THE TORONTO RAILWAY COMPANY ..... } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO..... } RESPONDENTS.

1895

*Mar. 28, 29.

*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Obstruction of street—Accumulation of snow—Question of fact —Finding of jury.

An action was brought against the City of Toronto to recover damages for injuries incurred by reason of snow having been piled on the side of the streets, and the Street Railway Company was brought in as third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence.

Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division in favour of the City of Toronto.

The action in this case was brought against the City of Toronto by one Langstaff who claimed compensation

*PRESENT :—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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for injuries alleged to have been received by him in consequence of one of the streets of the city being out of repair, and the Street Railway Company was brought as third party, the city claiming recourse over against the company for any damages assessed against it in the action. By the evidence at the trial the disrepair of the street was caused by snow having been placed on the roadway from the street railway tracks, and it was shown that snow from the sidewalks was also placed on the roadway. The jury found that the want of repair was caused by the act of the company and plaintiff having obtained a verdict against the city judgment was given for the city against the company for the amount of such judgment. The company appealed and the judgment was sustained by the Divisional Court and the Court of Appeal.

Laidlaw Q.C. and *Bicknell* for the appellant.

Fullerton Q.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—This was an action against the City of Toronto for injuries sustained by the plaintiff by reason of a street in the city of Toronto, upon which there is a street railway of the appellants, having been suffered to be in a dangerous condition, arising from a quantity of snow which fell during the winter of 1892-3, having from time to time been taken from the railway track and piled upon the roadway between the railway track and the sidewalk, and the railway company as parties against whom the city corporation if liable claim to have remedy over, have been made defendants as third parties under the provision of the municipal Act in that behalf. The action of the plaintiff against the City of Toronto, and the claim of the City of Toronto over against the railway company were tried

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together by the same jury. The plaintiff recovered judgment against the City of Toronto, who recovered judgment of indemnity over against the railway company, and it is only against this latter judgment of indemnity that this appeal is taken, and the ground upon which it is rested is, as follows: Among the questions submitted to the jury was the following, which related to the claim of the city to remedy over against the railway company, namely:

"Was the disrepair caused by the act or acts of either or both of the defendants? If by either, by which of them."

To which the jury answered that it was caused by the street railway company. The appellants now contend that this finding of the jury upon the issue between the City of Toronto and the appellants is ambiguous, perverse, and contrary to the evidence, upon the ground that, as the appellants contend, the evidence in the action established beyond all doubt that the accumulation of snow upon the portion of the street where the accident occurred was caused by the joint acts of the city by the snow thrown from the sidewalk, and of the railway company by the snow from the railway track, and that in such a case, although the railway company could offer no defence to an action by the plaintiff if they had been sued by him, the appellants are not responsible over to the City of Toronto.

Now by the appellants' Act of incorporation, 55 Vic. ch. 99, sec. 25, (O.) it is enacted that the company shall not deposit snow, ice or other material upon any street, square, highway or other public place in the city of Toronto, without having first obtained the permission of the city engineer of the said city or the person acting as such.

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The evidence showed that the space between the railway tracks and the sidewalks was fourteen feet, and that the width of the railway tracks was sixteen feet, and that the railway company had during the winter upon the occasion of every fall of snow piled upon the roadway adjoining the railway track on either side, the snow taken from the railway tracks and thereby raised the roadway immediately adjoining the railway track to the height of about twenty inches above the railway which was kept clear of snow. It was also proved that this piling of the snow by the railway company upon the roadway adjoining the railway track was without any leave of the engineer for that purpose first obtained. It was upon this part of the roadway immediately adjoining the railway track that the accident from which the plaintiff sustained injury happened. It is now contended that as snow from the sidewalk was also put upon the roadway between the sidewalk and the railway track, the snow from the sidewalk together with the snow from the railway track must be regarded as one inseparable accumulation of snow which caused the roadway to be out of repair, and from this it is argued that the finding of the jury that the disrepair which caused the accident was caused by the street railway company was perverse and contrary to the evidence; but in view of the evidence as to the manner in which the railway company removed the snow from their track and placed it upon the roadway immediately adjoining, the jury may, I think, not unreasonably have been of opinion that if the snow from the railway track had not been placed where it was the accident could not have happened, notwithstanding that the snow from the sidewalk had also been spread on the roadway; and as it was the height of the snow to the elevation of about twenty inches above the railway track immediately adjoining

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to it which caused the accident, they not unreasonably concluded that the piling of the snow upon the roadway by the railway company was the sole cause of the accident to the plaintiff; and so the appellants' sole ground of appeal against the finding of the jury upon the above question is removed. The appellants, however, further contend that even admitting the piling of the snow upon the roadway by the railway company to have been the sole cause of the accident to the plaintiff, still they are under no obligation in law to indemnify the city, because they say that the railway company by their solicitors upon the 27th February, 1893, addressed a letter to the city engineer, making proposals which were accepted by the city engineer, as to the removal of snow, ice, &c., from the streets so as to make them reasonably safe for public travel. The effect of this contention is that by the acceptance of such proposals by the city engineer, the city assumed the burthen of removing the snow, &c., so as to make the streets reasonably safe for public travel, &c. The question thus raised is a pure question of law, namely, whether the acceptance by the city engineer of such proposals as were contained in the railway company's solicitor's letter could have the effect in law of relieving the railway company from liability to the city arising out of acts then already committed by the railway company in violation of their statutory obligations; but it is unnecessary to consider this question, or to enter into the nature of the proposals so accepted by the city engineer, because it is expressly provided for in the letter itself that nothing contained in it should affect or prejudice the rights or liabilities of either party under the terms of the original agreement, which was made part of the company's Act of incorporation; it could not, therefore, relieve the railway company from their liability to

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indemnify the city from the consequences of acts then already due by the railway company in violation of the terms of their charter. The appeal must therefore, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitor for the respondents: *T. W. Caswell.*