LAWRENCE SCOTLAND (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN CARTRIDGE COMPANY (DEFENDANTS) ..... RESPONDENTS.

1919
*Nov. 27.
*Dec. 22.

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

Workmen's Compensation Act, 4 Geo. V. c. 25 (Ont.)—Negligence—"Accident"—Injury by poisonous gases.

Injury to the health of a workman in a munition factory through continuously inhaling the fumes of poisonous gases is not injury by "accident" within the meaning of that term in sec. 15 of the Ontario "Workmen's Compensation Act."

Judgment of the Appellate Division (45 Ont. L.R. 586; 48 D.L.R. 655), reversed on the merits as there was evidence on which the Jury could reasonably find for the plaintiff and the Appellate Division should not have disturbed their findings.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial in favour of the plaintiff.

The plaintiff, working in a munition factory, claimed damages from his employers for injury to his health caused, as he alleged, by inhaling gas fumes in doing his work. He claimed compensation under the "Workmen's Compensation Act" but the Board held that the injury was not caused by "accident" and that it therefore was without jurisdiction. He then brought an action in which the jurisdiction of the Board was made an issue. On the trial the evidence was conflicting as to whether or not the

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin' Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 586, 48 D.L.R. 655.

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illness of the plaintiff was caused by poisonous gases, some doctors testifying that it was impossible, others that there could be no other cause. The jury found in favour of the plaintiff and judgment was entered for him for $3,500. The Appellate Division reversed this judgment and dismissed the action.

McBrayne for the appellant. There was ample evidence to justify the findings of the jury and the verdict for plaintiff should not have been set aside. *Watt* v. *Watt* (1).

The evidence shews negligence in not providing proper ventilation. See *Butler* v. *Fyfe Coal Co.* (2); *Toronto Power Co.* v. *Paskwan* (3).

Strachan Johnston K.C. and *H. A. Burbidge* for the respondents, referred to *Brintons Co.* v. *Turvey* (4); *Glasgow Coal Co.* v. *Welsh* (5).

THE CHIEF JUSTICE.—This action was one brought by plaintiff appellant, a workman at one time employed by defendant company in operating an annealing bath or process in use in defendant's works in the City of Hamilton for the manufacture of cartridge shells and other war munitions.

It was the duty of the plaintiff who was known as a "dipper" to place the cartridge shells, which were made of brass and were at a high temperature, in what was known as a sulphuric acid bath and after a short time to remove them from this bath and place them in another bath known as the cyanide bath.

On February 12, 1917, plaintiff became ill and unable to continue his work and was removed to the

(1) [1905] A.C. 115.
(2) [1912] A.C. 149.
(3) [1915] A.C. 734, 22 D.L.R. 340.
(4) [1905] A.C. 230.
(5) [1916] 2 A.C. 1.

Hamilton general hospital where he remained under treatment until June, 1918. The contentions on which he based his claims were that his illness was caused by strong, irritating and poisonous gases which were emitted from the baths in which his duty required him to place and remove the cartridge shells and which were inhaled by him in the discharge of his work; and that in addition to these alleged poisonous gases, natural gases of a poisonous character were emitted from and by the natural gas furnaces in close proximity to the baths used in heating the shells and became mingled with the other poisonous gases which he was forced to inhale, and that no system of ventilation of any kind was adopted or furnished by the defendant for the purpose of removing the gases plaintiff was compelled to inhale while at his work, the result being his illness and complete collapse.

The defence of the defendant not only put in issue the facts of the defendant's illness having been caused by irritating and poisonous gases to which his work exposed him and the want of ventilation in the building as charged but also set up as a defence that in any case the plaintiff's remedy was confined to that given by the "Workmen's Compensation Act" and that his remedy had, on plaintiff's application for compensation under the Act, been refused, which refusal was final as to his claim and without appeal.

As to this latter defence, I do not think the plaintiff's common law right of action was taken away by the statute under the circumstances of this case. The Board declined to entertain the claim on the ground that plaintiff's claim was not one which occurred "for or by reason of any accident which happened to him in the course of his employment" and I cannot but think in so deciding they were right. The Board

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therefore had no jurisdiction to award compensation in a case of this kind and the plaintiff was properly left to his common law right of action.

The latest case which I have been able to find on the much debated question of what is an "accident" within the meaning of the term accident in the "English Workmen's Compensation Act," 1906, 6 Edw. VII., ch. 58, sec. 1, sub-sec. 1, is that of *Innes* or *Grant* v. *Kynoch* (1), decided by the House of Lords. Their Lordships, in very lengthy reasoned judgments in which all the previous cases were referred to and analyzed, decided, Lord Atkinson dissenting, that the fortuitous alighting of the noxious bacilli upon an abraded spot of the plaintiff's leg, though it did not appear when or how he received the abrasion and it was impossible to say with certainity when the infection occurred, nevertheless constituted an accident within the Act.

In the case before us, of course, no such point or controlling fact arose and I take it from reading the judgments delivered that in the absence of proof of the abrasion on the plaintiff's leg which became infected by certain noxious bacilli, there would not have been any ground for the holding their Lordships reached.

Leaving that defence and turning to the substantial defences set up by the defendant company to the claim of the plaintiff arising out of the alleged emanation of noxious and poisonous vapours from the baths at which he was working and the absence of proper and efficient ventilation in the factory which would have rendered these gases innocuous, it appears that after a lengthy trial during which a great many witnesses, scientific and otherwise, were examined, the learned trial judge charged the jury on all the disputed ques-

(1) [1919] A.C. 765.

tions with a fullness and clearness which does not seem to have left room for any complaint on either side and submitted to the jury for answers a series of questions covering all the debatable issues or contentions. I venture, even at the risk of unduly prolonging my reasons, to transcribe these questions and answers in full rather than give a simple epitome of them because, if there was evidence to justify the findings on the two main points of the emanation and inhaling of noxious and harmful gases and the absence of proper ventilation, these are sufficiently clear and definite as to justify the judgment entered by the trial judge but set aside by the Court of Appeal.

QUESTIONS FOR THE JURY.

1.—Were harmful gases generated in the defendants' factory while plaintiff worked there? If so, what gases? A.—Yes. The three fumes of gases combined: sulphuric acid, cyanide of potassium and natural gas.

2.—Was defendants' factory in which plaintiff worked ventilated in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours or other impurities, generated in the course of the manufacturing process carried on by the defendant while the plaintiff was in defendants' employment? A.—No.

3.—If you answer no, then what effect did such lack of ventilation have upon the plaintiff; answer fully? A.—The conditions in the factory where the plaintiff worked caused his present and possible future disability.

4.—Was the defendant guilty of negligence that caused the injury to the plaintiff complained of? A.—Yes.

5.—If so, what was the negligence? A.—Sufficient ventilation was not provided while plaintiff worked there.

