1914
March 4.
May 18.

THE W. J. McGUIRE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ELLEN S. BRIDGER, WIDOW OF JOSEPH TUNLEY, DECEASED, FOR HERSELF AND ÈS-QUALITÉ, (PLAINTIFF) . } RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Negligence — Construction contract — Sub-contract — Dangerous premises—Servant or agent—Building materials—Duty of principal contractor—Injury to invitee—Responsibility for damages—Evidence—Findings of jury.

The McG. Co., contractors for plumbing and heating in a building under construction, sub-let part of their contract to the R. Co., who manufactured the necessary material at Amherst, N.S., and at one time shipped a boiler-plate for use in executing their sub-contract consigned to the McG. Co. at Montreal. The McG. Co. sent the advice note of the shipment to the R. Co.'s local representative, who employed carters to get the plate from the railway company and carry it to the place where the works were being carried on. It was, under directions of the McG. Co.'s foreman, leaned up against a pillar of the building and remained there for about one day in a position where it projected over a part of the cartway used for bringing materials into the building. T. applied for employment as a labourer on the works and was told to return next day which he did and, while waiting to be employed, stood near the plate. When a vehicle entered the cartway the plate fell upon T., causing injuries from which he died. In an action by his dependents to recover damages from the R. Co. and the McG. Co.,—

Held, Anglin J. dissenting, that, in the circumstances, the McG. Co. were responsible for damages; that the fault from which the injury resulted was that of their foreman who, acting as their servant or agent, supervised the placing of the plate in a dangerous position, and that the plate itself was a thing which was, at the time, in the care of the McG. Co. *Lucy* v. *Bawden* ([1914] 2 K.B. 318), referred to.

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

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Held, also, Anglin J. dissenting, that the evidence shewing the circumstances stated justified the jury in finding that deceased was lawfully in the place where the accident occurred, that he had not been guilty of contributory negligence, and that the accident was due to negligence of the McG. Co. and the sub-contractors in placing the plate in a dangerous position.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of Greenshields J., in the Superior Court for the District of Montreal, whereby, upon a verdict in favour of the plaintiff, judgment was entered for the plaintiff for $5,000 damages, apportioned between the plaintiff and her minor children, with costs.

The action was brought by the respondent, plaintiff on her own behalf and as tutrix for her minor children, against the present appellants and the Robb Engineering Company, claiming from them, jointly and severally, damages sustained in consequence of the death of Joseph Tunley, deceased husband of the respondent and father of her minor children, his death having been caused, as alleged, on account of the negligence of both defendants in the circumstances stated in the head-note.

The trial took place before Mr. Justice Greenshields and a special jury, to which questions were submitted and answered, as follows:—

"Question.—1. Was Joseph Tunley, the plaintiff's husband, the victim of an accident, on or about the 9th November, 1909, while within or upon the premises known as the Jacobs Building, on St. Catherine Street in Montreal?

"Answer.—Yes.

"Question.—2. Was the plaintiff's husband lawfully in the place where he was injured at the time of the said accident?

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"Answer.—Yes.

"Question.—3. Did the said Joseph Tunley die, on the 18th December, 1911, as a result of the said accident ?

"Answer.—Yes.

"Question.—4. Was the accident due to the sole fault, negligence and want of care of the said Joseph Tunley, and if so, in what did such fault and negligence consist ?

"Answer.—No.

"Question.—5. Was the accident due to the sole fault and negligence of:—

"(*a*) The Robb Engineering Company, Limited ?

"Answer.—No.

"(*b*) Meldrum Bros., Limited ?

"Answer.—No.

"(*c*) W. J. McGuire & Company, Limited ?

"Answer.—No.

"(*d*) Emile Gellin ?

"Answer.—No.

"(*e*) One or more of them, and, if so, in what did their respective fault and negligence consist ?

"Answer.—Due to the neglect, fault, want of care and lack of supervision of The Robb Engineering Company, Limited, and W. J. McGuire & Co., Limited, by placing the piece of iron in a dangerous position.

"Question.—6. Was the accident due to the combined fault and negligence of the said Joseph Tunley and

"(*a*) The Robb Engineering Company, Limited ?

"Answer.—No.

"(*b*) Meldrum Bros., Limited ?

"Answer.—No.

