JOHN WALKER AND WILLIAM SPEARS ..... } APPELLANTS; 1881 *Nov. 2, 3.

AND

1882 *May 3.

JAMES McMILLAN ..... RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

41 *Vic., chs.* 6 & 7 (*N. B.*)—*By-law of city of St. John.—Building erected in violation of.—Negligence of contractor.—Liability of employer—Several defendants appearing by same attorney.—Separate counsel at trial—Cross-appeal—Rent, loss of.—Damages.*

On the 26th September, 1877, *S.* contracted to erect a proper and legal building for *W.* on his (*W.'s*) land, in the city of *St. John* Two days after, a by-law of the city of *St. John*, under the act of the legislature, 41 *Vic.*, c. 6, "The *St. John* Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, *W.* reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work without avoiding the contract, &c., &c. By the contract it was also declared that *W.* had engaged *B.* as superintendent of the erection—his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and issue certificate. While *W.'s* building was in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to *W.* and *McM.*, his neighbour. On an action by *McM.* against *W.* and *S.* to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, $3,952, and $1,375 for loss of rent. This latter amount was found separately, in order that the court might reduce it, if not recoverable. On motion to the Supreme Court of *New Brunswick* for a non-suit or new trial, the verdict was allowed to stand for $3,952, the amount of the general damages found by the jury. On appeal to the Supreme Court

*PRESENT—Sir William J. Ritchie, Knight, C. J., and Fournier Henry, Taschereau and Gwynne, J. J.

1881

WALKER v. MCMILLAN.

and cross-appeal by respondent to have verdict stand for the full amount awarded by the jury—

Held, (*Gwynne*, J., dissenting), 1. That at the time of the injury complained of, the contract for the erection of *W.'s* building being in contravention of the provisions of a valid by-law of the city of *St. John*, the defendant *W.* his contractors and his agent (*S.*) were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to *McM.* charged in the declaration.

2. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded.

Per *Gwynne*, J., dissenting, That *W.* was not, by the terms of the contract, liable for the injury, and, even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it.

The defendants appeared, by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine the witness.

Held (affirming the ruling of the judge at the trial), that the judge was right in allowing only one counsel to cross-examine the witness.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1) discharging a rule *nisi* for a non-suit or a new trial.

The facts of the case are, shortly, these: The respondent and the appellant *Walker* are owners of lots adjoining each other situate on the east side of *Prince William Street* in the city of *St. John*, the buildings on these having been swept away in the great fire of June, 1877. The respondent commenced to erect a building on his lot, one *Spears* being the contractor, and shortly afterwards the appellant *Walker* entered into a contract with *Spears* to erect the mason work of a block of stores to be erected on his lot, the stores to be

(1) 21 New Brunswick Rep., 31.

brick. *Miller* and *Nice* had a contract to build, finish and complete the carpentering, painting and plumbing of the buildings,—this being an entirely independent contract from that of *Spears*; it is dated the same day. Under these contracts, *Spears*, *Miller* and *Nice* went on with the building of appellant's building, and the walls were up to the top and ready for roofing; the floors were laid three stories. Under Act of Assembly 41 *Vic.* chs. 6 and 7, the mayor, aldermen and commonalty, on the 26th Sept. A.D., 1877, had passed a by-law relating to the construction of buildings. The walls to be built according to the contract contravened the provisions of the by-law. On the 6th Dec., 1877, a heavy rain storm took place, and in the afternoon the centre wall of *Walker's* building gave way, bringing down the other walls, tearing away the party wall between the building and respondent's building, and doing considerable damage to respondent's building. The foundation, it would appear, was defective and improperly built, but had been approved by the architect. For this damage the respondent commenced an action in the Supreme Court, to which the appellants pleaded several special pleas; in these pleas the principal allegation is that the buildings so being erected were not in possession of or under the control of the appellants, or either of them, but in the possession and under the control of *Spears*.

The case was tried before Mr. Justice *Weldon* and a special jury at the *St. John* circuit, November, 1879, when the jury, under the charge of the learned judge, found a verdict for the plaintiff for $5,327.32, including $1,375 for loss of rent.

The motion for a new trial was made on a variety of grounds, and the first ground was the refusal of the judge to permit the counsel of each defendant to cross-

1881

WALKER v. McMILLAN.

examine the plaintiff's witnesses and to address the jury for the defendant.

The defendants appeared by one attorney and united in their defence, which was substantially the same; but on the trial they appeared by different counsel, but during the progress of the trial no different defence was set up by either defendant. The other grounds were: improper reception of evidence; improper rejection of evidence; the refusal of the judge to order a non-suit; misdirection.

After argument for a new trial the court refused the rule, the verdict being reduced by the amount of the rent. The appellants thereupon appealed to the Supreme Court of *Canada*, and the respondent, by way of cross-appeal, claimed that the verdict should stand for the full amount awarded by the jury, $3,952 for general damages, and $1,375 for rent.

Mr. *Kaye*, Q.C, and Dr. *Tuck*, Q.C., for appellants, and Mr. *Weldon*, Q.C., and Dr. *Barker*, Q.C., for respondent.

The principle arguments urged and authorities cited are reviewed at length in the judgments of the Chief Justice and of Mr. Justice *Gwynne*. See also report of the case in *New Brunswick* reports (1).

RITCHIE, C. J.:—

[After having stated the pleadings, proceeded as follows:]

All the pleas are by defendants, by *S. R. Thomson*, their attorney, and are signed by Mr. *Kaye* as counsel for defendants.

At the trial it is said in the case:

Mr. *Weldon* and Mr. *Barker* for the plaintiff.
Mr. *Thomson* for *Walker*.
Mr. *Kaye* for *Spears*.
Mr. *Thomson* cross-examines the first witness. Mr. *Kaye* pro-

(1) 21 New Brunswick Rep. 31.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

poses to cross-examine witness as his counsel Mr. *Spears*. This being objected to by plaintiff's counsel.

Judge:—I rule, as the defendants have not severed in their pleadings there is no right that the defendants' counsel can be heard to cross-examine the witness, the plea is for both, one attorney and one counsel.

The witness appears then to have been further cross-examined by Mr. *Thomson*. Plaintiff's second witness was cross-examined by Mr. *Kaye*, when, at the close of his cross-examination, Mr. *Thomson* claimed the right, as counsel for Mr. *Walker*, to cross-examine the witness, Mr. *Kaye* being counsel for *Spears*.

The learned judge stated that, in accordance with his previous ruling, only one counsel could cross-examine the witness.

As the defendants appeared by the same attorney, pleaded jointly by the same attorney, and the pleas were all signed by the same counsel, and the same attorney and counsel appeared on the trial, and the defence, being in no material sense different and distinct, but on the contrary the defence of both being in substance precisely the same, under the circumstances I think the judge was right in refusing to allow the defendants to be represented separately at the trial. This was a matter relating to the conduct of the suit, and was in his discretion, and in my opinion no fault can be found in the way he exercised that discretion.

As to the merits:

On the 5th September, 1877, 41 *Vic.*, c 6, "An Act to amend the law for the better prevention of conflagrations in the city of *St. John*," and 41 *Vic.*, c. 7 were passed.

Sec. 7 of 41 *Vic.*, c. 7 is as follows:

7. The inspector shall have full power to decide upon any questions arising under the provisions of this Act, and of the by-laws passed under the authority of this Act, relative to the manner of construction or materials to be used in the construction, alteration

1882

WALKER v. McMILLAN.

Ritchie, C.J.

or repair of any building in the city of *St. John*, and he may require that plans of the proposed erection, alteration or repairs shall be submitted for inspection before issuing his permit; *provided, however*, that should any question arise between the inspector and the owner or architect of any building, or should the owner or architect object to any order or decision of the said inspector, the matter shall be referred to the arbitrament of three persons (who shall be either architects or master builders), one to be chosen by the inspector, one by the owner or other person interested, and these two shall choose a third, and the decision of these referees, or any two of them, submitted in writing, shall be final and conclusive on the matter referred.

8. The inspector shall examine all buildings in the course of erection, alteration or repair throughout the city, as often as practicable, and make a record of all violations of any provision of this act, or of the by-laws made under the authority of this act, together with the street and number where such violations are found, the names of the owners, lessee, occupants, architect and master mechanics, and all other matters relative thereto.

27. No building shall be erected hereafter in any part of the city of *St. John*, without a permit being first obtained from the inspector of buildings, and no addition or alteration to any building, subject to the regulations of this act, shall be made without a permit from the said inspector.

30. The Mayor, Aldermen and Commonalty of the city of *St. John*, in Common Council, are hereby authorized and empowered from time to time to make, ordain, amend and rescind by-laws and ordinances regulating the mode of constructing buildings in the city of *St. John*, and any part thereof, with a view to ensuring the sufficient, safe and proper construction thereof, and the security of life and limb, and protection against fire.

31. Whosoever shall commit or make any act or default contrary to the provisions of this act, or contrary to any of the provisions of any by-law or ordinance made under the authority of this Act, shall be liable to a penalty of not less than twenty dollars nor more than one hundred dollars for every such act or default, to be recovered by proceedings to be taken in the name of the inspector of buildings, before the police magistrate of the city of *St. John*, or other magistrate sitting at the police office in the said city; and in default of payment, the person convicted shall be committed to the common gaol of the city and county of *St. John* for a period of not more than two calendar months, in the discretion of the committing magistrate.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

32. Whosoever, having been convicted as last aforesaid, shall permit the continuance of any matter or thing contrary to the provisions of this act, or contrary to any of the provisions of any by-law or ordinance made as aforesaid, shall, for each day's continuance after such conviction, be liable to a further penalty of not less than ten dollars nor more than fifty dollars, to be recovered before the police magistrate of the city of *St. John*, or sitting magistrate at the Police Office in said city, in the same manner and with the like effect as hereinbefore mentioned in the last preceding section provided.

On the 24th September, 1877, defendant entered into a contract with *J. & W. C. Spears* for the erection of a building on his lot adjoining that of plaintiffs, and signed the following :—

This agreement, made this twenty-fourth day of September A.D., 1877, between *J. & W C Spears*, parties of the first part, and *James Walker*, party of the second part, witnesseth, the said party of the first part, for and in consideration of the payments to be made by them by the said second party as hereinafter provided, do hereby contract and agree to furnish all the material, labor, tools, machinery, etc., and to build, finish and complete for the said second party all the masons' and other trades of the block of stores to be erected on *Prince William* Street, east side, between *Princess* and *King* Streets, to be described as in the foregoing specifications, and according to the plans and drawings therein especially referred to; which plans and drawings are declared to be a part of this agreement.

And the second party, for and in consideration of the said first party fully and faithfully executing the aforesaid work, and furnishing all the materials therefor, as specified, so as to fully carry out the design according to its true spirit, meaning and intent, and in the manner and by and at the times set forth in the foregoing specification, and to the full and complete satisfaction of *John C. Babcock*, superintendent as aforesaid, doth hereby agree to pay to the said first party as the work progresses, and as the same shall be certified to by the said superintendent, the sum of ten thousand four hundred and forty-one ($10,441) dollars, to be paid in the following manner: On demand, as the work progresses, in payments amounting to seventy-five per cent. of the amount as set forth and specified above, and as the same shall be certified by the superintendent, and the balance of twenty-five per cent. as shall be found due as hereinafter provided.

It is further agreed by the parties that the twenty-five per cent.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

aforesaid agreed to be reserved by second party from the value of work executed, shall be held by second party until the full completion of the work to the satisfaction of the superintendent aforesaid, as security for the proper execution of the contract by first party, and as indemnity, as far as the same is sufficient, to be applied on the liquidation of any damages arising under this contract.

It is further agreed by the parties hereto that all the foregoing conditions and stipulations shall be mutually binding upon executors and administrators.

In witness whereof, the parties hereto have set their hands the day and year first above written.

JAMES WALKER,
J. & W. C. SPEARS.

JOHN C. BABCOCK.

And in the specifications referred to we find:

"§ V. The proprietor has engaged *John C. Babcock* as superintendent of the erection and completion of said building; his duty being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings and information required to properly illustrate the design given; also to make estimates for the contractor of the amounts due to him on the contract, in no case estimating any materials or work which are objectionable, or have not become permanent parts of the work; and when the building is completed, to issue a certificate to the contractor, which certificate, if unconditional, shall be an acceptance of the contract, and shall release him from all further responsibility on account of the work.

§ VI. It is to be understood by the contractors that the building or work is entirely at their risk until the same is accepted, and they will be held liable for its safety to the amount of money paid by the proprietor on account of the same.

§ VII. In case of any unusual or unnecessary delay, or inability, by the contractor in providing and delivering the necessary materials, and performing the necessary labor at the time the same is required, so as to insure the completion and delivery of the building or work at the time hereinafter set forth and contracted; then, and in such case, the proprietor, within three days after having notified the contractor of his intention so to do, shall have the right to enter upon the work and procure such necessary materials or labor to be furnished or performed, as the case may require; and remove from the same all defective materials or workmanship as in the judgment of the superintendent may be found necessary, and carry on the work to completion in such way as shall be proper and right, charg-

ing the cost thereof to the contractor, and deducting such charges from the amount of the contract price.

