THE

# ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING MAY 17TH, 1902.)

VOL. I. TORONTO, MAY 22, 1902 NO. 19.

MAY 13TH, 1902.

DIVISIONAL COURT.

## AITCHISON v. McKELVEY.

*Specific Performance—Agent—Fraud—Amendment—Delay.*

An appeal by defendant from judgment of FALCONBRIDGE, C.J., ante p. 51, was dismissed with costs, on the ground that the evidence supported the findings. (BOYD, C., MEREDITH, C.J.)

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FALCONBRIDGE, C.J. MAY 13TH, 1902.

TRIAL.

## LINDSAY v. STRATHROY PETROLEUM CO.

*Estoppel—Rent—Claim for, by President of Company—Annual Statements of Assets and Liabilities.*

Action by William B. Lindsay, physician, of Strathroy, against the company to recover $3,300, the amount of a promissory note given for money lent, $300 for services as manager, and $364 for use and occupation of an office. The defendants paid $3,617.91 into Court, and defended as to the office rent.

J. Folinsbee, Strathroy, for plaintiff.

I. F. Helmuth and C. H. Ivey, London, for defendants.

FALCONBRIDGE, C.J., found that plaintiff was president of the company, and statements of assets and liabilities were submitted at successive annual meetings, and no reference was made to any claim of his or liability of the company in this regard. Plaintiff never formally put forward any claim until after he was removed from the office of president.

Judgment to be entered after 12th June next declaring that the amount paid into Court is sufficient to satisfy the plaintiff's claim, and directing payment of the money in Court to plaintiff. Defendants to pay plaintiff's costs up to payment into Court. No costs to either party after payment into Court.

J. Folinsbee, Strathroy, solicitor for plaintiff.

Ivey & Dromgole, London, solicitors for defendants.

FALCONBRIDGE, C.J. MAY 13TH, 1902.

TRIAL.

## STRATHROY PETROLEUM CO. v. LINDSAY.

*Conversion—Retention of Books and Papers of Company by President —Unreasonable Refusal to Give Up.*

Action for return of books and papers of the plaintiffs and for damages for wrongful detention. The defence was that the defendant was ready and willing to give up the books, etc., and that the action was unnecessary.

I. F. Hellmuth and C. H. Ivey, London, for plaintiffs.

J. Folinsbee, Strathroy, for defendant.

FALCONBRIDGE, C.J., held that the conditions imposed by defendant or his agent as to particularity of receipt, etc., were not reasonable, and amounted to refusal, as did also his former attitude in the premises.

Judgment for plaintiffs for $4 damages. Plaintiffs to have costs up to delivery of statement of defence. Otherwise no order as to costs. Thirty days' stay.

Ivey & Dromgole, London, solicitors for plaintiffs.

J. Folinsbee, Strathroy, solicitor for defendant.

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MACMAHON, J. MAY 14TH, 1902.

TRIAL.

## LEWIS v. ELLIS.

*Solicitor and Client—Liability of Solicitor as to Investment of Client's Money—Guaranty.*

Sutton v. Grey, [1893] 1 Q. B. 285, distinguished.

Action against a solicitor for an account of moneys placed in his hands for investment upon mortgages of real estate. The plaintiff alleged that the defendant had guaranteed some of the investments.

M. Wilson, K.C., and A. H. Clarke, Windsor, for plaintiff.

W. M. Douglas, K.C., for defendant.

MACMAHON, J.—The plaintiff relied on two letters written to him by the defendant as containing a guaranty. In the first letter the defendant says, "I would be willing to vouch for any loan that I put through." And in the second letter, five months later, he says: "As to my guaranteeing investments made through me to your friend, all I can say is that I would guarantee loans made by me both as to title and valuation unless I stated to the contrary."

There is certainly no guaranty contained in either of the letters, and the plaintiff is in error in supposing that there existed any other letter from the defendant guaranteeing the loan. Even assuming that these letters afforded evidence of a verbal guaranty, that is not of any avail to the plaintiff, as, by no possible stretch of the imagination, could the defendant be said to come within the case of Sutton v. Grey, [1893] 1 Q.B. 285. In that case it was held that, although the contract was not in writing, the action was maintainable, because the defendant had an interest in the transactions equally with the plaintiffs, and therefore the contract was not within s. 4 of the Statute of Frauds. In the present case the defendant had no interest whatever in the lending of the money, except the solicitor's fee and any fee charged for valuation, both of which were paid by the borrower. There was no neglect of duty by the defendant, but every care was exercised by him in making the valuations, and the then marketable value of each of the properties, as stated by him, was amply sufficient to justify the advance made on the mortgage in each case. Action dismissed with costs.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for plaintiff.

Ellis & Ellis, Windsor, solicitors for defendant.

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MAY 13TH, 1902.

DIVISIONAL COURT.

## GODBOLD v. GODBOLD.

*Executor—Insolvency—Administration of Estate by Court—Motion for—Undertaking to Pay into Court—Costs.*

Appeal from order of MEREDITH, J., ante p. 233. The same counsel appeared.

THE COURT (BOYD, C., MEREDITH, C.J.) held that no reason had been shewn for ordering administration by the Court or for the appointment of a receiver. The order below went further even than was necessary in the plaintiffs' favour. There is now a discretion in the Court to grant or refuse administration, and the Court should not interfere where the administration is in competent hands. Nothing to the executor's discredit is now shewn which was not known to the testator when he appointed him executor. The executor has no property, but has paid his debts, and cannot be considered insolvent; he is apparently an honest man. His refusal to allow the plaintiffs to see the will before it was proved, is not material, and is not evidence of any want of good faith. There is nothing to shew that he

will not act fairly and distribute the property. The undertaking of the executor should be varied so as to be effective. Appeal dismissed with costs, but order varied so as to add to the undertaking the requirement that he shall collect with due diligence.