"(*c*) W. J. McGuire Company, Limited ?

"Answer.—No.

"(*d*) Emile Gellin ?

"Answer.—No.

"And if so, in what did their respective fault and negligence consist ?

"Answer.—No.

"Question.—7. Has the plaintiff, as well personally as in her quality of tutrix to her two minor children suffered damage by reason of the said accident, and if so, in what amount ?

"Answer.—Yes, $5,000 (five thousand dollars).

"Question.—8. If you have answered question 6 in the affirmative, that the accident was due to the combined fault and negligence of the late Joseph Tunley and any of the four defendants, in what amount do you fix the contribution of the said Joseph Tunley in the damage assessed by you in answer to question No. 7 and to what amount do you fix the contribution of the defendants or of any of them ?

"Answer.—All unanimous."

Upon the answers so given by the jury, His Lordship Mr. Justice Greenshields ordered judgment to be entered in favour of the plaintiff, for the damages assessed, apportioned, as follows: $2,500 to the plaintiff personally, and $1,250 to each of her minor children, and condemned the defendants the Robb Engineering Company and the W. J. McGuire Company to pay the said sums jointly and severally, with interest and costs. This judgment was affirmed by the judgment now appealed from.

Mann K.C. for the appellants.

Atwater K.C. for the respondent.

THE CHIEF JUSTICE agreed with Duff J.

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IDINGTON J.—There are two questions raised by this appeal. The first is as to the right of the deceased to be where he was when the metal fell upon him. This is hardly arguable upon the facts shewing an invitation to be there. The jury has passed upon it as they were entitled to upon such facts.

The other question is as to the scope of the authority which one Finlay had from appellants when he directed the placing of the metal where it was placed.

The appellant had a contract from the proprietor to do the work upon the building, and it was in the doing of such work that this accident was caused whereby the deceased was injured.

Part of the work undertaken by appellant had been sub-let by it to the Robb Engineering Company. If nothing more had transpired for consideration possibly appellant might have relied upon this sub-contract to exonerate it.

The case is, however, by no means so simple in its character as that.

The appellant contracted with the proprietor:—

> To assume all liability for damage or injury occurring to any persons or property through neglect or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants, and to indemnify and save harmless the party of the first part all claims caused by reason of said damage or injury.

As between the proprietor and deceased it might well be said that the invitation by which deceased came there was in last analysis what the proprietor authorized. Whether in law the proprietor could have been held liable need not be passed upon. He desired appellant should take all that risk and it did so. It was thus, as well as by implication of law in executing its contract with the proprietor, bound to take due care that the execution thereof should not lead to

injury to others. It became the duty of its foreman in charge to do all that his master and his master's interest in the premises might call for in order to avert any possibility of risk to the master by reason of anything happening within the scope of the master's plenary authority as to the execution of the contract with the proprietor.

If the sub-contractor had attempted to do anything in execution of its share of the work which might have tended in any way not merely to render the appellant liable to an action upon its undertaking with the proprietor, but tended to involve it in the risk thereof, I think appellant would in such event have been entitled to insist upon desistment from such attempts so far as could reasonably be required.

Suppose the appellant instead of being a corporation had been a person then in the building under such circumstances at the time the metal in question was brought by the carters he would have had a perfect right to have insisted upon the metal being placed back out of the way of doing any damage to any one.

And even if there was no legal obligation resting upon such a man to interfere actively, regarding which I say nothing, his right, nevertheless, to interfere as against a sub-contractor insisting upon running such risks, would be undoubted unless, of course, he had contracted specifically not to do so; and in some classes of cases he might find he had rendered himself liable for the acts of his sub-contractor.

What I wish to make clear is that though there is a line yet it is by no means a well-defined line, in law, which renders it safe for any man sub-letting his work

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to overlook the delinquencies of his sub-contractor in this regard.

Then in view of all this and the reasonable expectations of a contracting employer to have his foreman look after his interests, how can I say that one who did so under such circumstances as existed here could be disavowed as acting without authority and beyond the scope thereof? And when we find that this foreman exercised his authority on more than one occasion by taking the gang under his charge, or four or five of them, to do the very thing now complained of, to help the sub-contractor, is it not drawing it rather fine to say he had authority on several occasions to do this, but yet none to direct how these men of the appellant should assist in such work? Is it not asking too much when appealing here to ask us to say he had authority to spend his master's money in this way, but none to direct the proper use of such service? To say he had authority to take the appellant's men to do the work, but none to insist upon its being done in a proper manner, seems illogical.

