1893

*May 3, 4.

*June 24.

THE HALIFAX STREET RAILWAY COMPANY (DEFENDANT)..... APPELLANT;

AND

THOMAS JOYCE (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Street railway—Height of rails—Statutory obligation—Accident to horse.

The charter of a street railway co. required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove whereby he was injured. In an action by the owner against the company it appeared that the rail, at the place where the accident occurred, was above the level of the roadway.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter it was a street obstruction unauthorized by statute and, therefore, a nuisance and the company was liable for the injury to the horse caused thereby.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) refusing the defendants a new trial.

The action was brought to recover damages from the defendant company for injuries caused to plaintiff's horse while crossing the street railway and getting his foot caught in the groove of one of the rails. There were two trials, the first resulting in a verdict for defendant which was set aside and a new trial ordered. An appeal to this court from the order for a new trial was quashed (2). On the second trial a verdict was given for plaintiff which was affirmed by the full court, from whose decision the present appeal was taken.

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*PRESENT:—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 24 N. S. Rep. 113.

(2) 17 Can. S. C. R. 709.

1893

THE HALIFAX STREET RAILWAY COMPANY v. JOYCE.

The main contention of the defendant in moving the court below for a new trial was that the jury had failed to answer questions submitted to them as to the state of the roadway at the place of the accident, but the court held that the point of the questions submitted was disposed of by other answers and the mere fact that certain questions were not answered did not entitle defendant to another trial.

Ross Q.C. for the appellant.

Newcombe for the respondent.

The judgment of the court was delivered by :—

SEDGEWICK J.—The plaintiff (respondent) recovered a verdict against the city, in the Supreme Court of Nova Scotia, for $32.25. The plaintiff's horse, in crossing defendant's street railway, stept on a grooved rail; the caulk of his shoe caught in the groove and he was injured. The court *in banc* refused to disturb the verdict and from that judgment this appeal is taken. We are of opinion the appeal should be dismissed. The accident was occasioned by the defendant company placing on the street the grooved rail in question. They had a right, under the facts proved in evidence and their charter, to place a grooved rail on the street but they were bound to see that the roadway on both sides of the rail should be kept level with it. They had a right to place a grooved rail on the street but only in such a way as not to protrude above the level of the street. The rail in question protruded above that level. It was a street obstruction unauthorized by statute and therefore a nuisance. It was this obstruction that caused the damage and the company was properly found liable.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *F. G. Forbes.*

Solicitor for respondent: *E. L. Newcombe.*