THE

ONTARIO WEEKLY REPORTER

VOL. 26. TORONTO, JULY 30, 1914. NO. 10.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

BOLTON v. SMITH.

6 O. W. N. 531.

Way—Right of Way over Lane—Acquiring by Prescription.

SUP. CT. ONT. (2nd App. Div.) *held*, that using a lane for a short time on isolated occasions for various purposes, such as bringing in coal, taking out ashes and garbage, etc., was not sufficient to establish a right of way by prescription.

Appeal by defendants from a judgment of HON. MR. JUSTICE LATCHFORD, in favour of plaintiff.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. E. Jones, for appellant (defendant).

William Proudfoot, K.C., and Mr. Grant, for respondent.

HON. MR. JUSTICE LEITCH :—The plaintiff is the owner of part of park lot, number 19, in the first concession from the bay, now known as lot number 202 on Bathurst street, having a frontage of 80 ft. on Bathurst street by a depth of 108 feet.

The defendants are owners of lot number 204 on Bathurst street, having a frontage of 20 ft. 8 in., adjoining a lot immediately to the north of lot 202.

The plaintiff claims that not only the westerly ten feet of his own lot 202, but also the defendants' lot 204, and lot

200, have been used as a right of way by the owners of the said three lots as a means of gaining access to the yards in rear and for the use of the plaintiff and all other persons requiring to use the lane and for their horses and waggons and other vehicles.

The plaintiff claims the said easement or right of way by possession, and does not pretend to have any paper title, nor does she claim to own the land occupied by the lane. No question is raised—in fact, it is admitted—that the defendants are the owners of the lot 204 on Bathurst street.

The defendants allege that they have become the purchasers of lot 204 on Bathurst street without any notice or knowledge that the plaintiff or her predecessors in title have acquired any right or title to a right of way over lot 204. Defendants also pleaded that before they purchased lot 204 on Bathurst street, they caused a search to be made in the Registry Office, and found that there had been no registered conveyance of any kind giving the plaintiff or her predecessors in title any right of way or easement over lot 204, and that there is no reference to any conveyance under which the plaintiff holds, of any kind, to any right of way or easement over the defendants' lands, or of any inchoate right to use the said lands or any part thereof.

Plaintiff has no paper title of any kind to the right of way in question. The title which the plaintiff sets up is a possessory one and that only. The right of way or lane in question was not shewn on any map or plan of the subdivision which includes lot number 204. The right of way did not arise from necessity. A perusal of the evidence satisfies me that the plaintiff did not acquire a right to use the lane by prescription. No doubt at different times parties used the lane for a short time and on isolated occasions for various purposes, such as bringing in coal, taking out ashes and garbage; but the evidence satisfies me, and I think it is abundantly clear that none of these parties used the lane with the intention of gaining a title to an easement or the right to deposit garbage in the lane, or use it for the carriage of coal or other commodities. The user was only occasional and on isolated occasions, and was not continuous and with the knowledge of the true owner. The acts of user were mere occasional acts of trespass done without any intention of acquiring title, and without the knowledge, consent or acquiescence of the defendants.

I do not think it was practical (so far as the garbage is concerned, and that seems to be about all that was removed from this lane) to have it removed regularly or at stated intervals, but only occasionally, by carrying the garbage can out to the street. It was not the practice to drive horses and carts into the lane or to use it for the passage of carts or waggons for the purpose of removing garbage. It was a case of occasionally carrying out the garbage cans out of the lane to the carts on the street.

Ballard v. *Dyson,* 1 Taunton 279; *Langley* v. *Hammond,* L. R. 3 Ex. 161; *Bradbrim* v. *Morris,* 3 Ch. D. 812; *Foster* v. *Richmond,* 9 Local Government Reports 65.

The witness, Devins, who occupied lot 202 for about two and a half years, beginning in the year 1900, and lot 200 for three years prior thereto, swears that he was told by Mr. Armstrong, who occupied lot 204, that he had no right to use the lane, but that he might put his garbage out, provided that he would keep his part of the lane clear, and Matthews, who bought 202 in 1892 but did not live there for 7 or 8 years thereafter, told Devins the same thing. Although Matthews was called by the plaintiff he was not recalled, nor was this evidence contradicted in any way.

The evidence for the plaintiff falls far short of that required to create an easement for a right of way over the defendants' property.

I think the appeal should be allowed and plaintiff's action should be dismissed with costs.

HON. SIR WM. MULOCK, C.J., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE SUTHERLAND agreed.

HON. MR. JUSTICE RIDDELL :—I agree in the result.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

WHITE v. NATIONAL COATED PAPER CO.

6 O. W. N. 521.

Principal and Agent — Contract for Payment of Commissions — "Accepted Orders" — Commission Earned when Orders Accepted—Agent not Responsible for Subsequent Default—Judgment for plaintiff.

MIDDLETON, J., 26 O. W. R. 69; 5 O. W. N. 83, *held*, that where a contract provided that an agent was to receive a commission on all accepted orders, the commission was earned when the order was accepted, even though it was never carried out thereafter.

Austin v. *Canadian Fire Engine*, 4 E. L. R. 277, disapproved.

That a clause in the contract rendering the agent responsible "failing the customer paying the account" referred to a default in payment and not in ordering goods.

SUP. CT. ONT. (2nd App. Div. reversed above judgment. *Held*, in an agreement for a selling agency the words, "We shall pay you a commission . . . on all accepted orders," meant, not "contracts" simply, but definite orders for particular goods; and that where contracts for sale were made, not followed up by "accepted orders," no commission could be recovered.

Hart v. *Standard Marine Ins. Co.* (1889), 22 Q. B. D. 501, followed as to interpretation of words capable of two interpretations;

Hastings v. *North Eastern*, [1900] A. C. 260, as to meaning of word "order" in a commercial sense, followed.

Lockwood v. *Levick* (1860), 8 C. B. N. S. 603, distinguished.

Appeal by the defendants from a judgment of HON. MR. JUSTICE MIDDLETON, 26 O. W. R. 69.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J. EX., HON. MR. JUSTICE HODGINS, HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE LEITCH.

C. A. Masten, K.C., for defendants, appellants.

H. Cassels, K.C., for plaintiff, respondent.

THEIR LORDSHIPS' judgment was delivered by

HON. MR. JUSTICE HODGINS:—The liability if any, for the commission, sued for under the contract, arises under two letters exchanged between the parties and dated 15th and 19th January, 1912, under which the respondent accepted the selling agency of the appellants' goods for Ontario (except Ottawa).

The material terms of the agreement are as follows:—

"1. We (the appellants) shall pay you (the respondent) a commission of 5 per cent. on all accepted orders.

2. This commission shall be payable immediately the order is shipped and failing the customer paying the account we shall deduct from the first settlement with you the commission paid on said orders.

3. You shall have the exclusive agency for the province of Ontario with the above exception and at any time this agreement should cease we shall pay you on all accepted orders up to the termination of this agreement.

4. Lastly, we agree to pay you said commissions whether or not the order is sent by you direct or whether by any party within your district. We shall forward you at the end of each week a statement of all commissions due on orders rereived. We shall forward you a copy of each invoice as sent to the customer. We shall also keep you advised with any information in respect to all orders and send you copies of any letters we write to customers. If either of us wish to terminate this agreement we can do so by giving one month's written notice to either party. All commissions to be paid at the end of each month."