Now there was one of these occasions on which the appellant's foreman induced the carter's men to place the goods in a proper place, but on this latter occasion the foreman neglected this duty or part of his duty. As to this later occasion he denies interfering in any way but by helping with his men acting in obedience to his orders. The carter's man says not only did he interfere, but actually directed where the gang, including his own, were to put the metal in question.

It was for the jury to say which of these men they believed, and I assume they believed the carter's man.

And when we are asked to accept such denial of authority as the foreman did make I must assume

on the facts that this jury had to act upon they had a right to discredit this part of his story and did so. Moreover, no one over this foreman has ventured to appear in the witness box and add to the force of his denial or give more definite meaning to the limits of his authority than what we may gather from the course of conduct he manifests and the definition he gives in his evidence quoted hereafter.

The jury were then face to face with such narrow line of authority as is implied in the substantial leading facts relative to appellant's relation to the whole matter in ways I have set forth and in addition thereto as appears in the following evidence of the foreman:—

Q. In the month of November, 1909, you were foreman for the W. J. McGuire Company, Limited, were you not?

A. Yes.

Q. In the Jacobs Building on St. Catherine Street?

A. Yes.

Q. You had been foreman for a long time before that?

Witness: Foreman for the McGuire Company?

Counsel: Yes, in that building?

A. Since the building started.

Q. When would that be?

A. About May, 1909. No, I think it started in the fall.

Q. Were you present in the month of November, 1909, when a delivery was made of a part of the end of a boiler?

A. Yes.

Q. What time of the day was that?

A. That was just about ten minutes to twelve, or so.

* * * * * * *

Q. Did the lorry that brought this piece of iron in stop near this column?

A. A little bit from it. Pretty near it, but a little bit away.

Q. When it came in was it lying flat on the lorry?

A. Yes.

Q. Then your men with the Meldrum men canted it up and slid it down off the lorry?

A. Yes.

Q. You did not lift it clear?

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A. We had to slide it off the rig.

Q. There was only one passage for a cart to come in from Alexandra Street into the building?

A. One passage, yes.

* * * * * * *

Q. You were McGuire's principal foreman on the building, were you not?

A. Yes.

* * * * * * *

Q. You and your men were present during the whole time this boiler front was being put into the position described by you?

A. Yes.

Q. Did you not advise them at all in any way as to the manner in which this boiler plate should be placed against the pillar?

A. Yes. It was placed against the column, and I suggested that they had better move it a little farther back from the position that we had placed it. I thought it might make it a little safer.

Q. You suggested, I think, that they should give it a little more cant?

A. A little more cant.

And speaking of the part taken in the unloading of the piece of metal which later fell on deceased, he says:—

Q. You had it taken off?

A. Yes.

Q. Did you have some of your men there to help you?

A. Yes.

Q. How many?

A. Well, I cannot say exactly how many.

Q. Did you have ten of them?

A. Oh, no. There were three or four of us, anyhow.

Q. You and the men of the W. J. McGuire Company, Ltd., helped the Meldrum people to take that piece of boiler out of the wagon?

A. Yes.

Q. And, altogether you placed it where?

Witness: The second piece?

Counsel: Yes, that big piece of iron?

A. We placed it against the column.

I think this evidence, together with the circumstances I have adverted to shewing the relation of appellant to the work in question, form such evidence as could not be withdrawn from the jury.

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Upon their verdict so submitted the judgment rests and must be upheld.

I, therefore, think the appeal should be dismissed with costs.

DUFF J.—The question of agency is a question of fact and the point to be considered in this connection is whether there was evidence upon which the jury could reasonably find that in taking charge of the boiler ends Finlay acted as servant or agent for the appellants. Consider the facts:—Jacobs, the owner, who was constructing the building, had let various contracts; one was a contract for doing the concrete work, that is, for putting up the frame of the building; another was a contract with the appellants for the plumbing. Under the latter contract the appellants were obliged to have certain boilers in operation according to a certain specification on a named date.

