

The first question is whether Payne in making this repair was a servant of the corporation or whether he was acting under contract. . . . I think it clear under the cases that he was a contractor, and not a servant: *Saunders v. City of Toronto*, 26 A. R. 265; *Caston v. Consolidated Plate Glass Co.*, 26 A. R. 63, reversed 29 S. C. R. 624; *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890; *Donovan v. Laing, etc., Syndicate*, [1892] 1 Q. B. 629; *Waldock v. Winfield*, [1901] 2 K. B. 596; *Kirk v. City of Toronto*, 8 O. L. R. 730; . . . *Penny v. Wimbledon Urban District Council*, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72; *The Snark*, [1900] P. 105.

In the present case the obligation, in my opinion, still rested on the defendants to take all necessary precautions to see that the obstruction placed upon the sidewalk was properly guarded and protected so as to prevent an accident by persons having occasion to use the sidewalk. Here the contract, as I find, to do the repairs existed, but there was no indemnity clause, as in the *Kirk* case. . . .

[Reference to *Balzer v. Township of Gosfield South*, 17 O. R. 700; *Stilliway v. City of Toronto*, 20 O. R. 98; *McKelvin v. City of London*, 22 O. R. 70; *Homewood v. City of Hamilton*, 1 O. L. R. 266; *Minns v. Village of Omemee*, 2 O. L. R. 579, 8 O. L. R. 508; *Holland v. Township of York*, 7 O. L. R. 533.]

I think this is a case within the statute for recovery over. Judgment will, therefore, be that the defendants recover against Payne the amount which they have to pay to the plaintiff for damages and costs, together with their costs of the defence and the costs of the third party proceedings as between them and the third party.

DIVISIONAL COURT.

FEBRUARY 15TH, 1910.

***DENHAM v. PATRICK.**

Master and Servant — Dismissal of Servant — Justification — Confidential Relationship — Domestic Duties — Immoral Conduct of Servant.

Appeal by the defendant from the judgment of the County Court of Middlesex in favour of the plaintiff for the recovery of \$120 damages, in addition to \$200 paid into Court by the defendant, in an action for breach of a contract of yearly hiring by the dismissal of the plaintiff, the servant, in the middle of a year. The defendant justified the dismissal.

* This case will be reported in the Ontario Law Reports.