6.—Might the plaintiff by reasonable care have avoided the injuries complained of? A.—No.

7.—At what sum do you assess the damages? At common law? A.—We assess the damages at $3,500.00 under the common law.

Under the "Factory Act?" A.—$3,664.44.

QUESTIONS SUBMITTED BY MR. JOHNSTON.

1.—Was the risk of inhaling dangerous gases a necessary incident to the employment of the plaintiff? A.—Yes. It was necessary for the plaintiff to breathe, and in so doing he inhaled the fumes of the gases.

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2.—Was the imperfect ventilation, if any, caused by any of the fellow workmen of the plaintiff in keeping the windows and doors closed? A.—No. That the fumes were too heavy to be carried off by natural ventilation in the winter months.

3.—Did the plaintiff, knowing the conditions, assume the risk connected with the employment? A.—Not knowing that it was a dangerous position he did not assume the risk.

4.—If the plaintiff was injured in the course of his employment was the plaintiff injured by accident? (No answer).

I frankly confess that after reading the reasons for judgment of the Divisional Appeal Court delivered by the learned Chief Justice of the Common Pleas, I felt in great doubt whether the judgment entered upon the jury's findings could be sustained.

The question, of course, for our determination is not what we would find as jurymen having heard the evidence and inspected the factory and its means of ventilation in the winter months, but simply and only whether the findings of the jury were such as reasonable men might fairly make on the evidence submitted to them.

Since the argument at bar at the conclusion of which I still retained my previous doubts, I have read over most carefully the evidence given on both sides and parts of it more than once, and I confess that if I had to give the verdict I would most likely hold that the evidence taken as a whole did not justify the finding of the emanation of noxious and harmful gases from the baths at which the defendant worked, especially having regard to the weak solution of sulphuric acid proved to have been in one vat or tank 5 gallons to an 80 gallon tank, and another solution of cyanide of potassium approximately 25 lbs. to a 75 gallon tank, and to the scientific evidence, not contradicted by any other such evidence, respecting the possibility of these solutions throwing off these alleged noxious gases.

I say on this main and controlling issue I would as a juryman probably have found against the plaintiff. But that is not my province. I have only to determine whether in the conflict of evidence we have before us in this case, scientific and practical, we find enough to justify reasonable men in reaching the conclusion these jurymen did. After much consideration and thought I have reached the conclusion, though not without much doubt, that there is such evidence in the record and that I ought not, in view of the extreme jurisdiction which juries are permitted to have over questions of fact, to set aside their findings on mere doubts I may entertain or on my reaching on the reading of the evidence a conclusion different from that the jury reached. Now in this case the jury had the great advantage of seeing and hearing the witnesses and of judging how far and to what extent credit should be given to their statements. They had the whole history of the plaintiff's illness and the facts which preceded and were claimed to have led up to it, given by the plaintiff. They had the evidence very strong and positive of the three medical men who had examined the plaintiff most thoroughly. Dr. Martin was the physician who was consulted by the plaintiff when he first took ill and saw him many times, making, as he stated, a most special examination to determine whether he could exclude from consideration all possible causes, other than poisoning, of the symptoms of illness which plaintiff had and suffered from. In the result he reached the conclusion that poisoning by the inhalation of poisonous gases was the cause of the man's illness. This conclusion was, of course, founded partly on the plaintiff's history of his case, partly on the man's symptoms and partly upon the test of the patient's

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urine and blood made by him, excluding or "ruling out all other possible conditions." He called Dr. Nancekivell in consultation who also seems to have made a very thorough examination of the patient and reached the conclusion that the symptoms which the patient had were those of a man suffering from inhalation of poisonous gases and that those symptoms altogether pointed to nothing else. In cross-examination he expressed himself as willing to pledge his oath that the patient was suffering from gas poisoning and that his opinion was not a matter of conjecture but

> the result of logical analysis, history, and his condition. There is no one disease you will get the inflammation of all the mucous membranes and the symptoms that he produced. No one disease will give you all those symptoms, outside of gas poisoning.

Lastly we have Dr. Holbrook, a medical gentleman in charge of the Hamilton Sanitarium and who was called and examined pursuant to an order made by the court to have an examination of the plaintiff with a view of giving testimony at the trial. The written report of Dr. Holbrook is very full and complete evidencing not a mere casual examination of his patient but a thorough and complete one. The report after describing in detail the history of the man given by himself and the physical examination made by the doctor, of the plaintiff and the conditions in which he found the different parts and functions of the man, winds up by saying:

> In addition to these conditions a serious condition has been set up probably due to the fumes from the cyanide tank and which might be described as the chronic effects from cyanide poisoning. It seems to have set up a debility which has affected the nerves and muscles by causing a peculiar change which might be described as a loss of tone. This is probably the chief factor in the heart lesion, but while the other tissues would probably in time regain their tone, yet I would consider that this condition in the heart had led to physical changes which will remain permanent. Thus, while I consider it absolutely impossible to make definite statements at this stage, I would consider that his

occupation in the munition plant had led to a general debility probably the result of chronic cyanide poisoning; also to an increase of fibrous or scar tissue in the lungs and to some enlargement in the bronchial gland and to a decrease of tone of the heart muscle fibre with dilation of the heart. I would consider that the man is now unfit for any work and that in all probability he will never be able to return to any but very light work for which the remuneration in his case would be small.

The doctor's examination and cross-examination at the trial did not in any way alter or modify the report he had made, indeed it rather accentuated the opinion he had there expressed.

He said:

> Now I think that the bronchitis and irritation of bronchial glands was set up by inhalation of the sulphuric acid, and to some extent, cyanide fumes.

Again:

> I think the chronic cyanide poisoning is the chief factor. He may have been over working, too long hours and too hard, that may have had something to do with the breakdown, but the symptoms came on and suggested cyanide poisoning more definitely than any other thing. Of course it was a chronic poisoning, more from the inhalation of vapour.

In cross-examination he admitted not being an expert on toxicology or the science of the effect of poisons on the human body but gave with great lucidity the symtoms of cyanide poisoning and left the impression on my mind that, while not professing to be an expert in toxicology, he was well grounded on the subject generally and knew well what he was talking about.

The other two medical men I have spoken of, Drs. Martin and Nancekivell, were even more emphatic than was Dr. Holbrook in ascribing the plaintiff's symptoms to noxious and poisonous vapours. It is true the evidence of these medical men was founded to some extent, possibly to a very large extent, upon the history of his case given to them by the plaintiff and that their conclusions as to these symptoms having

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been caused by noxious and poisonous vapours were most emphatically contradicted by Dr. John A. Oille, a medical gentleman practising for many years past in Toronto and who, at the request of the Workmen's Compensation Board, had made a very full examination of the plaintiff's physical condition. In fact, to my mind it is quite impossible to reconcile Dr. Oille's evidence with that of Drs. Martin, Nancekivell and Holbrook. In substance, Dr. Oille's evidence was that his diagnosis disclosed pleurisy and osteo-arthritis as the diseases from which the plaintiff was suffering when he examined him and he is emphatic in his statement that

> neither of these diseases could have been caused by sulphuric acid or cyanide, as both of these diseases are infective in origin.