The appellants let to the Robb Engineering Co. a sub-contract for the erection and completion of these boilers which the Robb Company agreed to finish by the 30th of November, 1909. There can be no doubt, of course, that McGuire & Co. were entitled to sub-let a part of their contract with Jacobs, their relation to Jacobs being that of contractors merely who had undertaken to produce a certain result. The contract with Jacobs, which is in the evidence, obviously contemplated the letting of sub-contracts. On the other hand, McGuire & Company specifically covenant to

indemnify and save harmless the owner from all claims, loss, or cost by reason of damage or injury to any persons or property through the negligence

of these sub-contractors.

The Robb Engineering Company had their factory at Amherst, N.S., where the parts required for the

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execution of their contracts were made. These they shipped to Montreal, and they appear to have been in the habit of sending these parts to the building without making any express provision for their reception. Of this the appellants appear to have been complaining. It was obviously in the interest of McGuire & Co. to see that these parts were received and properly taken care of. In the first place they were under a contract to complete their work by a given time. In the next place, they were bound by the covenant to which I have already referred, and pieces of heavy machinery, carelessly placed by carters without proper directions may cause damage. In the third place, it might cause inconvenience to other contractors working in the same building and all the contractors so situated would be naturally interested in mutually accommodating one another in order to avoid unnecessary delays in executing the work; while Robb & Co. were sub-contractors, for whose actions they would not be directly responsible in a legal sense, still these sub-contractors had been engaged by McGuire & Co. to perform a part of their contract, and it was altogether natural that they and their workmen should take an interest in seeing that the sub-contract was not carried out in such a way as to give unnecessary trouble to others. All these points lend weight to the probability that McGuire & Co. would expect their foreman in their interest to exercise some supervision in the absence from the premises of anybody having authority from Robb & Co. in the placing of these pieces.

Coming now to the particular circumstances:—the boiler ends in question were shipped by Robb & Co. to McGuire & Co. It is not explained why this was done

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in this particular case unless it was in accordance with the usual practice. At the request of Robb & Co.'s manager in Montreal, the McGuire Company gave to a carter furnished by Robb & Co., the shipping documents shewing the articles directed to McGuire & Co. with instructions to obtain them from the railway company and deliver them at the premises in question. In the circumstances the carter naturally treated these goods as goods deliverable to McGuire & Co., and I think the jury would be entitled to find that they were so treated with the concurrence of McGuire & Co. When they reached the premises, there being nobody there representing Robb & Co., Finlay, McGuire & Co.'s foreman, assumed control of them, and it is upon Finlay's negligence, assuming there was negligence, that McGuire & Co. are charged.

Taking all the circumstances I have mentioned together, it appears to me that the jury would be entitled to find — and I must say that I do not think that it would be a conclusion in the least unreasonable — that Finlay was acting in the interest of and for McGuire & Co. with their authority, and not either giving his services to the Robb Co. or simply acting gratuitously in general interest.

I have only one more word to add on this point, and that is with the object of emphasizing this:—That the question as to whether Finlay was acting within the scope of some authority he had from the McGuires, is simply a question of fact, and for the purpose of determining this question I do not think that judicial decisions upon other states of fact can be of much value. The point upon which the jury had to pass was whether in view of all the circumstances Finlay

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was doing something which he and his employers understood he was there to do. That question was, I think, put to the jury with entire fairness and in such a way that I believe they could not fail to understand the nature of the question they were called upon to decide and being, indeed, far from certain that I should not have taken the same view as the jury did upon this question, I think there is here no good ground for setting aside their verdict.

Then comes the question as to whether there was evidence of negligence. Now I think the test to be applied is this. The owner of the building as occupier owed a certain duty to persons invited to come upon the premises in the ordinary course of business. I think that, as regards positive acts, the responsibility of the concrete contractors would be the same as that of the owner, and I think, also, that any other person engaged in the work of construction, as the appellants were, would be under precisely the same responsibility as to his own positive acts in relation to such persons as the owner would be. To put the point a little more concretely:—McGuire & Co., were, in my judgment, bound, as regards such acts, to use the same care, that is to say, they were under the same duty to persons properly on the premises in the course of their business with any of the contractors engaged in the construction of the building as the owner would be obliged to use with regard to persons invited by him or as any particular contractor would be obliged to use with regard to the safety of persons invited by that contractor himself. I am now speaking, let me repeat, of positive acts only. What then, is the measure of that duty? The nature of the situation with which we are dealing must not be left out of sight. Here is a

