111, sec. 2.]—An application by one Broom to prohibit proceedings in a Police Court on a charge that the applicant did, contrary to law, trespass upon the premises of Mrs. McIntyre. THE CHANCELLOR, in a brief written judgment, said that the charge appeared to be based upon the Petty Trespass Act, R.S.O. 1914 ch. 111, sec. 2, and was one over which the Police Magistrate had jurisdiction. This was the sole question, and there was no ground for interfering on the ground of want of jurisdiction. No order. The applicant in person. No one contra.