THE CITY OF ST. JOHN (DEFENDANT)...APPELLANT;

AND

CHARLES DONALD (PLAINTIFF).....RESPONDENT.

1925
*Oct. 14, 15.
1926
*Feb. 2

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Employer and contractor—Person damaged by contractor's negligence—Liability of employer—Work necessarily attended with danger—Duty of employer—Duty of owner of land to prevent use thereof causing a nuisance—Servant or independent contractor—Contract reserving powers of control to employer—"Casual or collateral" negligence.

The defendant city employed M. as a contractor to deepen a stream within the city. In the contract and specifications wide powers of interferference and control were reserved to the city, but there was no evidence of actual interference. The work involved rock excavation. Near the work M. built a shack on or partly on land included in a street limit but not used as part of the roadway, and in this shack he placed tools and appliances for the work, including a forge and also a box of dynamite. An explosion occurred, damaging plaintiff's house. At trial the jury found that the explosion was caused by the negligence of M. or his servants, the negligence consisting in the storing of the dynamite in a shed used as a storehouse for tools, instead of being locked up in a separate structure used for explosives only. No question was put to the jury involving the city's liability, which was dealt with by the trial judge on considerations of law upon the contract and as upon undisputed facts.

Held, affirming the judgment of the Supreme Court of New Brunswick, Appeal Division, and of Crockett J. at the trial, that the city was liable.

Per Anglin C.J.C. and Rinfret J.: The principle applicable was that where work is necessarily attended with risk, the person causing it to be done has the duty of seeing that effectual precautions are taken; and he cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. The city, in ordering work involving storage of dynamite near a highway and neighbouring houses was, at its peril, bound to see that the duty of taking preventive precautions against its manifest danger producing injurious consequences was performed; the most obvious of such precautions was to provide the safest storage possible; not only was there no proper stipulation or instructions as to storing of explosives, but the city's duty to see that proper storage was provided would not be satisfied by merely stipulating or giving instructions for it; failure to see that the duty was performed entailed liability on it as employer to those injured as a result of its non-performance. The improper storage of the dynamite could not be regarded as casual or collateral negligence on M's part; it was negligence in the performance of an essential part of the work; it was not such an act

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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of negligence as could not have been anticipated and guarded against; and carelessness in the storage and handling of explosives is not something so unusual that no sane contractor might be expected to be guilty of it.

Dealing with other grounds argued, Anglin C.J.C. and Rinfret J. *held* that, although the evidence should warrant an inference that the shack was on premises owned or controlled by the city, it did not satisfactorily appear that the city had, or should be deemed to have had, such notice that dynamite was stored therein as might entail liability on the ground taken by Newcombe J.; also, that the relation between the city and M. was that of employer and independent contractor, not of master and servant; the mere existence of wide powers of interference and control reserved to the city (but which were not exercised), did not suffice to make the contractor and his workmen servants of the city.

Per Duff J.: The storing of the dynamite at or near the site of the operations in progress and in the vicinity of dwelling houses and public streets was an act incidental to the carrying out of these operations by the city in virtue of powers vested in it as the municipal authority, through the instrumentality of the contractor. The nature of the work itself obviously dictated the duty of taking suitable precautions. This duty rested upon the city primarily as the donee of the powers in pursuance of which the work was being executed, and this duty it could not discharge by delegating it to a contractor. *Hardaker* v *Idle* (1896), 1 Q.B., 335; *Vancouver* v. *Hounsome*, 49 Can. S.C.R., 430.

Per Mignault J.: The duty was imposed on the city to supervise the storage of explosives, which duty it could not discharge by delegating it to the contractor.

Per Newcombe J.: Where a person is in possession of fixed property, he must take care that it is so used that other persons are not injured. This duty exists, though the property is in use by a contractor permitted, for purposes of his contract, on the premises. Such injuries are in the nature of nuisances. The shack was on land which, although included in the street appropriation, could not in its existing condition be used for street purposes, and was vacant unimproved land, as to which the city was under the obligation of an individual proprietor to see that it was not used in a manner to cause a nuisance. It may be assumed that the shack was not built without the city's knowledge and approval and that it was a consequence not improbable of the location and building of the shack, which the city should have realized, that the explosives for the work would be kept there; and the city could not escape liability for the user which, for purposes of the work, the contractor made of the shack, amounting to a public nuisance upon the city's property.

APPEAL from the decision of the Supreme Court of New Brunswick, Appeal Division, affirming the judgment of Crockett J. (who tried the case with a jury) in favour of the plaintiff, in an action for damages to plaintiff's property caused by an explosion of dynamite.

The defendant city employed the defendant Moses as a contractor to deepen a stream called Newman's Brook which crosses Adelaide street in that city. Under the contract the city had certain wide rights of inspection and direction by its engineer, of approval or rejection of materials, etc. The clauses in this regard are set out in the judgment of Anglin C.J.C. There was, however, no evidence of any actual interference. There was no express provision in the contract with regard to explosives. The work involved rock excavation. Moses brought his tools and appliances from the place where he had been working on another contract, about a mile distant, and built a shack in which they were placed. They included a forge and a box containing dynamite. The shack was built near the work, and on or partly on land which was included in the street limit of Adelaide street but was on a lower level than the travelled roadway which had been built up. The plaintiff's house was on Adelaide street, near the shack, but on the opposite side of the street. An explosion occurred, damaging plaintiff's house. The facts are more particularly set out in the judgments of Anglin C.J.C. and Newcombe J.

At the trial the jury found that the explosion was caused by the negligence of the defendant Moses or his servants, that the negligence consisted "in the storage of dynamite or other explosive in a shed used also as a storehouse for tools, instead of keeping it locked up in a separate structure used for explosives only," and found the damages to be $900, for which judgment was given. No question was put to the jury involving the liability of the city, nor was the court requested by either side to submit any such question. The question of its liability would appear to have been dealt with by the trial judge upon considerations of law, having regard to undisputed facts.

Both defendants, the city and Moses, were held liable by the judgment at trial. Moses did not appeal. The city appealed to the Supreme Court of New Brunswick, Appeal Division, which affirmed the judgment at trial. The city (by special leave granted by the Supreme Court of New Brunswick, Appeal Division) appealed to the Supreme Court of Canada.

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Hon. J. B. M. Baxter K.C. for appellant: The damage was not caused by any act done in the performance of the work, or on the site of the work or on any land occupied by Moses with the consent or knowledge of the city. If caused by negligence at all it was the casual or collateral negligence of the servants of Moses. The contract did not necessarily contemplate the use of a high or dangerous explosive in such a place as to be dangerous to plaintiff's property. The city was not under any duty towards plaintiff with regard to storage of dynamite or other explosive. There was no evidence of negligence.

