CARTWRIGHT, MASTER. APRIL 18TH, 1905.

CHAMBERS.

ARMOUR v. TOWN OF PETERBOROUGH.

Jury Notice—Striking out—Action against Municipal Corporation—Non-repair of Street.

Action to recover damages for injury alleged to have been caused by improper construction of a sidewalk.

Motion by defendants to strike out jury notice under sec. 104, O. J. A.

Grayson Smith, for defendants.

C. W. Kerr, for plaintiff.

THE MASTER:—The 6th and 7th paragraphs of the statement of claim allege that "the accident to the plaintiff was caused by the negligent construction of the said pavement, which is built on an incline, and is made with an exceedingly smooth granite finish, at all times dangerous to pedestrians, and the said pavement when moist is rendered even more dangerous than when dry through the faulty, improper, and negligent construction thereof. This pavement has been well-known and notorious at the place in question by reason of the negligent, improper, and faulty construction thereof, and the exceeding smoothness of the surface thereof, and by reason of the fact that the said pavement is built upon an incline, which would call for the ordinary rough finish which it is customary and prudent and usual to build under said conditions."

The question is, does not this allege nonfeasance so that the action is for an injury "sustained through non-repair?"

This was considered in the cases of Clemens v. Town of Berlin, 7 O. L. R. 33, 2 O. W. R. 1115, 3 O. W. R. 73, and Kirk v. City of Toronto, 7 O. L. R. 36, 2 O. W. R. 1138, where all the cases are cited.

The present action is based on the alleged "negligent, improper, and defective construction" of the sidewalk itself.

As pointed out by Street, J., in Barber v. Toronto R. W. Co., 17 P. R. 293, the cases upon non-repair and obstruction have run into one another a good deal."

It may not at first sight be easy to reconcile such a case as Dickson v. Township of Haldimand, 3 O. W. R. 969, with Huffman v. Township of Bayham, 26 A. R. 514, as the effect