

Legal Department

J. M. GLENN, K.C., LL.B.,
OF OSGOODE HALL, BARRISTER-AT-LAW.

Slinn v. City of Ottawa.

Judgment on motion by plaintiff to set aside judgment of non-suit and for new trial. Action in the county court of Carleton to recover damages for injuries alleged to have been sustained by plaintiff who carries on a bakery business on lots 16, 17 and 18 on the west side of Creighton street, in Rideau Ward, in the city of Ottawa. At the rear of plaintiff's property there has been for a number of years along the side of the Rideau river a high embankment, upon which is the track of the Canadian Pacific Railway Co., and which has protected the adjacent property from being flooded in the spring of the year. The defendants, O'Leary & Robillard, contractors, in the year 1899, constructed a section of the main drain in the ward, and in carrying the drain under the embankment left a large excavation or opening in it, negligently as alleged, through which water flowed and caused the damage. The trial judge held that the plaintiff had not showed that there was any duty by the defendants to the plaintiff in respect of the matters in question for breach of which he could recover; that plaintiff had not shown that he had an individual right to have the embankment maintained, and that there was not such evidence as to an agreement between the corporation of the village of New Edinburgh and the C. P. R. Co. that the embankment should be built and maintained at a certain height and of the expenditure of public money to that end upon which a jury could be directed, and that even if there had been such evidence the plaintiff had no right of action for breach of such agreement. Held that the trial judge having dispensed with the jury and grappled with the whole case himself the question is not whether there was evidence to go to a jury, but whether the conclusion of the judge was correct. After a perusal of the evidence the court is of opinion that the water that did the injury did not come through the cutting made under the railway in the construction of the sewer by defendants but water that flowed over the railway dyke owing to a freshet, and in such a case the defendants are not liable. Appeal dismissed with costs.

Brown v. City of Hamilton.

Judgment in action for damages for the permanent loss of the use of plaintiff's left eye owing to the negligence of defendants, who, he alleges, contrary to by-law No. 30, section 84, allowed, permitted and licensed an unlawful and dangerous display and use of fireworks on the market square and at the city hall and on the steps of the latter, and the streets, sidewalks in the latter. The plaintiff was travelling in a street car when he was

struck by a portion of explosive substance, a Roman candle, which was being set off by some one in a procession. The by-law was passed under the authority conferred by the Municipal Act. Held, that the passing of the by-law by the defendants was an exercise of the delegated sovereign power entrusted to municipalities, a function the exercise of which is discretionary. The city is free to enact and repeal and re-enact, but having enacted there is no duty cast upon the city to see to its enforcement; that rests with anyone who desires to have it carried into effect; *Back v. Holmes*, 56 L. T. 713. The decision in *Forget v. Montreal*, 4 S. C. R. 77, shows that at most the failure to intervene and stop the procession is mere misfeasance. The case cited from the State of Maryland, U. S. A., is opposed to all other American, English and Canadian authorities. The observations of Gwynne, J., in *Montreal v. Mulcar*, 28 S. C. R. 469, are much in point. Action dismissed with such costs as would be taxed had the point been dealt with as on demurrer under rule 373.

Re Salter and Township of Wainfleet

Judgment on motion by a ratepayer of the township to quash local option by-law No. 328, passed under section 141 of the Liquor License Act. Held that the by-law must be quashed on two grounds, (1) that directions to voters from schedule L, as required by sections 142 and 352 of the Municipal Act, were not furnished to the deputy returning officer. Voters are entitled to the information and direction which the statute provides, and ballots may have been wrongly marked and counted, although in no way spoiled, nor is the omission cured by section 204. It cannot be said, at all events the court ought not to be called upon to say, in the absence of any record before it of what the council did or intended to do in regard to conducting the voting in accordance with the principles laid down in the Act, how the result was affected. (2) That the council did not post up a copy of the by-law at four or more of the most public places in the municipality, the affidavit of proof not showing the time of posting, the person or persons who put up the notices, the time when or the authority for the posting, but the deponent merely swearing that he saw the notices at certain places. Costs to applicant, but not of objections on which he fails nor costs of affidavits showing the qualifications of voters.

Rex. ex Rel. Tolmie vs. Campbell.

Judgment on application by relator for order setting aside election of respondent D. Campbell as reeve of Township of Aldborough, County of Elgin, on the

main ground amongst others that each of thirty or more electors received a ballot paper and voted for reeve at more than one polling place in said township at said election. Held, following *Woodward vs. Sarsons*, L. R. I. O. C. P. 744, that the general principle to guide the courts in such cases is that the election should be set aside if a judge, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate of their choice. Held, also, that there is not in this case reasonable ground for believing that the result would be different if all illegal votes could be struck off. There being no actual proof in this case that more than four persons voted more than once, held that it cannot be presumed, as against the respondent, that every elector who received a second ballot paper after having once voted actually deposited it in favor of respondent. Order made dismissing motion, but without costs, as the facts are somewhat unusual, and as there was possibly double voting on both sides.

McClure v. Township of Brooke; Bryce v. Township of Brooke.

Judgment on motion by defendants for leave to appeal from the judgment (1 O. W. R. 274) of a Divisional Court (Falconbridge, C. J., Street, J.), allowing the plaintiffs' appeal from an order of Meredith, C. J., staying proceedings in these actions and refusing to direct references to the Drainage Referee, as a referee under section 29 of the Arbitration Act. The Divisional Court held that the Drainage Referee was an official referee within the meaning of the Arbitration Act. Held, that there is a plain and weighty reason for giving leave to appeal in this matter, viz., that the judgment in question involves the status, jurisdiction and authority of a judicial officer and the validity of proceedings which may be taken by him hereafter under the order of the Divisional Court. Plausible reasons have been suggested against the view of the Divisional Court. Order made granting leave to appeal on the usual terms.

Wason v. Douglas.

Judgment in action for damages for trespass and for injunction restraining defendant from further trespassing on plaintiff's land, part of lot 12, in the first concession of the township of Dummer in the county of Peterborough. Both plaintiff and defendant derive title from a common grantor; their respective paper titles are undisputed. The main question is as to the boundary line between the land of each party. Held, that the middle of the creek or stream called the Blind River is the true and correct southerly limit or boundary of the plaintiff's land, and that such limit runs along the middle of the most southerly of the said channels at high-water mark. Judgment for plaintiff for \$5 and costs. Thirty days stay.