The storage of materials cannot be treated as an act done in the performance of the work. The dynamite was not stored upon the actual site of the work. The city did not have notice of the building or of the storage. To carry the judgment at trial to its logical conclusion the result must have been the same if Moses had rented or occupied private land for the storage at any distance from the work. And until the dynamite was actually taken upon the site of the work what could prevent Moses appropriating it to other work?

The duty was not that of *Dalton* v. *Angus* (1), which was purely a case of lateral support; nor that of *Hughes* v. *Percival* (2), a case of interference with a party wall; and that the precaution required was in the *execution* of the works, see that case at pp. 725, 726; and see reference thereto in *Hardaker* v. *Idle District Council* (3), ("work ordered by him").

The above cases, and also *Penny* v. *Wimbledon Urban District Council* (4); *Holliday* v. *National Telephone Co.* (5); *Kitchener* v. *Robe and Clothing Co.* (6); are, in view of their circumstances, distinguishable. And see the *Hardaker Case* (3) at p. 344 where Rigby L. J. points out the distinction between cases of master and servant and of employer and independent contractor, and defines "collaterel negligence" as " negligence *other than the imperfect or improper performance of the work which the contractor is employed to do.*"

(1) 50 L.J.Q.B. 689.
(2) 52 L.J.Q.B. 719.
(3) [1896] 1 Q.B. 335 at p. 348.
(4) [1899] 2 Q.B. 72.
(5) [1899] 2 Q.B. 392.
(6) [1925] S.C.R. 106.

Reference to the rule stated in *Pickard* v. *Smith* (1), to the test laid down in *Greenwell* v. *Low Beechburn Coal Co.* (2), ("what act has been done which it is the duty of the defendants to take due care to prevent"); to Beven on Negligence, 3rd Ed. (1908), vol. 1 pp. 597, 607; 20 Hals., 264 para. 619; 16 Hals., 136 para. 238.

The provisions of the contract are only such as are required to secure to the city a proper workmanlike execution of the contract, as was said by Greenshields J. in *Smith* v. *City of Montreal* (3), or give the city control over the way in which the work shall be done and the kind of material to be used, as pointed out by Beck J. in *Smith* v. *Ulen* (4). The retention of a power of control is not sufficient to displace the relation of employer and contractor and substitute that of master and servant. In the *Hardaker Case* (5), while Rigby L. J. seems to have taken that view, the decision is the other way. See at p. 343, per Lindley L. J. and at p. 344 per A. L. Smith L. J. Reference also to *Murphy* v. *Ottawa* (6); *Reedie* v. *London & North Western Ry. Co.* (7); *Dooley* v. *City of St. John* (8); Smith's Master and Servant, 7th Ed. (1922) p. 238. It is a question of fact in each case whether the defendant was acting as master towards a servant or not: *Brady* v. *Giles* (9). See also *Bennett* v. *Castle & Sons* (10).

G. H. V. Belyea K.C. for respondent:—The city having undertaken a work necessarily attended with danger to the public and to the respondent, was under a duty to see that all necessary precautions were taken and could not rid itself of liability by entering into a contract for its performance by another. *City of Kitchener* v. *Robe & Clothing Co. Ltd.* (11); *Dalton* v. *Angus* (12); per Lord Watson and Lord Blackburn; *Quarman* v. *Burnett* (13); *Halliday* v. *National Telephone Co.* (14); *Hardaker* v. *Idle District Council* (5); *Penny* v. *Wimbledon Urban District Council* (15); *Black* v. *Christ Church Finance Co.* (16);

(1) 10 C.B.N.S. 470, at p. 480.
(2) [1897] 2 Q.B. 165 at p. 177.
(3) [1917] Q.B. 52 S.C. 284.
(4) 6 W.W.R. 678.
(5) [1896] 1 Q.B. 335.
(6) 13 Ont. L.R. 334.
(7) 4 Ex. 244.
(8) 38 N.B.R. 455.
(9) 1 M. & Rob. 494.
(10) 14 T.L.R. 288.
(11) [1925] S.C.R. 106.
(12) 6 App. Cas. 740.
(13) 6 M. & W. 499.
(14) [1899] 2 Q.B. 392.
(15) [1899] 2 Q.B. 72.
(16) [1894] A.C. 48.

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Longmore v. *McArthur* (1); *Waller* v. *Corporation of Sarnia* (2); *Pinn* v. *Drew* (3); *Bower* v. *Peat* (4); *Robinson* v. *Beaconsfield Rural District Council* (5); *Kirk* v. *City of Toronto* (6); *Ballentine* v. *Ontario Pipe Line Co.* (7); *Odell* v. *Cleveland House Ltd.* (8); *Pickard* v. *Smith* (9); *Hughes v. Percival* (10); *Tarry* v. *Ashton* (11); Moses' negligence in storing the dynamite as he did was not collateral or casual. Crockett J. in his judgment defined collateral or casual negligence as "some act or omission on the part of the contractor or his servants which could not reasonably have been anticipated or guarded against," referring to *Penny* v. *Wimbledon Urban District Council* (16); *Robinson* v. *Beaconsfield Rural District Council* (5). As to appellant's contention that it is only liable for Moses' negligence "in the execution of the work," this is dealt with in the appeal judgment as follows "If the explosion had occurred during the time that the dynamite was being transported to the shack and damage had been caused x x x it would at most have been caused by casual or collateral negligence and the city should not have been held liable therefor; but the situation is entirely changed when once the dynamite is placed in the shack in close proximity to the work for the sole and exclusive purpose of being used in connection with the work x x". Reference to terms of the contract. The case is a stronger one than the *Robinson Case* (12). The decision of Buckley L. J. in that case was adopted by Anglin C. J. C. in *City of Kitchener* v. *Robe & Clothing Co. Ltd.* (13). See also judgment of Idington J. As to holdings against finding collateral negligence, see also *Penny* v. *Wimbledon Rurban District Council* (14); *Holliday* v. *National Telephone Co.* (15), and *Hardaker* v. *Idle District Council* (16). As to negligence "in the performance of the contract" see *Black* v. *Christ Church Finance Co.* (17). Even if the contract prohibited storage of dynamite on the public highway and Moses was instructed

(1) 43 Can. S.C.R. 640.
(2) 8 D.L.R. 629.
(3) 32 T.L.R. 451.
(4) 1 Q.B.D. 321.
(5) [1911] 2 Ch. 188 at p. 191.
(6) 8 Ont. L.R. 730.
(7) 16 Ont. L.R. 654.
(8) 102 L.T.R. 602.
(9) 10 C.B. N.S. 470.
(10) 52 L.J.Q.B. 719.
(11) 1 Q.B.D. 314.
(12) [1911] 2 Ch. 188 at p. 181.
(13) [1925] S.C.R. 106.
(14) [1899] 2 Q.B. 72.
(15) [1899] 2 Q.B. 392.
(16) [1896] 1 Q.B. 335.
(17) [1894] A.C. 48.

to remove it, the appellant would nevertheless be liable under the authorities. He supplied it to the city in pursuance of his contract for the exclusive purpose of being used for the removal of the solid rock, and placed it where he did with appellant's consent or knowledge.

