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*Mar. 13, 15.

*May 1.

BENJAMIN ROGERS (PLAINTIFF) .....APPELLANT;

AND

THE TORONTO PUBLIC SCHOOL BOARD (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Negligence—Unsafe premises—Risk voluntarily incurred.*

An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises before making his visit.

*Held*, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages.

APPEAL from the judgment of the Court of Appeal for Ontario (1), which reversed the judgment entered upon the verdict rendered in the trial court for the plaintiff for $5,700 damages and costs.

A statement of the circumstances and questions at issue in this case will be found in the judgment of the court now reported.

*McCarthy* Q.C. for the appellant.

*Robinson* Q.C. and *Hodgins* for the respondent.

The judgment of the court was delivered by:

KING J.—This appeal is from a judgment of the Court of Appeal for Ontario setting aside a judgment

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 597.

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recovered in the Court of Queen's Bench and dismissing the action.

The action was originally brought by one Benjamin Rogers, since deceased, to recover damages for an injury sustained by falling into a furnace pit in the basement of Ryerson school building, in the city of Toronto. During pendency of the action the plaintiff died, and his widow and executrix was substituted as plaintiff under the provisions of R. S. O. ch. 110, sec. 9.

Rogers was yardmaster for the firm of Elias Rogers & Co., coal merchants, at Toronto, who had a contract with defendants for supplying all the coal for the school for the year beginning June, 1894. It was provided by the contract that the coal was to be delivered at such times and places, and in such manner and quantities, as might be directed by the supply committee and in terms of the tender, whereby it was stipulated that it was to be stored in the basement or wood-shed of the schools, under the inspection of an inspector or inspectors appointed by the supply committee, and to be subject to the approval of said committee.

The defendants notified the contractors that they would accept delivery of the coal for the Ryerson school on the 17th July. It was part of Rogers' duty to supervise this work on his employers' behalf. Their business was large, and he had to lay out the daily work of the carters and labourers, and, in doing this, it was advantageous to examine the places in which the coal was to be stored. Accordingly, he went to the Ryerson school building on the 16th July, between 7.30 and 8 p.m., to see (as he says) "what was the condition of the place for the delivery of the coal, and whether he would have to send an extra man up or not." During the day the defendants sent one Lindsay to notify the caretaker of the school that the delivery would be going on the next day. When

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Lindsay got to the caretaker's he found that his arm was broken, and Crawford, the caretaker, asked Lindsay to telephone to Mr. Bishop, the superintendent of buildings, to see if he could send a man to receive the coal as he was not in a fit state to receive it. Lindsay did so, and was himself appointed in Crawford's place to receive the coal.

The defendants were not advised beforehand of Rogers' visit to the school building. What took place when he got there is stated without material variation by Rogers, Mrs. Crawford, and by one Rooney, who had been employed a year or two before for a few weeks to act as caretaker during Crawford's illness, but who was not then in the employment of the board, and had called merely to see Crawford on account of his injury.

When Rogers reached the premises he went to the cottage of the caretaker and inquired of a woman whom he supposed to be, and who was, Mrs. Crawford as to where Crawford was. His wife said that he had broken his arm and was in bed. Rogers said that he had coal to deliver the next day, and that he had come to see where it was to go in. Mrs. Crawford pointed to three windows in the basement of the school building, and Rogers then said that he would like to see where it was to be stored. Rooney then came forward and volunteered to go with him.

The plaintiff's account is as follows:

I walked over to the caretaker's house, and the caretaker's wife, I took it to be, was standing at the door, and I asked for the caretaker, and she explained that he had broken his arm, and that he was in bed; just at that time I stated my business.

Q. Tell us what you said. A. I said I had called to see where the coal was to be delivered, and then this young man came out.

Q. What did she say? A. She said nothing, only that her husband was in bed with a broken arm. I do not remember that she said anything else; and then this young man came out of the door at the time and he says "I will go with you" and so he went with me.

Rooney says that to the best of his opinion he did not get the key from any one, and that the door was open.

At the foot of the stairs leading down into the basement there is a partition, and through it a door opening inwards. Directly opposite this doorway was an unfenced furnace pit, the space between which and the door, when opened, was quite narrow. Rogers knew nothing of the pit, and, as it was quite dusky, did not perceive it, and was not warned of it, and without any negligence on his part fell into it and was seriously injured.

The Chief Justice of the Queen's Bench directed the jury that if the plaintiff went to the schoolhouse in and about the reasonable performance of the contract which his employers had for the delivery of the coal and storing it in the basement, then he would be there by the implied invitation of the School Board, and the law in regard to an invitation of that kind applies.

The obligation of an occupier of premises to one whom he expressly or impliedly invites to come before them for the purposes in which the occupier has an interest is to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. The premises are to be in a reasonably safe condition, or, if otherwise, notice is to be given of their condition. The rules of law as to the responsibility of a principal for the negligence of a servant extend to the performance of his obligation. Circumstances giving rise, ordinarily, to the obligation would have existed if Rogers had gone upon the premises on the 17th in performance of the contract. It is unnecessary to say how it might have been if Crawford had known of Rogers' visit on the 16th, and had admitted him to the premises, or permitted him to enter. But Crawford, although upon the premises, knew nothing of Rogers being at the house until after the accident.

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The building was not one that was open to the public, and so far as regards the performance of the coal contract, it had been declared, in effect, that it would be open to the contractors for such purpose only from the 17th of July. The right of the defendant to enter it would then depend upon getting other permission to do so.

The evidence is insufficient to show that Mrs. Crawford was recognized by the board as acting caretaker. It was but that day that Crawford had notified them of his injury, and requested the appointment of another to take delivery of the coal. It also appears that on a former occasion of his illness a temporary caretaker had been appointed. Without some evidence tending to show authority to Mrs. Crawford, or recognition of her agency, the permission (if such it was) of Mrs. Crawford to plaintiff to enter the building was an unauthorized act not binding the defendants. The defence is substantial, for it may well be conceived that the caretaker would not have permitted the entering of the basement at such a late hour without precautions being taken for safety.

The reasonable conclusion is that, with knowledge that he had not the permission of the caretaker, Rogers took the chance of going into the basement at a time when the light of day had almost disappeared, under the guidance of a volunteer who unfortunately was not as cautious as he ought to have been.

With these views the judgment below ought to be affirmed and the appeal dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the respondent: *McMurrich, Coatsworth & Hodgins.*