HIGHWAYS.

WHAT CONSTITUTES NON-REPAIR

Foley vs. East Flamborough.

Municipal Corporations—Highway—Accident—Runaway Horses—Control—"Repair" of Highway.

An appeal by the plaintiffs, the widow and child of a man named Foley, who was killed by being thrown from a wagon on the centre road in the township of East Flamborough, from the judgment of Boyd, C., at Hamilton, dismissing with costs an action brought against the township corporation for damages for the death, which the plaintiffs charged was due to the road being out of repair, their being an obstruction in it in the shape of a stump. Foley was being driven by a friend of his, one Sullivan, in the latter's wagon, to which was attached a pair of spirited horses. The action was dismissed because it was found that Sullivan was drunk, and Foley, if sober must have known it, and this condition contributed to the accident. The trial Judge not having found specifically whether the road was or was not in a reasonable state of repair, the court now found upon the evidence that at the time of the accident the road was in a reasonable state of repair, having regard to the public using the road in the ordinary way.

The word "repair" was used in the Municipal Act, as a relative term. If the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard againt injury caused by runaway horses, i. e., horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it.

But for Sherwood vs. Hamilton, 37, U. R. C. 410, it should be held that in this case the running away of the horses and their ceasing to be under control was the proximate cause of the injury. Assuming the facts to be that the driver, in spite of ordinary care on his part, lost control of his horses, and that they running away, the injury was caused by their running the vehicle against the stump in the highway, the plaintiffs could not recover, because, notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel.

Appeal dismissed with costs.

This case involves several points of interest. The learned trial Judge, without determining as a fact whether the road in question was or was not in a reasonable state of repair, dismissed the action because it was found that the driver, Sullivan, was drunk, and that Foley, the plaintiff, if sober, must have known it, and that this condition contributed to the accident. The Divisional Court, instead of directing a new trial, assumed the functions of a jury itself, and found that the road was in a reasonable state of repair. If the road was in a reasonable state of repair the plaintiff could not recover, because the road, being in a reasonable state of repair, the municipality was not guilty of any negligence, and without negligence there could be no liability. We doubt very much if the Court should have taken upon itself the question of determining whether the road was or was not in a reasonable state of repair. If the trial Judge had found, as a fact, that the road was out of repair, the Divisional Court would not have disturbed his finding unless the evidence was greatly against the finding, and that being so, we think the proper course was to have ordered a new trial. If the road was out of repair, we doubt very much if the ground upon which the learned trial Judge dismissed this action was sufficient to warrant a dismissal.

In the case of Thorogood vs. Bryan, the Court held that a passenger was so far identified with the carriage in which he was travelling that want of care on the part of the driver was a bar to his right to recover against the driver of another carriage which injured him, but this case has been overruled by the House of Lords, by the case of Mills vs. Armstrong, 13 Ap. Cases, where Lord Watson says: "The theory that an adult passenger places himself under the guardianship of the driver so as to be affected by his negligence, appears to me to be without foundation either in fact or in law." The law upon this point is also laid down in Jones on municipal negligence as follows: "The prevalent and more reasonable rule on this subject now is, that a passenger in a public conveyance, or a person driving by an invitation with another, will have his right of action against a municipality for an injury occasioned him by the combined negligence of the corporation and the driver." The statement of law "that the word 'repair,' as used in the Municipal Act, is a relative term, and that if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied," is correct. An arbitrary standard, by which it should be determined whether a road was out of repair or not, would create hardships upon some municipalities. Sec. 606, R. S. O., 1897, provides: "Every public road, street, bridge and highway shall be kept in repair by the corporation, etc." In the case of Colbeck vs. Brantford, 21, U. C. Q. B., 276, Robinson, C. J., speaking of the words "shall be kept in repair," says: "There may in some such case arise a question as to the effect proper to be given to the words, *shall be kept in repair*. If, for instance, an accident should arise on a new side line or concession line lately opened in a township but thinly settled, the argument would be probably urged that what should be understood by the words "keeping in repair," should be construed with a reasonable attention to circumstances, for such a road could hardly be expected to be found in as perfect condition as an old highway in a well settled township. Dillon, on Municipal Corporations, states the duty of municipalities in regard to keeping roads in repair, as follows: "In general, however, the duty to keep in repair only extends to the road actually used for travel, provided it is wide enough to be safe, and is, in its actual condition, reasonably safe for travellers who use due care," and Jones in his work on Municipal Negligence, says: "But in discharging the duty of exercising reasonable care to keep its streets and roads safe a municipal corporation is not required to keep the whole width of a country road in a condition fit for travel. If reasonable care is exercised to keep a travelled track, sufficient to answer the needs of the public, safe for ordinary use the duty will be performed. But on the other hand the municipality should not allow obstructions or excavations to adjoin a travelled way which will render its use unsafe and dangerous." It may be stated here that it is not enough that the metal part of the road itself is in good condition for public travel. Such a road may be unsafe for ordinary travel by reason of obstructions adjoining the travelled part, and it makes no difference whether such obstructions or excavations are within or without the limits of the highway, provided they are so situated as to render the road dangerous and unsafe. The legislature has recognized the necessity of safeguarding such places by the provision of sub-sec. 6, of Sec. 640, R. S. O., 1897, which is as follows: "The Council of every county, township, city, town and village may pass by-laws.

6. For making regulations as to pits, precipices and deep waters and other places dangerous to travellers." In a recent case tried before Chief Justice Armour at St. Thomas, he held a township liable in damage because it allowed a railing along one side of a narrow fill in a ravine to get out of repair, through a gap in which the plaintiff's horses and engine fell, causing the plaintiff serious injury. The council of the township has since then had railings and fences put up along similar places throughout the township. The law upon the subject is stated as follows, in Jones on "Municipal Negligence:" "Many cases have arisen with regard to the duty of a Municipality to protect horses and vehicles from danger by reason of excavations, declivities or embankments adjoining the street. Whether in any particular place an excavation or embankment renders the street or road unsafe for use depends largely upon its proximity to the edge of the street. When the declivity adjoins the travelled way there can be little doubt of the duty of the corporation to erect barriers, but where on the other hand there is substantial protection in the distance of the danger, there is no liability for a failure to erect barriers. When a highway was so narrow that a team could not pass between an embankment and a fence, the town was held