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MAY 12TH, 1902.

DIVISIONAL COURT.

## GRAHAM v. BOURQUE.

*Contract—Breach—Absolute Refusal to Perform.*

Appeal by plaintiff from judgment of LOUNT, J., ante p. 138.

The same counsel appeared.

THE COURT (BOYD, C., MEREDITH, C.J.,) varied the judgment below by reducing the defendants' recovery on their counterclaim to $75. Judgment for plaintiff with costs for $958.05 (less amount paid into Court), and for payment out to plaintiff of amount paid into Court, and for defendants for $75 with costs. Judgments to be set off pro tanto. No costs of appeal to the Court below or to this Court.

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MAY 13TH, 1902.

DIVISIONAL COURT.

## REX v. McGREGOR.

*Municipal Corporation—By-Law for Prevention of Fires—Ejusdem Generis Rule—Storing Combustible or Dangerous Material—Oils—Petroleum Inspection Act, 62 & 63 Vict. ch. 27, does not Supersede Provincial Legislation on Same Subject—The Latter Confers Power to Make Police or Municipal Regulations of Local Character for Prevention, etc., of Fires.*

Hodge v. The Queen, 9 App. Cas. at p. 131, followed.

Motion by defendant to make absolute a rule nisi to quash conviction of defendant by the police magistrate for the city of Windsor, for that defendant, "agent of the Queen City Oil Company, did keep at one time in a house or shop within the city limits a larger quantity than three barrels of coal oil, rock oil, water oil, or other similar oils, and a larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or other combustible or dangerous material, contrary to the city by-law for prevention of fires and other purposes therein mentioned."

G. F. Shepley, K.C., for defendant. The by-law is *ultra vires*, not being within any of the powers conferred by sec. 542 of the Municipal Act; and sub-sec. 17 of sec. 542 is *ultra vires*. The *ejusdem generis* rule should be applied to

the words "and other combustible or dangerous materials," and they therefore apply only to articles or things which are combustible or dangerous as gunpowder is, and they must therefore be confined to explosives.

W. M. Douglas, K.C., for prosecutor.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.,) was delivered by

MEREDITH, C.J.—Anderson v. Anderson, [1895] 1 Q.B. 749, Re Stockport Co., [1898] 2 Ch. 687, 696, and Parker v. Marchant, 1 Y. & C. C. 290, shew that general words are to be given their common meaning unless there is something reasonably plain on the face of the instrument to shew that they are not used with that meaning, and the mere fact that general words follow specific words is not enough. But, even if the general words were to be given a restricted meaning, looking at the evident purpose of the whole section —the prevention of fires—and the powers given by the various sub-sections to enable councils to pass by-laws to that end, the sense in which the word "combustible" and the word "dangerous" are used, is that of liability to cause or spread fire. It was argued in support of the other objection to the by-law that, inasmuch as the Parliament of Canada, by the Petroleum Inspection Act, 62 & 63 Vict. ch. 27, has legislated on the subject of the storing of petroleum and naphtha, the Provincial legislation, in so far as it deals with the same subject, is superseded by the Dominion legislation. The Dominion Acts and the regulations made thereunder do not supersede the Provincial legislation or any by-laws passed under the authority of that legislation. The Provincial legislation was intended to confer power to make regulations in the nature of police or municipal regulations of a merely local character for the prevention of fires and the destruction of property by fire, and (Hodge v. The Queen, 9 App. Cas. at p. 131) as such cannot be said to interfere with the general regulation of trade and commerce, and does not conflict with the provisions of the Petroleum Inspection Act, 1899, or the regulations as to the storage of petroleum and naphtha which are in force under the authority of that Act. Rule nisi is discharged with costs.

Hearst & McKay, Sault Ste. Marie, solicitors for prosecutor.

Maclaren, Macdonald, Shepley, & Middleton, Toronto, solicitors for defendant.

MAY 14TH, 1902.

DIVISIONAL COURT.

## REX v. BENNETT.

*Costs—Conviction—Quashing of—Jurisdiction in High Court to Give Costs in Criminal Matters—Judicature Act has no Application to Criminal Matters—Protection to Magistrate—Sec. 891, Criminal Code.*

Motion to quash a conviction of defendant by a justice of the peace for the district of Algoma. It was conceded by counsel for the prosecutor and magistrate that the conviction must be quashed. The defendant asked for costs against both. The magistrate asked for an order for his protection under sec. 891 of the Criminal Code.

W. M. Douglas, K.C., for defendant.

F. Denton, K.C., for prosecutor.

W. E. Middleton, for magistrate.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—We are of opinion that this being a proceeding in a criminal matter the Court has no jurisdiction to give costs against the prosecutor or against the magistrate.

The question as to costs must be determined apart from the provisions of the Judicature Act, which have no application to the practice or procedure in criminal matters (sec. 191), as indeed they could not, because the power to legislate on that subject is by the British North America Act, 1867, assigned exclusively to the Parliament of Canada.

The practice and procedure in all criminal causes and matters in the High Court, as was pointed out by the present Chief Justice of Ontario, in Regina v. Beemer, 15 O.R. at p. 270, are to be the same as the practice and procedure in similar causes and matters before the establishment of the High Court : 46 Vict. ch. 10, sec. 2, now sec. 754 of the Criminal Code, 1892.

What that practice was is pointed out in Regina v. Parlby, [1889] W. N. 190, 6 Times L. R. 36, 53 J. P. 774, which shews that the Court has no inherent jurisdiction to award costs against the prosecutor on the making of a rule absolute to remove a conviction by *certiorari* or a rule absolute to quash a conviction so removed, and that the Court had no statutory authority conferred upon it to do so.