The city, having caused to be brought and used dangerous materials upon city property forming and being used as part of the scene of operations under the contract, is vicariously liable to respondent for damage caused by their escape, under the rule in *Rylands* v. *Fletcher* (1). The city was liable as an owner or occupier for damage to respondent by a nuisance existing on or originating from its land. *Attorney General* v. *Tod Heatley* (2); *Barker* v. *Herbert* (3); *Job Edwards Co. Ltd.* v. *Birmingham Navigations* (4); *Jones* v. *Festiniog Ry. Co.* (5); *Dominion Gas Co.* v. *Collins* (6).

Reference also to Smith's Leading Cases, vol. I p. 410; Clerk & Lindsell on Torts, 7th Ed. pp. 110-111; *Black* v. *Christ Church Finance Co.* (7); *Waller* v. *Corporation of Sarnia* (8); *Miles* v. *Forest Granite Co.* (9); *Grant* v. *Canadian Pacific Railway Co.* (10); *Canadian Southern Ry.* v. *Phelps* (11); *Rainham* v. *Belvedere* (12); *Midwood* v. *Mayor of Manchester* (13); *Charing Cross Electric Co.* v. *Hydraulic Co.* (14).

The city is liable for Moses' negligence, since the relation of master and servant was created under the contract terms and the circumstances surrounding the performance of the work (presence of appellant's officials to give orders). Reference to Salmond's Law of torts, 5th Ed. p. 96; *Performing Right Society* v. *Mitchell & Booker* (15); *Pollock* on Torts, 12th Ed. pp. 79, 80; *Yewens* v. *Noakes* (16); *Regina* v. *Negus* (17); *Warburton* v. *Great Western Ry. Co.* (18); *Hastings* v. *LeRoi Ltd.* (19); *Dallontonia* v. *McCormick* (20).

(1) L.R. 3 H.L. 330.
(2) [1897] 1 Ch. 56.
(3) [1911] 2 K.B. 633.
(4) [1924] 1 K.B. 341.
(5) L.R. 3 Q.B. 733.
(6) [1909] A.C. 640, at p. 646.
(7) [1894] A.C. 48.
(8) 8 D.L.R. 629 at p. 631.
(9) 34 T.L.R. 500.
(10) 36 N.B.R. 528 at p. 542.
(11) 14 Can. S.C.R. 132.
(12) [1921] 2 A.C. at pp. 480-481.
(13) [1905] 2 K.B. 597.
(14) [1914] 3 K.B. 772.
(15) [1924] 1 K.B. 762 at pp. 765, 767.
(16) 6 Q.B.D. 530, at p. 532.
(17) L.R. 2 C.C. 31, at pp. 34, 37.
(18) L.R. 2 Ex. 30.
(19) 34 Can. S.C.R. 177, at p. 187.
(20) 14 D.L.R. 613, at p. 621.

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ANGLIN C. J. C.—The plaintiff sues to recover damages for injury to his house caused by an explosion of dynamite stored by the defendant Moses in a shack nearby. Moses was employed by his codefendant, the city of St. John, as a contractor to deepen Newman's Brook, which crosses Adelaide St. in that city. The authority of the city to undertake this work is not questioned; neither is any doubt cast upon its right to employ a contractor to perform it.

The use of dynamite or some other powerful explosive for blasting was necessary for the economical carrying out of the work, which involved rock excavation. A short time before the explosion occurred, Moses had caused a quantity of 40 per cent dynamite—estimated at about 50 pounds—to be placed in a shack which he had erected on, or immediately adjoining Adelaide St. and adjacent to the work. This shack was built for use as a toolhouse. It also contained a forge for blacksmithing purposes in connection with the work.

The jury found that the storing of the dynamite in a shed used also as a storehouse for tools instead of keeping it locked up in a separate structure used for explosives only was negligence which caused the explosion. While the immediate cause of the explosion is not known, this finding of the jury has not been impugned.

Both defendants were held liable by the judgment of the trial court which was affirmed on appeal. The recovery being for $900 only, a further appeal to this court did not lie without special leave under s. 41 of the Supreme Court Act. That leave was granted to the city of St. John by the Appellate Division of the Supreme Court of New Brunswick. The defendant Moses submitted to the judgment against him.

The plaintiff rests his claim against the city on three distinct bases:

(*a*) that the dynamite required for carrying out the contract having been stored by Moses either on property of the city, or on property of which it had a right of occupation by license, its explosion, due to negligence in storing, entailed liability on the city whatever may have been its relationship with Moses;

(*b*) that in carrying out the work undertaken Moses, if not the servant of the city, was at least by the terms of his contract so much under the control of its engineer that it

cannot escape liability on the ground that he was an "independent contractor";

(*c*) that, if Moses should be regarded as an "independent contractor," the city is nevertheless liable because the work contracted for was of such a character that in the natural course of things injurious consequences to neighbouring property (including that of the plaintiff) must be expected to arise from its performance unless precautions were taken to prevent such consequences, and the defendant city, therefore, owed a duty to the plaintiff to see that such precautions were taken, responsibility for the discharge of which it could not escape by delegating that duty to a contractor.

(*a*) Although the evidence should warrant an inference that the shack in which the dynamite was stored was on premises owned or controlled by the municipality, I am not satisfied that its engineer had, or should be deemed to have had, such notice that dynamite was stored in the shack as might entail responsibility apart from the other grounds on which the plaintiff rests his claim. It is unfortunate that these aspects of the case were not more fully investigated at the trial and that we are without the advantage of findings upon them by the jury. If I thought a finding of tacit sanction by the city of the storage of dynamite in the shack justifiable, I should probably be disposed to support the judgment against it on the ground which I understand commends itself to my brother Newcombe.

