

An appeal by the Corporation of the City of St. Catharines, the defendants, from the judgment of the Judge of the County Court of the County of Lincoln dismissing the appellants' claim for indemnity over against one Ingersoll, trustee of the Neelon estate, and Swayze Brothers, brought in as third parties.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

A. Courtney Kingstone, for the appellants.

J. H. Campbell, for the respondent Ingersoll.

G. F. Peterson, for the respondents Swayze Brothers.

MULOCK, C.J. Ex., read a judgment in which he said that the action was brought to recover damages from the defendant corporation for injury to the plaintiff caused by her foot slipping into an open grating forming part of the sidewalk of St. Paul street, a public highway in the city, the grating being in front of the premises occupied by Swayze Brothers, and owned by the Neelon estate.

The trial Judge found the corporation liable for the condition of nonrepair of the street, and awarded the plaintiff \$200 damages and costs, but dismissed the claim against the third parties.

The corporation rested their claim for indemnity chiefly on sec. 464, sub-secs. 1 and 2, of the Municipal Act, R.S.O. 1914 ch. 192.

In front of the building there was (before June, 1913) a sand-stone sidewalk, and in this sidewalk and almost in contact with the building was a grating placed there for the purpose of affording light and ventilation to the basement. The grating consisted of parallel iron bars, about $3\frac{1}{2}$ inches apart. One of these bars became broken and disappeared; it was replaced by a wooden slat. In June, 1913, the corporation replaced the sand-stone sidewalk with a cement sidewalk, not disturbing but firmly cementing the grating in its then position. Such was the condition of the grating when Swayze Brothers became tenants and occupants of the premises under a lease of the 23rd June, 1913, made by Louisa L. Neelon, the owner, to them. Before the expiry of this lease, Louisa L. Neelon made to them another lease for 8 years from the 1st April, 1914. Having entered into possession under the first lease, Swayze Brothers continued in possession. Both leases were made in pursuance of the Short Forms of Leases Act, and contained the statutory covenants to repair.

The accident to the plaintiff was on the 19th May, 1919. The wooden slat had sufficiently served its purpose from June, 1913, until about a week before the accident, when it disappeared. Thereupon Swayze Brothers caused a board to be placed over the