§ VIII. The proprietor reserves the right by conferring with the superintending architect, to alter and modify the plans and this specification in particular, and the architect shall be at liberty to make any deviation in the construction, detail, or execution, without in either case invalidating or rendering void the contract. And in case such alteration or deviation shall increase or diminish the cost of doing the work, the amount to be allowed to the contractor or proprietor shall be such as may be equitable and just.

On the 26th September, 1877, by-laws were passed by the mayor, &c., of the city of *St. John*, in common council, under the authority of the 30th sec. of 41 *Vic.*, ch. 7, regulating the mode of constructing buildings in the city of *St. John*. In the latter part of September the building was commenced, the centre wall of the building having been misplaced was taken down and rebuilt; it is admitted on all hands that this wall was not built in compliance with the acts or by-laws and was not properly built. On the 6th December, this wall gave way, fell, and with it brought down the wall of plaintiff's building. The defendants contend that having contracted with a competent person they were not liable for the damage done plaintiff's building by the falling of this wall.

There was evidence to show that a large quantity of sand for building purposes had been put in the building for the convenience and use of the contractors, and that a somewhat continuous rain having come on, and the building not being roofed, the weight of the water and the sand contributed to the fall of the wall, though Mr. *Causey*, an experienced builder called by the defendants, and who rebuilt the wall, says:

I went to rebuild in the trench. The original was twelve inches astray. I saw indications on the clay. He said if the wall had been built in its present position as laid out on the plan it must have been on the clay. Half of it in the front part. It had not gone down to the rock in the right place. I re-built as laid down in the plan. I

1882

WALKER v. McMILLAN.

Ritchie, C.J.

got down to the rock. I got the rock for it from the cellar floor. The wall had got to the solid rock in front. Other part on clay. I should say it was not a proper job. I think *Spears* could not have known from the character I have heard of him. If so badly built it is a wonder to me it held until it got to the top.

The work was superintended by Mr. *Babcock*, defendants' architect, and *Spears* his agent. For the work done on the building the architect, under sec. 5 of the specifications, gave certificates as follows:—

St John, November 2nd, 1877.

This certifies that Messrs. *J. & W. C. Spears* are entitled to the payment of three thousand dollars ($3,000.00) for labour and material supplied to building of *James Walker*, Esq., east side of *Prince William* Street, between *King* and *Princess* Streets, *St. John*, according to contract.

"$3,000.00.

JOHN C. BABCOCK.

Received the above amount,

J. & W. C. SPEARS.

St. John, November 24th, 1877.

"This is to certify that Messrs. *J. & W. C. Spears* are entitled to a payment of twenty three hundred dollars ($2,300.00) for labour and material furnished to building of Dr. *Jno. Walker*, on the east side of *Prince William* Street, between *King* and *Princess* Streets, *Saint John, N. B.*, according to contract.

"$2,300.00.

JOHN C. BABCOCK.

Architect and Superintendent.

J. & W. C. SPEARS.

I think it is clearly established that injury was occasioned by the centre wall of the *Walker* building giving way, and there was conclusive evidence that this wall was improperly built on an improper foundation, was too weak, and was contrary to the statute and the by-laws.

Simeon Jones, in his evidence, says:

I know the buildings and recollect the occasion. I was on *Prince William* street near *King*. I heard a noise and saw the *Walker* building apparently settle down in the middle and fall, and I think the side of *McMillan* building fell out. Settled down in the middle and fell down. I could not see the rear of the building.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

Michael W. Maher:

I reside in *St. John*. Am Inspector of buildings since September, 1877. I knew the properties of *McMillan* and *Walker* before they fell. They are east of the street *Prince William*. I am practical builder for 40 years. I have been architect and practical builder. * * * I saw the *Walker* building a story above the street. I went to visit it. I think they were putting on the beams. I went there; I saw Mr. *Spears* and enquired who had charge of the building. I hunted up Mr. *Spears* and told him that the walls were not according to the law, and the vibration in the walls. Mr. *Spears* said he thought it good enough. I saw *Spears* near *Yeats'* iron store. I saw him at the building the next day or soon after, and met *Spears*, I think it was by appointment. I told him what I required. *Spears*, *Babcock* and *John McMillan*. I think Mr. *Spears* asked if I would not allow to get the building covered in when he would do it. I would not for or against. I wanted several courses of the— Mr. *Spears* spoke of spikes and ordinary concrete would do better. I spoke to Mr. *Spears*. He said he was the inspector of the building. I did not say anything; I was rather taken aback. The character of the building for storage and warehouse buildings. I stated what the law required me to have done, and then Mr. *Spears* said he—"

The sentence breaks off here, but I presume it has reference to what he said a moment before. *Spears* had said that he was the inspector of the building.

Joseph Pritchard says:

I reside in *St. John*. I know the *Walker* building. I have had conversation with Mr. *Spears*. He asked me what I thought of the building. I told him they looked very well, a few days before they fell, as far as they were. I said if the building was mine I would not have those shores in front. I said I would not trust them. He said that they were going to put iron pillars there. I said in the meantime the posts would have to support the whole of the building above. He asked to go and see it, and said it is stronger than you think it is. I told him I would not like to trust them myself to be under. The shore was under the front floor. There was no wall in front. The shore looked like a piece of scantling or deal. I was on the opposite side of the street.

The evidence of *Spears*, the contractor, is as follows:

I arranged for the building on the *Walker* lot. I spoke of *John C. Babcock;* he was here before I came. I entered into a written

1882

WALKER v. McMILLAN.

Ritchie, C.J.

contract with Dr. *Walker* for the building on the lot adjoining *McMillan's*. (Called for and produced by defendants). This is the contract. Only one signed. This is my signature of the firm and Dr. *Walker*, signed in presence of *Babcock* (the architect).

No. 2 contract.

Babcock same person I spoke of. I went on to construct this building. *Miller & Nice* had the contract for the carpenter work; it went on as I progressd with my contract. I began latter part of September to build; I went on. *Babcock* furnished me with plans —this is one. (One produced. No. 3.) * * * * * * * * This plan was given to me by *Babcock* as the working plan. The building is 65 feet high, 26 feet from the face of the *McMillan* wall to the face of the centre wall, and 26 feet to the face of the south wall. I worked under that plan from the commencement. I commenced the foundation, and I had to excavate extra to the rock in front, and ran to the rear. I built the stone wall and was ready for the first tier of beams. *Walker* and *Spears* were both there occasionally. I should judge a small space. There was a mistake in the plan. I went to the *Babcock* office as he was away. There was a foot of a mistake; it was a foot too near the *McMillan* building. *Babcock* suggested me to build another wall alongside this. I told him it would be, my judgment would be, against the doing this, as it would be on two separate foundations—better way to take down and re-build it; and it was done. I was directed, but can't state the language he used. I had previously built according to the plan. I took it down and re-built it. I then went on with the building. Mr. *Spears* was there while the building was in progress. Dr. *Walker* was there occasionally. Mr. *Spears* every day, some times several times a day. * * * Mr. *Maher* was in there one day and Mr. *Spears* and *Babcock* were there. We were in the front. *Maher* said the space was wider than the law provided, and the centre wall was not strong enough, that was his opinion. Mr. *Spears* had some words, and said he would make himself superintendent of the building, and Mr. *Maher* went away. Afterwards *Maher* came and told Mr. *Spears* that the wall, cellar wall, must be increased in thickness. This was the second time. *Spears* came and he wanted *Maher* to allow him to enclose the building, and he would increase the wall. *Maher* did not allow this to be done. I was asked for my opinion, was by driving a spike three inches into the wall and bricks four inches, and by that way add four inches to the wall. *Maher* or *Spears* asked me if I could build a wall, in the way I stated, to be as strong as if 16 inch. I declined an opinion. The centre

wall was left 16 inches as it originally was. Some weeks--three or four—the building fell. When *Maher* first came it was one story; the second time I think a second story was up. I notified Mr. *Babcock* to have the roof put on to protect the building, but it was not done. Mr. *Spears* came there—was annoyed at my not having more men as the work was not progressing. I told him it was going up faster than it ought to in my judgment. He said it was necessary to get the top on before the winter set in. I said in my judgment I would not put them along as fast as they were going. I told there was a great mass of green material and it was put up too fast in my judgment. I had not been in *New Brunswick* before; I had only built in *New York* and *Brooklyn*. *McMillan's* building fell 6th December about four o'clock, * * * Before the rain storm came on the building was allright. I received from Mr. *Spears* on the contract $5,300. I had certificates from Mr. *Babcock* which I gave to Mr. *Spears* when I got these payments. (These certificates called for). I never got the certificates back again.

No. 3. November 2, 1877, *John C. Babcock* certificate for $3,000.

No. 4. November 24, 1877, *John C. Babcock* certificate for $2,300.

These amounts paid by Mr. *Spears* to me. Mr. *Spears* paid me before on the *Walker* estate, all paid by him to me. The building was nearly all up as before described. I think the upper story was up, the rear and side walls and the centre wall when I got the $3,000; that is all I received. The certificates was given after the conversation between *Walker*, *Spears*, *Babcock* and myself. It would have taken $1,500 to complete my contract with *Walker*. I built the *McMillan* party wall; it was well built. The witness makes a plan, shews the jury.

I spoke of Mr. *Maher* having said such wall was too slight.

Maher spoke to me, I spoke to Mr. *Spears*.

Spears was hurrying previous to walls being up.

John McMillan another witness:

My father and myself are the firm. Dr. *Walker* in possession of adjoining lot to the lot occupied by my father. I was present when our building was the second story. *Walker* at first story, adjoining the party wall. Mr. *Spears*, Mr. *Babcock* and Mr. *Maher* called my attention to the centre wall. Mr. *Spears* said *Maher* had called his attention to the centre wall and would have it wider, which he thought was absurd. He said he knew as much as Mr. *Maher*, and he would have himself made inspector. I soon left, and *Maher* went with me. I did not know *Spears* until he came here. We had a temporary place on *Canterbury* street. The building was nearly

1882

WALKER v. McMILLAN.

Ritchie, C.J.

completed. The outside wholly completed. Preparing the internal fittings. Finally got in about 1st January. What rent were you to pay?

Objected. (I am of opinion it is somewhat doubtful whether the question is allowable, as the damages on this ground would be too remote; but I think by allowing it and the damages are agreed rent, the question may be put; no injury can be done in such view of it.) Mr. *Thomson* objects to this.

The firm of *J. & A. McMillan* had agreed to rent the building from the plaintiff. The rent was to be 10 per cent. on the outlay, $3,000 a year. 1st January, 1878, to the time we got into it after its being repaired would be $1,250. The latter part of June we got into it. * * * * * * *

Cross-examined:

I am quite sure of the conversation I had with *Spears* in *Maher's* presence was in the *Walker* building.

James McMillan, plaintiff, says:

This building I had put up to be occupied by the firm.

The defendant's case.

William Miller:

I am a carpenter. I did the *Walker* building carpenter work. There was with me *George Nice* as co-contractor. *Spears* did the mason work. Sand was put in the *Walker* building, next to *McMillan*. Sand was brought in and dumped against the wall. I spoke to Mr. *Spears* and told him it would spring the floor. He said it would not do so, and he spoke to Mr. *Babcock*. He put the shores within 3 feet of the centre wall.

George Nice, in his cross-examination, says:

Weight close up to the wall. *Babcock* told him to spread it over the floor about eighteen inches. The weight would be on the end of the beams. The shores would take the weight off the walls. *Spears* had been there two or three weeks, it had been screened over a fortnight. * * * Contract was made by Mr. *Babcock's* directions. He was there every day, and Mr. *Spears* there every day, and Mr. *Walker* not so often. I got my money from Mr. *Spears*.

Re-examined by Mr. *Thomson:*

I was there at the laying of each floor. They were not against the wall nor allowed to do so. They were rough boards and would come down as it fell. No. After sand was in made. *Babcock* said spread over the floor. Beams 3 x 15.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

John C. Babcock:

I am an architect. Principally engaged in *New York* City on my own responsibility. I profess to be a skilled man. Built a great many under my superintendence. I am a witness to the contract. I saw *Walker* sign and *W. C. Spears*. I am the architect who prepared the plan; all prepared by me—contract by the contractor. When my plan was made no work done on *McMillan's*. My plan was made with reference to a particular wall. I had nothing to do with a partition wall. I think it would be a suitable building according to my plan. I have no doubt if my plans were followed. This plan shews the dimensions. This central space constructed. It was to be carried to the rock. I was at the ground when the wall in the centre was commenced. The excavation made. The plan shews here the cellar wall was to be placed from the *Wiggins* side fifty-five feet. This was to the centre of *Wiggins* wall to *McMillan* wall centre fifty-five feet. I did not measure the distance when the trench was dug. Commenced from the centre of *Wiggins* twenty-four inches. Twenty-four inches on *Walker* lot. Width of north cellar, 25.6. To *McMillan* wall twenty-four inches. Cellar wall not located by these figures. I did not know the trench dug was in centre line of my plan. It had gone to the rock. The rock was about four feet from the centre line of the building and came to a foot in rear. The wall was carried up to the street level. I think I was the first to discern it was wrong. The *McMillan* wall carried up some distance, cannot say how far. When I discerned I had to see how the mistake occurred. I put it right in the rear, but not in the front. Wall to rear of *McMillan* building at the front. I pointed this out. We concluded to take it down and build it right. I saw Mr. *Spears* about it. It may be first or second day of May. It was done very quickly. I saw some portions taken down, not all. When I next saw it, it was nearly re-built. I had not seen it between those two periods. It would be necessary to excavate the trench for the alteration. I did not see it done. I suppose it had been done; I did not know it was done. I did not tell *Spears'* foreman I had discovered a mistake.