By "infection" he explained that it "meant that bacteria get into the body tissues or blood and cause disease."

When to this positive and clear evidence of Dr. Oille is added that of Mr. Fertig, a chemist and chemical engineer, who came to Canada from the United States on Government work and whose duties as inspector for the American Government took him to the factory here in question very often, it will be understood why I entertained doubts as to defendant's liability as to there being evidence to sustain the jury's findings. Mr. Fertig said that a solution of sulphuric acid mixed with water in the proportion of five gallons to an 80 gallon tank, and the water heated to 200 degrees, would not give off any harmful fumes or gases, and that there was no doubt about it; and further that putting 20 pounds of cyanide in the cyanide tank, 20 to 22, containing about 75 gallons, and the water heated to 100 or 110 degrees Fahrenheit,

no harmful gas or fumes would be produced. As he put it:

> No poisonous gases would come off. That bath in itself would be a very dilute bath, 22 pounds to 75 gallons would be a three per cent. solution.

In fact, in cross-examination Mr. Fertig went so far as to say that 24 parts of water standing there in place of these tanks containing sulphuric acid and cyanide, would be just as harmful and as harmless and that the combination of sulphuric acid and cyanide as proved was absolutely harmless and that made it unnecessary to make provision to carry off the fumes.

In addition to these conflicting statements of the medical men and the experts, there was, of course, the positive statements of the plaintiff himself as to the effect upon him at the time he breathed in the exhalations from the vats or tanks, and of such men as House as to their having had similar experiences when so emloyed, and evidence to the contrary by others equally qualified to speak from personal experience.

The discharge by the jury of their duties was not a light or easy one. I am not able to say that the evidence justifies me or justified the Appellate Division in setting aside their findings. I have discussed the branch of the case made on the noxious exhalations or fumes arising from the tanks, at some length, because probably it is the strongest for the defendant. I think there was sufficient evidence to justify the finding of the absence, under the circumstances as found by them, of efficient ventilation in the winter season.

For these reasons I would allow the appeal with costs and restore the judgment of the trial judge upon the jury's findings.

IDINGTON J.—The appellant claims from the respondent damages for injuries received, whilst serving

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as a workman in its factory, at part of the process of making shells for use as war munitions.

He alleges that, instead of making the place in which he was set to work reasonably safe for those performing the part of the service he was engaged in, it allowed the air, especially in that part of the room where he worked, to be contaminated with poisonous gases, resulting from the operations in which he and others were engaged; and that for want of proper ventilation he was compelled to inhale such poisonous gases and thereby suffered in his health.

It is reasonably clear that the building was so constructed that generally speaking in the warmer seasons ample means of ventilation were supplied by means of open windows or doors for all those engaged in the room in question, unless possibly for those few engaged at serving in immediate contact with the source and cause of the noxious gases in question.

But in the cooler and winter months the windows and doors were kept closed.

Obviously if, as now pretended, there were no noxious gases of any kind generated, there might be enough fresh air enter the room through the seams of the metal structure, or round the window frames and doors, to keep the room in a reasonable condition to work in.

In resolving the legal problem now submitted to us it does not seem necessary to follow that branch of the inquiry at greater length.

The appellant was taken ill and submitted the case, which his condition presented, to a physician in Hamilton who seems to give his evidence in a fair and intelligent manner and he attributes the condition of the appellant to the inhalation of just such noxious gases as might arise from the process in which the appellant

was engaged. Indeed he gives a very positive opinion, which, if correct, entitled the appellant to succeed, as he did, with the jury who found, in answer to the appropriate questions submitted, including a number proposed by respondent's counsel, sufficient facts to maintain the action and assessed the damages at $3,500 if based upon the common law or, alternatively, at $3,664.44 if based on the "Factories Act."

The learned trial judge entered judgment for the former sum.

Assuming the appellant told the truth and the whole truth as to his work and condition of his health, and his physical condition, the case is of a very simple and ordinary character so far as the relevant law is concerned, and in the result was necessarily committed to the determination of fact by a jury.

The physician is corroborated in all essentials by a brother practitioner knowing of and being consulted in the case at the time.

At a later time in the course of the proceedings in this suit an order was procured by respondent for the examination of the appellant by an independent physician selected by the judge applied to therefor.

His report is in the case and he was called also by appellant on the trial.

His report and evidence go also a long way to corroborate the view taken by the other physicians called by appellant. He, in view of the examination which he made of appellant having taken place sixteen months or more after his falling ill, properly speaks with caution as to the possibility of something else than the alleged gases producing the results he found. But so far as a skilled physician, not professing to be a profound toxicologist, could properly do so he leaves no doubt on the vital point of, in his opinion, sulphuric

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acid and cyanide having been a possible and probable cause of appellant's condition, and of the gases therefrom having possibly been and indeed probably inhaled in the way testified to by the appellant.

The basis for all that testimony of experts is, of course, what the appellant and his witnesses swore to.

The evidence of Husband, who was foreman in the room and had been discharged evidently for no other reason than that he did not get along with the men under him in a satisfactory way, seems, notwithstanding that incident, to have been given fairly and intelligently. If he and others are to be believed there is abundant evidence corroborative of appellant's story, and especially of the inhalation of noxious gases during the operations of appellant, and attributable thereto.

It would have been, in my opinion, unjustifiable to have granted a non-suit in face of such a case as thus presented, even if it had been moved for.

It is remarkable and indeed, in light of the subsequent development in the Second Appellate Division, amusing to find that able counsel, alert to take properly every possible arguable objection during the course of the trial, never thought of either moving for a non-suit at the close of plaintiff's case, nor at the close of the evidence for defence for a dismissal of the action.

The evidence for the defence apart from that of the expert evidence to which I am about to refer later, does not, to my mind, meet that of the appellant and his witnesses in any satisfactory way, much less overbear it in weight. Indeed much of it impresses me, after a perusal of the whole, given for the defence, with the view that it had better have been left aside and the defence rested upon the expert evidence alone,

coupled perhaps with some few facts testified to by some of the other witnesses for the defence.

Turning to the expert evidence, it consists of the evidence of a physician of sixteen years' standing who laboured under the disadvantage of not having seen the appellant until about two years after he had fallen ill, and of a chemist.

This physician had, I infer, seen but one case of acute cyanide poisoning, and none of the chronic cyanide poisoning from inhalation.

