

NOVEMBER 3RD, 1913.

**McLEAN v. CROWN TAILORING CO.*

Negligence—Excavation in Public Lane—Absence of Guard—Loss of Horse Falling into Hole—Findings of Jury—Use of Lane for Unhitching Horse—Reasonable Use—Excavation Made by Independent Contractor—Danger to Persons Using Lane—Liability of Person for whom Work Done—Contributory Negligence—Relief over against Contractor—Maintenance of Barricade—Contract—Time—Oral Evidence—Admissibility—Questions submitted to Jury.

Appeals by the defendants Brandham and Strath from the judgment of DENTON, Jun. Co.C.J., upon the findings of a jury, in favour of the plaintiff, in an action in the County Court of the County of York; and appeal by the defendant Brandham from the judgment of the same learned Judge dismissing Brandham's claim against his co-defendant Strath for relief over.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

A. J. Russell Snow, K.C., for the defendant Brandham.

W. A. McMaster, for the defendant Strath.

R. D. Moorhead, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The action is brought to recover damages for the loss of a horse of the plaintiff, which, at about eight o'clock in the evening of the 2nd February, 1913, fell into an excavation adjoining and extending for about two feet into a public lane about twelve feet wide, and was killed. The excavation had been made by the defendant Strath under a contract with the defendant Brandham, one of the provisions of which is, that Strath shall "form barricade around excavation to prevent any one from falling in."

The plaintiff is a cartage agent, and has a shed for storing his waggons and a stable for his horses, the entrance to which is from the lane and opposite to one end of the excavation.

On the night of the accident, a rough and dark night, the plaintiff drove his horse and waggon in from Euclid avenue, which runs at right angles to the lane, got off his waggon,

*To be reported in the Ontario Law Reports.