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building in course of erection. Different contractors are engaged at one and the same time in carrying on different operations. In the very nature of things the possibilities of injury are numerous. It would be most unreasonable that anybody going into such a place, in the ordinary way of business, should expect to find himself at every point protected against these possibilities as if he were a person incapable of taking care of himself. A person going into such a place assumes a certain amount of risk. He himself assumes the responsibility of exercising vigilance of a person of ordinary faculties and judgment in order to avoid the reasonably probable dangers of such a place, and the responsibility of the occupier must be considered in relation to this responsibility of the invitee. The result, I think, has been summed up by Mr. Justice Atkin in *Lucy* v. *Bawden*(1), in the proposition that the duty is to avoid setting traps.

Coming to the particular case before us, Bridger, so long as he kept to the way provided for persons coming on the premises, or apparently provided, was entitled to assume that there were no traps. I have had a great deal of difficulty in satisfying myself whether there was evidence in this case to convict Finlay of doing what could be fairly called setting a trap. I think the point is a very doubtful one, and I do not feel justified in going further than saying that I am not satisfied that there was not sufficient evidence to support the finding of the jury.

ANGLIN J. (dissenting).—I am, with very great respect, of the opinion that this appeal should be allowed.

(1) (1914) 2 K.B. 318.

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The deceased Tunley was, no doubt, upon the premises where he was injured as an invitee. Persons employed on the premises or lawfully there might reasonably be expected to be where he was when the boiler end fell upon him. If the placing of this boiler end where it was had been attributable to the appellants, I should not have been prepared to disturb the verdict and judgment against them. But I find nothing in the evidence to justify fixing them with responsibility either for placing or leaving the boiler end in the dangerous position in which it was.

The appellants were contractors with the owner of the premises for the installation of a system of plumbing and steam-heating. Their contract, however, contemplated that they might sublet any part of the work. They undertook with the owner Jacobs

> to assume all liability for damage or injury occurring to any persons or property through the negligence or illegal acts of the said party of the second part, *his contractors, sub-contractors,* agents or servants; and to indemnify and save harmless the party of the first part from all claims, loss, or cost, by reason of such damage or injury.

The appellants in fact sublet to their co-defendants, the Robb Engineeing Co., the contract for supplying and installing the boilers for the heating-system. Over that part of the work the appellants had no control or supervision. The Robb Engineering Co. were independent contractors.

The boilers were shipped in parts by the Robb Engineering Co. from their factory at Amherst, N.S. Through some unexplained mistake the end of the boiler which fell on the deceased Tunley was consigned to the defendants, The W. J. McGuire Co., instead of to the Robb Engineering Co. Immediately upon their being notified of its arrival at Montreal, the McGuire Company advised the Robb Engineering

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Company, and the latter company employed their co-defendants, Meldrum Bros., Ltd., to deliver it at the Jacobs' building, as they had delivered other material. It is admitted that this boiler end was the property of the Robb Engineering Company, and it is clear that it was for them that the delivery was made by Meldrum Bros., Ltd.

There is nothing in the record to warrant an inference that there was any agreement or understanding whereby the appellants had undertaken to receive or to look after the Robb Company's material when it should be delivered at the Jacobs' building.

When the lorry carrying the boiler end reached the building it was driven along a passage on the ground floor, to the third pillar, which, as Davidson C.J., says, was as far as its size would permit. There was nobody on the premises representing the Robb Engineering Company. The Meldrums' foreman, Little, went to the basement and informed one Finlay, foreman for the McGuire Company, who was engaged in installing the plumbing, of the arrival of the load.

To quote the learned Chief Justice:—

> Little swears he asked for instructions as to where the plate should be placed (and) got them. Finlay denies this and asserts that the only request was for assistance in the unloading. Some undisputed facts exist. Finlay took up three men and assisted in the unloading; the plate was stood up against the western face, sixteen inches wide, of the third octagonal pillar, with a space of about two feet between the base of the plate and the pillars, the end of which projected into the roadway; Finlay thought it might be knocked down and that for the sake of safety, it should be moved a little farther back from the road and also be given a little more cant; these suggestions were adopted. The plate still projected, however, about 18 inches into the roadway. So matters stood until shortly after seven of the following morning, when Gellin entered the passageway with his cart.