I submit that these facts coupled with the testimony he gives, evidently from reading, in regard to this lastly mentioned possibility, a text book, is not very convincing.

Another physician called gives unimportant evidence and admits that probably he knows little of the subject matter involved herein.

Then we have the evidence of a chemist who in a sentence or two denies that when cyanide is in specific proportions put into water of a certain temperature named, no harmful poison or poisonous gases could arise.

No accurate examination of the conditions of the water actually used was ever pretended to have been made by him or any one else, or of the actual condition of the cyanide used. The water was supposed to be of the limited temperature named.

The evidence discloses a possible cause of the water becoming overheated by reason of the haste of workmen, ignorant of the consequences, plunging into same many of the pieces to be dipped therein before being properly cooled off.

As a basis of scientific investigation, which the Appellate Division lays so much stress upon, I submit it would be difficult to found anything in support of the defence so far as rested thereon.

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To my mind, especially in view of the fact that cyanide was not used by any others engaged in the same process, except one, and that not named, this sort of testimony is next to if not entirely worthless.

I agree in the desirability of the truth revealed by science, being, when possible, duly observed, but the process of scientific investigation requires a thorough investigation of all the facts, conditions and circumstances so far as possible, before proceeding to determine and formulate any definite assertion of any supposed rule of action or scientific fact founded thereon.

It never seems to have occurred to any one concerned to have examined a single specimen of this so-called cyanide and ascertain thereby the quality of that used and then see what results would flow therefrom under such conditions as it was used herein or even approximately so.

Unless we are to overturn our system of jurisprudence and the one rule of reason governing in law the results of a jury's verdict I submit the judgment appealed from cannot be permitted to stand.

There was ample ground upon which the jury's verdict might well have been reached within that rule acting upon the evidence placed before them.

The judge's charge was full, fair and unobjected to, save by suggesting what I am about to refer to, and respondent having let it go at that, ought not to have been heard to complain, unless upon the one question of whether or not the evidence did not disclose a mere case of accident.

I am of the opinion that the ruling of the Workmen's Compensation Board was right in holding that it was not a case of accident, in the sense in which that word is used in the Act in question, but, if any-

thing, the result of a continuous and systematic method of carrying on the works in question, in violation of either common law or statutory law, or of both.

Had, for example, an explosion taken place by reason of the same method, if such a result possibly conceivable, then I can conceive of a case so founded being within the term "accident" in the "Workmen's Compensation Act." Not being so or akin thereto if as I suspect the injuries were the result of months of continuous defiance of nature's laws by respondent, the appellant's right of action is not barred by said Act.

I think the appeal should be allowed with costs here and in the court of appeal, and the judgment of the learned trial judge be restored.

DUFF J.—I have little to add to the reasons given by the Chief Justice with which I concur on the point whether the injuries from which the appellant suffered were due to the inhalation of noxious gases while engaged in the performance of his duties under his employment with the respondents. I find it impossible to concur in the decision of the Appellate Division that the findings of the jury on this point can be set aside or disregarded as without reasonable foundation in the evidence.

A more serious question is raised by Mr. Johnson's contention that there is no evidence justifying the finding that by the negligence of the respondents the appellant was deprived of some protection to which he was entitled and through which he would probably have escaped the harmful action of the gases to which he was exposed.

The evidence on this point is very meagre. After carefully considering the testimony of Mr. Darling,

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who was called on behalf of the respondents, together with the evidence as to the state of the atmosphere in which the appellant was working, I cannot concur in the view that there is not some support for the jury's finding on this point.

I should add a single word upon the effect of sec. 15 and sub-sec. 1 of the "Workmen's Compensation Act." I refrain from expressing any opinion on the question whether a claim for compensation having been rejected by the Board on the ground that the facts out of which the injury arose did not bring the case within the category of accident, it is open to the employer to allege in an action by the employee based upon the charge of negligence that the same facts did constitute an accident bringing the case within the operation of the provisions of the Act, including sub-sec. 1 of sec. 15 which on that hypothesis would afford an answer to the employee's action, if such a contention were open to the employer.

It is unnecessary to pass upon this because, for the reasons given by the Chief Justice, I think the respondents' contention independently of the Board's decision must fail.

ANGLIN J.—Sec. 43 (1) of the "Factory Act" (R.S.O. ch. 229), as amended by 8 Geo. V., ch. 44, sec. 4, requires that

> the employer of every factory or shop shall ventilate the factory or shop in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours, dust or other impurities generated in the course of any manufacturing process or handicraft carried on therein that may be injurious to good health.

At common law an employer is bound to provide so far as practicable a reasonably safe place for his work-

men to work in. *Ainslie Mining and Railway Co.* v. *McDougall* (1).

The plaintiff complains that while engaged in the defendant's munition factory he was unnecessarily exposed to the inhalation of poisonous gases generated in the course of its manufacturing process; that such exposure was due to inadequate ventilation of the annealing room where he worked; and that it resulted in serious and permanent injury to his health. On the trial, before Mr. Justice Clute, a jury found these several allegations to be established. On appeal the judgment based on this verdict was unanimously set aside, the Chief Justice of the Common Pleas delivering the judgment of the Divisional Court and holding that on each of the three issues

> there was no evidence upon which reasonable men could find in the plaintiff's favour (2).

On the plaintiff's appeal to this court the defendant supports this judgment and also contends that if injury to the plaintiff's health was caused as he alleges, the case was one of "accident" within the provisions of the "Workmen's Compensation Act" (4 Geo. V., ch. 25, Ont.) and this action therefore cannot be maintained. It will be convenient to deal first with the latter defence.

The plaintiff duly presented a claim for compensation to the Workmen's Compensation Board and it was twice considered by that body. On the first occasion it was rejected, as the formal certificate says, on the ground that it did not appear that

> the claimant sustained a personal injury by accident arising out of and in the course of his employment;

and on the second, because

(1) 42 Can S.C.R. 420. (2) 45 Ont. L.R. 586; 48 D.L.R. 655.

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the Board is unable to find that the claimant sustained personal injury by accident within the meaning of the Act.

The respondent contends that it is consistent with these certificates that the Board based its rejection of the claim on the view that the plaintiff had not in fact been injured as he avers, and did not determine that if so injured the case would not be one of accident within the meaning of the statute. The second certificate seems to me rather to indicate that the Board meant to hold that any injury the plaintiff sustained was not due to an accident and that it was therefore without jurisdiction. Any possible doubt on this point however is removed by these passages in the evidence given by Mr. Kingstone, one of the Commissioners, who made an investigation on behalf of the Board.

Q. Did you find when you were inspecting that factory that there were sufficient methods provided by that company to remove sulphuric acid fumes from that room? A. Well, let me answer that by making this mention; I had this in my mind, I was naturally looking under the terms of the Act to see whether or not anything had happened which could be considered an accident, because under the terms of sec. 3 of the Act the claim could only be allowed if it could be found that there had been injury to this man by accident.

