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*Dec. 13.

LEANDER C. MANNING (DEFENDANT) ..... } APPELLANT;

AND

JAMES NAAS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Trespass—Horse racing—Intruder upon race track—Carelessness.

After the first heat of a trotting match in which N. had been a competitor he was seated in his sleigh and walking his horse upon his proper side of one of the tracks, laid out by the ploughing away of the snow on the ice of a public harbour, while waiting to be called for the next heat. M., who had not been a competitor in that race, came along the same track, from an opposite direction to that in which N. was going, driving his vehicle at excessive speed and, in attempting to pass in a narrow space between the ridge formed by the snow and N.'s sleigh, collided with it, causing injuries to N. and damaging his sleigh and harness.

Held, affirming the judgment appealed from (39 N.S. Rep. 133) that even if M. was lawfully upon the track in question he was responsible for damages as the accident was solely attributable to his improvident carelessness and want of judgment.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), by which, on an equal division of opinion, the judgment of Meagher J. at the trial, in favour of the plaintiff, was affirmed.

The circumstances of the case are sufficiently stated in the head-note and in the judgment now reported.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 39 N.S. Rep. 133.

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James A. McLean K.C. and *Mellish K.C.* for the appellant.

W. B. A. Ritchie K.C. and *Kaulbach* for the respondent.

The judgment of the court was delivered by

DAVIES J.—At the close of the appellant's argument we did not think it necessary to call upon the respondent, plaintiff's counsel. No such *primâ facie* case was made out as would warrant our reversing the judgment of the trial judge, although the judges of the court in banc were equally divided. On the contrary, we thought that judgment perfectly sound.

Assuming for the sake of argument the appellant's contention to be correct, that on the horse-race day in question (which took place in winter on a public harbour frozen over, there being five straight tracks lying alongside of each other, divided by ridges of snow 18 to 20 inches wide and less than a foot high, with sloping sides) he, the appellant, was in the exercise of his rights driving along No. 4 track at a speed of about 2.50, does that exonerate him from responsibility for the collision?

The question is not, was he a trespasser in driving on that track at the time he did but whether he so exercised and used his rights as not to injure his neighbour who was also there possessing equal rights.

It was not necessarily an act of negligence *per se* to drive at the rate of 2.50 per mile. But it was clearly negligence under the circumstances of this case, even adopting the appellant's own evidence as a correct account of the accident.

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The defence consisted solely in the assumption of contributory negligence by the plaintiff. In what did that negligence consist? We asked during the argument time and again for evidence of that.

Plaintiff was driving along at a walk on No. 4 track, by the evidence of himself and his witnesses, and on his proper side of the track. Defendant was meeting him driving at a great speed, shewing to some friends what his horse could do as a trotter. He says he saw plaintiff a couple of hundred yards ahead of him coming along with his horse. He says he slackened

> his horse's speed as they approached, but could not rightly say how far away from him. I did not think there was going to be a collision. I certainly thought I was going to go right past him.

Now appellant was not charged with wilfully causing the collision, but with negligently causing it. He may have been rightly where he was, but if he drove at the rate he admits under the circumstances, and while thinking he would go past all right found he had entirely misjudged, and collided with and injured the plaintiff, how could the latter be held responsible?

It was, under the circumstances, the improvident carelessness and want of judgment of the appellant which caused the accident, and not any negligence of the plaintiff who was walking his horse, on his own side of the track and, at any rate, leaving in defendant's judgment, as stated by himself, plenty of room, so that he thought he could safely pass. He must take the consequences of his own carelessness and bad judgment.

We have stated shortly the grounds of our decision in deference to the differences of opinion in an equally

divided court below. Otherwise we were quite ready to dismiss the appeal for the reasons given by Meagher J. who tried the case.

Appeal dismissed with costs in this court.

Appeal dismissed with costs.

Solicitor for the appellant: *James A. McLean.*

Solicitor for the respondent: *R. C. S. Kaulbach.*