This view has been recognized in numerous cases as correct, and has been acted upon by the Court of Appeal : London County Council v. Churchwardens and Overseers of West Ham (2), [1892] 2 Q.B. 173; In re Fisher, [1894] 1

Ch. 53, 450; The Queen v. Justices, etc., [1894] 1 Q.B. 453; The Queen v. Jones, [1894] 2 Q.B. 382; see also The Queen v. Lee, 9 Q.B.D. at p. 396, per Field, J.

Two cases are reported in which the English High Court, after the passing of the Judicature Act, gave costs, in one of them against the respondents on making absolute a rule nisi to quash in part an order of the Quarter Sessions: Regina v. Goodall, L.R. 9 Q.B. 557; and the other against the magistrate: Regina v. Meyer, 1 Q.B.D. 175; but both of these cases were before the decision in In re Mills, 34 Ch. D. 24, by which it was settled, contrary to what had been thought by some Judges, that the Judicature Act had not conferred on the High Court any new jurisdiction as to costs.

Regina v. Parlby, according to the report of it in 22 Q.B.D. 520, at p. 528, would seem to be another case of the same class, but the statement made there that the rule was made absolute with costs is erroneous. The subsequent reports of the case, which have been mentioned, shew that the question of costs was not dealt with when the decision of the Court there reported was given, but was subsequently argued, when costs were refused on the ground stated in the subsequent reports.

In this Province costs have been awarded against the prosecutor in several cases. Most of them were decided before In re Mills, and in some of them the conviction or order quashed was for a penalty imposed by or under the authority of Provincial legislation, to which different considerations apply, at all events since the passing of the Law Courts, 1896, 59 Vict. ch. 18, sec. 2, sched. (35), by which the provision, which up to that time was contained in the Judicature Acts, by which proceedings on the Crown or Revenue side of the Queen's Bench and Common Pleas Divisions were excluded from the operation of those Acts, was repealed.

If the question to be determined were one of practice only, we should not feel justified in disturbing any settled practice that had been shewn to exist, but, as it is not of that character, but, as I have said, one as to the jurisdiction of the Court, and being of opinion that the Court has no jurisdiction to award costs in a criminal matter against the prosecutor, we are bound to disregard that practice and to give effect to that opinion.

Cases in which costs have been given against an unsuccessful applicant for a writ of certiorari or to quash are to be distinguished, for in such cases the Court has jurisdiction to give costs against the applicant, either because of the recognizance which he has entered into to pay the costs, or of the inherent power which the Court possesses to give

costs as a punishment for erroneously putting the jurisdiction of the Court in motion.

The conviction will therefore be quashed without costs, and there will be no order for the protection of the magistrate.

McFadden & McFadden, Sault Ste. Marie, solicitors for magistrate.

Denton, Dunn, & Boultbee, Toronto, solicitors for prosecutor.

Hearst & McKay, Sault Ste. Marie, solicitors for defendant.

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MAY 13TH, 1902.

DIVISIONAL COURT.

## MINNS v. VILLAGE OF OMEMEE.

*Municipal Corporation—Way—Non-repair—Opening in Street—Accident to Foot Passenger—Liability of Municipal Corporation—Nonfeasance—Trap-door—Want of Guard—Limitation of Actions.*

Appeal by plaintiffs from judgment of BOYD, C., 2 O. L. R. 579.

The plaintiffs are husband and wife. The defendant Graham is a hotelkeeper in the village of Omemee. The plaintiffs allege that the corporation permitted and allowed defendant Graham to make, keep, and maintain an opening or hole in the sidewalk, on George street, adjoining his hotel, for the purpose of an outside opening into its cellar, and that defendants did keep and maintain the opening, and left a loose plank beside it, and did not guard the opening in any way or place a light at it. On the 14th September, 1900, at 8 p.m., the plaintiff Margaret Ellen Minns struck her foot against the plank, and fell forward into the opening, and was injured.

G. H. Watson, K.C., for plaintiffs.

F. D. Moore, Lindsay, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.—The question for decision is, whether the limitation provision of sec. 606 of the Municipal Act, requiring that actions for damages for which a municipality is responsible, for its default in keeping its roads, streets, bridges, and highways in repair, to be brought within three months after the damages have been sustained, is applicable to the appellants' claim, and therefore a bar to their action, assuming the respondents' liability for the damages sustained to have been made out. The Chancellor was of opinion that

the provision was applicable, the liability being for nonfeasance. I think that the view of the Chancellor was right. But, at all events, assuming that, in the absence of a statutory provision limiting its liability, a municipality which gives, under the authority of a statute, such a permission as was in this case given to defendant Graham, is answerable for the negligence of its licensee, it is clear, looking at all the provisions of the Municipal Act having a bearing thereon, that the Legislature did not intend that a municipality giving the permission which by sec. 639 it is empowered to give, should be under any liability for the acts or omissions of its licensee, except in so far as liability is declared or created by sec. 606, and, if that be so, it follows that the action not having been brought within three months, the claim is barred. Appeal dismissed with costs.

Stewart & O'Connor, Lindsay, solicitors for plaintiffs.

Moore & Jackson, Lindsay, solicitors for defendant corporation.

Stratton & Hall, Peterborough, solicitors for defendant Graham.

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FALCONBRIDGE, C.J. MAY 12TH, 1902.

TRIAL.

## DEERING v. BEATTY.

*Partnership—Liability of Partner—Holding Out—Contract—Construction—Interest—Account Stated.*

Action for an account by a Chicago firm of dealers in harvesting machinery against their selling agents at Orangeville.