(Mr. *Kaye* reads from his notes of evidence what Mr. *Spears* said in his evidence, and he asks the witness if that is true. This being objected to by Mr. *Barker*, I express my opinion that it is not regular, but the witness is to state what took place between him and Mr. *Spears* and not what is read by Mr. *Kaye* and taken down by him. The witness may give his version of the conversation).

There was some measurement made as to see how much it was out of line, and some suggestions made as to whether the error could not be redressed in the first story by moving over the wall. I could not

1882

WALKER v. McMILLAN.

Ritchie, C.J.

agree to that, and I ordered the wall to be taken down. I did not suggest to Mr. *Spears* to build any other wall alongside of it. It would not be practicable. When you sent for *Spears* a general conversation took place, but I can't recollect exactly what was said. I regretted the error had been made in locating the wall. I did not tell *Spears* it was my mistake. The wall was not built in the first instance according to the plan. Some time after the accident I did discover the new wall had not been built on the rock, or some of it. After the accident I discovered a part had not been built up from the foundation (trench, rock). The beams were sixteen inch from centre in second, third and fourth floors, to twelve inch to centre of beam in first floor. The beams bore five inches in the under. The beams are bevelled below to save the walls in case of fire. The flooring was laid across the beams. Ordinary rough spruce boards. Rough stuff the 1¼. On the floor. The beams are cut to allow a deflection. The boards were laid on the beams; nailed, but open so water would pass through. Not roofed; all the rain that I ever saw in that building passed through the floor. I don't think the rain would pass over the floor to the side at the walls. I heard *Miller* and *Nice's* statements. Can you, from the work done in that building by *Miller* and *Nice*, speak as to their capacity as carpenters?

(Objected to): I only judge from that work. The carpenters, in my opinion, were competent to do the work they contracted for.

I saw sand on the building, in the north side, from front to rear, fifteen or twenty feet from the front. It was placed adjoining to the central wall the highest and sloped to *McMillan's* wall. It went to the vault, about fifty feet in length. When first put in half the distance in the width, but afterwards spread out. Between *McMillan* and the centre the cart passed through. A considerable quantity in when I first saw it. It was added to. I gave directions to Mr. *Spears* regarding it a week or ten days before the accident. I could not say exactly the quantity. And to spread over the surface to a depth of more than eighteen inches. I first ordered it to be taken away, and therefore allowed it to remain if spread over the building. Sand laid on a four inch ledge. A large portion of the sand was levelled off as I directed. I directed on several occasions. I said I thought it dangerous to place so much sand, it might injure the walls. I am not aware of any assent being given before the sand was brought in. What would be the effect of a body of sand? It would affect the wall. I thought there was sand enough for the building or more. A cubic yard of wet sand 1½ ton. I should think between seventy-five and one hundred tons there of sand. After the accident I found a part of the front portion of the wall had not been carried to the rock. The base of the wall was a little wider than

the wall, and the ground widened the bearing on the wall. If there had been no sand, the rain in my opinion would not carry down the wall. It had received injury from the sand before the rain. The wall had been effected by the sand before the rain came. I generally visited the building every morning, most generally twice a day. I did not actually see everything done. The rain would strike the wall and run down it. I heard Captain *Pritchard* give his testimony. I said there was no wooden shore in front. Iron columns was in before the accident, not less than a week. No boards on the roof of the *Walker* building. The fire walls not complete. Side and rear complete. I think no unnecessary delay in putting on the roof. I have recollection of *McMillan's* roof; rain fell through it. I can't say about the fire wall being carried out. Board could be put on before the parapet were put. I allowed a girder to run fore and aft in the cellar, resting on brick piers in lieu of the timber in the specification, which it was impossible to get. I saw *McMillan's* wall and party wall. 8.4.8 beams rested practically on an eight inch wall. Not so strong as a sixteen inch solid wall. This stopped at second story. Vaulted up two stories and then carried up fifteen inch solid. The sixteen inch would balance on the side of the 8.4.8. The upper part of the wall would be stronger than below, in my opinion. A large portion of the *McMillan* fell out by the withe anchor of ours, and one wall giving way. The sixteen inch wall or stronger than the hollow wall of 2.8. I think the party wall was defective in this respect. 26th September, the date of the contract; plan made before, I think. *Spears'* men worked in the buildings of *McMillan* and *Walker*. I knew Mr. *Spears* before he built here. He had erected, etc.

I observed a shore on *McMillan's* building, in front of the iron column. I saw nothing the matter with it.

Cross-examined by Mr. *Weldon*:

I came to *St. John* in July, after the fire. The *Spears* were builders, and had given satisfaction to the work done. I recommended them to come. My plans were made before the contract. The figures and details are on the plans to work by. I gave them measurements. They are bound by them and the figures on the plan. The contractor will not err when it is followed. I gave one to *Spears* from the centre wall to the centre of the wall or from face to face 27.6. Right through from face to face 25.6. Explain the measure 13.9 altered. I don't think the alteration was made after the mistake was discovered. Either plan would. I can't tell the alteration when made. Altered from 25.6 to 26.6. No mistake in

1882

WALKER v. McMILLAN.

Ritchie, C.J.

the figures. The alterations in the plan were made in my office. I can't say whether the alteration was made before or after. I think the alteration was made after the commencement of the wall. He had no right to take from that side. I think 25.6. On 24.6. There is a discrepancy. I don't think I was wrong. 2.24.6. 26.6.2. 13.3 to locate the pier after first wall was built. There is an alteration, 13.3 to 39. The wall ready for beams. The trench was to the wall. I discovered a break in the wall, and the error would diminish one foot to nothing in the distance of sixty feet of the height to a sharp pointed wedge. It had to go ten inches beyond the trench. I had to give certificates, and the work was done to my satisfaction. I knew I employed a competent man to do it, and I expected it was done. I think I found out the error first. I relied on my plan in my office. Mr. *Watson* was my assistant. Did you tell *Spears* I had taken a wrong point? I did not. I do not think the error is the original. The other working plan is corrected by it.

I gave the certificate up to 24th November. 2nd November. There was a permit got. The party wall was, I think, up. I think the wall of *McMillan* was up. I made some objection. I had solid done when I wanted. It was rear. There was, I think, over three feet. The joist did not always strike the withes. More beams put up stairs. Below twelve inches apart. Would the milky water indicate water running down the wall? There must be milk. It would indicate lime. Would it percolate the foundation? It would not, I think, the brick, it might the stone. Not many alterations made. *Spears* was the agent, he paid for *Walker*. I obeyed Mr. *Spears'* directions. Did Mr. *Maher* call your attention to the wall? He did. He did not tell me it was an unsafe wall. I did not hear the conversation between Mr. *Maher* and *Spears*. *Maher* did not tell me the wall would not do. We were to do. It was to be done. No terms were fixed between *Wiggins* and us. There was an old wall twenty-four inches. We had nineteen inches as a party wall in *Walker's*. It is, I think, the dividing line at the centre of the wall. It was intended as a sixteen inch, but large brick made it an eighteen inch wall.

I think *Maher* was there twice. A second time he insisted his direction were to be carried out. He kept increasing it. I never told *Spears* to put up the shores. I did not know it until after the accident. I did not tell *Spears*. I found under wall on the sand side was gone. Perfectly sound on other side. The sand was. The centre wall gave way and the building fell. Sand levelled before the accident. I think engaged in taking. Fifty cubic yards, $1\frac{1}{2}$, 75 tons. Dry sand much less. I think *McMillan's* roof was not tight. I think

it was three inch deal in front of *McMillan*. Thirty feet width of *McMillan*. A stick eighteen and twenty-four would not carry it without deflection. A brick tier and iron column. I don't know how the weight was distributed. The beam and anchor well in the wall. It brought down the whole by the withes. We do not use hollow party walls in the States. I have seen them. The withes are not equal to the solid wall. 13.9 is my figure.

Re-examined by Mr. *Thomson:*

These figures are the original in my office. The plan may have been in the office. One cellar is a foot wider than the other if the wall was located from that line. I discovered the deflection. The building would be a foot narrower in the front or rear. He had it partly up. It was his duty and he thought so. I found it after the building fell. I believe the effect of the sand. No danger of dry sand in a proper place. I gave a certificate after as percentage to make good if any irregulation. All party walls are carried up solid. The solid wall would increase the weight. No such indication as a milky wall. I examined the wall after the accident. I am satisfied they were close. was such they as my saying I had made a mistake. It made no matter who made the mistake, it would have to be altered. Soft crust ought to go to the rock. I saw a shore in front. The

By a Juror—Is it customary to cover that wall with boards?

I can't say it was, I don't know.

TUESDAY, 25th November.

What did you mean by I obeyed Mr. *Spears'* directions? I obeyed meant such directions as one would give to his architect. I had received directions to prepare plans and specifications, and, secondly, to receive tenders; also, what tender to accept, and prepare agreement with that party to arrange for commencement of work and order of payment. That is the usual directions. After the contract was made he did not interfere with me in any particular. Mr. *Spears* was away a good deal of the time.

Cross-examined by Mr. *Barker:*

I did not tell him a mistake had been made; he must have known it. He was in *Halifax* a part of the time. *Spears* was often there. I think he complained of the work not going on as fast as he could. I spoke to *Spears*. It was not necessary, in consequence of what Mr. *Spears* said. It was partly, not to a very great extent, by his influence. I can't tell you. I won't say it was not. I spoke before the beginning of the building. Was not *Spears* there constantly? He was there about the building. I thought I had no conversation about the wall, I won't swear I had not. It was my own judgment

1882

WALKER v. McMILLAN.

Ritchie, C.J.

about the wall. After work had progressed I got the permit. (Mr. *Thomson*—It was in writing. You have already said so, have'nt you?) Re-examined:

This wall was ordered down by my directions. He, *Spears*, gave no order, neither directly or indirectly:

William Causey:

I am a mason. In *St. John* forty to fifty years. I have looked at the contract. I don't presume to be much of a judge of the carpenter work. The foundation was built and what the contract describes. All foundation walls to bed in solid rock, which will be levelled off and shaped off as directed or required, laying all footings on large flat stone, bedded in cement when rock may not show sound or fit to be removed, and concrete substituted. Would such a foundation, if made, would it be proper and sufficient? (Objected to by Mr. *Barker*). It would be proper for such a building and fit and sufficient. stone wall ready for coutract. The work would be quite sufficient.

The usual way of doing it as described in contract. Head of granite pier sufficient. The usual way. Freestone. The general way. Specification.

The brick wall would be sufficient if properly built. A 16 inch wall would be sufficient for offices and stores anchored as required. The contract is such if carried out would, in my opinion, be sufficient. Walls secured by anchor would be sufficient. I have done walls as thus described. I am of opinion it is sufficient. A building so constructed would, in my opinion, be sufficient. I had to examine after the building fell next morning. I could not for the *debris*. I went to re-build in the trench. The original was twelve inches astray. I saw indications on the clay. He said if the wall had been built in its present position as laid out on the plan it must have been on the clay. Half of it in the front part. It had not gone down to the rock in the right place. I re-built as laid down in the plan. I got down to the rock. I got the rock for it from the cellar floor. The wall had got to the solid rock in front. Other part on clay. I should say it was not a proper job. I think *Spears* could not have known from the character I have heard of him. If so badly built it is a wonder to me it held until it got to the top. * * *

Cross-examined by Mr. *Barker:*

I found a trench down to the solid rock sufficient for a two foot base, which was brick. I found it half in the clay; the one part on rock, one on clay. I re-built by a plan according to the dimensions of this plan. My centre wall was a two foot wall. This plan is a sixteen inch. The space would be less. No such

vibration on a building used for offices or for iron. This is for storage of heavy goods. Supports would be underneath. Sixteen inch for offices would be sufficient. A wall might dry in a month. Built according to the specification it would take some time in the flat near the ground.

James Walker:

I am a defendant. I had to trust to my architect. I am neither a builder nor contractor. I trusted to my contractor. I believe if Mr. *Babcock's* specification had been followed there would have been no trouble. I did not interfere more than giving advice to take every precaution to prevent accidents.

Cross-examined by Mr. *Weldon:*

Babcock is my architect, and *William M. Spears* looked after it and attended to it much more than I did. I live five miles from town. I went to the building as it was going along, saw the cellar walls after they re-built them.

Cross-examined:

Spears made no complaint to me, nor Mr. *Maher*. *Spears* endeavoured to allay any suspicious in my mind about the building. Very particular in wanting stone and cement. I once remarked I wanted stronger mortar. He said he understood his business. It was my suggestion, I had to be satisfied. Did not interfere.

Re-examined:

There was talk about the wall. I told *Babcock* there was a new law, and *Babcock* had some conversation with Mr. *Maher*, and he had made it all right. I did not understand what it was.

Re-examined by Mr. *Thomson:*

This was about the building, and to get a permit, and he told me he had done, and I was told.

William M. Spears:

I am one of the defendants. I was acting for him as his agent. After the contract was made. I did not interfere directly or indirectly. I think I saw the building going up from day to day with the contractors. I have too much respect for Captain *Pritchard* to say I did not say what he said I did, but I have no recollection of it.

No. 7. 22nd September, *J. Harris & Co.*, contract for iron work.

