

and backed it into the shed. The shed was not deep enough to permit the horse as well as the waggon to be backed, so as to be entirely within it, and the neck and shoulders of the horse were outside the shed. The plaintiff then unhitched the horse; and, as he undid the last trace, the horse stepped out of the shafts too far, and fell into the excavation. There was a spring on the whiffle-tree which held up the shafts and kept the weight of them off the horse's back; and it was apparently the unfastening of this spring which caused the accident, as otherwise the horse would have turned around and gone into the shed, and through it into the stable. It was this that he was apparently intending to do when he stepped out of the shafts and turned; but he appears to have turned too far and in that way to have fallen into the excavation. According to the testimony of the plaintiff, there was no barricade on the side of the excavation which adjoined or encroached on the lane, and no light there.

It was not disputed that the excavation, if not protected by a sufficient barricade, constituted a source of danger to persons using the lane; and the testimony of the plaintiff was practically uncontradicted, except possibly as to a part of the barricade which was put up by the defendant Strath, pursuant to his contract, having been standing when the accident occurred.

The jury, in answer to questions submitted to them, found that there was "no sufficient barricade erected at the place where the horse fell in on the night in question," and that "the absence of the barricade was a negligent omission on the part of the defendants;" and there was ample evidence to support their findings.

It was argued at the trial and before us that the use the plaintiff was making of the lane when the accident happened was an unlawful one, and that he was, therefore, not entitled to recover; but it was found by the jury that he was "making the customary and proper use of the lane with his horse on the night of the accident;" and that finding was, we think, warranted. The cases cited by counsel for the defendant Brandham have no application to the circumstances of this case, and no case was cited by him which supports his contention. If the contention were well-founded, it would be unlawful for a merchant whose premises abut on a highway to use it for the purpose of unloading merchandise that was being taken into his warehouse or loading his waggon with merchandise that was being sent out; and many of the every-day uses of highways would be unlawful. . . .