From the above it will appear, as was the opinion of the learned trial Judge, that the provision for payment of commission "on all accepted orders" is the dominating and controlling clause.

The question is what the word "orders" means under this contract. The judgment in appeal construes it as meaning or including "contracts" whereas the appellants contend that its import is more limited, i.e., orders for particular goods given either under a contract previously made or sent in in the form of a request for a specific quantity of named paper.

I think the latter is the correct interpretation.

The appellants, in fact, apply the coating of paper, and in that sense are manufacturers of enamel book, lithographic and coated label papers. The agency is not restricted to any speeial kind of paper, but extends to all kinds manufactured by the appellants.

The claim in the present case is for commission amounting to $1,491.36, being 5 per cent. on $35,000 worth of paper, the order for which is said to have been accepted by the appellants by virtue of a contract made by them with the Buntin Reid Co., dated 4th June, 1912, less what was in fact

supplied, on which the commission was admitted and paid to the respondent.

In construing the words used by the parties it is well to remember the principle stated by Lord Esher, M.R., in *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. at p. 501 :—

"If the words are capable of two meanings you may look to the object with which they were inserted, in order to see which meaning business men would attach to them."

The situation of the parties, their respective occupations, what they were contracting about, and the way in which they contemplated the business was to be done are all legitimate factors in this determination. But in this case the question is really narrowed down to ascertaining whether the contract with the Buntin Reid Co. in itself is an "accepted order" within the meaning of the principal agreement.

The Buntin Reid Co. contract contains a consent to purchase "certain papers" known as "Reliance coated book, coated either one or two sides." The appellants, in consideration of the agreement of the Buntin Reid Co. to purchase "goods of the Reliance grade, amounting to not less than the sum of $35,000" were to supply such coated papers known under the trade name of Reliance Coated Book, or Reliance Coated Litho, at a price of $6.50 per 100 lbs." There is a further provision that this price of $6.50 per 100 lbs. shall include delivery free of all charges, to such points as Toronto, Hamilton, etc., and a guarantee "that the quality in all particulars is fully up to the standard of samples submitted."

Under this contract the grade is specified, the trade names designated, and the quality is referred to certain samples, but the quantities, sizes and thicknesses of paper within these limits is apparently left to be determined by the requirements of the Buntin Reid Co., and the delivery is to be made at various named points.

If no further action was taken by the Buntin Reid Co. in the way of designating just what they wanted from time to time, it may be that an action would lie against that company. If it did, the action would be for damages, for it is not a contract which could be ordered to be specifically performed. But if they asked for certain shipments to be made of designated sizes, etc., and these were not responded to, or when furnished, failed to come up to the grade and

quality demanded, then the liability would be the other way. Clearly something further was to be done before the appellants became in default. This illustrates the course of dealing that might naturally arise under the agreement sued on, and as the respondent took part in the consummation of the Buntin Reid contract, it is not unreasonable to consider it as throwing light upon the construction of his contract. It is an example of a state of affairs which might occur and with regard to which his contention may well be tested.

Dealing first with the main agreement, the words "accepted orders" imply that all orders may not be accepted and that there was a right in the appellants to accept or reject. Under clause 2, shipment is to fix the time of payment, and the customer's default in payment is to absolve the appellants from liability for the commission on the particular shipment, and entitles them to charge it back to the respondent.

Under clause 4 the order may be sent by the respondent or by the customer. Weekly statements of commssions on orders received were to be sent by the appellants as well as a copy of the invoice sent each customer.

It is obvious that the provisions of clauses 2 and 4 contemplate a definite requisition for certain kinds of papers from customers, procured either by the respondents' direct intervention or originating in his territory without it, and shipment pursuant to direction, to ascertain points as well as payment by such customer.

These provisions fit in well with the course of dealing intended by the Buntin Reid Co. contract and are inapplicable if that contract is to be deemed an "accepted order" because there can be no shipment and no copy of an invoice unless and until directions are received as to the former, and specifications are forwarded as to the exact paper required.

The judgment in appeal minimizes these preliminaries which in my opinion are essential, on the ground that as the shipments might be either immediate or future, the appellants could not free themselves from liability to pay commission by breach of contract. But there could be no breach of contract until the appellants were put in default by neglecting or refusing to fill the order, which they could not do till they knew what was required.

The fact that the parties contemplated that both would perform their obligations and that the Buntin Reid Co. were

of good financial standing and answerable in damages is true, but good faith and solvency are not equivalent to the performance of acts necessary to bring into play the provisions of the contract and required to be complied with before it can effectually be executed. The agreement is not that, if a contract is made under which orders may be, but are not, given, then the appellants will pay commissions upon the orders intended to be given, nor is it to pay commission upon damages for default in not carrying out the agreement. It is to pay on orders given and accepted.

If the Buntin Reid Co., being satisfied with the mode in which the orders they gave were being complied with, desisted from sending in for any more, or if they, for other reasons, ceased to require further shipments, then a question might arise as to whether they or the appellants were liable *inter se* for non-performance of the contract existing between them.

But I am unable to persuade myself that the respondent can treat default in the same way as performance and require payment on orders not given and not accepted unless he has specially provided for that contingency in his contract. In the case cited of *Lockwood* v. *Levick* (1860), 8 C. B. N. S. 603, the recovery is expressly put by Erle, C.J., on the ground that the defendant had the option of delivering the goods and so making a profit, and having accepted an order—in this case for a specified amount of web—which he should have performed, he could not contend that he was not liable to pay a commission as upon the "goods bought." If the orders had in this case been given by the Buntin Reid Co., and after their acceptance the appellant had refused or neglected to fill them, the respondent might be entitled to recover.

The question of responsibility as between the appellants and the Buntin Reid Co. is one thing, and the rights of the respondent against the appellants is quite another.

The respondent has failed to shew that there were any orders given which were accepted, and on which commission has not been paid.

The Buntin Reid Co. contract establishes a relationship which, if acted upon, would have benefited the respondent, and is in that respect very similar to the agreement in *Field* v. *Manlove* (1889), 5 T. L. R. 614, in which it was held that the plaintiff could not recover commission upon the full market price of the 27 engines which were not taken by

Messrs. Bath & Son, to whom the defendants had given a monopoly of sale in Canada on condition that they would take 30 engines.

I think the respondent must be confined to the actual result as between the parties to it as was the case in *Field* v. *Manlove ante,* and if by their lack of action nothing was done to create a state of affairs such as is required to make a basis of liability under his contract, he cannot, in my judgment, recover.

I have not referred to the subsequent correspondence between the parties and the Buntin Reid Co. as illustrating what the word "orders" meant or the evidence upon that point, the admissibility of which is doubtful. See *Hastings* v. *North Eastern* (1900), A. C. 260. But if it is read and if the cases I have already mentioned are considered, there will not, I think, be much difficulty in concluding that the word "order" in a commercial contract is a well understood word and that it was used in its usual signification in the contract in this case.

The appeal should be allowed and the action dismissed with costs.

HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE LEITCH:—We agree.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 8TH, 1914.

CANADA PINE LUMBER CO. v. McCALL.

6 O. W. N. 483.

Sale of Lumber—Delay in Shipment—Time, Essence of Contract—Trade Custom.

FALCONBRIDGE, C.J.K.B., in action for breach of contract for sale of lumber, on evidence gave judgment for plaintiff, holding that delay in shipment was due to matters not under plaintiff's control, and that time was not of the essence of the contract, either by agreement or by trade custom.

