

had put up any lights at the point in question, and the street itself was dark. On previous nights the gas company had hung lamps along the excavation to warn persons of its existence.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

William Steers, Lindsay, for plaintiff.

H. L. Drayton, for defendants.

STREET, J.:—The action was properly brought against both the town corporation, whose duty it was to keep the highway in repair, and the gas company, who had dug the trench: *Stilliway v. City of Toronto*, 20 O. R. 98. An absolute duty was cast upon the town corporation by sec. 606 of the Municipal Act to keep the highway in repair, and they could not divest themselves of this duty by requiring the gas company to assume it. The gas company had no right to dig up the highway without the authority of the by-law passed by the council, and in giving that authority the town corporation did not free itself from its statutory liability. Section 611 does not apply, because the gas company was acting with the consent and license of the corporation. The evidence shews that the highway was out of repair to the knowledge of the town corporation, and that the accident was caused by such non-repair and by the negligence of both defendants to see that the trench was lighted.

Appeal allowed, and judgment to be entered for plaintiff against both defendants for \$75 with costs. The town corporation to have judgment over against the gas company for the amount so recovered and the costs of the plaintiff and of the town's defence. The plaintiff to be paid the costs of this appeal by the town corporation, but the town corporation should not recover these costs from the gas company. No costs of appeal to gas company.

FALCONBRIDGE, C.J., concurred, and referred to and distinguished *Dallas v. Town of St. Louis*, 32 S. C. R. 120.

BRITTON, J., concurred.

William Steers, Midland, solicitor for plaintiff.

G. H. Hopkins, Lindsay, solicitor for defendant corporation.

Hugh O'Leary, Lindsay, solicitor for defendant company.