Q. And you decided ultimately it was not an accident? A. I concluded there had been no injury by accident.

Q. How did you conclude that the injury had been sustained? A. Having excluded the question of accident—

His Lordship: The report is very explicit. (Reading report.) Then they found this case was outside the jurisdiction of the Board?

Witness: Yes, when I found that I did not go so far into the investigation of what was the trouble with the man as I otherwise would have, had I been charged with the responsibility of getting at the whole trouble.

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Mr. MacBrayne: Q. Speaking as a witness on behalf of the defendants, can you say whether there was sufficient ventilation in this room or not? A. I would not want to express an opinion. Because from that point of view I do not know; all I do know it satisfied me there was no accident.

His Lordship: You were not there after September? A. I was just there in connection with another accident on another occasion.

Q. You have no knowledge of the conditions in winter? A. No.

Mr. MacBrayne: Did you inquire whether the conditions you saw in September were the same as in January and February of that year? A. Well now, I don't know that I can say that I did. I inquired sufficient to satisfy me that no accident had happened to this man, within the meaning of our Act.

By sec. 6 (1) of the "Workmen's Compensation Act" the Board is given exclusive jurisdiction to determine all matters and questions arising under Part I. of the Act. That part deals with workmen's rights to compensation. By sec. 64 the Board is empowered to determine, if an action is brought by a workman against the employer in respect of an injury, whether the workman is entitled to maintain the action or only to compensation under the statute.

By an amendment (5 Geo. V., ch. 24, sec. 8 (2)), any party to an action is enabled to apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation or as to whether the action is one the right to bring which is taken away by Part I.; and such adjudication and determination is declared to be final and conclusive. The re-consideration by the Board of the plaintiff's application for compensation was at the instance of the present defendant, and I agree with the learned Chief Justice of the Common Pleas that the Board's conclusion that the plaintiff's claim was not founded on a personal injury by accident within the meaning of the Act is binding on the defendant and not open to review in this action.

If the question were open I should incline to apply and follow the decisions in *Steel* v. *Cammell, Laird & Co.* (1); *Martin* v. *Manchester Corporation* (2); *Broderick* v. *London County Council* (3); and *Eke* v. *Hart-Dyke* (4),

(1) [1905] 2 K.B. 232.
(2) 5 But. W.C.C. 259.
(3) [1908] 2 K.B. 807.
(4) [1910] 2 K.B. 677.

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the authority of which, so far as they require proof of a particular occurrence causing the injury complained of, which happened within some narrow limitation of time has not been materially affected, as I understand it, by the recent judgment of the House of Lords in the readily distinguishable case of *Innes* or *Grant* v. *G. & G. Kynock* (1). I agree with the learned Chief Justice that the "Workmen's Compensation Act"

does not stand in the way of this action.

But, I am, with great respect, at a loss to understand how it can be said that there was not any evidence on which the jury could reasonably find as they did in favour of the plaintiff on each of the three issues involved in the question of the defendant's liability. There was, in my opinion, quite sufficient evidence, if the jury saw fit to credit it, to support their verdict on all three issues. This expression of opinion would perhaps suffice to dispose of this appeal, but, in deference to the learned judges of the Divisional Court, I think I should indicate what the evidence is upon which the jury's verdict in my view should have been sustained.

Were there noxious fumes or gases given off from the sulphuric acid and cyanide vats in the defendants' annealing room?

The plaintiff gives this evidence:

Q. What would be the effect on the sulphuric acid and the cyanide as you put these shells in there? A. Gas fumes, the hot shells going into the hot acid.

Q. There were fumes? A. As soon as you put them in the acid there was fumes you could see.

Q. That is steam? A. Yes.

* * * * * * *

Q. Your work took you practically over those vats? A. Yes.

William Husband, formerly a foreman with the defendant, says:

(1) [1919] A.C. 765.

His Lordship: What was the effect of this closing of the windows?

A. Why, it would cause a kind of heavy cloud of steam; pretty hard to see through it.

Q. From where? A. From the steam arising from the vats. The cold air would meet with the steam.

Q. Was there an odour to this steam that came from the vats? A. Yes.

Q. Having regard to the plaintiff's work, and his position during the work, what would you say as to whether or not he might or might not inhale any of the fumes? A. It is possible he may have. I have myself.

Q. You were not working over them? A. No.

Q. What do you say of the plaintiff in regard to his position and his work, whether or not he was in such a position that he would inhale it? A. Oh, yes, he would inhale it. He would inhale it more if the wind was on the west side. In the winter time it would blow up a sort of cloud.

* * * * * * *

Q. Has the cyanide in solution an odour? A. It has.

Q. What is it like? A. It is sickening to the head.

Q. Is it an odour that you can readily distinguish? A. It is.

Q. Then when you were using 20 pounds of this cyanide to 80 gallons of water, was there a perceptible odour? A. There was when we were using the strong stuff.

Q. And the strong stuff is the 20 pounds to the 80 gallons? A. Yes.

Q. Were there any fumes or odours from the sulphuric acid? A. Oh, yes.

Mr. Johnston: That is clearly a leading question.

Mr. MacBrayne: I don't know how I could ask the question in any other way.

His Lordship: Q. Was there an odour from the cyanide? A. Yes.

Q. What was it? A. A kind of sickening smell, and it used to affect my throat and lungs; if I got a good smell of it it would affect my throat.

Mr. MacBrayne: How many cyanide baths were there in that room. A. Two.

Q. And was the other being operated in the same way? A. Yes.

Q. With the same strength of pounds? A. Yes.

Q. Winter and summer? A. Yes.

Q. You said something to His Lordship about the effect of the odour from cyanide; will you tell us what that was? A. It affected in such a way that it was a kind of sickening smell to the head, and also affected my throat and lungs; each time I worked on the cyanide I would have the feeling till such time as I had reduced the quantity of cyanide.

Q. Was Scotland's work such as to keep him in this cyanide odour? A. It was such that there was three sets of vats he had to pass it to; he would be working there most of the time.

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Q. Did he have any other place to work? A. Well, he was changing around from the tanks. In the beginning he worked on sulphuric alone. After he was there a few weeks I put him to the cyanide tanks, because he was a smart man.

The strong mixture of cyanide, 20 or 22 pounds to 75 or 80 gallons of water, was used during most of Scotland's period of work. A harmless soda mixture is generally used for the same purpose.

Husband adds:

His Lordship: What was the difference between the lesser and the larger amount, in regard to its effect?

A. The fumes were stronger in the larger amount, and it left a kind of white substance on the cases.

James House, a fellow employee of the plaintiff, says:

Q. All I want you to tell the jury is what was the condition of that room when you were working there? A. The condition of the room, you mean the air, and in regard to the acid and cyanide?