Ford v. *Cotesworth* (1868), L. R., 4 Q. B. 127, referred to.

Action to recover $2,868.97, the price of timber sold by plaintiff to defendant, tried at Toronto.

G. H. Watson, K.C., and A. L. Fleming, for plaintiffs.

W. E. Kelly, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that the preponderance of evidence is against defendant as to the matters set up in par. 2a of the statement of defence and that his recollection is at fault when he thinks that he inspected, or was led to believe that he inspected, every stick in the bay at Kearney, but that the fact is as stated by H. Brennan, Corcoran and McKenny, whatever pines he called for were canted for and inspected by him, constituting about 75 per cent. of the lot, and that the remaining 25 per cent. were not inspected because he did not ask for them.

The contract is made between two business men, and there is nothing in it about the time of shipment. H. Brennan states that the time of shipment was not even mentioned before the contract was signed. Defendant declares that he had Brennan's assurance as to the time of delivery and so it did not occur to him to have it in writing. If so, that is his misfortune, for I cannot reform the contract on that contradictory testimony. There has been no such custom of the trade established as would justify me in finding that the parties contracted with reference to it.

It is to be observed that the first complaint of the shipments not being made in time is in defendant's letter of 30th September. The delay in delivery was due to matters not within the control of the plaintiffs, viz., the action of the Government in taking stop logs out of the dam and so lowering the water. This might not excuse plaintiffs if they had actually contracted to ship within a certain time. *Ford* v. *Cotesworth* (1868), L. R. 4 Q. B. 127.

The contract says "the grade of timber to be accepted as made, except that the Canada Pine Lumber Co. are to keep out what they consider the poorest 10 pines."

I find that the defence fails on all points.

Judgment for plaintiff for $2,727.38 with interest from 30th September, 1912, and costs.

Thirty days' stay.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

LAIRD v. TAXICABS LIMITED.

6 O. W. N. 505.

Trial—New Trial—Judge's Charge, Reflexion in, on Character of Parties and Purpose of Hiring—Jury Prejudiced by Charge.

On appeal from judgment of LATCHFORD, J., in favour of plaintiffs in action for damages for injuries to automobile, with counterclaim for injuries to taxicab, in collision.

SUP. CT. ONT. (2nd App. Div.) set aside judgment and directed new trial, holding that, the whole question being who was to blame for accident, certain intimations in charge to jury that defendant company let out taxicabs for immoral purposes as "travelling brothels," with reflexions upon character of occupants, tended to prejudice jury, notwithstanding instructions to disregard them.

Action to recover damages because of injury to plaintiff's automobile resulting from a collision with a taxicab of defendant company in High Park, shortly after midnight of the 25th of September, 1913.

The case was tried by Hon. Mr. Justice Latchford, with a jury, and a verdict was rendered for plaintiff for $1,750, from which defendant company appealed. The verdict was a general one, no questions having been submitted to the jury.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. P. MacGregor, for the defendant.

T. N. Phelan, contra.

HON. SIR WM. MULOCK, C.J.EX.:—The collision occurred near the bottom of two hills which slope towards each other. When descending the hill which slopes from the north to the south, Finmark, the plaintiff's chauffeur, saw the defendant company's taxicab some hundreds of feet away on the top of the other hill which slopes towards the north. The taxicab had two bright acetylene gas headlights lit which enabled Finmark to have an ample view of its movements,

and he appears to have watched it in its descent down the hill until the actual moment of collision.

Prior thereto, Finmark alleges that as the taxicab approached him, he observed that it was bearing to the north side of the road, namely, in the direction of his car, and he says that (evidently for greater safety) he ran his car close to the north edge of the road, but he did not sound his horn from the time he saw the taxicab on the top of the opposite hill until the accident.

The plaintiff's car was lighted by two oil sidelights, but had no headlights. The night was misty, and Allan, the driver of the taxicab, according to his evidence, was not aware of the presence of the plaintiff's car until the very moment of impact, and from all that appears Allan had no warning by horn, headlight, or otherwise in regard to the plaintiff's car.

At the bottom of the two hills a roadway turns off towards the south, and Allan had intended to take that road, and naturally would have descended the hill on the right side. When about reaching this side road he was asked by one of the occupants of the taxicab to go up the opposite hill, and he says that before he had changed his direction in order to do as requested, the plaintiff's car struck the taxicab on the side. Allan's evidence on this point would indicate that he was turning to take the side road at the time of the accident and therefore was not on what was to him the left hand side of the centre of the main road, which was 29 feet wide, and Allan says he kept to the south of this centre line.

Each driver alleges that as his car descended it was going at a moderate speed and was under proper control. There was much conflicting evidence as to the position of the cars and other circumstances after the accident, and it was for the jury to find whether it was caused by the negligence of either party, and if so, which, or whether it was the product of their joint negligence. There was evidence which, I think, would justify any one of such findings.

A careful perusal of the evidence leaves me in great doubt as to which, if either party alone caused the accident. In a case like the present it would have been preferable if questions had been submitted to the jury. They might have served the useful purpose of not only directing the jury's attention to the determining issues of fact, but also that of

reducing the danger of the jury being unconsciously swayed by consideration foreign to the issue.

In view of the conclusion which I have reached, it is inadvisable that the merits of the case be further gone into beyond what is necessary in order to make apparent why, in my opinion, there should be a new trial.

The defendant company's counsel complains that undue prominence was given and unfair reference made throughout the trial, to certain circumstances which may have prejudiced the jury against the defendant company, and that in consequence, it did not have a fair trial. I shall now deal with these objections. They are founded upon the following amongst other portions of the evidence and proceedings at the trial:

Extract from the cross-examination of the defendant company's witness, Lawson:

"Q. You had hired the taxicab? A. Yes.

His Lordship:—Who had?

Mr. Phelan:—I say he had hired the taxicab. Yourself and the other gentleman? A. The other gentleman hired it.

Q. Who were the other members of the party?

Mr. MacGregor:—Is that material, my Lord?

His Lordship:—I do not know whether it is or not. Perhaps not who they were, but what they were, may be material.

Mr. Phelan:—Yes, what were they? A. One was a friend of mine who is out of town, and the others were his two friends. That is all I know of them.

Q. What? A. A friend of mine who was out of town, just come to town to spend a few days.

Q. How long had you known this friend? A. Known him a couple of years.

Q. But the lady—

His Lordship:—Was there a lady in the party? A. There was a lady in the party.

Mr. Phelan:—Is that a true answer, 'There was a lady in the party'? A. There was two.

Q. How long had you known those two ladies? A. Well, I don't remember how long.

Q. Did your friend know them for any length of time? A. I don't know.

Q. You had picked up those two ladies at the Arlington Hotel? A. No sir.

Q. Had you got them after you left the Arlington? If you don't remember I will take your answer.

Mr. MacGregor:—I don't think this is admissible. It is months ago and I have not gone into this.

His Lordship:—You should not interrupt, Mr. MacGregor.

Q. Did you get the ladies at the Arlington? A. I did not.

Q. Did your friend get them there? A. I don't know.

Q. Where did you get into the car? A. I got in at the Arlington. . . .

Q. And were the ladies at the Arlington with you? A. They were in the ladies waiting room.

Q. How long had they been waiting there? A. About 15 minutes.

Q. Was that the first time you had met them? A. The first time.

Q. And the first time your friend had met them? A. I don't know.

His Lordship:—Do you know whether he had met them before or not? A. I do not, my Lord.

