

the surface merely, and ceasing with the rain that produced it. The plaintiff contended that there was a constant stream of water, having its source in the higher land, and only, if ever, ceasing in the very dry summer weather.

The trial judge read to the jury an extract from the judgment in *Beer v. Stroud*, 19 O.R. 10, as follows: "It is not essential that the supply of water should be continuous, and from a perennial, that is, a never-ceasing, living source. It is enough if the flow arises periodically from natural causes, and reaches a plainly defined channel of a permanent character. . . ." He also told the jury that a channel made by mere surface water and snow is not a watercourse unless there is ordinarily and most frequently a moving body of water flowing through it, and that the principles which are applicable to streams of running water do not extend to the flow of mere surface water spreading over the land.

Held, per STREET, J., that, without a permanent source, which, however, need not necessarily be absolutely never-failing, there cannot be a watercourse, and that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as the passage from the judgment in *Beer v. Stroud*, divorced from its context, might have misled the jury, there should be a new trial.

Per ARMOUR, C.J., that what the judge told the jury could not be held to be misdirection without reversing the decision in *Beer v. Stroud*, and the objection to the charge was too vague and indefinite.

In the result the motion to set aside the verdict for the plaintiff, awarding him damages for the permanent diversion of the watercourse, was dismissed; but the court ordered that the judgment should not be enforced unless and until the plaintiff delivered to the defendants a release of any further claim in respect of the cause of action and for damages.

Clute, Q.C., and *J. W. Gordon* for the plaintiff.

Oster, Q.C., and *Wallace Nesbitt* for the defendants.

Div'l Court.]

MCDONALD v. DICKENSON.

[March 3.

Municipal corporation—Rebuilding of culvert—Obstruction in highway—Negligence—Accident—Liability of servants of corporation—Municipal councillors—Officers fulfilling public duty—R.S.O., c. 73—Notice of action—Pathmaster.

Two of the defendants, being members of a township council, were appointed, by resolution of the council, a committee to rebuild a culvert, and they personally superintended the work, and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them, and did the work. The plaintiff met with an accident on the highway near the culvert, owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries.

Held, that the defendants were not fulfilling a public duty, and were not entitled to notice of action under R.S.O., c. 73.