Q. Yes. A. Well, in the cold weather the air was so thick with the sulphuric acid fumes and the cyanide that you could hardly see one another apart sometimes, and in inhaling the fumes it caused a bitter taste in the mouth, dizziness, headache, pricking of the eyes, and sleeplessness at night, and more tired when I got up in the morning than at night. When I went in I weighed 148, and when I came out I weighed 123 pounds.

Q. During the winter season what method was there for removing these fumes and letting fresh air in? A. There was no method whatever.

Q. Was there a window in the north side? A. No, the cold weather would blow the fumes to you, and you could not see, and it was so warm you would get heated up so over the tanks that you could not stand the least cold draft on you.

Q. What was your particular work? A. Packing the shells as they came out of the tank into the boxes.

Q. They had been pickled or had their bath? A. Yes.

Q. Why did you quit? A. Well, I quit on the doctor's advice.

Juror: Did you notice the fumes much more when the cyanide was being used? A. Well, you could taste it more.

* * * * * * *

His Lordship: What do you say caused the tired feeling?

A. Well, I believe it was the fumes of the sulphuric acid and cyanide, because before I went there I was in perfect health, could eat anything, and after being there three or four months I lost my appetite, and got up so cross and tired in the morning that I hated myself.

Q. Might that be attributed to the hard work? A. No, I worked at harder work before I went there.

Juror: Did you do any vomiting in the morning? A. Yes, shortly after I had eaten my lunch.

Q. What was the cause of that? A. The fumes it must have been, a bitter taste in my mouth, and food would not digest.

John Roberts, another fellow employee, gives this evidence.

Q. That was the only thing that held you up? A. No, I used to be I couldn't eat, take a little milk food.

Q. Did you lose any time during the six weeks except for this finger? A. No. I was not thinking the acid was doing any harm till people told me I was looking bad, and was yellow in the face, and couldn't eat and sleep, so I laid off after Christmas.

Q. Go to the doctor? A. No.

His Lordship: What caused that? A. The work I done before I never felt as I did then, I believe my flesh was yellow, and a nasty taste in my mouth, couldn't eat or sleep, and always tired getting up, wasn't the same man anyhow.

* * * * * * *

Q. That atmosphere is very heavy? A. Yes. Kind of hangs like that. A man inhaling that stuff it makes him sick. I could not eat, no taste of any food, just a little porridge that I had.

Husband also tells of an employee named Stirling who left the factory saying: "I can't stand these fumes and acid"—and went to a hospital.

Ernest Darling, a ventilating expert called for the defence, says:

Q. And so you would expect that these gases that would be in this room should be diluted? A. Yes.

Q. Why? A. If they are injurious to human health they should be diluted.

His Lordship: Do you know whether they are injurious or not?

A. From my knowledge I would know that cyanide gas is injurious, but sulphuric acid gases I don't believe are injurious to the same extent.

No doubt there is evidence from others, officers and employees of the defendant, that there were no perceptible fumes or gases in the annealing room; and one Fertig, a chemist called for the defendant, denied the possibility of fumes or gases arising from vats containing solutions of sulphuric acid and cyanide in the

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proportions and at the temperatures which the defendant company was supposed to maintain. In fact, he said these vats

were just as harmless as 24 pails of water. * * * Therefore why should any provision be made to take off the fumes?

Of course the witness assumed that the solutions were always maintained in the proportions directed and that the temperatures never exceeded those prescribed. Either of these conditions might easily have varied from time to time.

But it was clearly within the province of a jury to determine what credence should be given to the very positive and sweeping testimony of this witness and whether it should or should not be relied upon in view of the actual experience of the presence of such fumes and gases deposed to by men who had worked in the factory. When to their testimony is added the evidence of the doctors who examined the plaintiff (to be more particularly referred to in dealing with the next question) I confess my inability to understand how it can be said that there was no evidence on which a jury could reasonably have found that harmful gases or fumes were given off from the sulphuric acid or cyanide vats.

Was the plaintiff's impairment of health due to the inhalation of these gases—was he a victim of chronic poisoning from them? Dr. Martin, who had the best opportunity of forming a reliable opinion since he saw the man immediately after he was obliged to quit work, is convinced that he was.

My diagnosis was poisoning from the inhalation of poisonous gases—that the man's condition is the result of inhalation of poisonous fumes.

He rests his opinion on the symptoms of his patient and the history of the case. How far the plaintiff

could be depended upon to give a truthful history the jury had an opportunity of judging. They saw him in the witness box. Dr. Martin deposes that tests were made to eliminate the possibility of other diseases. No evidence of any other condition was found which would account for the symptoms as a whole, and while each of them, if taken separately, might be otherwise accounted for, the Doctor says that "the symptoms all together pointed to nothing else" than poisoning by the inhalation of poisonous gases, such as sulphuric acid and cyanide fumes.

Dr. Nancekivell, called by Dr. Martin in consultation, also examined the plaintiff two or three days after he was taken ill. His conclusion was that he had been poisoned by poisonous gases. He adds that if the man had come to him and he had not known that he had been working in a brass foundry he would have pronounced it a case of gas poisoning. Asked to do so he pledged his oath that the man is suffering from gas poisoning; and he adds:

> No one disease will give you all those symptoms (which the plaintiff exhibited) outside of gas poisoning.

Dr. Holbrook, the physician in charge of the Hamilton Sanitarium, who has had experience in gas poisoning cases with a number of returned soldiers, was appointed by the court, at the instance of the defendant, to examine the plaintiff and report upon his condition. He made three examinations, but had not the advantage of seeing the patient soon after he became ill. He found conditions, however, which he ascribes to the inhalation of sulphuric acid and cyanide fumes.

> It seems to me the cyanide fumes, the effect of that accumulated until a toxic effect was produced. * * * I think chronic cyanide poisoning is the chief factor * * * . Of course it was a chronic

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poisoning, more from the inhalation of vapour * * * . I think the conclusion I came to was that the cyanide poisoning was responsible for the different conditions he presented, and there was the general lowering of tone, nervousness, vomiting of food and irritability of the stomach * * * . It might be possible to deny that any of the symptoms he had were due to cyanide poisoning, but I think that the general lowering of tone and the symptoms were caused by that and nothing else.

Q. It might have been caused by one hundred different things? A. Yes, but in fairness to the man I do not think it was.

Dr. Oille, a physician employed by the Workmen's Compensation Board, called by the defendant, on the other hand, found no conditions that could not be fully accounted for by other causes and an absence of some symptoms which, in his opinion, are characteristic of cyanide poisoning. Dr. Oille admitted, of course, that when sulphuric acid and cyanide fumes reach a certain percentage they become dangerous, and will make a man sick if the percentage is great enough. And according to Drs. Martin and Nancekivell, the plaintiff exhibited most of the symptoms which Dr. Oille states to be those of cyanide poisoning.