(*b*) On this branch of the case the learned trial judge expressed these views:

> As to whether, by the terms of the written contract, Moses was in fact an independent contractor, or whether the city corporation retained such control of the work as to create the relationship of master and servant, I have not deemed it necessary to decide, inasmuch as in the circumstances indicated the defence as to the damage complained of being caused by the act of an independent contractor is, in my opinion, of no avail. I feel, however, constrained to say that had it been necessary for me to decide this question, the provisions in the contract and specifications as to the work being carried on *under the direction* of the city's engineer, and requiring the contractor and his foreman and servants to obey at all times the orders of the engineer, as well as the fact of the city's fixing the scale of wages to be paid by the contractor to his employees, and the provisions requiring him to save the corporation harmless from all suits and actions brought against it by reason of the carrying out of the work, are considerations which, in the absence of the clearest possible authorities to the contrary, I should have found it most

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difficult to reconcile with the idea of Moses being an independent contractor in the sense contended for.

In deliverying the judgment of the Court of Appeal, Hazen C. J., said:

I do not base my judgment on the ground that the relationship of master and servant existed between Moses and the city, but I certainly, like Mr. Justice Crockett, would have great difficulty in coming to the conclusion, in view of the clauses contained in the contract specification and conditions thereunder, that Moses was an independent contractor. He was to be subject to the control and direction of his employer in respect to the manner in which the work was to be done, and that I think would constitute him a servant of the city, which would therefore be liable for his negligence.

There is no suggestion in the evidence that there had in fact been interference by any civic official in the performance of his contract by Moses. No directions had been given him as to the bringing of dynamite to the work, or as to its storage. Indeed failure to give such instructions is one of the grounds on which the plaintiff imputes responsibility to the appellant. There is no proof that the presence of dynamite in the shack, or in the neighbourhood of the work, was known to any employee of the city.

The clauses of the contract and specifications relied upon to establish such control by the city as would preclude its plea that Moses was an independent contractor read as follows:

All labour and materials of every description requisite for performing the work to be provided by the contractor but be subject at all times to the approval or rejection of the city engineer. * * * And the contractor further agrees with the city that he will carefully and skilfully carry on and perform the work to be done under this contract and that he will employ proper and skilled men to do the work, and to supply and use, in doing the work, good, proper, and requisite materials to the satisfaction of the engineer. * * * The contractor is to furnish at his own cost all of the labour and all of the material required. * * * the engineer and the clerk of works are to have full power and liberty to inspect the various parts of the work at all times during their progress, and in case of the contractor refusing to allow such inspection the work is to be deemed insufficient and not in accordance with the terms of the specifications.

The contractor is not to use the land forming the site of or connected with the works for any other purpose whatsoever than the proper carrying on of the works. * * * No person is to be employed or allowed to remain on the work or any part thereof who shall be objectionable to the engineer.

The contractor shall attend to, and execute, without delay all orders and directions which may from time to time be given by the engineer in connection with the contract, and in case of his refusing to comply with such orders and directions, or of his not proceeding with all due diligence and expedition within twenty-four hours after a written notice

requiring the same has been delivered to him, or his foreman, as hereinafter provided, the commissioner shall be at liberty to use free of cost and charge for wear and tear all, or any, of the contractor's tools, implements and materials to perform such work as he requires and direct agreeably with the specifications, and the contractor shall repay to the city all the cost and charges and expenses to be thereby incurred or the same may be deducted from any amount that may be due to the contractor and retained by the city in reimbursement of all such costs, charges and expenses.

Wide as are the powers of interference and control thus reserved to the city, their mere existence does not *in se* suffice to make the contractor and his workmen in carrying out the work contracted for the servants of the city. It may, as Sir Frederick Pollock says (Law of Torts, 12th Ed., p. 80-81), sometimes

be a nice question whether a man has let out the whole of a given work to an "independent contractor" or reserved so much power or control as to leave him answerable for what is done.

But in the absence of actual interference by the employer or his representative in exercise of the power thus reserved resulting in the injury for which damages are claimed—here there was none—the authorities seem to be reasonably clear that the mere reservation, to quote Smith's Law of Master and Servant, (7th Ed., p. 238).

by contract (of) general rights of watching the progress of works which the contractor has agreed to carry out for him, of deciding as to the quality of the materials and workmanship, of stopping the works or any part thereof at any stage, and of dismissing disobedient or incompetent workmen employed by the contractor will not of necessity render (the employer) liable to third persons for the negligence of the contractor in carrying out the works.

This passage is cited with approval by McCardie J., in *Performing Right Society* v. *Mitchell & Booker* (1). That learned judge says that

the question whether a man is a servant or an independent contractor is often a mixed question of fact and law. If, however, the relationship rests upon a written document only, the question is primarily one of law. The contract is to be construed in the light of the relevant circumstances.

He proceeds to discuss the criteria indicated by the authorities for determining whether the relationship of the employed to the employer is that of independent contractor or of servant, and then says that

The final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be the servant. This circumstance is, of course, only one of several, but it is usualy of vital importance.

(1) [1924] 1 K.B. 762, at p. 767.

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He cites as authority the leading case of *Hardaker* v. *Idle District Council* (1), which has often been followed and, so far as I am aware, has never been seriously questioned. The powers of supervision and control of the city engineer in the present case are not wider than those that were reserved to the district council's inspector in the *Hardaker Case* (1). While the defendants were there held liable on the ground that they could not delegate their duty to provide against injury to the gas mains (escaping gas from which caused damage to the plaintiff) so as to avoid liability for a breach thereof, a majority of the Lords Justices (Lindley and A. L. Smith, L.JJ.) concurred in holding that

> large as the inspector's power was, Thornton (the contractor) was not * * * the servant of the defendants (p. 343): the true relation was that of principal and contractor (p. 344).

So far as the decision of the majority in the Appellate Division of the Supreme Court of Ontario in *Dallantonia* v. *McCormick* (2), where a contractor's workman was injured by the fall of loose overhanging rock, may be inconsisitent with the opinion on the question now under consideration expressed by Lindley and A. L. Smith, L.JJ., in the *Hardaker Case* (1), I am not prepared to accept it. *Dallantonia's Case* (2) is, however, distinguishable from the case now before us in several features, notably in that there the engineer of the defendant company had knowledge of the danger to which the contractor's workmen were exposed while at work and directed its removal but failed to see that his instructions were effectively carried out. These facts may have entailed liability of the company.

I am, with respect, not disposed to regard the relation between the defendants in the present instance as that of master and servant or as other than that of employer and independent contractor.