In passing the third pillar, Gellin turned to the

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right to avoid an outgoing cart, and his own cart probably struck the projecting boiler end which fell on top of Tunley and pinned him to the ground, causing injuries from which he died, some twenty-two months afterwards.

Upon the evidence it is clear that in whatever Finlay may have done in the way of assisting to unload the boiler end — even if he directed where it should be placed — he was not engaged "in the performance of the work for which he was employed" by the appellants. Art. 1054, C.C. It was not part of their work to bring the material required for the boilers into the premises or to look after it when it had been brought there. Whatever Finlay did he did on his own responsibility and it was probably nothing more than rendering the friendly aid which one workman usually gives to another when help is required. If he suggested where the boiler plate should be placed — if he even undertook to direct that it should be put where it was — in doing so he was not acting as the servant or agent of the W. J. McGuire Co. If he made a mistake, if he did something which was negligent, there is, in my opinion, nothing to warrant a finding that the appellants were responsible for it. He was not discharging any duty which he owed to them. He was not acting for their benefit or within the scope of his employment. He was not "under the appellants' control" within the meaning of article 1054 C.C.; nor was the boiler end a thing under their care. If he was acting for anybody other than himself it would be for the Robb Engineering Co. in whose interest he assisted the Meldrum employees. For collateral negligence of the Robb Company the appellants are not responsible, apart from the special provision in

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their contract above quoted. That clause of their contract might render the appellants liable to indemnify the owner, Jacobs, if he had been held responsible for the injuries sustained by Tunley. But it does not establish privity between Tunley and his representatives and the appellants.

The appellants should have their costs in this court and in the Court of Review and the action should be dismissed as against them with costs.

BRODEUR J.—It is stated by the appellant company that the respondent's husband was a trespasser in the Jacobs building. The evidence shews, on the contrary, that the deceased had an implied invitation to go into that building to get employment. He was waiting for that purpose when he was struck by the end of the boiler in question. The jury were justified in finding that the respondent's husband was lawfully in the place where he was injured.

As to the question of negligence charged against the appellant company, the jury found that the accident was

due to the fault, want of care and lack of supervision of the Robb Engineering Company and W. J. McGuire & Co., Limited, by placing the piece of iron in a dangerous position.

The appellant, the W. J. McGuire Co., had the contract for the whole heating system in the Jacobs building. They could not sublet their contract without the written consent of the proprietor. They assumed also by their contract with Jacobs

all liability for damage or injury occurring to any persons or property through the negligence or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants.

The appellant made a sub-contract with the Robb Engineering Company, of Amherst, N.S., to supply

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and install the boilers that formed part of the heating system. One of the clauses of that sub-contract was to the effect that the appellant was

> to provide right-of-way, openings in buildings, fences, etc., and *space necessary for the delivery and installation of the machinery.*

The boilers were sent from Amherst to Montreal and consigned to the appellant company. It was, however, on the instruction of the local agent of the Robb Engineering Co. that the boilers were carted from the railway station to the Jacobs building. But there was nobody else representing the Robb Engineering Co. to receive the goods on the premises; and, as they were consigned to the McGuire Company, the carter applied to the McGuire Co.'s foreman to get the place where those goods should be placed and the employees of the McGuire Co. also helped in unloading the goods and in negligently placing them in a part of the building where carts were constantly passing by.

The jury seems to have been properly charged by the judge presiding at the trial, since the counsel representing the appellants stated in answer to the judge's inquiry:—

> My Lord, I am thoroughly satisfied with your Lordship's charge.

The jury, with all those facts and circumstances in evidence have found that the appellants were guilty of negligence. That verdict has been upheld by the unanimous judgment of the Court of Review.

The jury could find the verdict they have rendered; and, in view of articles 498 and 503 of the Code of Civil Procedure, the appellants would not be entitled to have the plaintiffs' action dismissed or a new trial granted.

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I would refer to the case of *Harold* v. *City of Montreal*(1).

Appeal dismissed with costs.

Solicitors for the appellants: *Foster, Martin, Mann & Mackinnon.*

Solicitors for the respondent: *Davidson & Ritchie.*

(1) 3 L.C.L.J. 88.