I have no recollection in stating of what Mr. *Maher* said; if so. it was only in a joke. I have no knowledge of mason work.

No idea of taking charge or interfering. I was away two or three weeks every month while the building was progressing. I was executor of the late *John Walker*, and had to go to *Halifax*. I did

1882

WALKER v. McMILLAN.

Ritchie, C.J.

not observe the building. I saw the sand there. Was knowing *Spears'* men going from one building to another. I had no fear of it, neither of the weight, height or depth of the sand. I cannot remember the quantity there. I merely saw sand what was usually hauled from a wood-boat.

The only recollection I have is the taking of the wall down. I saw them altering. Neither consulted or directed anything about it. I did not know the cause for what I had seen until after the accident.

Cross-examined:

While I was in *St. John* I was there every fine day, sometimes half a dozen times a day, looking after it for Dr. *Walker;* he spoke to me to do so. I was in *Halifax* in November probably not less than a fortnight. I was in *Halifax* half-a-dozen times. I was in *Halifax* two or three times after the contract was signed, 27th September. I was not there in October. I am not prepared to say that I was more than once in *Halifax.*

There every fine day and several times on some days. I did not know anything about the wall being shifted until after the accident. Building on the *Potter* property. I don't remember when the conversation when *Babcock* spoke of. I remember *Maher* asked what the building was designed for. I went and got a permit from Mr. *Maher.* I was not present when the I was present when Mr. *Maher* asked what the building was designed for. He considered a 16 inch wall would be insufficient if converted into warehouse or stores, but if for offices it would be sufficient. Did not Mr. *Maher* speak of it being contrary to law? I don't remember he did. I will swear that at no time I was doing I suppose *Maher* was speaking about the regulations. I think this was after we got the permit.

* * * * * * * * * *

I think the matter was referred to more than once. I do not ask Mr. *Maher* to allow me to complete. The centre wall would be made heavier afterwards. There was no arrangement with Mr. *Maher* or *Babcock* that I was to strengthen the centre wall. Is it not new to you that Mr. *Maher* stated to you that the centre wall was not according to law? He did say it was not sufficient for a warehouse. I don't remember, but I won't swear he did or did not.

I suppose *Maher* only came as city inspector. He had nothing that I knew of.

If *Maher,* as city inspector, required you to make alteration? I did not refuse nor did I assent. He inquired if the building was to be used for other purposes than offices. I was to do certain things. It was intended for offices as much as for other purposes.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

Was it intended for offices?

Intended for both offices and warehouse purposes.

Then Mr. *Maher's* opinion was that if it was for warehouse purposes it was not sufficient? That was a part of the contract for warehouse purposes. It is for warehouse purposes, I never heard otherwise. It was built for wholesale purposes. I did not know it was for that purpose when I had the conversation with Mr. *Maher*. I did give Mr. *Babcock* instructions for the building. They were prepared under my directions. I did not know the contract was for wholesale business. I thought it was to be strong enough. So far as my recollection goes I said it was intended to be used for offices, and, if so, it was sufficient. The central wall was not then completed. There was no position demanded to carry it out. I really do not remember what impression was made in my mind. I said I might have said so, but I was not serious in saying I had control.

I did not take any steps to alter it from what Mr. *Maher* said. I heard nothing from Mr. *Spears*. I do not remember speaking to Mr. *Babcock* after what *Maher* said. I had a conversation with Mr. *Babcock* before or after *Maher* was at the building. I had not much opinion about it and I made no change. I do not remember *Babcock* made any change in the timber on the girder. I do not know sufficient about the specifications to make, nor of any alteration made. I made no objections. The season was getting late and I was anxious the building to proceed, and I may have spoken to *Spears*. I did not talk to the parties about the work. I do not recollect speaking to *Spears* more than once.

Assuming the work to have been lawful if done in a proper way, and that defendant had entered into a contract with a third person for the performance of the work, and that, therefore, he would not, under certain circumstances, be liable for any negligence on the part of the person with whom he had contracted in the performance of the work, it is very obvious in this case that the work was done under the immediate superintendence of *Babcock*, the defendant's architect, and defendant's agent, Mr. *W. M. Spears*, who, plaintiff says, "looked after it, and attended to it much more than I did." The work done on, and materials in, the wall which fell were estimated and certified for under the contract as being properly done by the architect, the

1882

WALKER v. McMILLAN.

Ritchie, C.J.

contract expressly providing that "in no case was he to estimate any materials or work which are objectionable," and were paid for by the agent. The evidence clearly shows that, independent of the statutes and by-laws, the work was so improperly done as to create a nuisance which caused the damage to the adjoining proprietor. There can be no doubt, the wall fell from being improperly constructed, and this the jury must be taken to have found, as the judge in his charge said:

If you are of opinion that the centre wall was improperly built, and the accident occurred by the falling down by reason of its weakness, or that a sufficient foundation had not been provided to bear the weight necessary for a warehouse, I am of opinion the plaintiff is entitled to recover and the defendants are liable. If the foundation was not on the solid rock or not a sufficient foundation after the inspector pointed it out, the plaintiff is entitled to recover.

On this ground it would be difficult for defendants to escape liability, but there is another ground on which I prefer to rest my judgment, viz., that the erection of the centre wall which fell and did the damage was an illegal erection, and that all engaged in its erection are liable; *Walker*, who caused it to be erected; *Sears*, who superintended its erection, and the party who actually erected it.

I think it was within the competency of the local legislature to pass these acts.

The prohibition imposed was for a public purpose, for the better prevention of conflagrations in the city of *St. John*, and to regulate the construction of buildings in the city of *St. John*, and to provide for the due inspection thereof—41 *Vic.*, c. 6, being "An Act to amend the law for the better prevention of conflagrations in the city of *St. John*," and 41 *Vic*, c 7, being "An Act to regulate the construction of buildings in the city of *St. John*, and to provide for the due inspection thereof."

These acts were passed for a public purpose, their policy was purely restrictive for the purpose of guard-

1882

WALKER v. McMILLAN.

Ritchie, C.J.

ing against fire, and to secure the erection of proper buildings in a city such as *St. John*. Any erections contrary to the regulations therein imposed being clearly unlawful, beyond all question it was unlawful to contract to do that which it was unlawful to do, and any contract which, though lawful in its inception, by a change in the law became unlawful to fulfil, is necessarily at an end.

There can be no doubt that this building was a direct violation of the law and in defiance of the inspector, and was consequently an unlawful erection, and the contract entered into for the erection of such a building was put an end to by the law prohibiting its being carried out, and though a person employing a contractor to do a lawful act may not be responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong, as was held in *Ellis* v. *The Sheffield Gas Co.* (1). For, can it be doubted that if one person commits an unlawful act or misfeasance under the direction of another both are equally liable to the injured party?

There was a statutory duty imposed on owners of property in that part of the city of *St. John* as to the character of the buildings to be erected and the mode of erection, and the non-compliance with such statutory duty and the erection of a building in contravention of the statutes and by-laws and in defiance of the inspector of buildings, clearly rendered the building a nuisance, had there been no section in the act declaring such erection a nuisance.

Such being the case the owner of the land, *Walker*, and his agent, *Spears*, and the contractors, *Spears &*

(1) 2 El & B. 767.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

Co., were all, in defiance of an express law and regulation to the contrary, engaged in the erection of a building, the centre wall of which fell and caused the injury complained of, and permitting and causing such wall to be erected, all parties engaged in such unlawful erection were liable for the damage occasioned to the neighboring property by the falling of the wall so erected, such damage being the result of work unlawfully done. Therefore the owner, for whom and at whose instance the work was done, the owner's agent, who superintended and directed and paid for the work, and as he says :

When I was in *St. John* I was there every fine day, sometimes, half-a-dozen times a day, looking after it for Mr. *Walker*, he spoke to me to do so ;

and as *Walker* says :—

Mr. *Wm. M. Spears* looked after it and attended to it much more than I did,

together with the parties who were employed to do the work, are equally responsible for the consequences of the improper building of the dangerous and illegal wall which caused the injury to plaintiff charged in the declaration.

This case seems to me to come clearly within the principle established in *Bower* v. *Peate* (1), and *Angus* v. *Dalton* (2) :

That where a defendant has employed a contractor to do the work which in its nature is dangerous to a neighbouring property, and damage is the result of the work done, the employer is liable though he has employed a competent contractor and given him directions to take precautions in executing the works.

Here all the parties were engaged in an illegal act, for when a statute prohibits a particular work being done, a party cannot procure the work to be done and avoid responsibility by contracting with another to do that work.

(1) 1 Q. B. D. 421. (2) 4 Q. B. D. 187.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

The erection of, or causing to be erected, this wall contrary to law by *Walker* on his property, being the creation of a nuisance and contrary to the statutory duty imposed on owners of property in respect to erections on their properties in the city of St. *John*, and mischief having resulted therefrom, it is no answer that the mischievous results arose by reason of the manner in which the owner's contractor performed his work in connection with the erection of the illegal structure. In *Stevens* v. *Gourlay* (1) it was held that "a contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act 18 and 19 *Vic.*, c. 122, cannot be enforced." *Erle*, C. J., in that case said:

The contract was for the erection of a building known to the plaintiff to be, or whether known or not, at all events it was in violation of the Metropolitan Building Act 18 and 19 Vic., c. 122.

And, after discussing whether the structure was a building within the meaning of that statute he says:

Upon the whole, I think this case a contract for the erection of a fabric or structure in violation of tl e statute, and that the parties being *in pari delicto potior est conditio defendentis.*

Williams, J., says:

Assuming then that this shop was a "building" within the statute, the rest of the case is clear. There has been a plain infringement of the act, and the plaintiff is disentitled to recover upon the principle laid down in the case of *Foster* v. *Taylor* (2) where it was held that the vendor of butter in a firkin that was not branded as required by 36 *Geo.* 3, c. 86, could not recover the price of it. That case is a distinct authority to show that the plaintiff cannot be allowed to enforce in a court of justice a contract which has been entered into in violation of the provisions of an Act of Parliament.

Crowder, J.:

I am also of opinion that this rule must be made absolute on the ground that the contract declared on was entered into and carried into effect in express violation of the Metropolitan Building Act.

(1) 7 C. B. N. S. 99. (2) 5 B. & Ad. 887.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

In *Broom's* Legal Maxims (1):

If an exercise of public authority render impossible the further performance of a contract which has been in part performed, the contract is *ipso facto* dissolved.

And also (2):

Again, we find it laid down where *H.* covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if *H.* covenant to do a thing which is lawful and an act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, such act of Parliament does not repeal the covenant.

In the Bank of *U. S.* v. *Orr* (3) the Court said:

But when the restrictive policy of a law alone is in contemplation we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do.

In a case in the *Massachusetts* Supreme Judicial Court, *Sturgess* v. *Society of Theological Education* (4):

Defendant having occasion to construct a sewer from the cellar of its building to the common sewer, employed a contractor to do the work. In constructing this sewer it was necessary to cut through a plank barrier which had been constructed beneath the surface of the street to prevent the tide flowing into cellars in that locality. The contractor so negligently performed this part of his work that the tide-water came through the opening made by him and flowed into the cellar of a building owned by plaintiff, adjoining that of defendant. It was held that defendant was liable for the injury done by the tide-water to plaintiff's premises. The owner of a building, who has used due care in the employment of an independent contractor, is not responsible to third persons for the negligence of the latter occurring in his own work in the performance of the contract, such as the handling of tools or materials or providing temporary safeguards while doing the work. *Hilliard* v. *Richardson* (5). *Connon* v. *Hennessy* (6). As to such matters, pertaining to the mode in which he does the work, he is not the servant of the owner. But where the thing contracted to be done from its nature creates a nuisance, or when

(1) P. 229.
(2) P. 224.
(3) 2 Peters 527.
(4) Albany Law Journal, Vol. xxiv. p. 76.
(5) 3 Gray 349.
(6) 12 Mass. 96

being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable for it. *Gorham* v. *Gross* (1) and cases cited. In the case at bar the defendant had a right to make an opening through the barrier for the purpose of laying a drain, but it was his duty to close it securely so that the cellars should be protected from the tide. Having employed an independent contractor, it is not responsible for his negligent acts while doing the work, because in respect of such acts he is not its servant; but if the work, after it was done, created a nuisance and caused injury to the plaintiff, it is responsible. *Sturges* v. *Society of Theological Education.* Opinion by *Morton*, J.

And in the case of *King* v. *Davenport* (2):

The delegation of legislative power to a city to prohibit the erection, placing or repairing of wooden buildings within limits prescribed by ordinance without permission, and to direct and prescribe that all buildings within the limits prescribed shall be made or constructed of fire proof materials, and generally to define and declare what shall be nuisances, and to authorize and direct the summary abatement thereof, etc., is within the competency of legislative power, and authorizes the passage of an ordinance prohibiting the erection or repairing of any building within the fire limits with combustible materials, and providing for the summary abatement or removal of the same. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may be prohibited in the midst of dense masses of population, on the general principle that every person ought so to use his property as not to injure his neighbour, and that private rights must be subservient to the general interests of the community. An ordinance of a city passed in pursuance of legislative authority, establishing fire limits and declaring that a wooden roof put on a building thereafter within the fire limits to be a nuisance, and requiring the city marshal, under an order from the mayor, to remove the same, is reasonable exercise of the police power of the state, and has the force and effect of a statute when set up in justification by the marshal in removing such a roof.