(*c*) The doctrine enunciated by Cockburn L. C. J., in *Bower* v. *Peate* (3), which is made the basis of the plaintiff's claim in the third branch of the case, was doubted by Lord Blackburn in *Hughes* v. *Percival* (4), as possibly too broadly stated; but the learned Lord did not indicate "how far this general language should be qualified". (See observation of A. L. Smith L.J. in *Hardaker* v. *Idle District Coun-*

(1) [1896] 1 Q.B. 335.
(2) [1913] 29 Ont. L.R. 319.
(3) [1876] 1 Q.B.D. 321, at p. 326.
(4) [1883] 8 App. Cas. 443.

cil (1). Lords Watson and Fitzgerald (p. 451 cited *Bower* v. *Peate* (2), without any suggestion of qualification. Mr. Salmond in his valuable work on Torts (6th ed.), at p. 124, treats Lord Blackburn's expression of doubt as a statement that Sir Alexander Cockburn's general proposition should not be supported. He concludes (p. 125) that

> the vicarious responsibility of the employers of independent contractors is not the outcome of any far-reaching general principle, but represents merely a number of more or less arbitrary exceptions based on considerations of public policy.

While it is

> a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract (*Ellis* v. *Sheffield Gas Consumers' Company*) (3).

it is, no doubt, the general rule that the person who employs an independent contractor to do work in itself lawful and not of a nature likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it. The employer is never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in the carrying out of the contract; and it is not universally true that he is responsible for injury occasioned by improper or careless performance of the very work contracted for; he is not so where the work is not intrinsically dangerous and, if executed with due care, would cause no injury, and the carrying out of it in that manner would be deemed to have been the thing contracted for. His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it. That, I take it, is a principle applicable in such a situation whatever be the nature otherwise or the locus of the work out of which it arises.

Injuries due to improper acts authorized by the employer, to his negligence in the selection of the contractor,

(1) [1896] 1 Q.B. 335, at p. 347.
(2) [1876] 1 Q.B.D. 321, at p. 326.
(3) [1853] 2 E. & B. 767, 769.
(4) 6 M. & W. 499.

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to his failure to impart proper instructions, to his neglect to prevent the creation on his own property by the contractor of a nuisance, or its continuance, or to his giving employment to do acts which, though lawful, can be done only at the peril of him who does them, are really not within the purview of the doctrine imputing vicarious responsibility. In these cases the responsibility is rather direct and rests on personal acts or omissions.

Contracts for works involving interference with rights of support (*Dalton* v. *Angus* (1); *Hughes* v. *Percival*) (2); and for works entailing the creation of dangers on highways (*Penny* v. *Wimbledon Urban District Council* (3); *Holliday* v. *National Telephone Co.*) (4) it is well established, subject the employer to vicarious responsibility for negligence on the part of his contractor which is not casual or collateral. The duty to take precautions for protection of the property endangered in the one case, and of the public in the other, cannot be delegated by the employer so as to avoid responsibility. These are admitted exceptions to the general rule giving the employer immunity from responsibility for the acts or omissions of the independent contractor. But the extension of this class of exception to contracts for works of other kinds the carrying out of which, unless precautions be taken to obviate the danger, involves equally manifest risk to those of the public who happen to come, or to possess property, within the region affected by it, is contested.

As early as 1861, however, in *Pickard* v. *Smith* (5), Williams J., delivering the judgment of the Court of Common Pleas, could find no sound distinction between the case of a public highway and of a road which may be, and to the knowledge of the wrongdoer will in fact be, used by persons lawfully entitled to do so. In *Black* v. *Christ Curch Finance Co.* (6), vicarious responsibility of the employer for negligence in the setting out of fire on open bush land, "an operation necessarily attended with great danger," was upheld by the Privy Council. The employer could not delegate his duty to take all reasonable precautions to prevent the fire spreading so as to escape responsibility for

(1) [1881] 6 App. Cas. 740.
(2) 8 App. Cas. 443.
(3) [1899] 2 Q.B. 72.
(4) [1899] 2 Q.B. 392.
(5) 10 C.B.N.S. 470, at p. 479.
(6) [1894] A.C. 48, at p. 54.

their being neglected. In *Odell* v. *Cleveland House, Limited* (1), the same doctrine was applied to a case of employment of a contractor to demolish the upper portion of a building, and the statement of law by Cockburn, L. C. J., in *Bower* v. *Peate* (2), was made the basis of the judgment. In *Hardaker* v. *Idle District Council* (3), while the contract was for work on a highway, the injury was to persons and property in an adjacent house. In this latter case the liability of the employer was rested upon the principle stated by Lord Blackburn in *Dalton* v. *Angus,* (4), that

> a person causing something to be done the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with a contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby release himself from liability to those injured by the failure to perform it;

Lord Watson, at p. 831, said

> In cases where the work is necessarily attended with risk he (the employer) cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done.

It is true that these noble Lords were immediately dealing with a case of interference with a right to support; but they are, in these passages, as I read them, stating a principle of general application; and that principle, I think, governs the determination of the present case.

The work here contracted for was rock excavation necessarily requiring, for economic reasons, the use of a high explosive. Convenience, amounting to practical necessity, demanded that a reasonable quantity of the explosive should be readily accessible. That in turn involved its being stored upon, or adjacent to, the site of the work, and in dangerous proximity to neighbouring buildings, one of which was that owned by the plaintiff. The dynamite was accordingly brought by Moses to, and stored in, the toolhouse. It was there solely for the purpose of his contract with the city. In so storing it he was acting under that contract, though improperly. *Black* v. *Christchurch*

(1) [1910] 102 L.T. 602.
(2) [1876] 1 Q.B.D. 321.
(3) [1896] 1 Q.B. 335.
(4) 6 App. Cas. 740, at p. 829.

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Finance Co. (1). Had the city carried on the work by day labour its legal duty to see that its servants safely stored the dynamite required and its liability for injurious consequences resulting from improper and dangerous storage of it would admit of no doubt. The danger to persons using the highway and to adjacent properties from improper storage of such an explosive must have been obvious to any thinking person. The employer ordering work involving storage of dynamite near a highway and neighbouring houses, was, at his peril, bound to see that the duty of taking preventive precautions against its manifest danger producing injurious consequences was performed. The most obvious of such precautions was to provide for the dynamite the safest storage possible. Compare *Wetherbee* v. *Partridge* (2).

If an obligation was imposed on the city, as employer, to exact a proper contractual stipulation or to give proper instructions as to the storing of the explosive, that duty was entirely neglected. (*Robinson* v. *Beaconsfield Rural District Council* (3)). But the city's duty to see that proper storage for the dynamite was provided would not be satisfied by merely stipulating or giving instructions for it. Failure to see that the duty was performed entailed liability on it as employer to those injured as a result of its non-performance. As put by Lord Lindley in *Hardaker* v. *Idle District Council* (4), the case is not one in which the contractor performed the city's duty for them, but did so carelessly; the case is one in which, so far as the providing of a proper place for storing the dynamite was concerned, no effort was made to discharge the duty of the city.

