CHARLES M. JAMIESON (PLAINTIFF) ..APPELLANT;

AND

THE CITY OF EDMONTON (DEFENDANT) ..... } RESPONDENT.

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*Oct. 18, 19.
*Dec. 11.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Municipal corporation—Maintenance of highways—Improper use of sidewalk—Damage by trespasser—Notice of disrepair—Nuisance—Negligence—Injury to pedestrian—Liability for damages.

The municipal corporation was obliged, and given power, to maintain its highways in a reasonable state of repair, having regard to the character of the streets and the locality in which they were situated, and regulations had been enacted to prohibit vehicular traffic over the sidewalks except at crossings specially constructed in a manner to sustain such traffic. At a place where no such crossing had been provided vehicles had been, for over a year, habitually driven across a wooden sidewalk and no action to prevent such trespasses had been taken by the municipal authorities. During the afternoon of the day before the accident, a plank was broken by a heavy vehicle crossing the sidewalk and it continued in this condition until the evening of the following day when a pedestrian tripped in the hole and sustained injuries for which he brought action to recover damages.

Held, reversing the judgment appealed from (9 West. W.R. 1287; 33 West. L.R. 851), Davies J. dissenting, that, in these circumstances, the municipal corporation was charged with notice of the condition of disrepair of its public sidewalk and, having failed to remedy the nuisance within a reasonable time, it was guilty of negligence involving liability in damages.

Per Duff J.—Section 507 of the charter of the City of Edmonton does not impose upon the municipality an absolute responsibility for harm suffered by individuals in consequence of a street being in a state of disrepair constituting a dangerous nuisance; but the municipality is responsible for the consequences of such a state of disrepair if, through the observance of proper precautions, it could have prevented the nuisance coming into existence: *Hammond* v.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, and Anglin JJ.

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Vestry of St. Pancras (L.R. 9 C.P. 316), and *Bateman* v. *Poplar District Board of Works* (37 Ch.D. 272), applied. Proof of the existence of such a nuisance and resulting damage is, in itself, sufficient to create a *primâ facie* cause of action against the municipality under section 507 of the charter.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), which reversed the judgment of McCarthy J. at the trial, and dismissed the plaintiff's action with costs.

The material circumstances of the case are stated in the head-note and the questions in issue on the present appeal will appear from the judgments now reported.

Chrysler K.C. for the appellant.
Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—This is an action brought by the appellant to recover damages for injuries caused by the defective condition of a sidewalk built by the corporation respondent for the use of the public.

The charter of the City of Edmonton (sec. 507) in express terms imposes upon the corporation the legal duty to keep the sidewalk in a reasonable state of repair and at the same time gives it authority to take all necessary measures to prevent the sidewalk becoming a danger to the public making use of it in the exercise of their right (sec. 237).

It is not disputed that the sidewalk was out of repair, that the appellant was making a proper use of it under the belief that it was in good condition and that as a result he was injured as alleged in his statement of claim.

There is in consequence no doubt that the appel-

(1) 9 West. W.R. 1287; 33 West. L.R. 851.

lant had a civil action against the respondent to recover compensation in damages for his injuries unless we are prepared to overrule the decision of this court in *City of Vancouver* v. *McPhalen*(1).

An action is given for breach of a statutory duty irrespective of whether the act done would be a wrong apart from the statute.

In *Dawson* v. *Bingley Urban District Council*(2), Farwell and Kennedy L.JJ. put the matter in this way: That where a person is one of a class for whose benefit a statutory duty is imposed, he is on breach of that duty entitled to maintain an action for damages occasioned to him by the breach unless the statute has indicated an intention to exclude that remedy.

