

LEGAL DEPARTMENT.

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HIGHWAYS.

Repair—Trees and Overhanging Objects.

It is now well settled that the duty of a municipality to exercise reasonable care to keep highways in a safe condition for public travel extends to dangers overhead as well as those that relate to the way itself. In *Embler vs Walkill* 57 Hun., 348 a decision of the Supreme Court of the state of New York the plaintiff was pushed off a load of hay by a branch of a tree which obstructed travel and he was allowed recovery. In this case the tree in question stood upon the side of the highway, and its branches hung over the travelled portion of the road so low as to leave a space insufficient for the passage of a load of hay, and that condition had existed for more than ten years, and the learned judge who delivered the judgment of the court said: "Those facts presented a case of inexcusable negligence, and there is no principle which will exonerate the town from the liability therefrom."

Ferguson vs. Southwold, 27 O. R., 66, a case in our own courts, is precisely the same as the American case in its facts. There a branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at the height of about 11 feet. The plaintiff, in endeavoring to pass under the branch on the top of a load of hay was pushed off by it and injured. At page 70 Mr. Justice Ferguson, in delivering his judgment, says: "I am of opinion that the learned Chief Justice was quite right when in his charge he said that he was bound to tell the jury that want of repair may exist not only with regard to the surface of the highway, but with regard to something above the highway, because, although the surface of the highway may be in perfectly good repair, yet if something exists or is allowed to remain above the highway interfering with its ordinary and reasonable use this would constitute want of repair and a breach of duty on the part of the municipality." In both of these cases the trees stood in the highway, but the liability of municipalities caused by overhead obstructions is not confined to the case of trees on the highway, but extends to trees off the highway. This principle of law is discussed in *Hawkins, P. C.*, page 701. It is there said that it is a nuisance at common law, "To suffer the boughs of trees growing near the highway to hang over the road, in such a manner as thereby to incommode the passage." And there are other authorities which show that overhanging trees, ruinous houses, or anything projecting over the highway so as to

be dangerous and cause imminent peril, is such negligence as amounts to a nuisance and renders the corporation liable to indictment. In a case in our own courts, *Gilchrist vs the township of Carden*, 26 U. C. C. P., page 1, this principle was discussed and applied. In that case the servants of the township, in getting material on land adjoining the road for its repair, felled a tree which in falling lodged against another tree near the road, and being left there afterwards fell and killed the plaintiff's wife while passing along the road and the jury awarded the plaintiff the handsome sum of \$100 damages. The verdict was moved against, but the court held that the township was liable. At page 7 Hagarty J. says "I think on the evidence before us, the defendant would not be liable for the accident unless the fact of the tree being left in its dangerous state was by the act of their pathmaster." But it is not to be understood from this language that there could be no liability in a case of this kind unless the municipality itself, through its officers or servants, caused the danger. All that the judge meant was, that according to the evidence in the case the township would not have been liable if its own officer had not directed the tree to be cut and left it lodged in another tree. The learned judge attached some importance to section 441 of the Municipal Act which empowers the council to pass a by-law directing that the trees shall for a space of twenty-five feet on each side of the highway be cut and removed by the proprietor or on his default, by the overseer of highways, etc. He said at page 7, "This is apparently a recognition of the duty to preserve the highway from danger from falling trees." Section 441 now appears in sub-section 3 of section 658 of the Municipal Act, R. S. O., 1897, under the heading, "Trees obstructing highways." This heading bears out what the learned judge says in regard to the object of the Legislation in making this provision. But while municipalities are required to take this precaution which we have pointed out in regard to trees on the highway they must also take care to act reasonably. The Legislature passed an act known as "The Ontario Tree Planting Act," to encourage the planting of certain kinds of trees along the highways for the purposes of ornament and shade. Under this Act the owner of lands adjoining the highway has a special property in not only trees which have been planted but also in trees of natural growth. When it is found that the branches of such trees are so low as to interfere with public travel the council ought not to direct the tree to be cut down as has in some cases been done without the consent of the adjoining landowner or even notice to him. In most, if not all of these cases a little trimming will remove the danger and enable the tree to be spared. After the verdict in the case of *Ferguson vs. Southwold* above referred to, the council of the township or one of its officers directed a couple of fine maple

trees standing on the side of the highway to be cut down instead of directing some low branches which were so low as to interfere with travel to be cut, and the land owner, in an action against the township, recovered \$60 and costs. Another case of this kind is *Douglas vs. Fox*, 31, U. C., C. 9, 140. The head note of this case is as follows: "Held that the owner of land adjoining a highway has, under R. S. O., chapter 187 such a special property in the shade and ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrong-doer to recover damages for the cutting down or destroying of such trees, and he is not restricted to the penalty given by section 5. Held, also, that the act refers to trees of natural growth as well as those planted. In this case the damage consisted in the cutting down of some ten or twelve of the trees for which the plaintiff was awarded \$150. Held not excessive."

It is the duty of municipal councils to see that poles are not so placed in the highway as to be likely to cause injury to persons using the highway. If they do so and they occasion injury the municipality will be liable in damages, and if the poles have been so placed under the superintendence or direction of the municipality it will not have a remedy over against the company for whose benefit the poles have been placed on the highway. In a recent case, *Atkinson vs. the City of Chatham*, tried before Ferguson, J., we find the following report: "The learned judge finds that the street was out of repair by reason of a certain pole or post planted in it, and that the corporation had notice and knowledge of it, and that it was the cause of the upsetting of the sleigh. The municipality claimed relief over against the Bell Telephone Company who had placed the pole where it was, but the learned judge held they were not entitled to such indemnity because the pole was planted under the superintendence and with the sanction of the corporation." We intended some time ago to warn municipal councils of the necessity of seeing that farmers should not be allowed to erect milk stands on the highways. They have no right to do so, nor have municipal councils any power to grant any such right to farmers.

Recently a certain township was mulcted in \$3,000 damages and costs in two actions brought against it in which the cause of the accident was a milk stand on the highway, and we understand that some councils have already, in consequence of the result of these cases, directed the removal of milk-stands from the highways.

Enthusiastic Chicago Man—In a few weeks we'll be able to show you the moon just exactly as it looks, at the Field museum!

Envious New Yorker—Are you going to annex the moon, too?