

Ferguson, J.]

ATKINSON v. CITY OF CHATHAM.

[July 16.

*Municipal corporations—Highway—Obstruction—Telephone pole—Non-repair—Runaway horses—Liability Notice—Contributory negligence—Indemnity—Telephone Company—Erection of poles—Sanction of corporation—Damages.*

A city highway, sixty-six feet wide, had upon it, near the angle formed by a sharp turn in the road, a telephone pole planted twelve feet from the centre line, and so far from the sidewalk that there was a beaten track for carriages between the two. The horses attached to a sleigh, which was being driven up and down this highway for the pleasure of the occupants, in daylight, ran away, and their driver lost control of them when approaching the pole, but at some distance from it, and before reaching the angle. In making the turn the horses and sleigh described a curve and brought the sleigh against the pole, overturning the sleigh, whereby the horses and sleigh were damaged, and bodily injury was caused to one of the occupants.

*Held*, that the pole was an obstruction upon the highway, which at this point, from this cause alone, was out of repair, and not in good or reasonable repair; and the city corporation, having notice and knowledge of the obstruction, and also of its dangerous character, and there being no contributory negligence, were liable in damages for the injuries sustained. *Sherwood v. City of Hamilton*, 37 U.C.R. 410, followed. *Foley v. Township of East Flamborough*, 29 O.R. 139, distinguished.

Driving a horse that has before run away, as one of a pair of horses, is not of itself negligence contributing to the disaster.

*Held*, also, upon the evidence, that the pole was planted where it stood under the superintendence of the corporation, and with their sanction, and they could not recover indemnity from the telephone company by whom it was erected. Quantum of plaintiffs' damages considered.

*Atkinson*, Q.C., and *C. R. Atkinson*, for plaintiffs. *Douglas*, Q.C., and *Aylesworth*, Q.C., for defendants. *M. Wilson*, Q.C., for the telephone company, third parties.

Falconbridge, J., Street, J.]

IN RE MATHIEU.

[July 20.

*Parent and child—Custody of infant—Rights of father—Discretion of Court.*

Where a husband has done no wrong, and is able and willing to support his wife and child, the court will not take away from him the custody of his infant child, merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the court over the custody of infants, by R.S.O. c. 168, s. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.