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| MARIA INCE, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF THOMAS HENRY INCE, DE- CEASED, (PLAINTIFF) } | APPELLANT; | 1901 <u>Mar. 18, 19.</u> *May 13, |
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AND

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| THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) } | RESPONDENT. |
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Maintenance of streets—Accumulation of snow and ice—Gross negligence—R. S. O. [1897] c. 223 s. 606 (2).

About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shown that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city had scattered sand on the crossing but the high wind prevailing at the time had probably blown it away.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 410) that the facts in evidence were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the Corporation within the meaning of R. S. O. [1897] ch. 223, sec. 606 (2).

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

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

* PRESENT :—Taschereau, Gwynne, Sedgewick and Girouard JJ.

(Mr. Justice King was present at the argument but died before judgment was delivered.)

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Aylesworth K.C. for the appellant referred to *Town of Cornwall v. Derochie* (1); *Driscoll v. Mayor of St. John* (2).

Fullerton K.C. and *Chisholm* for the respondent.

The judgment of the court was delivered by :

GWYNNE J.—In the judgment of the Court of Appeal at Toronto in this case and in the reasons upon which that judgment is founded I entirely concur. For the suggestion that the original grade upon which the street crossing where the accident occurred was constructed was so faulty and defective as to constitute any ingredient in establishing that “gross negligence” of the Corporation necessary to maintain an action against them, there was not in the evidence the slightest foundation whatever; and the only other suggestion of negligence of the Corporation was in substance to the effect merely, that they had not succeeded in preventing the severe inclemency of the weather upon the morning in question, in which inclemency a high wind travelling at the rate of from 24 to 28 miles an hour constituted a most material element, from being attended with its natural consequences. There was evidence that between the hours of 7 and 8 and of 9 and 10 on that morning the Corporation had made use of the ordinary method to countervail the inclemency of the weather by spreading sand upon the crossing in question, but that such method proved ineffectual in the present case was reasonably attributable to the high wind not suffering the sand to remain upon the slippery places where it was spread. To hold the defendants responsible in the present case would not only have the effect, as stated by the learned judges of the Court of Appeal, of depriving

(1) 24 Can. S. C. R. 301.

(2) 29 N. B. Rep. 150.

the defendants altogether of the recent Ontario statute which exempts municipal corporations from liability in the cases of accidents occasioned by falling on icy places unless in case of *gross negligence* by the Corporation, but would introduce a new element of liability by making the Corporation responsible as for gross negligence in not providing means which shall prove effectual to prevent injury happening to any one from ice upon the streets in the city being occasioned by the inclemency of the weather however severe it be. The appeal must, in my opinion, be dismissed with costs.

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Gwynne J.

Appeal dismissed with costs.

Solicitors for the appellant: *Barwick, Aylesworth & Wright.*

Solicitor for the respondent: *Thomas Caswell.*