TROUBLESOME TREES.

Seldom until recently have the courts of this country or even England been called upon to determine the liability of the owner of a tree which has fallen and done damage. Almost every day trees are blown down by severe winds and the records show that in the City of Toronto as many as 35 in a single day have fallen, although when one considers that this city boasts of 135,000 shade trees on its highways this is a comparatively small number. Luckily for the municipality damage to persons or property has rarely occurred. Such, however, was not the fortune of this city when, on the 17th day of October, 1925, a huge silver maple fifty years or so old was blown down and crashed into the hood of a motor car being lawfully driven upon a highway and the suit of *Huestis* v. *City of Toronto*[1] resulted.

An analysis of the cases under similar facts, decided largely by the courts to the south of us leads to the conclusion that there is liability where the defect or signs of decay are so apparent as to be a warning of the true condition of the tree, when if not removed a finding of negligence is justified.

It is possibly of interest to mention a few of the cases in which the presence of trees on or near a highway have brought people into law courts.

First of all the presence of a tree on a highway may have some relation to its state of repair and it is manifest from the decision in *Ferguson* v. *Township of Southwold et al.*,[2] that an object suspended above a highway may be regarded as a defect which renders the walk out of repair. Here the plaintiff whilst riding along upon a load of hay observed a branch of a tree which to the knowledge of the defendant township extended over the line of travel at about an elevation of eleven feet. He and another with him concluded they could pass under in safety but the plaintiff attempting to make the way less troublesome put up his feet to raise the limb which he failed to do, and was swept off the load. Notwithstanding that he had not done the prudent thing by lying close to the hay as his companion had done and escaped injury, judgment was given in his favour.

[1] [1926] 3 D.L.R. 143; (1925-26) 58 O.L.R. 648.
[2] (1896) 27 O.R. 66.

Where there is negligence there is corresponding liability. In *Jones* v. *New Haven,*[3] the Council of a city having passed a by-law authorized by its charter, imposing a fine on any person who should interfere with shade trees, the municipality was held liable when it negligently allowed a dead limb to remain upon a tree in a public square which fell upon and injured the plaintiff. The city undertook by its own by-law the care of the trees under its jurisdiction and negligently permitted one of them to be in an unsafe condition.

In another American case, *Chase* v. *Lowell,*[4] the superintendent of the streets of a city was notified that a shade tree was unsound and dangerous. No precautions were taken for its removal and the city was held liable to a traveller injured by its fall.

The question arises—How far is a municipality bound to inspect or investigate the condition of trees, the care of which it has reserved to itself.

In *Jones* v. *City of Greensboro,*[5] a dead limb on the edge of a sidewalk fell upon and injured the plaintiff and the defence was that the defendant had no notice of the defective condition, the onus of proof being upon the plaintiff. The judgment in the Court of Appeal was given by Faircloth, C.J., at page 313, in these words:—

"So whether constructive notice will be attributed to the City must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety of the defect open to reasonable observation but if it be concealed or obscured in any way so as to escape the attentive observation on the part of the defendant notice will not be attributed to it."

Here there was no evidence that the limb was decayed materially or how long it had existed or that anyone had seen it before the accident or that any city officer knew of it or could by reasonable diligence have seen it before the accident and the action failed.

The most important case which the writer has been able to find is one of *Gubasko* v. *New York.*[6]

Here in an action against a municipal corporation for damages caused by the fall of a tree in a public street, it appeared that, six years before the accident, the top of the tree had been cut off in constructing over it an elevated railroad, leaving a stump nine feet high, the interior of which, after the fall, was found to be decayed. The court charged the jury, "that if to all ordinary appearances the

[3] (1867) 34 Conn. 1.
[4] (1890) 151 Mass. 422.
[5] (1899) 124 N.C. 310.
[6] (1888) 14 Daly's Reports 559.

tree was sound at the time, the mere fact of allowing it to remain would not charge the defendants with negligence;" and also, "that if in fact the tree were dangerous, and yet appeared to be safe to ordinary observation and intelligence, the defendants would not be liable for negligence in respect of it;" and refused to charge "that if the jury found that the defendants could have ascertained that the inside of the tree had decayed, by examining the interior of the hole which was visible on one side of it, and no such examination of the hole was made, this would be evidence of negligence on the part of the defendant." Held, that there was no error; a municipal corporation, in the absence of express notice, is chargeable only with the exercise of reasonable care and vigilance.

The most recent case dealing with this sort of matter is *Noble* v. *Harrison,*[7]

In this case the plaintiff's motor coach was damaged when a branch of a growing beech tree which overhung the highway at a height of 30 feet suddenly fell in fine weather. At the trial the county court judge found that neither the defendant nor his servants knew the branch was dangerous but that the fracture was due to a latent defect not discoverable by any reasonably careful inspection and negatived a finding of negligence on this ground but held the defendant responsible on the ground of nuisance under the *Rylands and Fletcher* principle. On appeal it was held that this principle had no application and that the right of the public upon a highway was merely that of passing and repassing and so long as that right was not interfered with they could not complain and that the defendant could not be liable when he neither knew or ought to have known of the actual danger and that the defendant was not an insurer of nature. For these and other reasons the appeal was allowed.

Let us hope that this will be the last of these cases, and out of the ever-increasing liability of municipalities that they and the public will continue to be as fortunate in matters of this kind as they have been in the past.

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[7] [1926] 2 K.B. 332.