

SECOND DIVISIONAL COURT.

DECEMBER 7TH, 1917.

## \*TESSIER v. CITY OF OTTAWA.

*Negligence—Obstruction in Highway—Injury to Conductor of Street-car—Municipal Corporation—Contractors—Absence of Authority—Liability of Contractors—Contributory Negligence—Evidence—Findings of Trial Judge—Appeal.*

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Carleton dismissing an action brought in that Court, and tried without a jury, to recover damages for personal injuries sustained by the plaintiff by coming against an obstruction in a highway, said to have been placed there by the two individual defendants by the authority of the defendants the city corporation.

The appeal was heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

Taylor McVeity, for the appellant.

F. B. Proctor, for the defendants the city corporation, respondents.

G. F. Henderson, K.C., and A. C. Fleming, for the individual defendants, respondents.

LENNOX, J., in a written judgment, said that the appeal as against the city corporation was dismissed at the hearing, but the question of costs was reserved.

The defendants Neate and Wentzloff, desiring to construct a drain from their premises north of Creighton street to connect with the city sewer in that street, in the city of Ottawa, obtained a conditional permit from the defendant corporation, on the 9th February, 1916. They did not, however, go on with the work, and the permit expired on the 11th March. In June, 1916, these defendants, without again obtaining the sanction of the corporation, commenced to open up the ditch. They worked intermittently, and the work was not finished on the 21st June, but was at a standstill on that day. The street railway ran along Creighton street, double-tracked. These defendants had erected a barrier, 3½ feet high, constructed of trestles and planks, over or around their open drain, coming to within 2 or 2½ feet of the most northerly rail of the tracks. The planks were not fastened down, and no precaution was taken to keep them in place. Possibly they were moved closer to the track by school-children. There was nothing to prevent that, but it would not relieve these