Nor can the improper storage of the dynamite be regarded as casual or collateral negligence on the part of Moses. It was negligence in the performance of an essential part of the work which he was employed to do—in the discharge of the very duty (amongst others) which the law would have thrown upon the city had it been acting by the hands of its servants. *Hardaker* v. *Idle District Coun-*

(1) [1894] A.C. 48, at pp. 55-57.
(2) [1900] 175 Mass. 185.
(3) [1911] 2 Ch. 188.
(4) [1896] 1 Q.B. 335, at p. 342.

cil, per Rigby L.J. (1); *Robinson* v. *Beaconsfield Rural District Council* (2). Moses expressly agreed to provide, and by implication to care for, all necessary material. The dynamite required for the work was part of such material, and its storage at a point reasonably accessible for the men engaged in the work was one of the obligations which Moses impliedly undertook. Improper storage was not such an act of negligence as could not have been anticipated and guarded against; *Penny* v. *Wimbledon Urban District Council* (3); *Pearson* v. *Cox* (4); and carelessness in the storage and handling of explosives is not something so unusual that no sane contractor might be expected to be guilty of it. *Hughes* v. *Percival* (5).

Storing the dynamite was an integral part of the work contracted for which was necessarily attended with danger, unless the precaution of providing a suitable place to keep it in was observed. The palpable recklessness of Moses in putting it in a building used as a tool-house and occupied as a forge involved the city in responsibility.

DUFF J.—When the facts are understood, the question of law presents no difficulty.

We are not informed of the particular sources of the statutory power under which the work of excavating the bed of Newman's Brook was undertaken by the city, but it has been assumed throughout the case that the work was carried out in execution of some general or special statutory authority vested in the municipality. In his judgment, Mr. Justice Crockett says,

> It was by virtue of the city corporation's authority, and its authority only, that the contractor could have exposed people improperly to such a danger.

The storing of the dynamite in the immediate vicinity of the work on which it was being used was an incident of the work which the corporation, as the proper public authority, was executing through the instrumentality of its contractor.

As the work was being carried on in the vicinity of dwelling houses and public streets, the duty of taking steps to

(1) [1896] 1 Q.B. 335, at p. 352.
(2) [1911] 2 Ch. 188, at pp. 191, 196, 197.
(3) [1899] 2 Q.B. 72, at p. 78.
(4) [1877] 2 C.P.D. 369.
(5) [1883] 8 App. Cas. 443, 450.

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protect the public against the risk of explosions was obviously dictated by the very character of the work itself. The failure to discharge this duty was no casual or collateral negligence: it was the breach of a duty resting upon the municipality, which, in exercise of its statutory powers, was causing the work to be done; a duty which it could not discharge by delegating it to the contractor, *Hardaker* v. *Idle District Council* (1); *Vancouver* v. *Hounsome* (2).

It is on this ground that I should dismiss the appeal.

MIGNAULT J.—In view of the circumstances of this case and of the close proximity of the work to dwelling houses and to the travelled portion of the highway, I think a duty was imposed on the city to supervise the storage of explosives to be used in the blasting operations, which duty it could not discharge by delegating it to the contractor.

I would dismiss the appeal with costs.

NEWCOMBE J.—The city contracted with its co-defendant, George Moses, for the excavation of the channel of Newman's Brook by contract in writing of 24th March, 1921, and the contractor thereby engaged to provide all labour and materials of every description requisite for performing the work, subject at all times to the approval or rejection of the city engineer, also

to supply and use in doing the work good, proper and requisite materials to the satisfaction of the engineer.

By the second of the specifications attached to the contract it was provided that the contractor was to furnish at his own cost all of the labour and material required; to erect the necessary fencing to protect the public; to erect a sufficient number of red lights warning the public of danger, and to conform with all of the city's by-laws in this respect. By clause 41 of the by-laws, relating to the fire department of the city, the storage of gun powder or other explosive substance in any building or place whatsoever within the limits of the city, in any quantity exceeding 25 pounds of gun powder or 10 pounds of any other explosive substance, at any one time, is forbidden under penalty of forfeiture and $40 for each offence. The contract provided prices for both rock, solid and loose, and earth excavation. It is

(1) [1896] 1 Q.B. 335, at p. 340. (2) 49 Can. S.C.R. 430.

common ground in the case that the excavation which the contractor undertook consisted largely of solid rock. Nothing is said expressly either in the contract or in the specification about explosives, but it must be taken that the city, according to the common understanding and having regard to the attendant conditions, impliedly authorized the use of explosives, and that these were included in the materials, if indeed they were not the only material, which the contractor would supply. The channel which was to be excavated extended for a distance of about 950 feet, including the stream below or to the westward of Adelaide street bridge as far as the pond. The contractor had been executing a contract for the city on Douglas avenue, which is distant a mile or thereabouts from the work now in question, and when he completed this work, perhaps on or about Saturday, 16th April, he removed his plant, tools and materials to Newman's Brook; the evidence as to the precise date is not satisfactory, but it certainly was not later than Monday morning, 18th April. Adelaide street approaching Newman's Brook is not built to the full width of its layout. It would appear that the ground included within the street limits at this point naturally slopes or falls away to the westward, and that it is only the eastern part of the roadway which had been built up or was used for purposes of travel. The road is said to be laid out to a width of 66 feet, but the travelled roadway consists only of the easterly portion, having a width of 45 feet 6 inches, upon which an embankment was formed supported on the westerly side by a retaining wall, several feet in height, which is nearly perpendicular, and protected by an iron rail. It was on the lower level or westerly side of the road allowance, within a short distance of the brook, that the contractor's teamster deposited the tools and materials which he brought from Douglas avenue, including lumber for the building of a shed, and a box containing a considerable quantity of dynamite, 50 pounds or less. Here on Monday the contractor built a temporary shed or lean-to, 20 feet by 10 feet, having a roof of one slope covered with tar paper, and in this shed were deposited the contractor's tools and appliances for use in the work, including a forge and also a box of dynamite. A stove pipe projected from one end of the shed from which smoke was seen to issue on several occasions, and the forge

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was set up in the shed and put into operation. On Tuesday the men began the work of excavating the channel, working with picks and shovels. The work had been laid out by or under the direction of the city engineer before the excavating began. The distance of the shed from the channel is variously estimated at from 60 feet to 75 feet. On Wednesday morning the men returned to their work, ditching. There was a fire lighted in the shed that morning, presumably for purposes of the forge, and at 11 o'clock an explosion occurred which blew the shed to pieces, killed one of the contractor's men, who was the only occupant at the time, and caused considerable damage to the houses in the neighbourhood, including the plaintiff's house.