There is no suggestion that the plaintiff was exposed to the inhalation of poisonous gases anywhere else than in the defendant's annealing room.

The jury found that

the conditions in the factory where the plaintiff worked caused his present and possibly future disability.

But the Chief Justice delivering the judgment of the Appellate Division says:

All the symptoms of illness of the plaintiff deposed to were by *all* the physicians stated to be symptoms of a common everyday character that may arise from any one of many common ailments; they proved nothing.

With deference it would seem that some of the evidence above outlined must have escaped the learned Chief Justice's attention. Otherwise I cannot account for his comment.

He adds:

> No other conclusion can be reached by me than that reasonable men could not find upon the evidence alone that the plaintiff was injured by poisonous vapours arising from these tanks; though reasonable men might be led by their impulses to do so * * *.

With respect, it was clearly competent for the jury to find as they did on this branch of the case. Not only was there evidence to warrant their finding but the weight of the medical testimony supports it. In accepting the evidence of Dr. Oille and rejecting the opinions of the other three physicians because of their lack of "any special knowledge in chemistry or toxicology," the appellate court would seem to have usurped the functions of the jury. The same observation may be made upon their action in treating the evidence of the chemist Fertig ("the proper evidence" the learned Chief Justice terms it) as conclusive against the presence in the annealing room of cyanide and sulphuric acid fumes arising from the tanks, notwithstanding their actual experience deposed to by several men who worked there and the conditions found in the plaintiff by three reputable physicians ascribed by them to the inhalation of these gases and for the existence of which no other cause has been or can be suggested and also as to the effect given to the evidence of the defendant's expert in ventilation notwithstanding the weaknesses in it disclosed on cross-examination and the actual atmospheric conditions in the annealing room deposed to by several witnesses.

The evidence on this latter branch of the case must now be considered. Admittedly there was no artificial ventilation and little attention seems to have been paid to the need for it. Open doors and windows provided excellent ventilation during the summer

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but there is abundant testimony that these were all closed during the cold weather.

The plaintiff worked in the annealing room from October, 1916, to February, 1917.

Ernest Darling, the expert in ventilation called by the defendant, deposed that, owing to the character of the building—a shed with sides and ends of corrugated iron sheeting

> the walls were not tight * * *. The building ventilates itself so to speak * * *. As far as ventilation is concerned it was very well ventilated. I think the trouble is that it is a question of heat and cold.

This expert made no examination of the building when the conditions prevailed under which the plaintiff was working. He never saw the factory in operation. On cross-examination it became apparent that he relied on open windows to take care of any noxious fumes that might arise in the room. The opening or closing of windows was left to the whim of the workmen, and some of them tell us that owing to the heat from the natural gas furnaces in the room—1200° Fahrenheit—and the character of the work they were engaged in they could not stand the draft from open windows during cold weather, working as they did in their shirts or with bare backs, and that consequently windows and doors were kept closed. The witness Darling criticizes their bad judgment in not opening windows on the side of the building on which there was no wind, but gives this significant testimony:—

> Q. Wouldn't the air in this room if there were not sufficient ventilation, become very much vitiated after ten hours' work, with the windows closed, the doors open occasionally? A. Yes.
>
> Q. And are you not trusting to a sort of accidental or providential ventilation when you speak of the doors being open? A. No. I think the men should use their judgment.
>
> Q. Then is it a good system of ventilation that leaves the question of shoving off the entire ventilation to the control of some workman?

A. You would have a great deal of trouble if it is left in the hands of more than one man.

Q. Shouldn't it be left in the hands of the management? A. No, the men should do it themselves.

Q. Is a system which is left to the men themselves and which causes physical injury to a man, a good system of ventilation? A. Not necessarily, no.

Q. It sounds rather bad? A. Yes.

Q. Wasn't that the case here? A. Not necessarily.

Q. These men who felt the cold should close the windows? A. The amount of gas—

Q. I am not talking of that? A. The density of the gas is the main feature.

Q. Is that system of ventilation which is left with workmen, entirely at the whim of any workman, to use or stop using it, a good and sufficient system? A. In that class of building, yes.

Q. In any class of building? A. No.

Q. Then with this building, why this building? A. Merely a shed.

Q. Then the windows don't amount to anything at all? A. Sure they do.

Q. Shut them and they still have good ventilation? A. Not necessarily.

Q. And the ventilators are no good because the cold air is coming in? A. You have to take into consideration the whole operation of the building.

Q. Because that is a shell of a building, built of corrugated iron, therefore the workman can close those windows or not, and it is still an efficient system of ventilation? A. An efficient system if properly used. You have to use your judgment.

Darling also states that

where you have concentration of gases—where they become dense or the air becomes saturated with gases

—forced ventilation is

a necessary part of factory construction

in order to carry those gases off; and, again, that some provision (should be made)

not carrying them off—dilution by supplies of cold air.

He also says that for 90% of the time a building such as that of the defendants' would be satisfactory

and manufacturers find they can afford as a rule to use a building like that rather than go into a brick building, where it would be unsatisfactory in summer, just simply for a few weeks of cold weather in winter.

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Mr. Kingston, a member of the Board, testified to finding satisfactory ventilation when he visited the building. But his visit was paid in the comparatively warm weather of September, when windows and doors would be open.

Some of the evidence on the conditions of the atmosphere in the annealing room and its ventilation during the winter months is as follows:—

William Husband, a former foreman of the annealing department, tells of having complained of the ventilation in the winter of 1916, while Scotland was working there, to the superintendent, Mr. Embree, and suggested the introduction of suction fans. He says the reply was

> the cold shoulder; if the men did not like it, get more men at the gate.
>
> Q. Was there any result from your complaint? A. No, not just then, not till the summer time. When the summer came they knocked off two sheets of galvanized iron on the north and the south and of the roof but not during the winter.
>
> Q. So the condition you complained of remained all that winter? A. Yes.

Embree denies this complaint.

Asked whether the windows were closed entirely during the winter months, Husband said:

> It really depends upon the conditions of the weather. If the men are working in front of a draft they close the window. We could not keep them open in the winter, men working in their shirts or bare backs.

I have already quoted the passage in this witness's evidence where he describes the effect of the closing of the windows in winter and the atmospheric conditions in the building. To complete it I add this extract:

> Speaking of the winter season, that these places were closed, did you, as foreman, have these rooms ventilated in any way? A. I might have opened the windows occasionally myself, but they were soon shut, because the men got cold.
>
> Q. Would the day gang coming in start in with fresh air? A. Not on a cold morning.

Q. And would the night gang start in with fresh air? A. Just come in with the same as the day gang left it.

I have already quoted from the evidence of James House, who was working in the annealing department at the same time as Scotland. To complete what he says I add this passage:

Q. You could have opened the doors or windows at any time to get fresh air? A. Not very well in the winter. Because we could not stand the cold air.