In the case of *Maguire* v. *Liverpool Corporation*(3), Vaughan-Williams L.J. asserts the same general rule as do Farwell and Kennedy L.JJ. in the *Bingley Case*(2), and treats the immunity of the authority in respect to the non-repair of highways as an exception due to the particular history of the highways. But in *City of Vancouver* v. *McPhalen*(1), the distinction is very clearly made between those English cases in which the duty imposed is, as Sir Louis Davies says, one transferred from a body or authority on or with whom it previously rested and which body or authority was not itself liable in civil actions for nonfeasance (page 196) and cases in which the duty is created and imposed in the charter calling the corporation into existence. The general rule is that every public duty presumably gives rise to a private action in favour of a person injured by its breach and I know of nothing in the history of the highways in Edmonton

(1) 45 Can. S.C.R. 194. (2) [1911] 2 K.B. 149.
(3) [1905], 1 K.B. 767.

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which would justify creating an exception to that general rule in the case of breach by nonfeasance in respect to their repair.

But it is said that there is no proof of notice to the City of Edmonton of the existence of the hole in the sidewalk which caused the appellant's injury and that in consequence no liability attached. In *City of Vancouver* v. *Cummings*(1), Mr. Justice Idington speaking for the majority of this court said (p. 466):—

> I am, despite dicta to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.

My brother Anglin describes the circumstances under which the sidewalk became dangerous to the public using it and it is unnecessary for me to add anything to what he says beyond this. As a necessary consequence of the improper use to which it was put, to the knowledge of the corporation, the sidewalk became out of repair and a danger to those obliged to pass over it. The hole actually made in the sidewalk as a result of that improper use and which was the direct cause of the accident was allowed to remain unrepaired for over twenty-four hours, and the city police whose duty it was to report such conditions passed the place frequently. In these circumstances I am bound to hold, in view of the opinion expressed in *City of Vancouver* v. *Cummings*(1), that there arises a presumption without proof of notice that the duty relative to repair has been neglected. On the authority of *Mersey Docks Trustees* v. *Gibbs*(2), I would add,

(1) 46 Can. S.C.R. 457.

(2) L.R. 1 H.L. 93, at p. 121.

it must be taken as an established fact that the respondent had, by its servants, the means of knowing the dangerous state of the sidewalk, but was negligently ignorant of it. If the knowledge of the defect would make it responsible for the consequence of not having it repaired, it must be equally responsible if it was only through its culpable negligence that its existence was not known to them.

The appeal should be allowed with costs.

DAVIES J. (dissenting).—After much consideration of the facts in this case I have reached the conclusion that the judgment of the Supreme Court of Alberta was right and that this appeal should be dismissed.

I am satisfied with the statement of the facts and of the law as applicable to them made by the learned judges who formed the majority in the court below.

All the judges in that court held that as the city had not any actual notice of the break in the sidewalk which led to plaintiff's injuries sufficient time had not elapsed between such breakage and the accident to impute notice to them.

The evidence shews beyond doubt that the city had kept the sidewalk, which was for pedestrians only, in suitable repair for the purposes intended.

I do not think there was any obligation upon the city to make the sidewalk stronger in order to accommodate trespassers who desired to cross it with loaded trucks or drays. Nor can I find any obligation existing on the part of the city to make a crossing at the place in question.

The liability of the city must therefore depend on their alleged negligence in enforcing the by-law, and it seems to me that the limit of the city's obligation

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in that regard was to prevent trespasses by prosecuting offenders.

Before liability can attach to the city for non-enforcement of a by-law an existing nuisance must be shewn to exist of which it had notice or be held to have had notice in law. Nothing of the kind existed here.

Mr. Justice Beck sets out in his judgment the provisions of the by-law relied on as casting a duty upon the city and shews that they do not support the statement of the trial judge that the city could require an owner to put and keep a sidewalk abutting on his property in repair but merely prohibits him or any one else from crossing the sidewalk without taking steps to avoid injuring it. The learned judge adds that the most that might be expected of the city in the present case was that they should have prosecuted under the provisions of the by-law and he concludes (citing as authorities 14 Cyc. title "Municipal Corporations," p. 1356, under the sub-title "Failure to prevent improper use of streets" and Dillon on Municipal Corporations, vol. 4, p. 1627) that no action can lie against the city for failure to enforce such by-law except in cases amounting to a public nuisance.