The following questions were put to the jury at the trial and their answers:

1. To what extent was the plaintiff's house damaged by the explosion of April 20, 1921, apart from the destruction of the window glass and other damage which was made good immediately after the explosion?

Ans.: Nine hundred dollars ($900).

2. Was the explosion caused by the negligence of the defendant Moses, or his servants?

Ans.: Yes.

3. If so, in what did such negligence consist?

Ans.: In the storage of dynamite or other explosive in a shed used also as a storehouse for tools, instead of keeping it locked up in a separate structure used for explosives only.

No question was put involving the liability of the city, nor was the court requested by counsel on either side to submit any such question. It would appear to have been assumed that there was no dispute of fact affecting the city and that its obligation depended entirely upon considerations of law, having regard to admitted or undisputed facts.

I should have liked to know from the jury whether in view of the facts and circumstances of the case the city authorized or approved the building and location of the shed, and whether it knew or had reason to know or to apprehend that dynamite was being stored there, but in view of the course of the trial, the submissions at the argument, and the considerations which I shall mention, I do not think it necessary to send the case back for any finding. By the New Brunswick Judicature Rules, Order 39, Rule 6; Order 40, Rule 10, and Order 58, Rule 4, which correspond to the English rules, the court has power to draw inferences of fact and to give any judgment and make

any order which ought to have been made, and a new trial is not to be granted because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial.

It is stated in the appellant's factum that the contractor built the shed

> either wholly within the bounds of Adelaide street or partly within the street and partly upon the adjacent property of a private owner,

and counsel for the city stated at the hearing that the shed might, for the purposes of the case, be treated as wholly upon the highway. People living in the neighbourhood saw the construction of the shed going on and saw the shed in place a day or two before the accident. It was plainly visible from the street and from the brook where the work was going on. No witnesses were called on behalf of the city. The city engineer had been upon the work and laid it out, but there is no direct evidence to show whether or not he was there at any time during either of the two days previous to the explosion, or when he was there.

It being conceded that the contractor, immediately before beginning to execute his contract, erected his shed upon land belonging to the city, in a public place, in close proximity to one of the city streets and to the site which had been laid out, or was then being laid out, by the city engineer for the excavating which was to be done under the contract; that the shed was provided for the purposes of the work; that the contractor had already, probably on a previous day, deposited at the site of the shed his tools and materials, and that the shed was used by the contractor from the time of its construction until destroyed by the explosion for no purpose save that of the contract, I think we may assume, neither the city nor the contractor producing any evidence to the contrary, that these things were not done without the license or consent of the city authorities, and that the city permitted the contractor to occupy the land in the way he did occupy it; and if the natural consequence of the user for which the contractor was authorized or licensed was to cause a nuisance, the city cannot escape liability for this.

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I think it was the duty of the city both to the public using the highway and to the people living in the neighbourhood to see that the explosives, which were practically required for the doing of the work, if kept on the work, or on the property belonging to or under the control of the city, did not cause a nuisance. The execution of this duty was unprovided for by the contract and in fact the duty was unfulfilled, and it was, as against the city, in consequence of the neglect of this duty that the accident took place.

In the well known case of *Laugher* v. *Pointer* (1), which had reference to a very different cause of complaint, Littledale J. at p. 560, says, referring to *Bush* v. *Steinman* (2), and *Sly* v. *Edgley* (3), that:

> These cases appear to establish that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner. But supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others.

In this case there was in the result an equal division of judicial opinion in the King's Bench, but in *Quarman* v. *Burnett* (4), it became necessary to decide the question, which had been left in difference, and Parke B., pronouncing the judgment of the Exchequer Chamber, held that the weight of authority and legal principle was in favour of the view taken by Lord Tenterdon and Littledale J. In consequence it was held that where the owners of a carriage were in the habit of hiring horses to draw it for a day or for a drive, and the owners of the horses provided a driver through whose negligence an injury was done to a third party, the owners of the carriage were not liable to be sued for the injury. And, as to the passage which I have quoted, Parke B. observed:

(1) 5 B. & C. 547.
(2) 1 B. & P. 404.
(3) 6 Esp. 6.
(4) 6 M. & W. 499.

It is true that there are cases—for instance, that of *Bush* v. *Steinman* (1); *Sly* v. *Edgley* (2), and others, and perhaps amongst them may be classed the recent case of *Randleson* v. *Murray*—in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my Brother Littledale, in his very able judgment in *Laugher* v. *Pointer* (3). The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances.

In *Reedie* v. *London and North Western Railway Co.* and *Hobbit* v. *London and North Western Railway Co.* (4), the defendant company had contracted with certain persons for the construction of a portion of its railway, including a bridge over a public highway, and the contractor's workmen in constructing the bridge negligently allowed a stone to fall upon a person passing underneath along the highway. It was held that the company was not liable and Rolfe B., pronouncing the judgment, having referred to *Quarman* v. *Burnett* (5) and the cases following that decision, said:

By these authorities we must consider the law to have been settled; and the only question is, whether the law, so settled, is applicable to the facts of this case. To show it was not, it was argued by the counsel for the plaintiff, that there is a recognized distinction on this subject, between injuries arising from the careless or unskilful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed real property. In the latter case, it was contended the owner is responsible for all injuries to passers by or others, howsoever they may have been occasioned; and here it was said the defendants were, at the time of the accident, the owners of the railway, and so are the parties responsible. This distinction as to fixed real property is adverted to by Mr. Justice Littledale, in his very able judgment in *Laugher* v. *Pointer* (6); and it is also noticed in the judgment of this court, in *Quarman* v. *Burnett* (5). But in neither of these cases was it necessary to decide whether such a distinction did or did not exist. The case of *Bush* v. *Steinman* (7), where the owner of a house was held liable for the act of a servant of a sub-contractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument, in support of the liability of the defendants, both in *Laugher* v. *Pointer* (6) and in *Quarman* v. *Burnett* (5), and as the circumstances of those two cases were such as not to make it necessary to overrule *Bush* v. *Steinman* (1), if any distinction in point of law did exist, in cases like the present, between fixed property and ordinary

(1) 1 B. & P. 404.
(2) 6 Esp. 6.
(3) 5 B. & C. 547.
(4) 4 Exch. 244.
(5) 6 M. & W. 499.
(6) 5 B. & C. 547, at pp. 550, 560.