As to the rent:

The loss of the use of the building during the time the damage was being repaired, was the direct and immediate result of defendant's act, and though damages

(1) 125 Mass. 232

(2) Albany Law Journal, vol. xxiv, p. 135.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

may not be recoverable as rent, or rent as rent recoverable as damages, I know no better way of establishing the exact amount of the damage sustained, than by shewing the actual amount that the plaintiff (but for the defendant's wrongful act) would have received from the occupation of the building during the time reasonably required to repair the injury (in this case the actual time it took to repair was shewn), and as defendant offered no evidence on this point to shew that the amount claimed and found by the jury was unreasonable or in excess of the actual loss, and did not raise any question for the jury in relation thereto, though the judge offered to submit to them any question on which counsel might desire to take their opinion, I can see no reason why the jury should not, in the absence of any evidence to the contrary, adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained as the legal and natural consequence of defendant's wrongful act, and to enable plaintiff to recover for such loss as was proved to be the direct result of the wrong to be redressed.

The appeal will therefore be dismissed, but inasmuch as the damages claimed in the declaration amount only to $5,000, and as the amount found by the jury was in excess of that sum, and as the declaration has not been amended, the verdict can only be entered for $5,000.

FOURNIER, HENRY and TASCHEREAU, J. J., concurred.

GWYNNE, J. :—

This action was brought originally against the defendant *Walker* and one *Spears*, and judgment in the court below was against them both, and both appealed. Upon the argument before us it appeared to us that there was really nothing to support the judgment as

against *Spears*, and this being admitted by the learned counsel for the respective parties, it was agreed that a *nolle prosequi* as to *Spears* should be entered in the court below, and that the case should be treated here as the appeal of *Walker* against a judgment rendered against himself alone.

The point arising for adjudication, without setting out the lengthy pleadings spread upon the record, may be stated thus:—*A* and *B*, being owners of contiguous lots of land, purposing to erect houses on their respective lots, agree with each other that there shall be erected on the line between their lots a party wall common to both buildings, the erection of which *A* assumes; and they respectively enter into written contracts with *C* for the completion of the mason's work of their respective buildings. By the contract between *B* and *C* the latter agreed to furnish all the materials, labor, tools, machinery, &c., and to build, finish, and complete for *B* a building as described in certain specifications set out in the contract, according to plans and drawings in the specifications referred to, which plans, drawings and specifications were declared to be part of the contract.

By the 4th article, it was provided that the contractor should in all cases be his own judge as to the amount of diligence and care required for the proper execution of the various constructions.

By the 5th, it was declared that *B* had engaged *John C. Babcock* (an architect) as superintendent of the erection and completion of the said buildings; his duty being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings and information to properly illustrate the design given; also to make estimate for the contractor of the amounts due to him on the contract, in no case estimating any materials or work which are objectionable, or have not become

1882
WALKER
v.
McMILLAN.
Gwynne, J.

permanent parts of the work, and when the building is completed to issue a certificate to the contractor, which certificate, if unconditional, shall be an acceptance of the contract, and shall release him from all further responsibility on account of the work.

By the 6th, it was declared that the building or work should be entirely at the risk of the contractor until the same should be accepted, and that the contractor should be held liable for its safety to the amount of the money paid by *B* on account of the same.

By the 7th, it was provided that in case of any unusual or unnecessary delay or inability by the contractor in providing and delivering the necessary materials, and performing the necessary labor at the time the same is required, so as to insure the completion and delivery of the building or work at the time hereinafter set forth and contracted; then and in such case the proprietor, within three days after having notified the contractor of his intention so to do, shall have the right to enter upon the work and procure such necessary materials or labor to be furnished or performed as the case may require, and remove from the same all defective materials or workmanship, as in the judgment of the superintendent may be found necessary, and carry on the work to completion in such way as shall be proper and right, charging the cost thereof to the contractor and deducting such charges from the amount of the contract price.

8th. The proprietor reserves the right, by conferring with the superintending architect, to alter and modify the plans, and this specification in particular; and the architect shall be at liberty to make any deviation in the construction, detail or execution, without in either case invalidating or rendering void the contract, and in case such alteration or deviation shall increase or diminish the cost of doing the work the amount to be

allowed to the contractor or proprietor shall be such as may be equitable and just.

9th. The contractor is to co-operate with the contractors for the other parts of the work, so that, as a whole, the job shall be a finished and complete one of its kind, and he is to arrange and carry on his work in such a manner that any of the co-operating contractors shall not be hindered or delayed at any time; and when his part of the work is finished, he shall remove from the premises all tools, machinery, *debris*, &c., and so far as he is concerned, leave the job clear and free from all obstructions or hindrances.

While both buildings were still in course of erection by *C*, a centre wall of *B*'s house fell, either by reason of the persons employed by *C* not having built that wall upon rock foundation as was required by the plans and specifications—a fact which did not become known to *B*. or his architect until after the wall fell—or by reason of sand to be used on the building having been brought by persons employed by *C* on to the floor of *B*'s building so in course of erection, and having become saturated with rain and too heavy for the floor to bear, and the falling wall taking with it the floor upon which the sand was so deposited, brought with it the party wall erected by *C* under his contract with *A*, in which *A* and *B* were mutually interested, thereby damaging also the front wall of *A*'s building erected for him by *C* under his contract. In such a case will an action lie at the suit of *A* against *B* for the damage so done to the party wall in which *A* and *B*. are so mutually interested, and to the front wall of *A*'s building so in course of erection? And can *A* recover from *B* monies paid by *A* to *C* for re-erecting and restoring the party wall and other wall so damaged? or other damages alleged to have accrued to *A* by reason of his not having had his building completed ready for occu-

1882

WALKER v. MCMILLAN.

Gwynne, J.

pation at the time at which it might have been completed if *B.'s* wall so erected by *C* had not fallen, and, in falling, done the damage aforesaid? At the trial there was much evidence given attributing the falling of the centre wall of *B's* building to the weight of the sand piled upon the floor of the building, and other evidence, which attributed the fall to the fact of the wall not having been built, as required by the plans and specifications, upon rock foundation. At the close of the case, the learned counsel for the defendant moved for a non-suit upon the ground that the action did not lie against *B*—that he was not responsible for the neglect, default or misconduct of the persons employed by *C*, the contractor, such persons not being servants of *B*.

The learned judge before whom the case was tried refused to nonsuit the plaintiff upon the ground that, as he held, articles 5 and 8 of the contract, quoted above, had the effect in law of making the defendant responsible, as retaining control by his architect to receive or reject what was proper or what improper work, and that therefore it became a duty imposed upon the defendant to take care that the work was properly executed according to the specifications—that it was the duty of the architect, acting for the proprietor of the building and engaged by him, to take care that the work was properly done, and that if the work was improperly done, the defendant, having taken control over the contractor, rendered himself liable in law as a party to the act and injury sustained by the plaintiff; and he so charged the jury; and he added that if they should think that the wall fell from not having been built upon the rock, as required by the contract, they *must* find for the plaintiff. The jury found for the plaintiff.

In the following term a motion was made upon

behalf of the defendant for a nonsuit, or for a new trial, upon several grounds stated, and among others, for misdirection in the learned judge having directed the jury as above, and a rule *nisi* was granted, which, after argument, was discharged.

1882

WALKER v. MCMILLAN.

Gwynne, J.

It is against the rule discharging the rule *nisi* that this appeal is taken, and I am of opinion that the appeal must be allowed, and that the rule in the court below must be made absolute for a new trial.

The ruling of the learned judge before whom the case was tried, on the motion for a nonsuit and his charge to the jury cannot, in my opinion, be upheld consistently with a sound application of the principle which is recognized in modern times as governing the case, both in the decisions of the English courts and in those of the courts of the *United States*.

In *Bush* v. *Steinman* (1799) (1), where *A*, having a house by the roadside, contracted with *B* to repair it for a stipulated sum, and *B* contracted with *C* to do the work, and *C* with *D* to furnish the materials, and the servant of *D* brought a quantity of lime to the house and placed it on the road, by which the plaintiff's carriage was overturned, it was held that *A* was answerable to the plaintiff for the damage sustained. C. J. *Eyre*, before whom the case was tried, was of opinion at the trial that the action was not maintainable; and although after argument he yielded to the opinion of his brothers in holding that the action was maintainable, he confesses his inability to state upon what precise principle it can be supported. *Heath*, J., founded his judgment upon the single ground that all the sub-contracting parties were in the employ of the defendant, and he illustrates the case by an *obiter dictum* which he lays down, namely, that:

Where a person hires a coach upon a job, and a job coachman is

(1) 1 Bos. & P. 404.

1882

WALKER v. MCMILLAN.

Gwynne, J.

sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, although he is not his servant.

And *Rooke*, J., rests his judgment upon the position taken by him, namely: that he who has work going on for his own benefit, on his own premises, must be civilly answerable for the acts of those whom he employs. The case, then, comes not recommended by any concurrence of opinion of the learned judges by whom it was decided in the principle upon which their judgment can be supported.

In *Laugher* v. *Pointer* (1826) (1), where the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to the plaintiff, the latter, having brought an action for such injury against the owner of the carriage, was non-suited by *Abbott*, C. J., and upon argument, the court being divided, the non-suit was maintained. In that case, *Littledale*, J., who concurred with the C. J., that the action did not lie, and the C. J. both repudiate the *obiter dictum* pronounced by *Heath*, J. in *Bush* v. *Steinman*; while *Holroyd* and *Bailey*, J. J., who maintained that the action did lie, did so upon the ground that, as they held, the driver of the horses while engaged in driving the defendant was the servant of the defendant, and that so the maxim *respondeat superior* applied. And *Littledale*, J., for the purpose of showing that *Bush* v. *Steinman* had no application to *Laugher* v. *Pointer*, points out the fact which had been relied upon by *Rooke*, J., as the ground of his judgment, that in *Bush* v. *Steinman* the injury was done upon or near, and in respect of the property of the defendant, of which he was in possession at the time, and granting that the rule of law may be that in all cases where a man is in

(1) 5 B. & Cr. 547.

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 and their servants, that had no application to *Laugher* v. *Pointer*. He does not express his opinion to be that there is any such rule of law, but assuming there to be such a rule, the judgment in *Bush* v. *Steinman* was not a binding authority in *Laugher* v. *Pointer*, and as to that judgment he points out its weakness by reference to the doubt expressed by *Eyre*, C. J., as to what principle could be urged in its support, and he proceeds to show that *Bush* v. *Steinman* was mainly grounded upon *Littledale* v. *Lord Lonsdale* (1), which was a clear case of master and servant, and *Leslie* v. *Pounds* (2), in which the defendant's liability was put upon the ground of his having personally interfered in the superintendence of the repairs which were being done to his house by his tenant, in whose occupation the house was, and at whose cost and charges the repairs were being made, in the progress of which the plaintiff received injury. Whatever, then, may be the ground upon which *Bush* v. *Steinman* may be sought to be supported, the judgment in that case acquires no confirmation from *Laugher* v. *Pointer*.

In *Randleson* v. *Murray* (1838) (3), where a warehouseman employed a master porter to remove a barrel from his warehouse, the master porter employed his own men and tackle, and through negligence of the men the tackle failed, and the barrel fell and injured the plaintiff, it was held that the warehouseman was liable in case for the injury. It is to be observed that in this case the learned counsel for the defendant admitted that *Bush* v. *Steinman* had been questioned, and contended

(1) 2 H. Bl. 268.
(2) 4 Taunt. 649.
(3) 8 Ad. & El. 109.

1882

WALKER v. MCMILLAN.

Gwynne, J.

only that the defendant would be liable, if the master porter and his men could be considered as the servants of the defendant and the case was decided upon the ground that they clearly were so under the circumstances of that case. Lord *Denman*, C. J., says:—

> Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendant, there can be no doubt they would have found in the affirmative.

That case then proceeded upon the principle that the master is responsible for the tort of his servant, wholly irrespective of the fact that the premises upon which the tort was committed was the property of the defendant.

In *Quarman* v. *Burnett* (1840) (1), the very point which was raised in *Laugher* v. *Pointer* was decided in accordance with the opinions of *Littledale*, J., and *Abbott*, C. J., as given in that case, notwithstanding that, as pointed out by *Littledale*, J., in his judgment in *Laugher* v. *Pointer*, there might be a rule of law that 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 with them or their servants; but the court does not lay down that there is any such rule of law so that the dictum of *Rooke*, J., in *Bush* v. *Steinman*, that there is such a rule, has acquired no confirmation or force from the judgment in *Quarman* v. *Burnett*.

In *Milligan* v. *Wedge* (1840) (2), the Court of Queen's Bench, approving and following the judgment of the Court of Exchequer, in *Quarman* v. *Burnett*, held, where the buyer of a bullock employed a licensed drover to drive it from *Smithfield*, and the drover employed a boy to drive it to the owner's slaughterhouse, and mischief was occasioned by the bullock through the careless

(1) 6 M. & W. 499. (2) 12 Ad. & El. 737.

1882

WALKER v. MCMILLAN.