Mr. Phelan:—Who had brought this meeting together, you or your friend? A. My friend.

Q. So you got those two ladies at the Arlington Hotel, and did you have a few drinks there before you went out for your trip? A. We did not. . . .

Q. What were you doing between the time you left the Arlington at 10 o'clock or 10.30 and the time of the accident? A. We were riding in the car.

Q. The four of you sitting on the one seat? A. Yes.

Q. The two ladies sitting on the two gentlemen's knees? A. No chance, No.

Q. There was not room for the four of you to sit abreast in the one car. A. There was.

Q. Four people to sit abreast in the one car? A. Yes.

Q. You are absolutely serious about that statement? A. Yes.

Q. Well, possibly. And of course you had hired this car to take you out for a drive? That is what it was hired for. A. He hired it to take us home.

Q. Where do you live? A. Down at the Beach."

From the re-examination of Lawson:—

"One question with your Lordship's permission.

Q. What interference, if any, Mr. Lawson, did any of the party in the rear of your car have with the driver? No interference whatever.

His Lordship:—They were doubtless otherwise occupied.

Mr. MacGregor:—I don't understand.

His Lordship:—They doubtless had their own business to attend to. They did not interfere with the driver."

From the cross-examination of Allan, the defendant company's chauffeur:—

"Q. Now a question or two about the way the taxicab company owned this car. They owned it as they owned all the other cars with which they do their business? A. Yes. . . .

Q. The business is carried on by the taxicab company? A. Yes, sir.

Q. And not by the chauffeurs? A. Well, they carry on the business themselves in getting orders and delivering them.

. . . .

Q. The chauffeurs are hired by the company, the cars belong to the company, and it is the company's business, the chauffeurs are only doing the company's business?

Mr. MacGregor:—That is a point of law that has gone to the Court of Appeal.

His Lordship:—It is a point of fact whether the cars are owned by the company or not? A. The cars are owned by the company.

His Lordship:—That is the sense in which the witness did not own the car. I suppose the defendants are respectable people who would not let out their cars as travelling brothels.

Mr. MacGregor:—I do not understand?

His Lordship:—So they turn them over to the chauffeurs who fulfill that purpose.

Mr. MacGregor:—I do not so understand this case, my Lord.

His Lordship:—It looks like it.

Mr. Phelan:—It is the company's business is it not? A. Yes, sir.

Q. And the method that was adopted of allowing you to collect the money and keep a certain percentage was simply a method of paying you for your services instead of paying you wages? A. Yes, sir."

Extract from the re-examination of Mr. Allan:—

"His Lordship:—Something that is a little wide of this case, but it has been brought up in Court recently. Do you constantly take out parties at night, such as you had on this night? A. Well, I am all the time taking parties out.

Q. All the time taking them out? A. Well, not . . .

Q. Any prohibition by your employers against the use of their taxis for such purposes? A. Well, that is what their cars are for, taking people out for a ride by the hour.

Q. That is what they are for; that will do. That has nothing to do with this case at all.

Mr. MacGregor:—I should think not my Lord.

His Lordship:—It has a good deal to do with what was brought before me by the grand jury and with what the people of this country have been discussing with regard to the purpose to which these motor vehicles are put.

Mr. MacGregor:—I submit your Lordship should have some evidence before coming to that conclusion.

His Lordship:—I have the evidence of this case and the evidence of this witness. That is sufficient for my purpose. It is aside altogether from this case."

Extract from the learned Judge's charge to the jury:—

"Gentlemen of the jury:—As I said to you some time ago, there is only one question here for your decision, and that is, which of these two men is to blame for the accident? If Finmark, the plaintiff, cannot recover, and the defendant can recover from the plaintiff upon his claim. If Allan is to blame, then the plaintiff is entitled to recover and the defendant company cannot recover on their claim. . . .

On the night of the 25th and 26th of September last, Henry Finmark, a chauffeur for the plaintiff, took the plaintiff's car, without the plaintiff's permission, but that does not matter in the present case. We have nothing to do with that. He took out the plaintiff's car, his employer being away, and at Child's restaurant, not far away from here, took in two girls, sisters, and another girl, and a chauffeur like himself, and they started out in the plaintiff's car, going out King street and through High Park in the west end of the city.

At about the same time Allan was employed by the witness Lawson or his friend, to take two girls with whom they had very little acquaintance, out towards High Park and to drive slowly for an hour. You can imagine what the purpose was in such a case. Girls almost strangers to these two young men, in the back part of a taxicab at that hour of the night.

Granting that the others were out on what is called a "joy-ride" also, the people in the taxicab were such that the owners of the taxicab can throw no stones on that account. The two parties were out for a "joy-ride;" you may take it that way; what is called a joy-ride often ending in sorrow for some of those on the ride, and sorrow for the parents and friends of some of the girls who are taken out by these scoundrels in cars and taxis at night for improper purposes beyond any doubt. No one who knows anything of city life can reach any other conclusion. So that you have these two parties out going through the park. Now, as I said, what they were doing there has nothing whatever to do with the matter which you have to decide. What the practices are of taxicab owners and taxicab drivers or of chauffeurs generally is a matter with which you have nothing to do. You have to determine who on that occasion was to blame for the accident, Finmark, with the plaintiff's car, or Allan, with the defendant's car." . . .

Extract from the notes of proceedings at the conclusion of the charge to the jury, but whilst they were still in the box:—

"Mr. MacGregor:—Then I think your Lordship was hardly fair in describing Lawson's relation to this transaction. He said these were acquaintances of my friend.

His Lordship:—What were they but prostitutes? What decent girls would go out with strange men like that?

Mr. MacGregor:—There is no evidence of that, I submit, my Lord. There is no evidence whatever of the relationship between this other man and these girls.

His Lordship:—There is common sense, and common knowledge of what goes on in this city every night.

Mr. MacGregor:—I submit that is going outside of the record.

His Lordship:—Well, I say it has nothing to do with the case. I excluded it from the consideration of the jury."

The issue was not whether the defendant company carried on the business of letting taxicabs for immoral purposes but whether their chauffeur when in charge of one of their taxicabs had by negligence caused the accident. Much of the evidence and observations above set forth was not pertinent to the issue. To intimate to a jury that the defendant com-

pany hired out their taxicabs for immoral purposes as "travelling brothels" would in all probability create a prejudice in their minds against the defendant company and considering the prominence given to the supposed character of the women and the object of the parties in the two vehicles I doubt if that prejudice was removed by the learned Judge's instructions to them not to consider the suggested purposes of the defendant company in letting out their taxicabs.

Further, whilst perhaps all the women in the car and in the taxicab may have belonged to the same unfortunate class, still the jury (and juries are not always logical) with their attention frequently and pointedly called to the apparently immoral purposes of the two parties in those vehicles may have been more prejudiced against the defendant company whose taxicab was in use with their consent than against the plaintiff whose car was being used without his consent. In the weighing of the conflicting evidence the prejudice thus aroused may have been thrown into the scale and turned it against the defendant company.

Under the circumstances, it appears to me that the trial has not been satisfactory and that the defendant company has reasonable grounds for questioning its fairness, and therefore the Court in the exercise of its discretion should set aside the judgment and direct a new trial.

The costs of the former trial and of this appeal to be costs in the cause.

HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH:—We agree.

