

not be possible that the water on the west side of the street would be $2\frac{1}{2}$ feet lower than on the east side, and that the open ditch between the street and the coal-shed had not overflowed its banks, and this was proved by Manigault and not contradicted, but corroborated as to the latter statement by the evidence given on behalf of the railway company.

I am, consequently, of opinion, that the appeal of the defendant Scott should be allowed and the action dismissed as to him, and that the appeal of the railway company should be dismissed.

As to costs, those connected with the appeal of the railway company should follow the ordinary rule. As to the costs of the defence and appeal of Scott, the circumstances are entirely exceptional. The railway company gave a third party notice, and claimed indemnity over against him. In the circumstances, I think that it was quite reasonable for the plaintiff to bring a joint action against the two defendants rather than to have proceeded against one of them, and, if he failed, then to proceed against the other. This latter course might possibly result in his failing to recover against either, even if the fact were that one of them, or perhaps both, had caused him the injury. . . .

[Reference to *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181, per Vaughan Williams, L.J., at p. 186.]

In the present case, the railway company brought witnesses to prove that the flooding complained of was caused by the obstruction under the defendant Scott's coal-shed; and having, in my opinion, failed to establish this, it ought, in consequence, to pay the costs of its co-defendant both in this Court and in the Court below, to the exoneration of the respondent; the respondent's costs to include all costs incurred by reason of Scott having been joined as a defendant.

DECEMBER 21ST, 1914.

*LITTLE v. SMITH.

Water—Frozen Surface of Bay of Quinté—Public Highway—Right of Travel Paramount to Right of Ice-cutters—Hole Cut in Ice and Insufficiently Guarded—Criminal Code, sec. 287—Runaway Horse Falling into Hole—Liability of Ice-cutters—Findings of Jury — Negligence — Contributory Negligence—Nuisance.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings in favour

*To be reported in the Ontario Law Reports.