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movable chattels, it was right to notice the point. But, on full consideration, we have come to the conclusion, that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and in fact, that, according to the modern decisions, *Bush* v. *Steinman* (1) must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded. It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be, that in some cases he is so responsible. But then, his liability must be founded on the principle, that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law: *Sic utere tuo ut alienum non laedas*. This is referred to by Mr. Justice Cresswell, in delivering the judgment of the Court of Common Bench, in *Rich* v. *Basterfield* (2), as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed. And, possibly, on some such principle as this, the case of *Bush* v. *Steinman* (1) may be supported.

In *White* v. *Jameson* (3), which was followed by Kekewich J. in *Winter* v. *Baker* (4), and in *Jenkins* v. *Jackson* (5), the plaintiff was the owner of cottages, and, on the opposite side of the street, was a shipyard owned and occupied by the defendant Jameson, where a brick kiln was erected and lighted within 45 feet of the cottages. The action was brought against Jameson and Proffitt to restrain the burning of the bricks in a manner to cause a nuisance to the occupiers of the cottages. Jameson had contracted with Proffitt for the excavation of clay in the shipyard, and for the making of bricks. The case was heard before Jessel M.R., who held the defendant Jameson liable, and he said:

> The land on which they (the acts complained of) were committed was his (Jameson's); and, independently of his having an interest in the profits, the defendant Proffitt did these acts by his license. The law on this subject is laid down in *Laugher* v. *Pointer* (6), a case which itself related to a very different matter. Mr. Justice Littledale there says: "The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned

(1) 1 B. & P. 404.
(2) 4 C.B. Rep. 783, at p. 802.
(3) L.R. 18 Eq. 303.
(4) 3 T.L.R. 564.
(5) 40 Ch. D. 71.
(6) 5 B. & C. 547, at p. 560.

by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." These observations are exactly in point, and have been cited with approbation in *Quarman* v. *Burnett* (1), and *Rich* v. *Basterfield* (2). Now here Jameson was in possession of the property, for he did not demise it to Proffitt, he merely granted to him a revocable license to burn bricks on it. Consequently he has brought Proffitt on his land and allowed him to commit a nuisance, and for this I hold he is liable to be sued in equity as well as at law.

In *Attorney General* v. *Tod-Heatley* (3), it was held by the Court of Appeal (Lindley L.J., A. L. Smith L.J., and Rigby L.J.) that it is the common law duty of the owner of vacant land to prevent it from being a public nuisance. That case had to do with the obligation of the owner of the land to prevent it from continuing to be a public nuisance by reason of the depositing thereon of offensive material to the annoyance of the inhabitants of the neighbourhood.

It is true that in *Hardaker* v. *Idle District Council* (4), where it was sought to charge the local authority with liability for damages caused by the negligence of its contractor in building a sewer upon a street under its statutory authority, A. L. Smith L.J., said, as to the principle which had been referred to or considered in the cases above quoted and in *Rapson* v. *Cubitt* (5):

> It was not contended at the bar that such a liability had any application to the present case, and indeed, if it had, it would impose a very onerous obligation upon local authorities, which, so far as I know, it has never before been attempted to impose upon them when executing works by their contractor in a public street.

I do not think however that this observation was intended to apply, either to an occupation of the street permitted by the municipal corporation for unauthorized purposes, or to vacant lands in the possession and under the administration of a local authority, which, although laid out and appropriated for a street, have not been formed into a street or utilized by the local authority for any purpose, or, as in this case, cannot in their existing condition be used for street purposes. The site of the nuisance here was vacant, unimproved land of the city, as to which, although its ultimate destination may have been a street, the city would, without hardship, incur the obligation of

(1) 6 M. & W. 499.
(2) 4 C.B. 783.
(3) 46 L.J. Ch. 275.
(4) [1896] 1 Q.B. 335.
(5) 9 M. & W. 710, at p. 714.

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an individual proprietor to see that the land was not in the meantime used in a manner to cause a nuisance.

In *Harris* v. *James* (1), the action was against the owner and tenant of a field by the occupier of adjoining land for injury caused to his land by the smoke from certain lime-kilns and by stones thrown upon it in the process of blasting the limestone in the field, which the owner had leased to the tenant for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by means of blasting, and the owner had authorized the quarrying of the stone and the erection of lime-kilns in the field. It was held by Blackburn J., upon demurrer, that the landlord was liable, although the nuisance was actually created by the act of his tenant, because the terms of the demise constituted an authority from him to the tenant to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demise.

In the present case, in like manner, the city, by its contract with Moses, authorized his occupation and use of the area laid out for excavation upon Newman's Brook, and the blasting and the bringing of the usual and necessary explosives upon the premises. The city was the owner or in occupation or had the control of that part of the road allowance set off and appropriated to Adelaide street, which was vacant and not built up for use and was not used or, in its unimproved state, capable of use as a highway. It was necessary that a reasonably safe and convenient place should be provided for the storing of the dynamite which was requisite for the blasting of the channel. No place of any sort had been provided by the city, and, when the work of excavation was about to commence, the contractor brought thither his tools and materials, including some dynamite, and deposited them upon this vacant land of the city, and constructed there a shed to receive them, in which he stored the tools and the dynamite. It is difficult to perceive how the contractor could reasonably have proceeded with his work without a magazine of some description located conveniently to the work. The contract contemplated that the contractor might be in possession of land

(1) 45 L.J. Q.B. 545.

other than that actually belonging to the site of the excavation. He contracted

not to use the land forming the site of or connected with the works for any other purpose whatsoever than the proper carrying on of the works; * * * from time to time to remove all surplus and objectionable materials, waste or rubbish from the works, and from any land or premises where any portion of the work may be carried on.

The city retained large powers of supervision and direction under the contract.

I think it may be assumed that the shed was not built without the knowledge and approval of the city, and that it was a consequence, not improbable, of the location and building of the shed, which the city should have realized, that the explosives for the work would be kept there. It follows upon the authorities that the city cannot escape responsibility for the use which, for the purposes of the work, the contractor made of the shed, amounting to a public nuisance upon the property of the city. I come to this conclusion not because the contractor was the agent or servant of the city, nor because he was an independent contractor who had contracted with the city to execute for its benefit a dangerous work, but because the damage complained of ensued from a nuisance permitted or tolerated, if not authorized, upon its property which the city was by the common law bound to prevent.

RINFRET J.—I concur with the Chief Justice.

Appeal dismissed with costs.

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