J. N. Fish, Orangeville, for plaintiffs.

A. A. Hughson, Orangeville, and George Robb, Orangeville, for defendants.

FALCONBRIDGE, C.J.—I find : (1) As to the constitution of the firm of Beatty & Co., that Annie Beatty was the sole member thereof ; that every precaution was taken to give publicity to the fact by way of registration and otherwise: that Robert Beatty had made an assignment for the benefit of creditors before the transactions took place; that all the formal documents and papers were signed by him "Beatty & Co., per R.B.," or "by R.B.," or "p.p.R.B.;" that there had been a power of attorney from Annie Beatty to her husband, but plaintiffs were not satisfied with this, and had a new one prepared and executed on a form of their own : that against all these things there is only verbal evidence of "holding out," which is denied by defendants, and which is not sufficient to fasten Robert Beatty with liability during

the period in question. (2) As to the question of interest, I find in favour of plaintiffs, both as to the reformation of the contract suggested by defendant and as to the construction thereof; the increased price was not to be in lieu of interest. (3) No sufficient grounds have been shewn for disturbing the accounts stated. I direct a reference to the Master at Orangeville upon the basis of these findings. Further directions and all questions of costs are reserved before me; and upon further directions either party may shew by affidavit or *viva voce* what efforts have been made to strike a balance without going before the Master. If the parties should intimate that they can themselves adjust the account and that the case will go no further, probably I shall not give costs. Stay for 30 days.

Walsh & Fish, Orangeville, solicitors for plaintiffs.

George Robb, Orangeville, solicitor for defendants.

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STREET, J. MAY 15TH, 1902.

TRIAL.

## DAWDY v. HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R. W. CO.

*Street Railway—Accident to Passenger—Conductor Attempting to Pull Passenger on Moving Car—Scope of Authority of Conductor.*

Coll v. Toronto R. W. Co., 25 A. R. 55, followed.

Action for negligence, tried with a jury at Welland. The plaintiff's story was that she was standing on the platform of defendants' station, signalling with her hand to one of their cars which was coming on at a rapid rate and into which she wished to get. As the car passed her, her hand was seized by the conductor of the car, and she was lifted from the platform and carried bodily some ten feet, when the conductor let go, and she landed on her feet; that during this period she was struck on the breast by the handle bar and injured. She said she did not attempt and did not intend to get upon the car until it stopped. The defendants called no witnesses, and the jury found that the injury to plaintiff was caused by the conductor seizing her by the hand, causing her to strike on the end of the car; that he was trying to pull her on the car; that he acted negligently in doing so; and they assessed the damages at $650. At the trial the defendants' motion for a nonsuit was refused, and the questions for the jury were submitted to counsel before being put. No objection was taken to the form of the questions, and no other questions were suggested.

W. M. German, K.C., and G. H. Pettit, Welland, for plaintiff.

E. E. A. DuVernet and L. C. Raymond, Welland, for defendants.

STREET, J., held that in endeavouring to pull on board a car a person who was merely standing on the platform and not attempting to get on board, the conductor was not acting within the scope of his duty as a servant of the company: Coll v. Toronto R. W. Co., 25 A. R. 55, and cases there cited. Action dismissed with costs.

German & Pettit, Welland, solicitors for plaintiff.

DuVernet & Jones, Toronto, solicitors for defendants.

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MAY 15TH, 1902.

DIVISIONAL COURT.

## REX v. ST. PIERRE.

*Municipal Corporation—By-law—Transient Traders—Trader Living at Hotel and Taking Orders for Clothing to be Made of Sample Shewn—Not within Transient Trader Clauses of Municipal Act—Conviction—Statute Taking Away Right to Certiorari.*

Motion by defendant to make absolute a rule *nisi* quashing a conviction of defendant by the police magistrate for the city of Ottawa, for offering goods for sale contrary to a transient traders' by-law of the city of Ottawa.

E. E. A. DuVernet, for defendant, contended that the sales were not at Ottawa; that the defendant was in the same position as any other commercial traveller; and was not a transient trader.

A. B. Aylesworth, K.C., for prosecutor, contended that the defendant was properly convicted; that the question as to where the sales took place was one for the magistrate; and, at all events, that the *certiorari* should not have been granted, the Act 2 Edw. VII. ch. 12, sec. 14, having taken away the right to *certiorari*.

DuVernet, in reply, contended that *certiorari* will be granted for want of jurisdiction, notwithstanding such enactment: and that there is want of jurisdiction when the evidence does not disclose an offence within the statute.

The judgment of the Court (BOYD, C., MEREDITH, C.J.) was delivered by

BOYD, C.—There being no statutory provision as regards transient traders, similar to that as regards hawkers, that the description is to include those who carry or expose samples or patterns of goods to be delivered afterwards, the defendant does not come under the category of transient traders. No goods were offered for sale. Samples of goods were exhibited suitable for clothing, and the transaction was carried out by the choice of some particular pattern in Ottawa, notification of which was sent to Montreal, whereupon the garment was made out of that material, and forwarded to the person giving the order at Ottawa, who then made payment on delivery. The collocation of the words in the

statute as to sale or offering for sale by transient traders implies some exhibition and visible presentation of the goods dealt in, such as occurs in sales by auction, the whole trading being carried on by the occupant of fixed premises within the municipality. Neither in terms nor in substance was there an offering of goods for sale within the municipality. Nevertheless, the effect of this method of dealing may be to affect prejudicially the business of tax-paying tailors and clothiers of Ottawa.

According to the cases, *certiorari* lies if the magistrate has no jurisdiction over the matter adjudicated. That is, there was no power to pass a by-law, or to convict, under the transient traders' clauses in the Municipal Act, in respect to a person living at a hotel and taking orders for clothing to be made out of material corresponding with samples exhibited.