HON. MR. JUSTICE BRITTON. JUNE 5TH, 1914.

RENZONI v. SAULT STE. MARIE.

6 O. W. N. 440.

Negligence—Explosion—Dynamite Caps—Loss of Eye.

An infant found dynamite caps on defendants' street, carried them around a few days and then threw one in a stove which exploded causing him the loss of an eye.

BRITTON, J., dismissed his action to recover damages from defendants, evidence not shewing negligence on part of defendants. *Jones* v. *G. T. R.*, 45 U. C. R. 193, followed.

Action against city of Sault Ste. Marie and McNamara & Son to recover damages for personal injuries sustained by plaintiff by reason, as alleged, of the negligences of defendants or one of them.

Tried at Sault Ste. Marie without a jury.

U. McFadden, and McMillan, for plaintiff.

J. L. O'Flynn, for Sault Ste. Marie.

J. A. McPhail, for McNamara & Son.

HON. MR. JUSTICE BRITTON:—The plaintiff, Arthur Renzoni, a boy about 7 years of age, residing at Sault Ste. Marie, alleges that on or about the 16th November, 1913, he was walking on Allen street in that city when he saw a man—whose name the boy did not know—place a small box upon a stone or upon something on the street. The plaintiff took the box to his home, it contained about a dozen or more dynamite caps or detonators, such as are generally used for firing blasts, in blasting rock. The plaintiff did not know to the full extent the dangerous character of these caps, but I am of opinion that he knew well, that he should not have taken them, and that they were explosive. It is not certain how long the plaintiff kept these caps. He was living with his sister and brother and they moved from where they resided at the time of the alleged finding, to Cathcart street, and during the time from the finding until the accident, the plaintiff carried about with him in his pocket these caps. Pasquel Renzoni, the brother, and who is next friend in this action, had heard of the caps, that they were in the house, and that plaintiff was carrying them, but he had not seen them until after the accident. I am of opinion that the plaintiff kept the caps more than 2 or 3 days. After his brother and sister moved to Cathcart street, the plaintiff threw one of these

caps upon, or into the stove, with the result that it exploded and destroyed one of the plaintiff's eyes.

The allegation is that the defendants were making excavations in Allen street, or in that vicinity, and for that purpose used such dynamite caps as were found by the plaintiff, and that these caps so found were negligently and carelessly left upon the street by the defendants.

The work which was being done by the city was by the defendants, McNamara & Son, under a contract in writing, which contract was for a very large amount of work.

There was no evidence of any work done by the city, other than the McNamara & Son work, or of any interference by the city with the work of, or with the time or manner of doing it by, McNamara & Son. The plaintiff's right to recover depends upon his being able to establish negligence on the part of McNamara & Son. At the trial the plaintiff stated that he saw a man put down the box of caps. He was asked to look about and see if he could identify that man if in the Court room. The plaintiff made a careful search in the crowded Court room, but did not find the defendant McNamara, or any person, as the one who had the box of caps. The senior McNamara was in the Court room at the time. He was one of the firm most about the work. He stated that the caps used were kept in the cap box, then in a wooden compartment of a big tool or implement chest kept on the ground or in close proximity to the work. The work on Allen street, where caps were said to have been found, was completed a considerable time before the 16th November.

There is a considerable uncertainty as to the time when the caps first came into the possession of the plaintiff. If long before the 16th November the greater chance there was of their being McNamara caps. The notice of action is dated 18th November and states the date as 16th, but that probably was, and was intended as, the date when plaintiff received the injury.

I am not satisfied that the plaintiff gave a full and accurate account of how he came to find these caps. After the accident naturally enquiry was made and suspicion was directed towards McNamara & Son and that suspicion was strengthened because the senior of the firm was on one or more occasions intoxicated when at work. I accept the evidence of Andrew McNamara that he did not see any of the caps at Renzoni's house after the accident nor did he see any

of them anywhere. I find that Andrew McNamara took the position from first to last that the caps alleged to be found were not those of his firm. He said in effect that he was quite sure the caps were not theirs. The case is one of suspicion. The plaintiff fails in his proof. I do not feel myself at liberty to draw the inference that the caps said to be found were those of defendants, McNamara & Son, or that they were guilty of any negligence in the use of any caps on their work.

The case seems to me no stronger, (if so strong) than *Jones* v. *G. T. Rw. Co.*, 45 U. C. R. 193. Such caps could have been easily purchased by any one desiring to buy. If upon the evidence plaintiff is entitled to recover, I would assess damages at $1,200 against McNamara & Son.

The action must be dismissed with costs if demanded.

Thirty days' stay.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

McCALLUM v. PROCTOR.

ARMSTRONG v. PROCTOR.

6 O. W. N. 556.

Fraud and Misrepresentation—Action for Damages—Purchase of Interest in Western Lands—Evidence—Damages—Measure of.

LENNOX, J., 25 O. W. R. 602, 5 O. W. N. 692, *held*, that the measure of damages in an action for damages for false and fraudulent representations by which the plaintiffs were induced to purchase an interest in certain lands was the difference between the price paid and the actual value of such interests.

Storks v. *Boulter*, 47 S. C. R. 440, referred to.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeal by the defendant from a judgment of HON. MR. JUSTICE LENNOX, 25 O. W. R. 602; 5 O. W. N. 692.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE LEITCH.

R. S. Robertson, for the defendant, appellant.

R. McKay, K.C., and R. T. Harding, for the plaintiffs.

HON. SIR WM. MULOCK, C.J.Ex.:—These are two actions of deceit against the same defendant, and were tried together. The evidence was taken in *McCallum* v. *Proctor*, and by

agreement is to be used, so far as relevant, in *Armstrong* v. *Proctor*.

The trial was commenced before Chief Justice Sir William R. Meredith, and all the evidence, except that taken under commission, was given before him. The trial was concluded before Mr. Justice Lennox, who in each case gave judgment for the plaintiff for $5,700 and the appeals are from his judgments.

The cause of action in each case is that the plaintiff was induced to purchase an interest in certain lands in the Province of Saskatchewan by the fraudulent misrepresentation of the defendant as to quality and description thereof, and I will first take up that of *Armstrong* v. *Proctor*.

It appears that one Alfred James McPherson became entitled to a grant from the Dominion Land Colonization Company of certain lands in the Province of Saskatchewan, and by agreement, bearing date the 25th of October, 1906, agreed to sell to the plaintiff and the plaintiff agreed to buy from said McPherson a one-tenth part of an area of 14,488.10 acres of said lands, subject to a lien on the whole acreage of $79,684, the plaintiff, as purchase money, to pay one-tenth of the said $79,684, and to the vendor the sum of $6,157.40. He was thus buying 1,448.81 acres, paying therefor on account of the lien $7,968 40
and also to the vendor 6,157 40

making the total purchase money $14,125 80
or $9.75 per acre.

Subsequently a new contract, dated the 2nd November, 1906, in lieu of the old one, was entered into between the parties and by this new contract, McPherson agreed to sell to the plaintiff and the plaintiff agreed to buy from McPherson a one-sixth part of 7,808.67 acres, being part of the said 14,488.10 acres, subject to a lien of $42,944, and to pay to the vendor the sum of $6,181.33. The plaintiff was thus acquiring under the second contract an acreage of 1,301.44 acres, and paying therefor on account of the lien. $7,157.33
and to the vendor 6,181 33

making the total purchase money $13,338 60
or $10.25 an acre.

