FEBRUARY 23RD, 1906.

DIVISIONAL COURT.

McKAY v. VILLAGE OF PORT DOVER.

Way—Non-repair—Injury to Pedestrian — Defect in Sidewalk—Liability of Municipality—Negligence—Contributory Negligence—Damages.

Appeal by plaintiff from judgment of BRITTON, J., 6 O. W. R. 878, dismissing action without costs.

The appeal was heard by BOYD, C., STREET, J., MABEE, J.

W. S. McBrayne, Hamilton, for plaintiff.

T. R. Slaght, K.C., for defendants.

BOYD, C.:— . . . Upon the evidence the learned Judge has found that the place where the accident happened on the sidewalk was not in such a condition as to indicate negligence on the part of the municipality. He finds that the walk was in a state of repair sufficient for ordinary travel, and in effect that the slight defect was not one from which danger was reasonably to be expected. . . . It had existed for perhaps a month before the accident, and had been seen by plaintiff herself, but no complaints were made of its condition, and some persons passing over it did not notice it—it was comparatively so slight. The planks in the walk were sound as a whole, and the walk in fair passable condition for pedestrian travel.

The village of Port Dover has a summer population of some 1,200 people, and such care is not to be expected there as in a larger and more populated centre. The walks were gone over bi-yearly, in the spring and autumn. And in this particular year this place had been specially examined by a member of the council to see whether it should be replaced by another kind of walk, and he saw nothing calling for repair; this was in the month of May. If the trial Judge had found the other way, it would have been a matter of difficulty to reverse him, and it is equally so on his present finding, because the whole question is of fact and as to the degree of repair and likelihood of danger or accident resulting from the lack of repair.

A case going very much further than this in exempting from liability is Betz v. Yonkers, 74 Hun 73, as finally