Rule absolute quashing conviction without costs.

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MACMAHON, J. MAY 13TH, 1902.

TRIAL.

## PARENT v. COOK.

*Conversion—Trespass—Cutting and Removing Trees—Damages.*

Action for damages for breaking and entering lot 2 in the 12th concession of the township of Colchester, containing 107 acres, and cutting down and removing therefrom timber and wood, and also for carrying away felled timber and wood and committing other waste and damage.

J. W. Hanna, Windsor, for plaintiff.

J. H. Rodd, Windsor, for defendants.

MACMAHON, J., after reviewing the evidence, held that the plaintiff had not sustained any damage, and dismissed the action with costs.

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MAY 12TH, 1902.

C. A.

## GUNN v. HARPER.

*Judgment—Death of Plaintiff After Argument and Before Judgment—Certificate of Judgment May be Amended and Dated the Day the Argument Terminated.*

Motion by defendants *ex parte* to vary the certificate of the judgment of this Court by changing the date from that of the pronouncing of judgment to that of the argument, the plaintiff having died between argument and judgment. In ignorance of his death, the defendants applied for and obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced.

T. D. Delamere, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, and MOSS, JJ.A.) was delivered by

MOSS, J.A., who, after referring to Turner v. London and South Western R.W.Co., L.R. 17 Eq. 561, Collinson v. Lister, 20 Beav. 355, Troup v. Troup, 16 W. R. 573, and Ecroyd v. Coulthard, [1897] 2 Ch. 554, said:—These cases shew that where at the time of giving judgment the Court is aware that an abatement has occurred since the argument, it may direct the judgment to be dated as of the day when the argument terminated. Rule 629 provides that every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which it is pronounced, and shall take effect from that date, unless otherwise directed. In the present case, if the Court had been aware of the death of the plaintiff when giving judgment, it would have pronounced it and directed it to be entered as of the day of the argument, and it would then have borne that date, and have been so entered. The certificate of this Court having issued in its present form through ignorance of an existing fact, the Court, in the exercise of its inherent power over its records, may now give the proper directions with regard to its form: Re Swire, 30 Ch. D. 239; Sherk v. Evans, 22 A.R. 242; Rattray v. Young, Cass.Sup.Ct. Dig. 692. And the proper course is to amend it by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument. Direction accordingly. No costs of application or amendment.

J. L. Whiting, Kingston, solicitor for defendants.

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ROBERTSON, J. MAY 12TH, 1902.

TRIAL.

## HOLMES v. TOWN OF GODERICH.

*Municipal Corporation—"Ordinary Current Expenditure"—By-law to Raise Money for—Right of Corporation to Use Portion of Such Money as Security on Appeal by it to Supreme Court.*

Action to restrain defendants from discounting or in any way dealing with a promissory note for $2,000, made for the purpose of providing funds for security for appeal to Supreme Court of Canada in a former action of Holmes v. Town of Goderich, and for delivery up of note for cancellation. The note in question was signed by the mayor and treasurer of the town and sealed with the seal of the town corporation. The council of the town had previously passed by-laws authorizing the mayor and treasurer to borrow $22,000 from the Bank of Montreal for current expenditure of the corporation. These by-laws were acted upon, and from time to time money was drawn from the bank as re-

quired for current expenditure, notes being delivered to the bank for such sums as were required. At the time the note in question was given, $5,000 of the $22,000 remained to be borrowed.

W. Proudfoot, Goderich, for plaintiff.

J. T. Garrow, K.C., for defendants.

ROBERTSON, J.—It is contended by the defendants that the by-laws authorizing the borrowing of the sum of $22,000 are still in force; and, therefore, whatever sum or sums may have been lent by the defendant bank under the authority therefor, not exceeding that sum, must be assumed for the present as being justified.

On the other hand, the plaintiff contends that the amount thus authorized to be borrowed, exceeded the sum which, under sec. 435 of the Municipal Act, the council had authority to borrow; and the by-laws, therefore, are *ultra vires*, because $22,000 was in excess of 80 per cent. of the amount collected as taxes, to pay "the ordinary current expenditure" of the municipality in the preceding year.

The total amount collected, of all taxes, for 1900 at the time of the passing of the by-laws, was $28,154.68; of this sum, 80 per cent. would be more than the amount authorized to be borrowed by $5,630.93, if the plaintiff's contention is correct.

The question then is, what is the meaning of the words, "ordinary current expenditure"? After much consideration I have come to the conclusion that the whole sum of the estimates for 1900, viz., $30,084.12, as shewn in the 4th paragraph of the admissions, as follows: for public schools, $5,000; for separate schools, $450; for collegiate institutes, $2,800; for county rate, $984.70; for consolidated debenture debt, $3,755.48; and for all other purposes, $17,093.94: was the sum levied to be collected for that purpose; but, as the whole amount was not collected up to the time of the passing of the by-laws, the percentage for borrowing was calculated on the latter sum, $28,154.68. * * * To say that the sums required for public school purposes or for separate schools or for collegiate institutes or for county rates or for consolidated debenture debts, are not all within the "ordinary current expenditure" of the municipality, is something I cannot understand. "Expenditure" of the character indicated appertains to every municipality. Such "expenditure" includes all sums which are not to be applied in payment of liabilities exceptional in character and are not recurring year by year. Scott v. Peterborough, 19 U. C. R. 469, McMaster v. Newmarket, 11 C. P. 398, Wallace v. Orangeville, 5 O. R. 37, Re Olver and Ottawa, 20 A. R. 529, do not declare what constitutes "ordinary current expenditure." * * * It appears to me that a little practical