The plaintiff's evidence shews that on or about the 24th October, 1906, the defendant and Alfred James McPherson came to the farm of the plaintiff, when the defendant informed him that he was organizing a syndicate to buy western land and had come to see if he would join it. The plaintiff was at the time unable to consider the proposition and the defendant requested him to come to Stratford the next day, and there see one Bennock about it. This the plaintiff did, and, when in Bennock's office, the defendant assured the plaintiff that he had been all over the land, that it was near Indian Head and just the same as land around Indian Head, which the defendant knew the plaintiff had seen; that it was first-class land, that it was good agricultural land and was good wheat land. In consequence of these representations, the plaintiff decided to go into the syndicate, signed the agreement of the 25th October, 1906, and gave his notes for the purchase money. Subsequently, by agreement of the 2nd November, 1906, the plaintiff exchanged his one-tenth interest in the lands for the said one-sixth interest in a portion thereof.

Turning now to McCallum's case, it appears that by agreement dated 2nd November, 1906, but not actually entered into until the 1st January, 1907, the said Alfred James McPherson agreed to sell to the plaintiff and his brother Duncan McCallum, and they agreed to buy from McPherson a one-sixth interest in 7,808 acres, part of the said area of 14,488.18 acres, for the sum of $6,181.33, to be paid by the vendor, and to the payment of the further sum of one-sixth of $42,944 (the amount of the prior lien on the said 7,808 acres), namely, $7,157.33, making the total cost to the said Duncan and George McCallum the sum of $13,338.66. Duncan McCallum joined in the agreement merely to accommodate his brother, the plaintiff, in case the latter should find himself unable alone to carry it out. The plaintiff, however, did not find it necessary to call on Duncan for assistance, and the latter transferred his interest in the land to the plaintiff, and I, therefore, think that for the purposes of this action, the plaintiff is entitled to be considered as the sole purchaser in equity of the said one-sixth interest last mentioned, and as such is entitled in his own name to maintain his action against the defendant.

The evidence of the plaintiff, George McCallum, is to the following effect; the defendant met him at the market-place

in Stratford and took him over to Bennock's office, and there stated that he desired to interest him in certain western lands, and produced and read to him a printed report (Ex. 2) describing these lands. He also stated to McCallum that he had examined every foot of the land, and that it was better than as described in the report; that it was first-class land, that you could plow a furrow across any section of it without a break; that you would not have to lift the plow or turn around any obstruction; that it was clear, open land. These representations he repeated to Duncan McCallum.

A careful examination of the evidence satisfies me that the land was not as represented by the defendant to either Armstrong or the plaintiff, McCallum, but, on the other hand, that it was broken up with numerous sloughs and other bodies of water, including a lake of some 70 or 80 acres, bluffs, patches of stone, gravel and holes, including a gorge of from 100 to 150 feet in depth, which ran through one section, and that a very substantial portion of the whole area, estimated by some witnesses as high as 75 per cent., was waste land.

I am also convinced by the evidence that the land fit for agriculture consisted only of small patches of a few acres each, scattered amongst the bluffs, sloughs, etc., and that even these patches are of questionable value as arable land, because of the expense in conducting farming operations on such small and scattered pieces of land.

The evidence abundantly supports the view that, in order to induce the plaintiffs to make the respective purchases in question, the defendant made to them material statements as to the character of the land, which were in fact untrue. He represented himself as speaking from actual knowledge derived from a personal inspection of the whole property. If he made such an inspection, then his misstatements must have been intentionally untrue. If he did not make an inspection, it is clear that he made the mis-statements recklessly and not caring whether they were true or false in order to induce the plaintiffs to purchase.

The defendant did not give evidence in his own behalf and his counsel was warned by each of the Judges who took part in the trial to the effect that his failure to testify might expose him to inferences unfavourable to his innocence. Nevertheless, he chose to offer no explanation as to his mis-

statements, and the fair inference is that they admit of no explanation consistent with innocence on the defendant's part, and I think the learned trial Judge was fully justified in finding that the defendant knowingly made the false statements in question to the prejudice of the plaintiffs, in order to induce them to purchase, and the case comes within *Derry* v. *Peek*, 14 A. C. 337.

Some slight attempt was made to shew that the defendant's statements were not the only inducements to the plaintiffs entering into their purchases, but the point was not strongly pressed.

If the false statements of the defendant materially contributed towards inducing the plaintiffs to purchase. they have a cause of action against the defendant, even though there may have been also other contributing causes to their action. *Clarke* v. *Dickson*, 6 C. B. N. S. 453.

As stated in *Edgington* v. *Fitzmaurice*. L. R. 29 Ch. D. 459, where the plaintiff says: "I had two inducements, one my own mistake, the other the false statement of the defendants; the two together induced me to advance the money," and Fry, L.J., says: "But, in my opinion, if the false statement of fact influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives."

The remaining question to consider is that of damages. The price of the lands purchased by each of the plaintiffs was $13,338.66, or $10.25 per acre. Witnesses for the plaintiff estimated the land as worth, some of it, as low as $3 an acre, some worth $5 an acre. The defendant's witnesses put a value on the land as between $10 and $11 per acre. Bearing in mind the large proportion of waste land, the learned trial Judge, I think, if he has erred at all, has erred in fixing the damages at too low a figure. The judgment in this case was entered in January, 1914, some seven years after the transaction in question.

In fixing the amount of damages, the time that has elapsed since the transaction may be considered.

In *Lamont* v. *Wenger*, 18 O. W. R. 171, which was an action for damages because of fraud in the sale of land, the Master allowed to the plaintiff as part of his damages interest on the difference between the purchase price and the

actual value from the time of sale until his report and was sustained in the Divisional Court.

The appeal, I think, should be dismissed with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE LEITCH agreed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

PARKER v. DYMENT BAKER LUMBER CO.

6 O. W. N. 559

Negligence—Archway over Roadway—Driver on Load Crushed between Archway and Loaded Waggon — Died Later—Action by Widow to Recover Damages under Fatal Accidents Act — Deceased in Position of Licensee or Invitee—Duty of Owner of Premises.

KELLY, J., *held*, that plaintiff had failed to shew that the archway was a trap or hidden danger and dismissed the action.
SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE KELLY, dismissing the action.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

P. H. Bartlett and J. F. Faulds, for plaintiff, appellant.

G. S. Gibbons, for defendants, respondents.

HON. MR. JUSTICE SUTHERLAND:—The plaintiff's husband, a teamster, had come upon the defendant's premises with a horse and waggon for laths and after loading, with the assistance of one of their employees, proceeded to drive out. In doing so it was necessary to go along a passage or roadway through a building of the defendants which had an archway at either end, that which he entered first, the westerly, being 9 feet. 8¾ inches in height and 10 feet 10 inches in width at the bottom where cement blocks had been inserted at each

side to prevent the wheels of vehicles from coming in contact with the brick walls, and 12 feet 5 inches in width above these; the other, the easterly, being 9 feet 1 inch in the highest place and 8 feet 11¾ inches in the lowest, and somewhat narrower than the other, the width above the cement blocks being 10 feet 6½ inches.

The deceased mounted the load and drove safely through the westerly archway but on coming to the easterly one was struck on the upper part of his chest by the top of the archway and so crushed as that death subsequently ensued.

His widow brings this action and claims to recover an account of the negligence of the defendants, stating in her pleading such negligence to consist in the fact that the archway was not of sufficient height and width.

