ALEXANDER McGREGOR AND ELIZABETH McGREGOR, (PLAINTIFFS.) ..... APPELLANTS;

AND

THE MUNICIPALITY OF THE TOWNSHIP OF HARWICH (DEFENDANT.) ..... RESPONDENT.

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*Mar. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Necessary proof—Statutory officer—Ratepayer—Statute labour.

In an action against a municipal corporation for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, and one of the occupants thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour has been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster or by a ratepayer engaged in the performance of statute labour.

Held, affirming the judgment of the Court of Appeal, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible.

Per Strong C.J. *Quære.* Is the corporation liable for the acts of a statutory officer like the pathmaster, or of a ratepayer in performance of statute labour?

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of Mr. Justice Ferguson at the trial in favour of the plaintiffs.

The material facts of the case are sufficiently stated in the above head note.

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*Present: Sir Henry Strong C.J., and Gwynne, Sedgewick, King and Girouard JJ.

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Gundy for the appellants cited *Stalker* v. *Township of Dunwich* (1); *Hesketh* v. *City of Toronto* (2); *City of St. John* v. *Campbell* (3).

Matthew Wilson Q.C. for the respondent was not called upon.

THE CHIEF JUSTICE (Oral):—We are all of opinion that this appeal must be dismissed, and as it does not involve any question of law we may decide it at once. The Court of Appeal were of opinion that the evidence was insufficient to establish the material fact, indispensable to the maintenance of the action, that the dumping of the gravel complained of was done by somebody for whose acts the municipal corporation was responsible. This conclusion was entirely right.

Speaking for myself I concur on the grounds relied on by Osler and Moss JJA. in the Court of Appeal, though I am unable to agree with Mr. Justice Maclennan that it was a case of non-repair. If it was there would be no liability because, first, there was no notice of action; and secondly, there would have been no proof that the municipality had notice of the want of repair which could only have existed between the hours of 3 and 8 p. m. of the day of the accident.

Then as to the question as to whether or not the gravel was dumped on the road by some one acting under the orders of the council or of some person for whom the council was responsible, there is not a tittle of evidence. It is useless to talk of presumptions in such a case for, in such a case, so to act would be merely to guess. If there had been any evidence I should have wished to consider how far the council was responsible for the acts of a statutory officer like the pathmaster. Then, again, the dumping might have

(1) 15 O. R. 342.
(2) 25 Ont. App. R. 449.
(3) 26 Can. S. C. R. 1.

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been done by a ratepayer in which case there would have arisen a similar question of law, with which we are not now called upon to deal, namely, how far the council is responsible for the acts of such a person.

The appeal is dismissed with costs.

GWYNNE (Oral) :—I entirely concur in what His Lordship has said, and would like to add a few words. It does not appear to me that the corporation can be made liable at all for the gravel having been left where it was by some of the persons engaged in repairing the road. It was not wrongful to leave it there; the only wrong of the corporation, if any, was in suffering it to remain there during the night without a light. But there is not a particle of evidence that the corporation, or any one belonging to the corporation, knew it was there at all, and how could they be guilty of negligence ?

SEDGEWICK, KING and GIROUARD, J.J. concurred.

Appeal dismissed with costs.

Solicitor for the appellants : *W. E. Gundy.*

Solicitors for the respondent : *Wilson, Kerr & Pike.*