common sense, and common knowledge, must be applied in disposing of this question. In the first place, it may be asked why the council of any municipality was authorized to borrow money at all. One and all have the power to assess and levy on the whole taxable property within its jurisdiction, a sufficient sum in each year to pay all its valid debts, whether principal or interest, falling due within the year, etc. The work of the assessor is the first thing done; the assessment rates being returned and the assessed value ascertained. as provided; the next thing in order is to ascertain the amount required for all purposes during that year; and a rate not to exceed two cents on the dollar on the whole assessed value, is to be struck for all purposes, except school rates. Then the collector goes to work. Now the accomplishment of all these things requires time; it is generally as late as October, and sometimes later, before the taxes are collected; but in the meantime the liabilities are accruing due from month to month. The salaries of officials have to be paid; the schools require funds to meet teachers' salaries and other expenses connected with the schools; debentures are becoming due, and interest thereon; but there is nothing in the treasury to meet these several demands. This being the case, the Legislature allowed and gave power to the council of each municipality to pass by-laws authorizing the borrowing of what was necessary to meet those several demands in anticipation of the taxes levied and being collected. How can it be said that these several sums thus falling due from time to time each year, as shewn by the estimates of each year, and the money to meet them when paid, is not "current expenditure"? There is nothing to shew that there is a "debenture sinking fund" in this case, which, of course, would not be included in "current expenditure." That fund, if any, is one created by putting by a certain sum each year, levied for the purpose of meeting debentures yet to fall due. It was stated at the Bar that the consolidated debt debentures, referred to in the estimates, were payable by annual instalments, and the amount of each instalment was levied each year, etc., and there was, therefore, no "sinking fund."

I have, therefore, come to the conclusion that the amount authorized to be borrowed by the by-law No. 4 of 1901, as amended by by-law No. 4 (B) of 1901, authorizing the amount of $22,000 to be borrowed, was not, nor is it, *ultra vires* of the council of the defendant corporation. And, on the whole case, I am of the opinion that the action must be dismissed, and the injunction dissolved, with full costs, together with the costs of the motion to extend the injunction and all costs incident thereto.

Dudley Holmes, Goderich, solicitor for plaintiff.

Garrow & Garrow, Goderich, solicitors for defendants.

MAY 16TH, 1902.

DIVISIONAL COURT.

## CLARK v. GRAY.

*Fraud and Misrepresentation—Sale of Shares—Action for Deceit—Sole or Material Cause of Purchase.*

Motion by plaintiff to set aside nonsuit entered by LOUNT, J., at the trial at Woodstock, of an action for damages for deceit, inducing the plaintiff to purchase from defendant a block of shares in the Bear Creek Mining Co. of British Columbia.

The motion was heard by BOYD, C., and MEREDITH, C.J.

A. B. Aylesworth, K.C., for plaintiff.

G. H. Watson, K.C. for defendant.

MEREDITH, C.J.:—In order to entitle the defendant to have his case submitted to the jury, it was incumbent on him to give evidence that the representations upon which he relied were in fact made; that they were false in fact; that the defendant knew them to be false, or made them recklessly, not caring whether they were true or false; and that the representations were the sole cause of the plaintiff's act of purchasing the shares, or materially contributed to his purchasing them. As to all of the alleged representations, except that as to the $40,000 stated to have been in the treasury for the purpose of developing the mine, there was no reasonable evidence that they were false to the knowledge of the defendant, or that they were made by him recklessly, not caring whether they were true or false. The plaintiff knew that the information which the defendant communicated to him was the result of what had been reported to him from British Columbia as to the property; and the circumstance that, after discovering the true state of matters, the plaintiff attributed blame for the false statement to Best, from whom the defendant derived his information, and not to the defendant, is an important circumstance to be considered in dealing with this branch. As to the representation as to the $40,000, the testimony of the plaintiff was somewhat vague and unsatisfactory, but, assuming that it was shewn to have been made as charged by plaintiff, his case fails for lack of any evidence that the representation caused or materially contributed to his act of purchasing the shares. Nothing can be found in the plaintiff's testimony in the nature of a statement of that effect. He did testify that he relied on the defendant's representations as to the property; but that means as to the mining property, its character, richness, etc., and not as to the financial position of the company or the extent to which it had succeeded in disposing of its shares. Motion dismissed with costs, without prejudice to any action that the

plaintiff may be advised to bring for the rescission of the contract to purchase the shares; or the plaintiff may have the option of a new trial confined to the representation as to the $40,000, on payment of the costs of the last trial and of this motion.

BOYD, C.:—The only matter to be considered is as to the $40,000 representation. This was not complained of till a late stage, and then by amended pleading. The representation as pleaded is not as proved, but materially varies therefrom. The evidence as to what was represented is not distinct and clear cut, such as would be expected in order to establish fraud and deceit, and altogether I am not disposed to differ from the conclusion of my brother Meredith.

J. S. Mackay, Woodstock, solicitor for plaintiff.

Smith & Mahon, Woodstock, solicitors for defendants.

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MACMAHON, J. MAY 12TH, 1902.

CHAMBERS.

## REX EX REL. IVISON v. IRWIN.

*Municipal Election—Tampering with Ballots—Evidence of Voters as to how they Cast their Ballots not Admissible—Evidence Viva Voce Supplementary to Affidavit Evidence Admissible—Discretion to Refuse Leave to Cross-Examine Affiants—Irregularities.*

Appeal by respondent from the judgment of the senior Judge of the County Court of Essex, declaring void and setting aside the election of the relator as a councillor of the town of Leamington.