At the trial it was further contended that the act of the defendants in erecting and maintaining the archways of irregular heights was also negligence.

The action was tried before Kelly, J., and a jury at London, and at the conclusion of the plaintiff's case, counsel for defendants asked for a dismissal on the ground that no evidence of negligence on the part of the defendants had been shewn which could properly be submitted to a jury. Effect was given to this contention.

There was evidence that the deceased had driven through the archway 2 or 3 times before. There was no evidence as to whether on these occasions his waggon was or was not loaded. The trial Judge found as follows:—

"I shall have to grant a non-suit because the evidence submitted by the plaintiff herself is that this man was in the habit of going there. The measurements do not by themselves constitute a danger. There is no evidence of any change between the times that he had gone before and the time he met with this unfortunate accident which caused his death. There is the uncontradicted evidence of his own admission to the yard foreman that he was the author of his own trouble—that it was his own fault. Added to that is the evidence of his change of position from what might have been a safe position to an unsafe one, and the absence of evidence of the difference in height between the two arches at the time the accident occurred, so far as that is material."

After some discussion it was admitted by defendants' counsel that the archways were of the same height at the time of the accident as when measured by the witness who testified

to the measurements at the trial. The trial Judge thereupon dismissed the action.

It is from this judgment the appeal is taken. Three points are argued: 1st, that the archways were not high enough; 2nd, that the difference in height between the archways was a trap, and 3rd, that the evidence of the deceased's admission was either not receivable at all or in any event was matter referable to contributory negligence and should have been submitted to the jury.

The deceased was lawfully upon the premises of the defendants for a purpose of common interest, namely, to obtain a load of laths purchased by his employer from them. The duty of the owner of the premises under such circumstances "is to take reasonable care to prevent injury" to the invitee "from unusual dangers which are more or less hidden of whose existence the occupier is aware, or ought to be aware, or in other words to have his premises reasonably safe for the use that is to be made of them." Volume 21, Halsbury's Laws of England, p. 388; *Thomas* v. *Quartermaine,* 18 Q. B. D. 697.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact;" *Indermaur* v. *Dames,* L. R. 1 C. P. 274 at 288.

In *Lowery* v. *Walker,* [1910] 1 K. B. 173, at 183, [1911] A. C. 10, Vaughan Williams, L.J., puts it in this way: "Another class of case is that in which the plaintiff was upon the defendant's premises, not by virtue of any grant of a right, but by invitation of the defendant. In those cases the plaintiff is not a trespasser, and there is a duty on the part of the defendant towards him. In such cases a duty exists

on the part of the person who invites towards a person who acts on the invitation. That duty does not, according to the authorities, amount to a guarantee by the inviter that the person invited shall suffer no injury while on the premises to which he has been invited to come, but only to a duty to take reasonable care that he shall not be exposed to dangers which are more or less hidden and not obvious. Cases of that kind have been frequently called 'trap' cases."

In the present case there was no defective construction or want of repair in archways or roadway suggested or proved. The accident occurred in broad daylight. I do not see how it can be said upon the evidence that there was any trap or any unusual or hidden danger. Everything was open to the view of a careful man. I do not see how it can be said the archways were not reasonably safe for the purpose intended.

I agree with the trial Judge that there was no evidence of negligence which could properly be submitted to the jury; reference also to *Lucy* v. *Bawden* (1913), T. L. R. 321; *Norman* v. *G. W. Rw. Co.* (1913), T. L. R. 241; I quote in the latter case from the judgment of Mr. Justice Lush, p. 241: "It must be borne in mind that the reason why a person who invited people on to his premises, the occupier of a shop for example, was under a duty to the person invited not to have a hidden trap on his premises, was because in that case the duty was created by the invitation. The person invited might come or not as he pleased, and if he chose to come on the premises, he must take them as he found them, subject only to this, that if the inviter knew of a danger which was not so obvious as also to become known to the invitee, then the inviter was under a duty to warn the invitee of the existence of that danger."

Counsel for the appellant relied much on the case of *Bliss* v. *Boeckh,* 8 O. R. 451, but there the obstruction causing the injury was a beam improperly erected above a public highway from which was hung a gate, another gate being put up across the street a few feet further south, the two gates not being opposite each other. The evidence of the injured man was that being obliged to drive along the road in a slanting direction to avoid these gates his attention was diverted from the beam.

Here there was nothing, so far as the evidence discloses, to in any way divert the attention of the deceased from the archway and the necessity on his part to avoid coming in

contact with it. Upon the undisputed evidence, if he had continued to retain the place on the load where he was sitting when he came through the first archway, he would have come through the second in safety.

If there was no negligence to submit to the jury the question of contributory negligence becomes of no importance. But if it were, I think the language of Lord Fitzgerald in *Wakelin* v. *London & South Western Rw. Co.*, L. R. 12 A. C. 41, at 52, are appropriate: "It has been truly said that the propositions of negligence and contributory negligence are in such cases as that now before your Lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiffs' witnesses. In such a case, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a verdict for the defendant, or if there is conflict or doubt as to the proper inference to be deduced from the facts in proof then it is for the jury to decide."

In the present case there is no conflict of evidence in so far as the admission of the deceased is concerned that the accident occurred by reason of his own negligence and want of care.

I would dismiss the appeal with costs.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LEITCH agreed.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

CAIRNS v. CANADIAN REFINING CO.

6 O. W. N. 562.

Nuisance—Smelter—Noxious Fumes and Vapours—Special Damage to Plaintiff—Death of Cow—Voluntary Abatement of Nuisance by Defendants.

SUP. CT. ONT. (2nd App. Div.), reversed judgment of BOYD, C. (25 O. W. R. 384; 5 O. W. N. 423) holding that plaintiff was entitled to damages, costs of action and appeal. His rights were two-fold rights in respect of his property and rights as one of the general public.

Fletcher v. *Rylands*, 3 H. L. at 330, followed.

Appeal by the plaintiff from a judgment of HON. SIR JOHN BOYD, C., 25 O. W. R. 384; 5 O. W. N. 422.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by

A. E. H. Creswicke, K.C., for appellant.

D. W. Saunders, K.C., *contra.*

HON. SIR WM. MULOCK, C.J.EX.:—In this action, the defendant company is charged with carrying on near to the plaintiff's lands a smelting business that gives off noxious gases, which have seriously affected the health of the plaintiff and other occupants of his lands and injured his property, and the plaintiff asks for damages arising from the death of a cow, and injury to his land, and for an injunction.

The case was tried by the Chancellor, who found that the death of the cow was caused by arsenic from the defendant's smelter, which had reached the plaintiff's lands, and he awarded the plaintiff $80 damages therefor and costs on the County Court scale; in other respects, the action was dismissed.

The plaintiff's appeal is for damages for injury to his lands and for an injunction restraining the defendants from carrying on the business in a manner injurious to his lands and to the plaintiff in the occupation thereof.

The smelter is situate in the town of Orillia and was erected in about the year 1910. The plaintiff owns certain lands on Moffat Street, in Orillia, situate within about 1,200 feet of the smelter, and has erected thereon a residence which he, with his wife, have occupied continuously since some time in the year 1912.

