

opening in the grating, but in a day or two the board disappeared, and the accident occurred by reason of the plaintiff's foot slipping through the opening formerly occupied by the slat.

Apart from the statute, if the owner of premises leases them when they are in a condition free from a nuisance, and the tenant enters into possession, and than a nuisance is created by the tenant or another, the owner is not liable until he is able to regain possession and thereby become enabled to abate the nuisance: *Chauntler v. Robinson* (1849), 4 Ex. 163; *Gandy v. Jubber* (1864), 5 B. & S. 78.

The grating was not constructed by the owner, and was not in disrepair when either lease was made, nor did it fall into disrepair until a day or two before the accident, and it did not appear that the owner became aware of its having fallen into disrepair until after the accident. Thus there was no negligence on his part, and at common law he was not liable. To establish liability under the statute, it must be shewn that the owner "placed, made, left, or maintained" the nuisance, or was guilty of some "negligence or wrongful act or omission" which caused the injury. It did not appear who repaired the grating with the wooden slat, and there was no evidence shewing that the grating was not sufficiently repaired. The disappearance of the slat, not its being placed in the grating, was the cause of the accident. The owner was not liable under the statute.

Upon the question of the tenants' position and liability the learned Chief Justice distinguished *Pretty v. Bickmore* (1873), L.R. 8 C.P. 401, and *Gwinnell v. Eamer* (1875), L.R. 10 C.P. 658. For a correct statement of the law he referred to *Horridge v. Makinson* (1915), 84 L.J.N.S.Q.B. 1294.

To succeed at common law, the corporation must shew that the tenants were guilty of actionable negligence which caused the injury. There was nothing which they were bound to do or had a right to do which would have prevented the slat disappearing. They did not remove the slat, and the removal was the cause of the accident.

The tenants' covenant to repair could not enure to the benefit of the corporation. The corporation had no by-law authorising a frontager to repair a highway. The tenants could not be held to have either laid or maintained the defective grating.

The appeal should be dismissed with costs.

RIDDELL, J., agreed in the result, for reasons stated in writing.

SUTHERLAND, J., agreed with MULOCK, C.J. Ex.

MASTEN, J., agreed in the result, for reasons stated in writing.

*Appeal dismissed.*