A. B. Aylesworth, K.C., for the respondent.

J. H. Rodd, Windsor, for the relator.

MACMAHON, J.—There were ten candidates for the office of councillor for the town of Leamington, of whom only six could be elected. The respondent was elected by a majority of 101 votes over Mr. Coultice, the minority candidate who polled the vote next in number to the respondent, the vote being :

| | |
|---|---|
| Irwin..... | 300 |
| Coultice..... ..... | 199 |
| Majority for Irwin... : | 101 |

Out of 142 ballots cast at poll No. 3, 132 were found to be marked for the respondent, while 29 voters by their affidavits and 3 others who gave *viva voce* evidence—in all, 32 voters,—swear that they did not vote for him; there is the strongest possible evidence that in some way access was had to the ballot box and the ballot papers tampered with.

With regard to the objection of the improper reception by the County Court Judge of *viva voce* evidence on behalf

of the relator, it was contended that he was precluded from supplementing his affidavit evidence by calling witnesses to give *viva voce* evidence, although their names were mentioned in the notice of motion. The question raised was disposed of adversely to the respondent's contention, in Regina ex rel. Mangan v. Fleming, 14 P. R. 458. . . . It appears that, although objection was raised to the evidence, some of the voters were called as witnesses by the relator, and stated for whom they voted. . . .

Section 200 of the Municipal Act, R. S. O. ch. 223, provides that "no person who has voted at an election shall in any legal proceeding to question the election or return be required to state for whom he voted." Section 7 of the Dominion Elections Act, and sec. 158 of the Ontario Elections Act, R. S. O. ch. 9, are in like terms. See Re Haldimand Election, 1 E. C. at p. 574; Re Lincoln Election, 4 A. R. at p. 210.

The improper reception of the evidence to which I have referred, cannot, however, affect the judgment appealed against, as without such evidence there was the evidence of the 32 voters, to which credence was given by the learned County Court Judge, which, together with the scrutiny made by him of the ballots, afforded, as he considered, ample evidence that the ballots had been tampered with after the ballot papers had been deposited in the ballot box at the close of the poll.

At the examination counsel for the respondent asked for leave to cross-examine the several affiants who had made the affidavits filed by the relator. The learned Judge of the County Court refused, and his refusal is one of the grounds of appeal. In Regina ex rel. Piddington v. Riddell, 4 P. R. 80, Morrison, J., held that ordering the oral examination of the parties for the purpose of impeaching the facts sworn to by one Clinkenboomer and the respondent was discretionary with him, and refused the application. And in Rex ex rel. Ross v. Taylor, 22 C. L. T. Occ. N. 183, the Master in Chambers followed Piddington v. Riddell, holding that it was a matter of discretion as to permitting a cross-examination of persons who had made affidavits filed by the respondents in answer to the affidavits filed by the relator. There is no doubt that in the present case it was discretionary with the learned County Court Judge, after the examination had commenced, to refuse leave to cross-examine.

As the practice in the High Court is applicable to quo warranto proceedings (Rex ex rel. Roberts v. Ponsford, 22 C.L.T. Occ. N. 146, ante 223), the respondent could before the examination have cross-examined all persons who had made the affidavits filed by the relator.

It was contended by the respondent that the election was saved by sec. 204 of the Act.

Although the deputy returning officer said that when taking the ballot box from the poll to the office of the town clerk, he only called at his own house for a few moments, his taking the ballot box there was violating a very stringent provision of the Act, for which, on conviction, he would be liable to imprisonment for 6 months and to a fine of $400; this, together with the finding by the County Court Judge that a large number of the ballots had been tampered with after the ballot papers had been placed in the ballot box, renders it impossible to say that such irregularities did not affect the result of the election.

The appeal must be dismissed with costs.

Fleming, Wigle, & Rodd, Windsor, solicitors for relator.

J. W. Hanna, Windsor, solicitor for respondent.

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MAY 17TH, 1902.

DIVISIONAL COURT.

## O'HEARN v. TOWN OF PORT ARTHUR.

*Street Railways—Negligence—Operation of Car—Collision— Contributory Negligence—Duty of Driver of Vehicle—Proximate Cause—Nonsuit.*

Appeal by defendants from judgment of BRITTON, J., entered upon the findings of the jury in an action by plaintiff, a teamster in the town of Port Arthur, for damages for bodily injuries caused by being run into by a street car of defendants, owing to alleged negligent running at a rapid and dangerous speed.

The plaintiff, at 4 p.m., was driving northward along the west side of Cumberland street, on which the track is, and was crossing it to go along Ambrose street, which runs into Cumberland street at right angles, when the collision took place.

The following questions were submitted to the jury:

1. Were the defendants guilty of negligence in running their car on the occasion of the accident at too great speed?

2. Were the defendants guilty of negligence in not so running their car as to be able to control it or stop it in time to prevent a collision with the plaintiff, who was seen by the motorman, and who, for all the motorman knew, might turn down as he did actually turn down Ambrose street?

3. Was the gong sounded by the motorman as the car approached the plaintiff on Cumberland street?

4. Could the plaintiff by the exercise of ordinary care have avoided the collision?

5. What damages has plaintiff sustained?

The jury found that the speed of the car on the occasion of the accident was excessive; that the motorman was negligent in not sounding the gong; and that the plaintiff could not have avoided the accident, nor be justly accused of ordinary negligence; and assessed the damages at $200.

N. W. Rowell, for defendants.

J. H. Moss, for plaintiff.

THE COURT (BOYD, C., MEREDITH, J.) held that the case was not distinguishable from Danger v. London Street R. W. Co., 30 O. R. 493.