In this opinion I agree and would dismiss the appeal.

IDINGTON J.—The appellant recovered judgment against the respondent, a municipal corporation, for damages suffered by reason of his leg getting broken in consequence of the negligence of the respondent in failing to keep in a reasonable state of repair its sidewalk whereon he was walking.

The court of appeal for Alberta reversed that judgment and hence this appeal.

The duty of the respondent in the premises is de-

fined by section 507 of its charter, which is as follows:—

507. The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situated or through which it passes.

The respondent had constructed the sidewalk, some six or seven years before the accident in question, of spruce planks, laid, I infer from the evidence, transversely to the line of the street, and supported by light scantling fit only to support pedestrian travel.

At the place in question there was a lane running at right angles to the sidewalk to serve the houses abutting thereon.

It turned out that teamsters who might have entered at the other end of this lane, with loads of any kind, got into the habit of using for their entrance or exit the end of the lane fronting on the sidewalk in question.

If the respondent had either protected the end of the lane next the sidewalk from any entrance, or built or caused to be built a proper crossing, by usual structure for such use, the sidewalk would have been in no danger of being broken as it was, and thus producing such accidents as this.

Instead of doing so the respondent tolerated the use that was made continuously, for at least a year or more, next preceding the accident, of that means of entrance into the lane in question and thereby endangered the maintenance of the sidewalk, and consequently the safety of pedestrians.

Indeed earth excavation, resulting from the execution of other work on the street at that point, was left lying as thrown there, while doing the work, long

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after such work was completed, and till some neighbour levelled it off and piled some of it up against the sidewalk so as to give it the appearance of a proper entrance to the lane and thereby invite just such traffic across the sidewalk as was sure to destroy it, and did destroy it twenty-eight hours before the accident in question.

Planks of the sidewalk had been worn out or destroyed by such use and the want of repair thus created was attended to more than once by the respondent's servants.

Even when repaired there remained a breaking or chipping off of the ends of the planks in the sidewalk, so apparent to everyone, that no man, qualified for his job, when looking after the sidewalks could fail to recognize the notorious fact that this crossing use was being made of it, and was liable any day to break planks never intended to bear such traffic, and hence unfitted to meet the needs of pedestrian travel which demands safety.

That open and notorious use of the sidewalk and condition of things resultant therefrom, having existed by the negligence of the respondent for a year or more, it has the temerity to suggest that this case falls within that class of cases where courts have had to consider whether or not when an unavoidable, unexpected and improbable accident has put the highway out of repair, or wrong done by others had obstructed its use in a way of which the municipal authorities had no knowledge or notice, should be held to constitute negligence.

No court could properly find on the facts in question, in most of these cases, where the municipality was excused that there was negligence. Some of them may be very questionable.

The usual statute in question in each of such cases made no provision for actual notice, indeed notice of any kind, but has been so interpreted as to render the question merely one of negligence in the discharge of a statutory duty, and in short the application of common sense.

In defining the law in such cases the term "want of notice" has been used sometimes when it was only intended to signify that the defendant might or might not, or should or should not have known, if all reasonable means had been taken to observe and discharge the duty which the statute had imposed.

The short method of expressing the duty has led some people to imagine and loosely to assert that notice is actually necessary.

It has been time and again explained that the same degree of vigilance and the same condition of repair or maintenance could not be reasonably insisted upon in every case.

The highway that only serves a remote and sparsely settled district would not be tolerated in the centre of a large city, or serve its needs. The inspection demanded in the latter could not reasonably be required in the former. It comes to this that the section of respondent's charter quoted above expressly provides by the word "reasonably" what the law had already been determined by the courts to mean in cases where the statute merely imposed the duty of keeping in repair.