The business carried on by the smelter is that of smelting Cobalt ores, which produce silver, nickel and arsenic. The first operation is to roast the ore in the blast furnace for the purpose of gaining the silver. This process gives off arsenic fumes which pass from the blast furnace through flues to the crude arsenic bag house, also called in the evidence, the large bag house. As the fumes cool, dust in the condition of crude arsenic is deposited. The flues run under the floor of the bag room and the fumes enter the bag room through openings in this floor. There are 288 of these openings, each having a diameter of about twenty inches. Set in these openings are metal thimbles. From iron rods running across the rafters are suspended 288 woollen bags, each about 30 feet long, the mouth of each bag being fas-

tened over one of these thimbles. The object of the bag arrangement is to separate the arsenic from the gaseous fluid as it passes through the material of the woollen bags. when it is permitted to escape through the ventilator into the atmosphere.

The evidence shews that clouds of fumes of a dirty white colour pass out of the ventilator and deposit particles of crude arsenic on the surrounding country.

There was evidence that since the advent of the smelter trees and other vegetation in its vicinity had been killed or injured and that some domestic animals had died of some irritant. That the atmosphere was injurious and hurtful appears from the following extracts from the evidence of the plaintiff's wife.

"Q. Now since the smelter was built have you noticed any changes as regards your health and property? A. Well, for the last two years I have noticed a very great difference.

Q. In what way? A. It has been injurious to our health.

Q. How has it affected you, if it has affected you at all? A. It is from breathing it.

Q. Yes? A. It seems to burn in your nose and throat. it affects the eye and gives me a pain in my head and affects my stomach.

Q. How did it affect your stomach? A. A sick, terrible sick feeling in my stomach.

Q. Inclined to vomit? A. Inclined to, but not to vomit altogether. Once or twice I vomited, I think, from the effects of it.

Q. Any other way it affected you? A. I do not think it affected us in any other way, but we could not keep our windows open in midsummer. . . .

Q. What do you blame this on or blame it from? A. Breathing in fumes from the arsenic.

Q. How do you know it comes from the arsenic and where the arsenic comes from? A. Well, the arsenic I know comes from the smelter.

Q. How do you know that? A. I have seen it coming up from there, and when I have been outside. and when the wind was blowing from the north it was blowing right in my face and I could feel it burn right in my nose and in my throat.

Q. Could you see it? A. You could feel the effects of it from that distance.

Q. Could you see it? A. I have seen the stuff; it seems to be like dark coloured stuff, and it seems to come from the bag house, and I have noticed it coming over the land. It gets something like a fine steam or a fine powder or something or other. . . .

His Lordship—How did it affect your face; you say it smarted? A. Yes, it burns.

His Lordship—Burns the face?

Mr. Saunders—The nose and throat.

His Lordship—You said something about it blowing in your face; it did what?

Mr. Creswicke—When this blew into your face. His Lordship is asking, what did it do to your face? Did it do anything to your face? A. It burns just like a hot flash.

Q. What sort of stuff is this, have you ever looked at it; can you describe it? A. I can't describe it, only from the distance I see it is like a fine powder; it is not large enough to be discernible.

Q. When you say 'from a distance' what do you mean? A. What I see coming from the——

Q. From the smelter? A. From the bag house.

Q. How does it get out of the bag house? A. It seems to be from the ventilators. also there seems to be some windows open or broken or something or other. There is a door at the top where they climb up to shake the bags, and there is a door open."

Speaking of the occasion of her washing her face in the rain water in November, 1912, she says:

"But before we sent that away I washed myself in the rain water I became sore, and I knew it was affected in some way or other, and we believed it wasn't safe to grow anything at all.

Q. You said that before you sent the water away for analysis you washed the floors? A. No, I washed my face.

Q. In the rain water? A. Yes.

Q. Out of what? A. Out of the rain barrel.

Q. Caught from the roof? A. Yes.

Q. What did you notice about it? A. I noticed that it burned right away on my face, and I felt spots on it, although when I felt it start to burn I felt I must have made some mistake and there must be something wrong with the water, and went and got well water, but still there were sores that stayed on my face for a week later, little splotches like burns like."

In the winter of 1912-13, the defendants made some changes in their plant with a view to preventing the escape of arsenic into the atmosphere, but it is a question whether throughout the year 1913 the improvements proved effective, for the sample of water taken by Dr. Rogers out of the rain barrel in November, 1913, shewed the presence of two millegrams of arsenic in sixteen ounces.

The plaintiff gave evidence to the effect that the selling value of his property had been greatly depreciated owing to the matter complained of in this action.

From the evidence it appears that the defendants so conducted their business as to permit the escape from their premises into the atmosphere of clouds of fumes carrying arsenic which settled upon the house and grounds of the plaintiff in such quantities as to injuriously affect his and his wife's health and comfort, which destroyed or injured vegetation, and caused the death of a cow because of its grazing upon his lands; that in the month of May, 1913, and again in the month of November, 1913, rain water which had flowed from the roof of the plaintiff's house into the barrel was found to contain arsenic in such quantities that when on one occasion his wife washed her face and hands with water taken from this barrel, her face broke out into sores which did not heal for a week. And it further appears from the evidence that soil taken in the month of November, 1913, from the plaintiff's land shewed the presence of arsenic in appreciable quantities, and that in consequence of the arsenic on his property the same was greatly depreciated in value. With all deference I find myself unable to agree with the learned Chancellor that the plaintiff in respect of these matters is not entitled to maintain in his own name and for his own benefit an action for damages. It may be that the defendant's conduct in allowing these poisonous fumes to escape into the atmosphere constitute a

public nuisance, but if it inflicts upon the plaintiff in his character as owner of certain lands, special injury other than that inflicted upon the general public, it is an actionable wrong at his instance.

His rights are two-fold, namely, rights in respect of his property and rights as one of the general public.

The injuries complained of on this appeal are in respect of the invasion of the plaintiff's rights as an individual owner and occupant of certain property, and if the defendants caused the injuries sustained by him or any number of individuals, each one in respect of his lands suffers special injury and is entitled to compensation in damages, but such injury does not affect the general public and therefore they are not entitled to maintain any action in respect of such private wrong for the plaintiff's exclusive benefit. In such a case the individual sufferer alone can maintain such an action.

Depositing arsenic on the plaintiff's lands does not affect the rights enjoyed by citizens generally, but merely those of the owner of the land. It is not necessary to cite authority in support of the proposition that no one is entitled to cause to be deposited on the property of another arsenic or any other thing which injures such others rights as owner.

Though the facts are different, the principle involved in the present case does not differ from that in *Fletcher* v. *Rylands,* 3 H. L. p. 330. For these reasons I think the plaintiff is entitled to damages in respect of the injury occasioned to him by arsenic coming from the defendant's smelter and falling on his property; and that there should be a reference to the Master to fix the amount of such damages, the plaintiff to be paid the costs of the reference.

As to the prayer for an injunction, the defendants say that in the winter of 1912-13 they adopted effective means to prevent the escape of arsenic from the smelter. The finding of arsenic in the rain water barrel in November, 1913, would go to shew that notwithstanding these means, arsenic escaped. The defendants have no right to permit so dangerous a material as arsenic to escape from their premises into the atmosphere, and thence be carried by the wind upon the land of the plaintiff and others; and the plaintiff is entitled to an injunction restraining the defendants from continuing and repeating the nuisance complained of in such

a manner as to injuriously affect the plaintiff's said lands or the plaintiff in his ownership and occupation thereof.

The plaintiff is entitled to full costs of the action and of the appeal.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.