G. H. Watson, K.C., and W. E. Buckingham, for the plaintiff.

Leighton McCarthy, K.C., and W. E. Foster, for the defendant railway company.

I. F. Hellmuth, K.C., and P. Kerwin, for the defendant city corporation.

CLUTE, J., said that the subway was made under the authority of an order of the Dominion Board of Railway Commissioners; and the footway was constructed by the railway company at the expense of the city corporation. The subway was in a dangerous condition at the time of the accident and for a long time previously, and both the defendants were aware of its dangerous condition.

The accident occurred on the 10th November, 1914; and the action was begun on the 17th December, 1914. The city corporation was added as a party on the 4th March, 1915, more than three months after the accident. As against the city corporation, the action was barred by sec. 460, sub-sec. 2, of the Municipal Act, R.S.O. 1914 ch. 192—the action being treated as brought against the city corporation at the date when it was added as a party, and not at the date of the issue of the writ of summons.

The railway company was liable under the Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 241.

The plaintiff's damages were assessed at $3,500.

Objection was taken by counsel for the railway company that more than three experts were called as witnesses by the plaintiff, without leave. As to this, the learned Judge said that only three of the professional witnesses called were regarded by him as experts.

There should be judgment against the railway company for $3,500 with costs; and, inasmuch as that company, in corresponding with the plaintiff's solicitors, took the ground that the city corporation was liable, it was reasonable and proper that the plaintiff should add the city corporation as a defendant; and the plaintiff was entitled to include his costs incident to the city corporation being a party in the costs recoverable against the railway company: Till v. Town of Oakville (1915), 33 O.L.R. 120; Besterman v. British Motor Cab Co., [1914] 3 K.B. 181. As the city corporation was negligent in not seeing that repairs were properly done on the subway, it was not entitled to costs—the action as against it should be dismissed without costs.