If a municipality persists in using a mode of construction and material fit only for pedestrian traffic, when its officers know that it is used also for loaded teams to cross, it has not discharged its obligations but laid a trap for its citizens getting their legs broken.

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All that has been urged about liability for non-observance of its own by-laws is quite beside the question involved.

It matters not whether there was a by-law enacted or not, or enacted only to be broken. No man could seriously consider the sidewalk as constructed at the point in question as fit for the use that it was being put to or a safe place over which to induce daily travel by pedestrians in a thickly inhabited part of the city. As well invite men to rely for crossing, by night and by day, a brook, upon a bridge which everyone concerned to know should, if thinking for an instant, realize will be swept away by the first storm that comes that way.

It is idle to point to the by-law forbidding such use when the breach thereof from week to week is tolerated. As well pass a by-law against storms in the illustration I put.

It is the maintenance of an insufficient sidewalk in a place notoriously needing something more substantial, or more rigorous means of warding off its destruction, than merely passing a by-law which nobody but its authors ever reads.

The powers the respondent had for enforcing the construction of a proper crossing at the point in question at the expense of those concerned in its use render the negligence of the respondent the less excusable.

The appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge be restored.

DUFF J.—The appellant one evening in November, 1914, after dark, stepped into a hole in a wooden sidewalk on Fifth Avenue, a street in Edmonton, with the result that his leg was broken. He sued the municipality for damages, basing his claim upon section

507 of the Edmonton City Charter, which is in the following words:—

> The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situate or through which it passes.

At the trial before Mr. Justice McCarthy he succeeded; but the judgment given in his favour at the trial was reversed on appeal with the dissent of Mr. Justice Stuart.

In the immediate neighbourhood of the place where the accident happened there were some residences which had a lane or back area in the rear and for many months before the accident—at least a year—it was the practice for delivery vehicles entering this lane to pass over the place where the plaintiff met his injury; and the day before the date of the accident the sidewalk had collapsed under the weight of one of these vehicles.

Some facts are admitted or so clear as not to be open to dispute. The sidewalk was not of sufficient strength to support traffic of the kind to which it was thus subjected. For the convenience of vehicles passing over this sidewalk an approach had been made by banking with earth the street side of the sidewalk opposite the lane and the sidewalk itself there shewed unmistakable evidence of the passage of wheels—unmistakable, that is to say, to competent persons performing the duty of observing the condition of the sidewalk.

It was not disputed, I think, that in the condition in which the sidewalk was when the accident occurred the street was not in a "reasonable state of repair" having regard to "the character of the streets and the locality in which it was situated" within the meaning of sec-

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tion 507; and I have no difficulty in holding that if due diligence had been used by the municipality and those entrusted by the municipality with the care of the streets, that is to say, if diligence had been exercised of such a degree as to bring it into conformity with the standard supplied by the ordinary notions of sensible people, the sidewalk would not have been allowed to fall into that condition. Proper diligence would have led to the knowledge, by the persons responsible, of the fact that this sidewalk was being subjected to the burden of an extraordinary traffic—a usage under which it was certain eventually to collapse; actuated by a reasonable respect for their duty, such persons on discovering the state of affairs, would have addressed themselves to finding means for the prevention of that which might be expected to happen in the absence of precautions, and which did in fact happen. They could have attained this object by stopping the traffic; or they could have attained it by strengthening the sidewalk.