BOYD, C.—When vehicles are moving ahead of the cars and in the same direction, it is reasonable to hold that the drivers of the vehicles, who know when and where they are going to turn and cross the track, should be vigilant to see that no car is coming behind them. A greater burden in this regard should rest on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension that some one or everyone ahead may cross in front of the moving car at any moment. The driver can move in any direction, not so the motorman. The right of way being with the car, the driver should keep out of its track, unless upon observation he is satisfied that the passage is clear.

MEREDITH, J.—It would have been better if the usual qustions had been submitted to the jury. Little is ever gained by departing from well settled forms ; often a good deal is lost. In this case there is no direct finding that the negligence which the jury attributed to the defendants was the proximate cause of the plaintiff's injury; the usual question was not asked. Nor was the question whether, assuming the plaintiff to have by negligence contributed to the accident, might the defendants yet have by the exercise of ordinary care avoided the injury. This subject seems to have been dealt with, during the charge, by withdrawing it from the jury, on the ground that it was plain that the injury could not have been so avoided. This was done in the plaintiff's interests, it being said that the defendants conceded it. It seems to have been overlooked at the moment that it might also, in another view of the case, the one now being dealt with, aid the plaintiff, and no assent on his part is mentioned. Both parties are perhaps now precluded from urging that the injury might have been so avoided; still it would have been more satisfactory to have had the usual answers.

And, if the case should have gone to the jury at all, it would have been better if the jury had been charged at least somewhat in accordance with the law as expounded in the case of Danger v. London Street R. W. Co., 30 O. R. 493.

That is a case which was binding upon the trial Judge, and is under the statute binding upon us. It was the latest

case upon the same questions, and, in its facts, most like this case, and is judgment of a Divisional Court.

But the main question is whether the plaintiff ought to have been nonsuited, on the ground of contributory negligence.

He should have been if the Danger case was well decided, and, whether it was or not, it was binding, as I have said, and so there should have been a nonsuit. I am quite unable to distinguish this case from that. The few minor differences of fact seem to me to make this case rather stronger than that was, against the plaintiff. In that case, the plaintiff was driving in a covered buggy, under very considerable difficulty of hearing and seeing anything behind him ; in this case the plaintiff was driving on the top of an open coal cart, with no obstruction to his view in any direction, and had but to turn his head to know whether his way was safe or dangerous. In that case the plaintiff had looked back and had seen an approaching car, but so far away —many hundreds of feet—that he thought he could cross before it overtook him, but he did not look when he ought to have looked, just before attempting to cross; in this case the plaintiff looked back several hundreds of feet, and again about one hundred feet, before attempting to cross; but by reason of a turn in the road he could not see an approaching car unless within 800 feet from him at the furthest; beyond that he could know nothing by sight; within it he might fail to observe. In the Danger case the track was a straight line as far as the eye could see; and in that case the plaintiff's attention was distracted by another car approaching in the opposite direction. In this case, the whole line and the whole public street were clear, except for the plaintiff's cart and the car into which he turned; and all there was to distract his attention was some children riding by his leave at the tail of his cart.

I understand the Danger case to decide this, that, under ordinary circumstances, any one attempting to cross an electric street railway, with a knowledge of the constant running of cars upon it, such as is usual in cities and towns, without looking, is negligent. I entirely concur in that view of everyone's duty to himself, and to all whom he may endanger by want of that ordinary care. No reasonable man could, in my judgment, say that, on the facts of this case, there was not great negligence in attempting to cross without looking. Looking meant a mere turn of the head; the man was not going on in the same course; he was on the wrong side of the road in regard to passing other vehicles, and he was about to turn at right angles to his course and immediately upon the car track. This he knew; the change was the result of his own thought, and his own action. He

knew that he was passing from a place of safety into a place of general danger; he intended to do that, and did it; but did it without taking the trouble—if trouble it can be called —to turn his head and know if he safely might. His one excuse seems to me to condemn rather than to acquit him, if it really have any effect upon the question at all. He looked, at about 400 feet and again at about 100 feet, before attempting to cross. If it was right to look at 400 or 100 feet away, how much more so just before going upon dangerous ground. The noise of his cart—the excuse for not hearing —made it more imperative to look at the proper place and time. When he looked first about 400 feet away, a car would be out of sight at about 400 feet off; when he last looked at about 100 it would be out of sight; at each or either time it might be in sight and he have failed to observe it. I cannot imagine any ordinarily careful person acting as the plaintiff says he did just before turning upon the track. His position on the left hand side of the road would indicate that he was going to stop at some place on that side or to turn to the left at one of the cross streets, if it indicated anything. Some measure of care is required of a driver ahead; if his stopping or turning one way or other will interfere with traffic behind him, he should indicate his intention in time by raising his whip or arm or in some other recognized or sufficient manner.

Then the one question is: Was the plaintiff upon his shewing guilty of negligence? That his act at least contributed to the injury is unquestioned, and unquestionable. Without it he could not have been injured.

All the facts are admitted; for the purposes of the motion for nonsuit the plaintiff's statement of them is accepted; no other evidence strengthens it upon this question. There is no disputed question of fact for the jury; no inference of fact to be drawn. All that has to be considered is, did his admitted act constitute negligence?

Is that a question for the Court or for the jury? Unhesitatingly I would say for the Court in the first place to say whether it afforded any reasonable evidence to go to the jury. It is for the Court to say whether there is any reasonable evidence upon which a jury could find, and it is only after that question is answered in the affirmative that it is for the jury to say what the finding should be.

Upon any given state of facts it is for the Judge to say whether negligence can rightly be inferred, and for the jury to say whether it ought to be inferred: Jackson v. Metropolitan R. W. Co., 3 App. Cas. 193.

Appeal allowed and action dismissed with costs on lower scale.

F. H. Keefer, Port Arthur, solicitor for plaintiff.

W. F. Langworthy, Port Arthur, solicitor for defendants.