the duty of the said Thomas Hutchinson, and not of the defendants, to remove and clear away the accumulation of snow from the roof of the said house, at the same time when, &c.

Replication, to the second plea.—That the said defendants, before and at the time of the committing of the grievances in the declaration mentioned, became and were the tenants and occupants of the upper part, and that part immediately under and next to the roof of the said house and premises in the first count of the said declaration mentioned, whereby it became and was the duty of the said defendants to clear away and remove the snow, as in the first count alleged.

The trial took place at Toronto, before *Draper*, C. J., when a verdict was given for the plaintiff, and £100 damages, subject to the opinion of the court on the law and evidence, the court to determine the plaintiff's legal right to recover on the evidence given.

The facts of the case are stated in the judgments.

Hector Cameron for the plaintiff, cited Broom Leg. Max. 330; *Fay* v. *Prentice*. 1 C. B. 828; *Regina* v. *Watts*, 1 Salk. 357; *Bishop* v. *The Trustees of the Bedford Charity Estate*, 33 L. T. Rep. 27; *McCallum* v. *Hutchinson*, 7 C. P. 508; *Barnes* v. *Ward*, 9 C. B. 392.

Cameron, Q. C., contra, cited *Holden* v. *Liverpool New Gas Company*, 3 C. B. 1.

Robinson, C. J.—The evidence given upon the trial, proved that the plaintiff was walking on the 7th of December, 1858, in the street, along the front of Sargant's store, which forms part of the building called St. Lawrence Hall in Toronto, and on the same side of the street; that a quantity of snow slid down from the roof of Sargant's store and struck her on the head, throwing her down, and occasioning her very serious injury, from which at the time of the trial in October last she had not fully recovered.

The defendants own the land on which the building is erected from which the snow fell. They leased to Mr. Hutchinson a piece of ground adjoining what is properly St. Lawrence Hall, upon certain conditions as to building. Hutchinson gave a bond to build such a building as the corporation would approve of, and he built his house under the directions of the city architect.

The defendants occupy the garret of that building, and the floor next below it, over Sargant's store.

The city are bound by their lease from Hutchinson to repair the premises occupied by them. The only way of getting on the roof from the inside is through the garret occupied by the defendants, but Mr. Hutchinson stated that he did not know that there was any access to the roof from that part. The roof over Sargant's store slopes at two angles, the lower part of the roof being more precipitous than the upper part. The roof of the St. Lawrence Hall is higher than the other. The two roofs are covered with slate.

It was sworn by Mr. Hutchinson that he had seen snow fall from the same roof occasionally, but had not known of any damage being done before.

The defendants contend that if the injury did occur in the manner stated in the declaration, and if in consequence the plaintiff had a good cause of action against any one, it could only be against the owner or tenant of the house from which the snow fell, not against the defendants, who were the sub-tenants only of the upper part of the house; that the evidence shewed a faulty construction of the roof, rather than a neglect to clear off the snow; that it did not sustain the first count, for it did not shew that the snow came from the building mentioned in it, but the snow may have fallen from St. Lawrence Hall: that as to the second count, which charges that the roof was negligently constructed, it was not the defendants who built the house mentioned in it, but Hutchinson; and although he may have been obliged to build it under the superintendence and direction of the defendants' architect, still that cannot make the defendants liable to a third party, as if they had built the house.

The Municipal Act 22 Vic. ch. 99, sec. 290, sub-sec. 12, provides that the municipal council of every city may pass by-laws for compelling persons to remove the snow from the roofs of the premises owned or occupied by them. It was not shewn that any by-law had been made by the Corporation of Toronto, and that the defendants had infringed it, and I do not see in the evidence such proof of negligence as should render the owner or occupier of the house from which the snow fell liable to an action. What occurred here was such an accident as may occasionally happen, and be attended with serious results, but I do not think that in the absence of any public regulation on the subject people are compelled to keep the roofs of their houses clear of snow, or to detain the snow on the roofs so that the snow cannot slide from them into the street. There may be in a particular case something so evidently faulty in the construction of a roof as to make it more likely to occasion accidents from this cause than roofs in general are, but I do not see any proof that such was the case here.

If that had been shewn, however, then on whom would it be incumbent in this case to make compensation?

In both counts the defendants are charged as liable for the snow falling from the house along the front of which the plaintiff was walking: that is, from the shop referred to in the declaration.

The principles of law which govern the remedy against the owner or occupier of property on which a nuisance has been created or exists is very fully gone into in the case of *Rich* v. *Basterfield* (4 C. B. 783), in which a great number of authorities are cited. The first count in this declaration charges the defendants with neglecting to remove the snow from the building in question; but as owners of the land merely they had no such duty incumbent on them, and they are not charged on that ground, but because they occupied the upper part of the house. No case has been cited for the position that a tenant of part of a house has the duty cast upon him of taking care that the building generally is not the cause of injury to others. If any one would be liable to this action by reason of occupation, it must be, I think the lessee of the whole building. The defendants have no particular charge of the roof because they occupy the room next below it.

As to the second count, it does not appear to me to have been proved that there was anything unskilful and negligent in the construction of the building, and if there was, there was nothing in the evidence, as it seems to me, that would make the defendants liable as if the house had been built by them, or for them, which it was not, but by Hutchinson, under the conditions of his lease. The defendants were the owners of the soil. They did not let it with the house in question built upon it, nor did they afterwards build the house upon it, but their tenant built it; and though it was done under the superintendence of the defendant's architect yet that does not, I think, establish that the defendants built the house, and unless they either built, or own, or occupy a house which is necessarily a nuisance, and not merely from want of care in the owner or occupier of the building, they cannot be liable in this action.

In my opinion the *postea* should go to the defendants.

Burns, J.—There is not any evidence to support the second count, for the building from which the snow fell upon the plaintiff was not erected by the defendants. The defendants owned the land in fee, but had leased it for years of those who erected the buildings, and though it appears the buildings were erected according to a plan furnished by the defendants, yet that fact cannot make them the builders or create any duty upon them. What the plaintiff desires to make out as supporting that count is that the centre being the St. Lawrence Hall had its roof constructed in such a way as the snow slid from that roof to the other, the roof of the latter being constructed at right angles, or at an angle which caused the snow resting upon the latter to slide into the street. If the fact had been as suggested by the plaintiff, still it would have been a question whether the defendants were liable under the circumstances, but the facts were not proved as suggested, there being no evidence whatever that the snow first fell upon the St. Lawrence Hall and then slid upon the other roof before again falling into the street. All this part of the proposition advanced by the plaintiff rests upon theory only. Perhaps the theory might be quite correct if applied to rain falling in such quantities that the gutters or appliances to carry off the water from the St. Lawrence Hall were insufficient for the purpose, but I apprehend that the same rule cannot be held with respect to snow, which we know blows and drifts about in every way the eddies of the wind carry it. The fact of the St. Lawrence Hall being so much higher than the adjoining building would I think of itself furnish very strong evidence that snow would not and could not in the nature of things