The question to be decided on this appeal is whether in the circumstances the municipality is responsible in damages for the consequences of the neglect to take proper measures to prevent this sidewalk, under the effects of this traffic, falling into such condition as to amount to a nuisance. Section 507 is capable of being read as creating an absolute duty to prevent the highways of the city falling into a state of disrepair. There is, however, much to be said and there is a long line of authorities beginning with *Hammond* v. *Vestry of St. Pancras*(1), in support of the view that where duties of maintenance are, by enactments similar to section 507, cast upon a municipal body, the responsibility is not an absolute responsibility making the municipality in

(1) L.R. 9 C.P. 316.

all circumstances answerable in damages for the existence of a state of things which the statute aims to prevent, *e.g.*, a nuisance arising from the disrepair of a sewer; but that the public authority charged with such responsibility is not answerable if the state of things out of which the complaint arises is one which could not have been prevented or made innocuous by the observance on its part, and on the part of such agencies as it employed, or ought to have employed, of proper care and diligence. A highway may become a dangerous nuisance through a sudden operation of nature not reasonably forseeable, or from the mischievous act of some person for whom the authority charged with the care of the highway is not responsible and which it could not reasonably be held to be negligent or incompetent in not anticipating. In such cases and generally speaking in cases in which the state of things complained of can be shewn to have been something which the public authority could not reasonably have been expected to know or to provide against, it has been held that there is a good answer to any claim for reparation: *Bateman* v. *Poplar District Board of Works*(1); *Brown* v. *Sargent*(2); *Blyth* v. *Company of Proprietors of Birmingham Waterworks*(3); *Whitehouse* v. *Birmingham Canal Co.*(4). Under an enactment in the "Ontario Municipal Act," to much the same effect as section 507, municipalities have uniformly been held to be exonerated in the absence of negligence. It may properly be assumed that section 507 was not enacted without reference to this course of decision and therefore, in construing that section, one is not without weighty sanction when giving effect to the considerations upon which these decisions rest.

(1) 37 Ch.D. 272.
(2) 1 F. & F. 112.
(3) 11 Ex. 781.
(4) 27 L.J. (Ex.) 25.

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Strictly no question of burden of proof is here material. By the pleadings the onus of establishing an actionable breach of duty, is of course, on the plaintiff in the first instance. I express no opinion upon the question whether the effect of the statute itself is that where a nuisance is shewn to have existed in fact the onus is thereby cast upon the municipality to establish that the nuisance was not due to any cause for which it is responsible; in other words, whether or not there is a presumption of law arising from the existence of a nuisance—in the condition of a highway—that the municipality is responsible for it; a presumption that the municipality can only meet by establishing the negative of the issue. It is also strictly unnecessary to pass upon the question whether or not the plaintiff by proving the existence of the nuisance thereby establishes a *primâ facie* case; although, as it is quite evident that the legislature in passing the enactment has assumed that in the ordinary course highways can be kept in a reasonable state of repair by the exercise of such diligence as may properly be expected from the municipality, there seems to be sufficient ground for holding that proof of the existence of a nuisance does in itself constitute a *primâ facie* case throwing upon the municipality the burden at least of going forward with evidence. (See *Blamires* v. *Lancashire & Yorkshire Railway Co.*(1).)

The evidence before us in this case is quite sufficient, as I have already indicated, to shew failure to discharge the duty arising under section 507 for which the municipality is responsible.

It is argued that the municipality cannot be held responsible for the non-enforcement of its by-laws.

(1) L.R. 8 Ex. 283.

In truth the municipality in the view expressed above is held responsible for allowing a nuisance to come into existence which could and ought to have been prevented. It was incumbent upon the municipality to use its powers of control on the highway to that end; and if the enforcement of the by-law had been its only means of effectively executing its duty, the municipality was bound to resort to that means. There is a passage in Lord Blackburn's judgment in *Geddis* v. *Proprietors of Bann Reservoir*(1), at page 456, that may be usefully quoted. It gives the principle which affords another answer to this argument:—

> And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

ANGLIN J.—The plaintiff was injured through stepping into a hole in a sidewalk constructed by the defendant corporation on a city street where the traffic was considerable. The accident occurred at half-past seven o'clock on a November evening. The sidewalk had been broken down by a heavy load of coal driven over it on the afternoon of the previous day about four o'clock. The evidence shewed that the sidewalk had been constructed as an ordinary plank walk intended for use by pedestrians only, and that no provision had been made for the crossing of it by vehicular traffic at the point in question. A by-law of the city prohibited the crossing of sidewalks by horses and vehicles where protective timbering had not been provided for that purpose. Notwithstanding this by-law the place in question had been used throughout the whole of the year preceding the accident without

(1) 3 App. Cas. 430.

