

Boyd, C., Magee, J., Mabee, J.]

[Jan. 9.]

## POW v. TOWNSHIP OF WEST OXFORD.

*Highway—Nuisance—Obstruction—Usual travelled way—Electric railway tracks on highway—Contributory negligence—Fatal Accidents Act.*

This was an appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B. dismissing an action brought by the widow to recover damages for the death of her husband under the following circumstances:—The deceased was driving on a dark night on a highway on which had been constructed an electric car track. After crossing this track he got on the travelled road but coming upon some piles of gravel and large stones and the rough surface of a drain lately covered, he turned aside and again got on the track. After going on a short distance he apparently turned off the car track to go on to the travelled road. Probably in crossing the raised rail of the track which, in some places, was about a foot and a half above the road-bed, the deceased was thrown out and killed.

*Held*, 1. That on the evidence there was no contributory negligence.

2. Under the common law the public are entitled not only to free passage along the travelled part of the highway, but also to a free passage along any portion of it not in the use of another traveller.

3. Under our Municipal Law the local municipality are responsible for keeping in proper repair the travelled part of the road, but it is also liable for misfeasance or nonfeasance if it permits obstacles to be placed alongside of the travelled way which are dangerous to travellers, and any traveller suffering injury from coming in contact with such obstacles has right of action against the municipality for injury caused thereby.

4. The municipality having the power to control the construction of the electric railway tracks having failed to exercise any effective supervision was guilty of negligence.

5. As to the measure of damages. The deceased was making about \$500 or \$600 a year, and his widow depended upon him for support. It was considered that three years' earnings, say, \$1,800, would be a fair allowance for damages, together with costs.

*Douglas, K.C., and W. P. McMullen, for plaintiff. Johnston, K.C., and G. F. Mahon, for defendants.*