Gwynne, J.

driving of the boy, that the owner of the bullock was not liable for the injury, for the reason that the boy was not in point of law his servant. Lord *Denman*, C. J., in this case takes the opportunity of casting a doubt upon that portion of *Quarman* v. *Burnett* referring to the judgment of *Littledale*, J., as to the distinction in cases of fixed property which *Rooke*, J., had relied upon as the foundation of his judgment in *Bush* v. *Steinman*. He says:

I think we are bound by the late decision in *Quarman* v. *Burnett* which was pronounced after full consideration. It may be another question whether I should agree in all the remarks delivered from the bench in that case. If I felt any doubt it would be whether the distinction as to the law in the cases of fixed and of movable property can be relied upon.

Williams, J., then says the difficulty always is to say whose servant the person is that does the injury; when you decide that, the question is solved. To say that that party is liable from whom the act ultimately originates is indeed a rule of great generality, and one which will solve the greater number of questions, but its applicability fails in one case.; For *where the person who does the injury exercises an independent employment the party employiug him is clearly not liable.* And *Coleridge*, J., says, the true test is to ascertain the relation between the party charged and the party actually doing the injury; unless the relation of master and servant exists between them the act of the one creates no liability in the other. This case did not raise for judicial decision the question whether the injury being done on property which was the fixed real property of the defendant, would make the owner liable irrespective of the existence of the relation of master and servant between him and the person who is directly the cause of the injury; but the principle upon which an action of this nature is maintainable against a person not directly the cause of the injury is so clearly placed

1882

WALKER v. McMILLAN.

Gwynne, J.

upon the existence of the relation of master and servant as plainly to cast a doubt upon the correctness of the principle as to the injury occurring upon fixed property of the defendant, which *Rooke*, J., relied upon in *Bush* v. *Steinman* as the foundation of his judgment.

In *Rapson* v. *Cubitt* (1842) (1), the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club house, including the preparation and fixing of gas fittings. He made a sub-contract with *B*, a gas-fitter, to execute this part of the work. In the course of doing it, through *B*'s negligence, the gas exploded and injured the plaintiff, and it was held that the defendant was not liable, upon the ground that the person whose negligence had directly caused the injury did not stand in the relation of a servant to the defendant, but was a sub-contractor. Lord *Abinger*, C. B., says:

> I think the true principle of law, consistent with common sense, was laid down in the case of *Quarman* v. *Burnett*, in which all previous cases on this subject were cited and considered, and some distinguished and some overuled.

It is true that *Parke*, B, in that case distinguishes it from *Bush* v. *Steinman* in the language used by *Littledale*, J., in *Laugher* v. *Pointer*. In *Burgess* v. *Gray* (1845) (1), *B*, the owner and occupier of premises adjoining a highway, employed *C* to make a drain therefrom to communicate with the common sewer. In the performance of the work the workman employed by C placed gravel on the highway, in consequence of which *A*, in driving along the road, sustained personal injury. Before the accident the dangerous portion of the heap was pointed out to *B*, who promised to remove it, and *B* was held liable to *A*. *Bush* v. *Steinman* was relied upon by the plaintiff's counsel, as also were the observations in relation to it made by *Littledale*, J, and *Parke*,

(1) 9 M. & W. 710. (2) 1 C. B. 578.

B., in the above cases. *Sergeant Byles*, on the contrary, for the defendant, insisted that *Bush* v. *Steinman* was not law, and that the sole test of liability was to enquire whether the relation of master and servant existed. The court in pronouncing judgment seem to take special care to avoid resting their judgment upon *Bush* v. *Steinman*. *Tindal*, C. J., says:

> The only question in this case is, whether there was any evidence to leave to the jury? The matter left for the consideration of the jury on this declaration was whether or *not the defendant* wrongfully put and placed *or caused to be put and placed* in a large heap or mound great quantities of earth, gravel, &c., upon a certain highway, *and so* caused the accident of which the plaintiff complained.

and he adds:

> I think there was evidence to leave to the jury in support of that charge. *If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor,* and not by the individual for whom the work was done.

He then goes through the evidence showing the evidence from which the jury were justified in concluding that the defendant had actually interfered in causing the dirt to be heaped where it was, and that it was, in fact, placed there with the defendant's consent, if not by his express direction, and *Cresswell*, J., going through the evidence in like manner, comes to the conclusion that there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road, and *that therefore* he was responsible for its consequences. Now, this case is a clear enunciation of the opinion of the Court of Common Pleas, that if an owner of fixed property enters into a contract with an independent contractor for work to be done upon the property, the proprietor is not liable

1882

WALKER v. MCMILLAN.

Gwynne, J.

because of his being owner of the property, to a third person, for injury arising to him from an act or default of a person employed by the contractor, nor unless there be evidence of the proprietor having himself personally interfered by authorizing or sanctioning the very act or default which was the cause of the injury. It is therefore in antagonism with the principle enunciated by *Rooke*, J., as the foundation upon which he rested his judgment in *Bush* v. *Steinman*. In *Allen* v. *Hayward* (1845) (1) the Court of Queen's Bench, referring to the above quoted cases, say:

> It seems perfectly clear that in an ordinary case the contractor to do work of this description is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them. We find here none of the reasons which have prevailed in cases where one person has been held liable for the acts of another as his servant. The doubt is raised by the contract which expressly requires that all such parts of the said work to be done by *Butten* (the contractor) as are not in particular manner specified and described in the contract, or the plans and specifications, shall be executed in such manner as the surveyor of the said works for the time being shall direct, and in a good and workmanlike manner. * * * This passage of the agreement would appear to take power from the contractor and keep it in the hands of the commissioners or their surveyor; but whatever may be its proper construction or effect, it has no application to the present case, for the bank which failed is part of the works so specified and described, and for which, therefore, if ill done, the contractor is liable, and not the commissioners.

In *Reedie* v. *London & North Western Railway Co.* and *Hobbitt* v. the same (1849) (2), where the company, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contrac-

(1) 7 Q. B. 975. (2) 4 Exch. 244.

1882

WALKER v. MCMILLAN.

Gwynne, J.

tor's workmen for incompetence, it was held that the company were not responsible to the administrator of a person passing along a highway who had been killed by the negligence of a workman employed in constructing a bridge over the highway for the company under the contract, and that the terms of the contract made no difference.

Rolfe, B., pronouncing the judgment of the court, referring particularly to the distinction drawn between fixed property and moveable chattels, and pointing out that the circumstances of *Laugher* v. *Pointer* or of *Quarman* v. *Burnett* were not such as to make it necessary to overrule *Bush* v. *Steinman*, says:

> 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* must be taken not to be law.

and he proceeds to say that, if the owner of real property be responsible in any cases 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, the 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, but such principle could not apply to the wrongful act which caused the injury in the case before the court, which could in no possible sense be treated as a nuisance, for that it was a single act of negligence, and that in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property, and referring to the observations of *Littledale*, J., in *Laugher* v. *Pointer*, that the law does not recognize a several liability in two principals who are unconnected,

1882

WALKER v. McMILLAN.

Gwynne, J.

if they are jointly liable; you may sue either, but you cannot have two separately liable, he says:

> This doctrine is one of general application irrespective of the nature of the employment, and applying the principle to the present case it would be impossible to hold the present defendants liable without at the same time deciding that the contractors are not liable, which it would be impossible to be contended.

This last observation seems to be the logical conclusion necessarily deducible from the liability in cases like the present being made to depend upon the relation of the master and servant and the maxim *respondeat superior*, for it is plain that a workman employed by, and the servant of, an independent contractor can no more be said to be the servant of the contractor and his employer jointly than he can be the servant of the employer alone, there could, therefore, be no joint liability of the contractor and the employer. If there was, the defendants in the above case might have been sued alone. Then as to the terms of the contract, *Rolfe*, B., says:

> Our attention was directed during the argument to the provisions of the contract whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal, but this power of removal does not appear to us to vary the case; the workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskillful, did not make him their servant.

Hence it follows that the control, which, being retained by an employer of work done upon his premises, over the work, which would make him liable as the superior, upon the principle which governs in cases of this kind, must be such a control as to make the person actually causing the injury the servant of the person sought to be charged; the supervision of an architect in the ordinary discharge of the duties of his profession to see justice done by the contractor to their joint princi-

pal can never make that principal liable for the negligence of the person standing in relation of servant to the contractor alone.

In *Knight* v. *Fox* (1850) (1), where a railway company had entered into a contract with *A* to construct a portion of their line, and *A* contracted with *B* to erect a bridge on the line, and *B* entered into a contract with *C* (who acted as the surveyor and manager of *B*'s business in *London* at an annual salary), by which *C* agreed to erect for £40 a scaffold which was necessary for the building of the bridge, the scaffold was erected upon the footway by *C*'s workmen and a portion of it improperly projected, by reason of which *D* fell and was injured. It was held that *B* was not liable to *D*, for that the act of *C* was not done by him in the character of servant of *B*. There *Alderson*, B., says:

> The real question and the only one, is whether the negligent act by which the injury was occasioned to the plaintiff, was the act of *C* as the defendant's servant; but the evidence shows that when the negligent act was occasioned by *C* he was acting in the character of a sub-contractor, and that he did the work on his own individual account. The plaintiff's remedy is against *C*.

In *Overton* v. *Freeman* (1851) (2), *A* had contracted with parish officers to pave a certain district, and entered into a sub-contract with *B*, under which the latter was to lay down the paving of a street, the materials being furnished by *A* and brought to the spot in his carts; preparatory to the paving, the stones were laid by laborers employed by *B* on the pathway and there left unguarded at night in such a manner as to obstruct the same, and *C* fell over them and broke his leg, and it was held that *B*, and not *A*, was responsible to *C*.

In giving judgment, *Cresswell*, J., there says:

> It seems to me that the modern cases of *Rapson* v. *Cubitt*; *Reedie* v. *The London & N. W. Rwy. Co.* and *Knight* v. *Fox* are conclusive.

(1) 5 Ex. 721. (2) 11 C. B. 867.

1882

WALKER v. McMILLAN.

Gwynne, J.

In *Reedie* v. *The London & N. W. Railway Company, Rolfe* B. delivering the judgment of the court says: The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*; the party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or care of the person employed, but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned.

And *Williams*, J., says:

This is not the case of master and servant, but of contractor and sub-contractor, The plaintiff's counsel has rested his argument upon a broad and intelligent ground, viz: that the act complained of is a public nuisance. Some of the cases, it is true, would seem to justify the distinction, but it seems to me we cannot give any weight to it without overruling *Knight* v. *Fox*.

And upon this point *Cresswell*, J., added that

If indeed the act contracted to be done would itself have been a public nuisance of course the defendant would have been responsible.

In *Peachey* v. *Rowland et al* (1853) (1), *A* employed *B* to construct a drain from certain houses of *A's* across a public highway. *B* employed *C* to fill in the earth over the brickwork and to carry away the surplus, *C*, in performing this work, left the earth raised so much above the level of the road that *D*, driving in the dark, was thereby upset and sustained injury, and it was held that *A* was not responsible to *D* for the negligence of *C*. *Maule*, J., in giving the judgment of the court, says:

It would be extremely inconvenient if this case could be successfully distinguished from *Overton* v. *Freeman*, which proceeded upon the decision of the Court of Exchequer in *Knight* v. *Fox*; the true result of the evidence here was that the defendants had nothing whatever to do with the wrongful act complained of; they employed somebody to do something which might be done, either in a proper or an im-

(1) 13 C. B. 182.

proper manner, and he did it in a negligent and improper manner, and injury resulted to the plaintiff. I am of opinion that if the jury had, upon this evidence, found that the defendants did the wrong complained of, their verdict would have been set aside as not warranted by the evidence; there was, in truth, no evidence for the practical purpose in hand.

He adds:

The rule is very well stated by *Rolfe*, B., in *Reedie* v. *L. & N. W. Ry. Co.* (1)

In *Ellis* v. *Sheffield Gas Co.* (1853) (2), it was held that the Gas Company who had no right to open the streets of *Sheffield*, and the opening of which was a public nuisance, could not shield themselves from responsibility to a person receiving injury from the nuisance by shewing that the nuisance was committed under a contract entered into by the company with contractors for that purpose. Lord *Campbell*, C. J., there says:

I am clearly of opinion that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself, affirming the principle stated by *Cresswell*, J., in *Overton* v. *Freeman.*

And *Erle*, J., says:

The cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract, and that, in my opinion, makes the distinction between the present case and those cited in which the cause of the accident was the negligence of those doing the thing, not the thing itself.

And in *Sadler* v. *Henlock* (1855) (3), where the defendantwas held liable, upon the ground that the person who caused the injury there complained of, by digging through a public highway, was the servant of the defendant, Lord *Campbell* points out that *Ellis* v. *Sheffield Gas Co.*, which was relied upon by the plaintiff, had no application, for it proceeded on the ground that the act done there could not be done at all without committing

(1) 4 Exch. 244.

(2) 2 El. B. 767.

(3) 4 El & B. 571.

1882

WALKER v. MCMILLAN.

Gwynne, J.

a public nuisance, which the person committing it was employed by the defendants to commit, whereas in *Sadler* v. *Henlock* the drain which was being cleansed might have been cleansed without the committing of any nuisance; and he, therefore, puts the case then before him upon its true principle, namely, the relation of master and servant, and *Wightman*, J., says:

The question is whether *Pearson* (the laborer who did the work) is to be considered as the defendant's servant or as a contractor exercising an independent employment; the whole evidence is that the former is the correct view.