Q. The place was heated? A. It was not so hot, a person when perspiring cannot stand cold air.

Q. You say you could not ventilate the place without getting cold? A. In the winter time.

From the evidence of John Roberts, also employed with Scotland, I extract the following additional questions and answers:

Q. Then I want you to tell the jury what you found the working conditions to be while you were there? A. Well, I found it a very hot place, very unhealthy.

Q. Describe the conditions? A. There was two furnaces there in a very small room, about the size of this room, two annealing furnaces, and lots of vats. Two different sorts of vats, and lots of steam coming out of the vats. I did not stay there very long; I stayed there six weeks.

Q. Was there any method of getting rid of the foul air that might be in the room? A. Yes, I guess there was. There was windows above and all around, and I never seen them open hardly, because we could not very well stand the cold air. It was the winter time, and with the sweat and the hot place the men could not stand the cold air. We were all in short shirts, just pants and boots on. We were so hot that we could not stand any cold air. We were working in just an undershirt.

Q. Were all the men just working with the undershirt on? A. Yes.

* * * * * * *

Q. It was very hot there in winter in the Cartridge Company's factory? A. Yes, very hot.

Q. Why didn't you open the windows? A. I was not the boss.

Q. You would have opened the windows and Husband would not let you? A. If I had opened them you would not very well stand it in the winter time, and a gush of wind, zero weather, and us sweating, and the fumes, you could not stand it, we would be held up in another way.

Q. So you say it was impracticable to open windows? A. Yes. Better if there had been a fan to take the fumes away.

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Q. Who told you about a fan? A. Nobody. I have been in different factories and seen them.

Q. Where would you have put a fan? A. Well, I am not an engineer. Every man has a position. I would not know, but most likely some person would have picked up a place to put a fan.

Q. Can you suggest any way in which the ventilation of that building could have been improved? A. No, sir, I was not getting that deep into it. I knew I had to quit because I was losing my health.

* * * * * * * * *

Juror: Couldn't you have the top windows open in the winter? A. I could not tell you. I have seen them pulling the chain on the side to open them.

Q. Do you know if they were opened; could you feel the draft from up there? A. No. But in the side doors a man could not have the draft at his back. And a man sweating with two furnaces on each side of him.

Q. If the top window was open there was quite a draft to drive up the vapours? A. No, I don't think it would. It seemed to work slowly. * * *

Q. You were not over the tank all the time? A. Not the same kind of a tank as he was. Just on the wash-off tank and cyanide, and I would put it in there ready for the press room.

His Lordship: Would you get as heavy fumes where you were as Scotland? A. No, because he was getting it all the time. I was getting a chance to get away from it. I was putting them in the clean water part of the time; I was not getting as much as him. He was in it all the time.

In view of all this evidence it is not at all surprising that the jury found that the defendant's factory was not

ventilated in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours or other impurities generated in the course of the manufacturing process carried on by the defendant while the plaintiff was in its employment,

that

the conditions in the factory where the plaintiff worked (had) caused his present and possibly future disability

and that the defendant was guilty of negligence which occasioned this injury in that

sufficient ventilation was not provided while the plaintiff worked there.

The finality of a verdict, where it is such as a jury viewing the whole evidence reasonably could properly

find, is too well established to admit of discussion. As Lord Atkinson said in *Toronto Rly. Co.* v. *King* (1), at page 270:

> The jury is the tribunal entrusted by law with the determination of questions of fact and their conclusions on such questions ought not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at.

In *Commissioner of Railways* v. *Brown* (2), at page 134, Lord Fitzgerald, speaking for the Judicial Committee, said:

> Where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand.

Here no exception is taken to the charge of the learned trial judge.

As put by Lord Macnaghten in *Cooke* v. *Midland Great Western Rly. Co. of Ireland* (3), at page 233:

> The only question before your Lordships is this: Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was the verdict must stand, although your Lordships might have come to a different conclusion on the same materials.

I reiterate my inability to understand how any answer can be given in the present case to the question presented by Lord Macnaghten other than in the affirmative.

I would allow the appeal with costs here and in the Appellate Division and would restore the judgment of the learned trial judge.

BRODEUR J.—The duty of a master towards his servants is to provide such appliances as are necessary for avoiding accidents and for preserving their health; and where there are special circumstances which are likely to cause injury the degree of care required is

(1) [1908] A.C. 260. (2) 13 App. Cas. 133.
(3) [1909] A.C. 229.

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proportionately higher. Then consummate caution is required. *Dominion Natural Gas Co.* v. *Collins* (1).

The respondent company was using in its manufacture acids which might produce fumes and gases injurious to the health of its employees. At common law, it was bound to see that its building would be properly ventilated in order that those fumes and gases should cause the least injury possible to its employees.

The statutory provisions in force in Ontario under the "Factories Act" and the "Public Health Act" required that the building in which the plaintiff worked should be ventilated in such a manner as to keep the air reasonably pure so as to render harmless vapours generated in the course of work done.

The evidence is rather conflicting as to whether there were harmful gases and proper ventilation. But it was for the jury to decide as to its value. The jury found that there was negligence. There was certainly sufficient evidence to justify such a conclusion. The Appellate Division came to a different conclusion.

The respondent relies upon what it calls the uncontradicted evidence of an expert chemist. It is true that this expert stated positively that no injurious gas emanated from the receptacles in which acids were diluted. But the evidence of the co-employees of the plaintiff and of the doctors who attended him shew conclusively that his health has been injured by gases which evidently poisoned him.

In these circumstances the findings of the jury should not have been disturbed.

It is contended by the respondent that the plaintiff's right of action has been abolished by the "Work-

(1) [1909] A.C. 640.

men's Compensation Act," 4 Geo. V. ch. 25, which established a new code of law respecting compensation for accidents to workmen. The statute provided that all claims for accidents to workmen should be dealt with by a Board and that employers would be required to contribute yearly to a fund which should be administered by the Board.

In this case the appellant applied to the Board for compensation; but the Board decided that it was not an accident which entitled him to compensation from the Board.

The word *accident*, on the construction of which the plaintiff's application was dismissed, has been more discussed than any other word.

It means some unexpected event happening without design and the time of which can be fixed.

The latter condition as to the time cannot be ascertained in the present case.

It has been decided that lead poisoning contracted gradually is not an accident. *Steel* v. *Cammell, Laird & Co.* (1).

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

MIGNAULT J.—For the reasons given by my brother Anglin, I am of opinion that the appeal should be allowed with costs here and in the Appellate Division and that the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *McBrayne & Brandon.*
Solicitors for the respondent: *Mewburn, Ambrose, Burbidge & Marshall.*

(1) [1905] 2 K.B. 232.