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any such protection as a crossing to a yard or private lane. The user had been of such a character and to such an extent that the learned judge found, properly in my opinion, that the city had notice of it. No charge of contributory negligence is pressed against the plaintiff. At the trial before McCarthy J. the city was held liable on the ground that there had been a breach on its part of a duty

> to have put and kept *the crossing* in a state of repair or to have required that the private owners of the property adjoining who used the crossing should put the same in a proper state of repair.

The Appellate Division of the Supreme Court reversed this judgment, holding that there was no obligation on the part of the city to provide a crossing, that its only duty in respect of the sidewalk was to repair it within a reasonable time after notice that it was out of repair and that notice actual or imputed of the existence of disrepair was not established. Mr. Justice Stuart, dissenting, held that because the municipal corporation knew that the sidewalk was being crossed continually by vehicles the place in question had the combined character of a sidewalk and crossing of a highway and should have been kept in a state of repair suitable to that character. He found that such a state of repair was not maintained. He also held that, having regard to such user and the character of the construction of the sidewalk, the city was called upon, if it did not desire to reconstruct so as to make the place suitable for a crossing for vehicles, to exercise greater vigilance in discovering breakages.

By its charter (sec. 507) the City of Edmonton is required to keep sidewalks constructed by it in a reasonable state of repair having regard to the character of the highway and the locality. This duty is imposed to ensure the safety of persons lawfully using the sidewalk

and a breach of it entails liability in damages to such persons when injured in consequence: *City of Vancouver* v. *McPhalen*(1). It must have been obvious to anybody giving the matter a moment's consideration that the user of a crossing over a sidewalk constructed as was that in question might result in its breaking down at any time. The user was certain sooner or later to put the sidewalk into a state of disrepair. I think it is not imposing upon the municipality an obligation greater than the legislature intended to hold that the duty to keep in a reasonable state of repair involves the duty to prevent, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair, and, if the continued existence of such conditions is not prevented, to take precautions in the nature of extra inspection commensurate with the likelihood of a dangerous state of disrepair arising. Probably the safest and least expensive method of discharging its duty to keep in repair would have been to construct a proper crossing at the place in question. But, without holding that the municipality was under an obligation to construct such a crossing, or that failure to institute prosecutions for breaches of its by-law forbidding the crossing of unprotected sidewalks rendered it liable for damages, having knowingly permitted the continuance of forbidden and dangerous vehicular traffic involving risk of a break in the sidewalk at any moment, I think it cannot escape liability for injury sustained in consequence of a break occasioned by such traffic, after it had been allowed to remain unrepaired for more than a day. Whether such liability would arise in the case of an accident happening immediately, or very shortly, after the occurrence of a

(1) 45 Can. S.C.R. 194.

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break it is not necessary now to determine. It may be said that this implies an obligation of at least daily inspection of a place such as that in question which would be too onerous to impose upon the municipality. But the necessity for such an inspection could have been so easily avoided, either by putting in a comparatively cheap crossing, which the city might have done on its own initiative, or by taking steps to prevent vehicular traffic crossing the sidewalk, which need have entailed no great trouble or expense, that the municipality can scarcely be heard to complain of the burden so imposed. Because, in my opinion, under the special circumstances in evidence it failed to take adequate measures for the fulfilment of its statutory duty to keep the sidewalk in a reasonable state of repair as a sidewalk, I would hold the defendant corporation liable.

The appeal should be allowed with costs in this court and in the court appealed from and the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *A. G. MacKay & Co.*
Solicitor for the respondent: *J. C. Bown.*