In *Steel* v. *The South Eastern Railway Co.* (1855) (1), it was held that where work is done for a railway company under a contract, parol or otherwise, the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done.

Cresswell, J., there says there was no evidence that could properly be left to a jury to show that the defendants or their servants had been guilty of any such negligence as to make them responsible. He says:

If it could have been shown that that plaintiff's land was flooded in consequence of something done by the orders of the company's surveyor it might have been said that was the same as if the surveyor had done it with his own hands, and then the company would have been responsible.

And *Crowder*, J., says:

The only persons responsible for the acts complained of are *Furness* or *Eaves*, the circumstance of the work being done by *Furness* under a contract negatives his being a servant of the company. The evidence of *Eaves* showed that he was acting quite independently of the company, though receiving orders from their surveyor; there clearly was no evidence to fix the defendants.

In *Hole* v. *Sittingbourne and Sheerness Railway Co.* (1861) (2), where a railway company were autho-

(1) 16 C.B. 550. (2) 6 H. & N. 489.

rized by their Act of Parliament to construct a railway bridge across a navigable river, and the Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals, or passengers ready to traverse, to cross the bridge and for opening it to admit such vessel, the defendants employed a contractor to construct the bridge in conformity with the provisions of the Act of Parliament, but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river; it was held that the railway company was responsible for the damage thereby caused to the plaintiff, upon the authority of *Ellis* v. *Sheffield Gas Co*, because the very thing which was contracted to be done for the company, namely, the erection of the bridge, was the thing which caused the obstruction and nuisance of which the plaintiff complained as obstructing his right to navigate the river, contrary to the express terms of the Act of Parliament, in virtue of which alone the railway company had any right to erect the bridge.

Pollock, C. B., says:

There is a wide difference between a liability arising from the relation of master and servant, and that which exists in the present case. The defendants are authorized by Act of Parliament to construct certain works, and they cannot transfer that authority to another person without being responsible for the proper execution of them. This is a case in which the maxim *qui facit per alium facit per se* applies.

And he adds:

Where a person is authorized by act of Parliament or bound by contract to do a particular work, he cannot avoid responsibility by contracting with another person to do the work.

Then quoting what was said by Lord *Campbell* in *Ellis* v. *The Gas Co.*, that where the contractor does the thing which he is employed to do, the employer is res-

1882

WALKER v. McMILLAN.

Gwynne, J.

ponsible for that thing as if he had done it himself, he says:

> Here the contractor was employed to make a bridge, and he did make a bridge which obstructed the navigation, so causing the injury complained of;

and he proceeds to draw the distinction between the thing itself contracted to be done causing the injury, and injury caused by an act arising incidentally in the course of the performance of the work contracted for, that is to say, between the thing itself contracted for, causing the mischief, and mischief arising only from the manner in which a thing in itself innocuous, if properly constructed, is constructed. He says:

> Where the act complained of is purely collateral and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act, the remedy is against the person who did it; that, however, generally affords but a poor compensation to the party injured, for the wrong doer is usually a common workman. Then comes the enquiry, who is the master?—the contractor. In such case the employer is not responsible; but when the contractor is employed to do a particular act the doing of which produces mischief, another doctrine applies. Here the legislature empowered the company to build the bridge; in building that bridge the contractor erected an obstruction to the navigation, and for that the company are liable.

That the principle applied to the determination of this case has no application to the case now before us appears from the judgment of the same court in *Butler* v. *Hunter* (1862) (1), which was decided by the same judges as had decided *Hole* v. *Sittingbourne and S. Ry. Co.*

The plaintiff and defendant being owners of adjoining ancient houses, it became necessary for the defendant, in consequence of a fire, to repair his house, and he employed an architect to superintend the making the repairs. The architect having considered it necessary to pull down and rebuild the front wall, agreed with a

(1) 7 H. & N. 826.

contractor to do the work for an estimated price, and the workmen of the contractor, in pulling down the wall, removed a brest-summer which was inserted in the party wall between the defendant's and plaintiff's house without taking any precautions by shoring or otherwise, in consequence of which the front wall of plaintiff's house fell, and it was held that the contractor and not the defendant was the person responsible to the plaintiff for that injury.

Martin, B., says:

The contractor's negligence in removing the brest-summer caused the plaintiff's wall to fall. When a person employs a builder to do certain work and he does it negligently, the employer is not liable unless he personally interferes.

And again,

The relation of master and servant must exist before any other person can be made responsible than the person who did the act which caused the mischief.

Pollock, C. B., says:

The argument of Mr. *Denman* amounts to this: That where a person employs a tradesman to do work which may be dangerous to another, he is bound to show that he directed all care to be taken and specifically pointed out in what way the danger was to be guarded against; or, at all events, to show that he did enough to exempt himself from responsibility. No doubt where the act is in itself a nuisance. And this term nuisance is to be read in the sense declared by *Parke*, B., in *Knight* v. *Fox*, to be attributed to the same term in *Reddie L. & N. W. Ry. Co.*, namely, a private nuisance as connected with a man's house or fixed property. The party who employs another to do it is responsible for all the consequences, for there the maxim *qui facit per alium facit per se* applies, but where the mischief arises not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists.

And *Wilde*, B., says:

It seems to me the case is very plain. *Hole* v. *S. S. Ry. Co.* is distinguishable. There it is said that where the act itself has caused the injury, the person who ordered it is responsible, but where the

1882

WALKER v. McMILLAN.

Gwynne, J.

injury happened from something collateral in the course of carrying out the order, he is not responsible.

And, again, as to the fact of the defendant having employed an architect, he says:

In the case of almost every house that is built the owner employs an architect; the architect employs a builder, and the builder employs workmen, but the owner of the house is not responsible for the negligence of the workmen.

Pickard v. *Smith* (1861) (1) proceeds upon the same principle as that which was involved in *Ellis* v. *Gas Co.* and *Hole* v. *S. & S. Ry. Co.* *Williams*, J., pronouncing the judgment of the court, puts the case thus:

If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not responsible. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; and by parity of reasoning to cases in which the contractor is entrusted with a duty incumbent upon his employer and neglects its fulfilment whereby an injury is occasioned, which was the case before the court.

In *Bower* v. *Peate* (1876) (2), where plaintiff and defendant were respective owners of two adjoining houses, and plaintiff's house was entitled to the support of defendant's soil, and the defendant employed a contractor to pull down his house, excavate the foundations close to plaintiff's wall and rebuild defendant's house, it was held that the defendant was liable to the plaintiff for injury occasioned to his wall by reason of the means taken by the contractor to prevent the injury having been insufficient, upon the principle, as stated by *Cockburn*, C.J., delivering the judgment of the court—that

A man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve him-

(1) 10 C. B. N. S. 470. (2) 1 Q. B. D. 321.

self from responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

In that case injury to the plaintiff was, in the natural course of things, to be expected to follow from the excavation ordered to be made by defendant for his house unless the plaintiff's house should be properly shored up during the progress of the excavation for and the building of defendant's house; the defendant, under these circumstances, owed the duty to the plaintiff involved in the maxim *Sic utere tuo ut alienum non lædas*, and so apparent was the danger to plaintiff's property that the defendant took a covenant of indemnity from the contractor.

Between such a case and the case now before us there is a manifest distinction, as was pointed out by *Cockburn*, C. J., in pronouncing judgment against the defendant in the above case, at p. 326, where he says:

> There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures a adopted, while it may be just to hold the party authorizing the work in the former case exempt from liability from injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injur caused by an act certain to be attended with injurious conseque ces if such consequences are not in fact prevented, no matter t l rough whose default the omission to take the necessary measures s uch prevention may a e.

Butler v. *Hunter* was not cited, not because the learned counsel who argued *Bower* v. *Peate* may be assumed to have been ignorant of it, but because, as I think, it had no application to the question arising in *Bower* v. *Peate*, which was rested upon a wholly different principle than that governing *Butler* v. *Hunter*, namely, on the principle involved in *Ellis* v. *The Gas Co.*, *Hole* v. *S. & S. Rwy. Co.*, *Pickard* v. *Smith*, and

1882

WALKER v. McMILLAN.

Gwynne, J.

Grey v. *Rullen*, while *Butler* v. *Hunter* comes within that class of cases which is contrasted by *Cockburn*, C.J., in principle with the principle governing *Bower* v. *Peate*. The defendant in *Butler* v. *Hunter*, so far as appeared in evidence, was in the position of a man who had simply authorized and contracted for the execution of a work from which, if executed with due care and in a proper manner, no injury was or could reasonably have been anticipated, and who, therefore, was not responsible, because of injury having arisen in the progress of the work from the negligence of the contractor or his servants; whereas, in *Bower* v. *Peate* the injury which did happen was naturally to be expected to happen as the direct and immediate consequence of the work ordered by the defendant to be done unless special care should be taken to prevent its happening; and the probability of the occurrence of the injury was so apparent that the defendant required the contractor to indemnify the defendant in case it should happen. This view is confirmed, as it appears to me, by what fell from the learned judges in the Court of Appeal, and in the House of Lords upon this point in the recent case of *Angus* v. *Dalton* (1). That case was identical in its circumstances with *Bower* v. *Peate*, and was determined wholly, so far as this point is concerned, upon the authority of *Bower* v. *Peate*.

Lord Justice *Thesiger*, in *Angus* v. *Dalton* (2), says:

> It is properly admitted by the defendant's counsel that the case of *Bower* v. *Peate* is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice in delivering the considered judgment of the court is correctly stated and placed upon proper principles, and that the defendants in the present case who have ordered work to be executed from which in the natural course of things injurious consequences to the plaintiff's factory might be expected to arise unless means to prevent them were adopted, are, if the plaintiffs are entitled to recover at all,

(1) 5 Q B D. 184. (2) 4 Q. B. D. 184.

responsible for the damage which has in fact arisen owing to the means adopted having proved to be insufficient.

And Lord Justice *Cotton*, at p. 188, says:

I agree with the decision in *Bower* v. *Peate*, that where a defendant has employed a contractor to do work, which in its nature is dangerous to a neighboring property and damage is the result of the work done, the employer is liable, though he has employed a competent contractor and given him directions to take precautions in executing the work.

And in the House of Lords (1), Lord *Blackburn* says:

Ever since *Quarman* v. *Burnett*, it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them, so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

And at p. 831, Lord *Watson* says:

The operations of the commissioners were obviously attended with danger to the building in question. * * * When an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor, but in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions.

The courts in the *United States* have adopted the law upon the subject as expounded by the English courts. In *Blake* v. *Ferris* (1851), the Court of Appeals of the state of *New York* (2), reviewing all the English cases up to that time, came to the conclusion that *Bush* v. *Steinman* was not law in *England*, or in the State of *New York*, and they held that persons who, having a license from the proper authorities of the city of *New York* to construct at their own expense a sewer from their house into the public street, engaged a contractor

(1) 6 App. Cases. 829. (2) 1 Selden 48.

1882

WALKER v. McMILLAN.

Gwynne, J.

to construct it at a stipulated price for the whole work, were not liable to third persons for any injury resulting from the negligent manner in which the sewer was left at night by the workmen employed by the contractor, upon the ground that the contractor or his servants were not servants of the defendants. In *Barry* v. *The city of St. Louis* (1852) (1), the Court of Appeals of the State of *Missouri*, after a like review of all the English cases, came to a like conclusion as to *Bush* v. *Steinman*, and held that the defendants, who had entered into a contract with a contractor for the construction of a sewer, whereby the contractor covenanted for a consideration agreed upon to furnish all materials and do all the work, were not responsible to a third person for the negligence of the contractor in not properly guarding the excavation at night, upon the ground that the contractor was not the servant of the defendants, and it was held further that the contract having contained a provision that the work was to be done under the inspection of the city Engineer made no difference. In *Pack* v. *The Mayor, &c., of the city of New York* in (1853) (2), the Court of Appeals of the State of *New York*, following *Blake* v. *Ferris*, held the city corporation was not liable for injury to third persons occasioned by negligence of workmen engaged in grading a street under a person who had entered into a contract with the corporation to furnish all the materials, and perform the work in conformity with certain specifications mentioned and described in the contract, and further to conform the work to such further directions as should be given by the Street Commissioner and one of the city Surveyors, and it was further held that this last clause made no difference as it did not change the relation between the parties and constitute the contractor or his servants the servants of

(1) 17 Missp. 121. (2) 4 Selden 222.

the corporation. In *Hilliard* v. *Richardson* (1855) (1), the Supreme Court of the State of *Massachusetts*, reviewing all the English cases to that time, came to the same conclusion as to *Bush* v. *Steinman* as the Court of Appeals of the State of *New York* had in *Blake* v. *Ferris*, and held that the owner of land who employs a carpenter for a specific price, to alter and repair a building thereon, and to furnish all the materials for the purpose, is not liable for damages resulting to a third person, from boards deposited on the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in the repair of the building.

In *Gilbert* v. *Beach* (1858) the Court of Appeal of the State of *New York* (2) say the question whether an owner can be held responsible for damages occasioned by the unauthorized act of builder or contractor could not arise in the case until the question of fact, whether the act was or was not authorized by the owner, should be first disposed of and settled, and a new trial was ordered. On the case coming up again (3) the court, following *Blake* v. *Ferris*, held that the owner of a lot of ground who has contracted with masons, carpenters and other mechanics of competent skill for the erection of a building thereon in a safe and proper manner, is not responsible to an owner of adjoining property for injury occasioned by water from the defendant's property flooding the plaintiff's cellar, occasioned by the negligence of the servants of the contractor engaged in the prosecution of the work contracted for. *Clark*, J., in delivering the judgment of the court, referring to *Blake* v. *Ferris*, and the principle thereby adopted, says :

I cannot conceive that it makes any difference when the injury happens to have been committed on the premises of a person sought

(1) 3 Gray (Mass.) 349. (2) 16 N. Y. Rep. 608.
(3) 5 Bosw. 455.

1881

WALKER v. McMILLAN.

Gwynne, J.

to be charged, if he had no direct agency in the commission of it, or has not sanctioned it in any way. If the person doing the injury is not his servant but the servant of another, there is no better reason why the latter should be relieved from responsibility than if the injury was committed in the street.

In *Blackwell* v. *Wiswall* (1) the Supreme Court of the State of *New York* held the only principle upon which one man can be made liable for the wrongful acts of another to be that—

> Such a relation exists between them that the former is bound to control the conduct of the latter. The party sought to be charged must stand in the relation of superior to the person whose wrongful act is the ground of complaint.

In *Storrs* v. *The City of Utica* (1858) (2) the Court of Appeals of the State of *New York* draws the distinction which exists between injury arising from the work itself authorized to be done, and that which arises from negligence only in the manner of performing the work; and proceeding upon the same principle as the courts in *England* proceeded in *Ellis* v. *The Gas Co.*, *Hole* v. *S. and S. Ry. Co.*, *Bower* v. *Peate*, and *Angus* v. *Dalton*, held that a municipal corporation, by reason of its owing a duty to the public to keep its streets in a safe conditon for travel, were liable to persons receiving injury from neglect to keep proper lights and guards round an excavation which it had caused to be made in the street, although that excavation was made under a contract entered into with a competent contractor, and that the corporation could not escape responsibility for putting a public street in a dangerous condition for travel at night, by interposing the contract by which they had authorized the very thing which created the danger. Says the court:

> The danger arises from the very nature of the improvement, and yet can be avoided only by special precautions, such as placing

(1) 24 Barb. 355. (2) 17 N. Y. 104.

guards or lighting the street. The corporation which has authorized the work is plainly bound to take those precautions.

This is the precise principle laid down in *Bower* v. *Peate*, and *Angus* v. *Dalton*.

In *Potter* v. *Seymour* (1859) (1), where an owner being about to erect a building on his lot entered into a contract with one *Adair*, whose business was to put up marble fronts to buildings, to furnish and set the marble for the front thereof agreeably to certain specifications, and the plaintiff passing along the street sustained injury in consequence of the fall of a derrick erected on the top of the building by persons employed by *Adair* for the purpose of raising the marble, and counsel for the defendant required the learned judge who tried the case to direct the jury

That if they should find that a contract had been made with *Adair* to put up the marble front, and that he was exercising an independent employment under such contract, and the accident was the result of his negligence or that of his servants, the defendant in law was not liable, or that if the negligence of *Adair's* servants had caused the accident, and the defendant had not the right to choose said servants, the defendant was not liable in law;

And the learned judge refused to give such direction; it was held that by so refusing he had erred, and that he should either have treated the contract with *Adair* as a defense, or should have left some such question as he was requested by counsel for the defendant to do as above, and a new trial was ordered.

In *Benedict* v. *Martin* (1862) (2), in an action brought by plaintiff to recover damages for injury done to his property by reason of the falling of a wall which the defendant the owner of the adjoining lot was having built for him under a contract entered into with a competent contractor, the Supreme Court of the State of *New York* held that the learned judge before whom the

(1) 4 Bosw. 140. (2) 36 Barb. 288.

1882

WALKER v. MCMILLAN.

Gwynne, J.

case was tried erred in leaving the case to the jury, and in overruling the contention of defendant's counsel that the defendant was not liable, and that plaintiff should be nonsuited, as the persons actually engaged in erecting the wall were servants of the contractor, and not of the defendant, and the court, holding that, as there was no conflict of testimony as to the relation between the defendant and the contractor, there was nothing to leave to the jury, ordered a new trial.

In *Hunt* v. *Pennsylvania Railroad Co.* (1866) (1), the Supreme Court of *Pennsylvania* held, that where a railroad company had contracted with a builder to do the work of a building in a substantial and workmanlike manner, and in accordance with plans, specifications and instructions furnished by the company, the latter were not liable to a third person for injury arising from the negligence of a person employed on the building by the contractor, for that notwithstanding the above provision that the work was to be done in accordance with instructions furnished by the company, the contractor was left to his own skill and judgment as to the mode of accomplishing the work, and he was bound to bring to its execution the degree of skill and care necessary to perform his contract; and the persons to be employed on the work were necessarily to be hired by the contractor, and so were his servants, and not the servants of the company.

As to the case of *Gorham* v. *Gross* (2), which contains expressions of the court which appear to be in antagonism with the above cases, it is not necessary to express an opinion whether it was well or ill decided, for that case appears to be distinguishable in this that there the masons had completed the wall, and it had been accepted by the defendant as completed in accordance

(1) 51 Penn. Rep. 475. (2) 125 Mass. 236.

1882

WALKER v. MCMILLAN.

Gwynne, J.

with the contract, from which circumstance it seems to have been considered that there became a duty imposed upon the defendant to maintain it in such a state of efficiency that it should not fall and do damage to neighbouring property. Unless thus distinguishable it appears to be in antagonism with all the above decisions as well of the American as of the English courts.

Now, in the case before us it appears to me to be clear that the 8th article of the specifications (relied upon by the learned judge who tried this case as subjecting the defendant to liability), whereby the defendant reserved the right by conferring with his architect to be at liberty to make any deviation in the construction, detail or execution without invalidating or rendering void the contract, cannot be construed as having invalidated the contract so far as to make the defendant responsible for the negligence of the contractor's servants, and for which the defendant would not be responsible if the 8th article had not been introduced; that article, (even if what is there contemplated had been done) could not relieve the contractor from the obligation assumed by him of furnishing all materials and labor, of executing the work to be contracted for with due care and skill, and in a perfect manner, and of incurring all risk until completed as was provided in other articles, nor could it be construed to have the effect of altering the relation existing between the defendant and his contractor, or of making the persons employed by the latter to be the servants of the former, but inasmuch as what was contemplated by the 8th article is not claimed to have been ever done, that article can have no bearing whatever upon the question as to the liability of the defendant under the circumstances appearing in evidence.

Then, as to the 5th article, also relied upon by the learned judge, whereby *Babcock* is declared to be the

1882

WALKER v. McMILLAN.

Gwynne, J.

defendant's architect for the performance of duties and services usually devolving upon an architect, (duties and services which, as pointed out by *Wilde*, B., in *Butler* v. *Hunter* are called into action in the case of almost every house which is built without making the owner of the house responsible for the negligence of the contractor or his workmen) the appointment of the architect cannot have the effect attributed to it by the learned judge without introducing a wholly new principle governing the liability of one person for injuries caused by the actual negligence of another, not sanctioned by any of the cases in either the English or American courts; and which is expressly repudiated in some of them, notably in *Reedie* v. *L. & N. W. Ry. Co.* and *Steel* v. *S. E. Ry. Co.*, in the English courts, and in *Barry* v. *City of St Louis*, *Pack* v. *New York*, and *Hunt* v. *Pennsylvania Ry. Co.* in the *United States* courts, and not only is the proposition contended for, not sanctioned by authority, but it cannot, as it appears to me, be reconciled with any principle that a person who, if departing from the universal practice of employing an architect to superintend the erection of a house being built for him under contract with an independent contractor would not be liable for injuries caused by the negligence of the contractor or his servants, would become liable for such injuries by the mere fact of his adopting the universal practice of employing an architect. If there were any such liability no doubt it would have been established by express authority long ago, and would have been alluded to in some of the above cases in which the ground upon which one person can be made liable for the negligence of another is so clearly put upon the relation of master and servant, except in the cases where the thing itself, authorised by a defendant to be done constitutes a nuisance to the property of a neighbour, or where, from

1882

WALKER v. MCMILLAN.

Gwynne, J.

the nature of the thing authorised, it is obvious that in the nature of things injury is likely to happen from the execution of the work to the person or property of another, unless special precautions are taken to prevent the injury, in which case a duty becomes imposed upon the person authorizing the work to take all necessary precautions to prevent the injury arising; and this duty is wholly irrespective of all consideration by whom the injury was caused, and whether from the negligence of a contractor or his servants, or whether an architect or superintendent be or be not employed to take measures to prevent the happening of injury from the work authorized. The learned judge then, as it appears to me, erred in ruling that the legal effect of the contract in this case, by reason of its providing for the appointment of an architect to superintend the contractor's work, made the defendant liable to the plaintiff for injury arising from the contractor and his servants being guilty of negligence in the performance of the work and not executing it according to the plans and specifications furnished by the architect, and there must, therefore, be a new trial.

It is admitted that the accident would not have happened if the contractor had excavated, as he was bound by his contract, down to rock excavation; but assuming that if the centre wall had been built upon the rock foundation, the floor upon which the sand was piled would have been sufficient to bear the weight of the sand, it may, nevertheless, be that although the centre wall was not carried down to rock foundation, still the accident might not have happened but for the great weight of the sand become saturated by the rain, and this act of placing the sand upon the floor comes clearly, as it appears to me, upon the authority of all the cases within the description of a collateral act for the consequences resulting from which the contractor, and not the defendant, would plainly be responsible.

1882

WALKER v. McMILLAN.

Gwynne, J.

In fine, I can see no principle upon which this case can be taken out of that class of cases which is governed by the principle involved in the relation of master and servant, unless a jury should first find as a fact, upon the authority of *Bower* v. *Peate* and *Angus* v. *Dalton*, that the accident was in the natural cause of things to be apprehended as likely to occur from the erection of defendant's building, that the risk was obvious as necessarily attendant upon the erection of the building; but I cannot well see how upon the evidence a jury could come to such a conclusion, nor, if they should, how it could be upheld by the courts without practically reversing nearly all the cases which have been decided upon the principle involved in the relation of master and servant and nullifying that principle.

To hold that the plaintiff can recover from the defendant damages occasioned to the former by reason of his contractor not having completed his contract with plaintiff within the time limited in their contract or within a reasonable time; or moneys paid by the plaintiff to his contractor for rebuilding a wall damaged by the tort of that contractor, upon the ground that such tort was occasioned by the act of the contractor in the course of his executing work for the defendant upon an adjoining lot, by which act the defendant was damnified equally with the plaintiff; that in fact the plaintiff can recover from the defendant money paid by the plaintiff to his own contractor for work which the latter, as well by reason of his own tort, as by his covenant with the plaintiff to complete his building for him, was bound to execute without payment, would, as it seems to me, be a decision novel in its character, wholly without precedent, and which with great deference for the opinions of those with whom it is my misfortune to differ in this case, appears to me to be irreconcilable with any principle of law.

1882

WALKER v. MCMILLAN.

Gwynne, J.

In the argument before us it was contended that the building as designed by the defendant's contract departed in some particulars from certain regulations prescribed by a by-law of the corporation of the city of *St. John*, (in which city the building was being erected) passed after the contractors entered into their contract, but before the building was commenced, and that for this reason and for the reason that by an act of the provincial legislature, 41st *Vict*, ch. 6, sec. 6, it was enacted that all buildings hereafter erected in the city should be constructed in accordance with any law for the time being in force in the city regulating the construction of buildings, and by sec. 9, that any building which should be erected after the passing of the Act contrary to any of the provisions of the Act, should be and was thereby declared to be a public and common nuisance; and by section 10, that in addition to any indictment which might be found or any action which might be brought for such nuisance, the person erecting or causing to be erected, or who might attempt to erect or cause to be erected such building, should be liable to a penalty not exceeding $20, and to a further penalty of not less than $10 for each and every day on and during which such nuisance might be maintained and continued, to be recovered before the police magistrate of the city upon the information or complaint of the inspector of buildings or of any ratepayer, and to be paid to the Chamberlain of the city to the credit of the city, and it was contended, therefore, that this present action lay at the suit of the plaintiff againt the defendant.

It is unnecessary to determine a question raised in connection with this point, viz., whether it was competent for the provincial legislature so to extend the area of the criminal law, for even if the point were raised by the pleadings, which it does not seem to be, it could not give to the plaintiff any right to recover in

1882

WALKER v. MCMILLAN.

Gwynne, J.

this action, if independently of this point he had no right; for it is admitted that the particulars in which the defendant's building departed from the regulations prescribed by the by-law did not cause, and had no connection with the occurrence of, the accident which caused injury to the plaintiff, and it is obvious that the defendant's disobedience of the city regulations, in a matter having no connection with the occurrence of the thing which caused injury to the plaintiff, cannot entitle the plaintiff to recover damages from the defendant for an injury asserted by the plaintiff himself to be attributable to a totally different cause. The question of the defendant's liability in this action must be determined by his responsibility or non-responsility by reason of some duty which he owed to the plantiff in connection with the thing which caused the plaintiff injury, and not by his responsibility or non-responsility to other persons for a thing which had no connection with the causing the injury sustained by the plaintiff.

The act or by-law, or both combined, cannot make the servants of the contractor to be servants of the defendants, so as to make the latter responsible for the acts of the servants of the contractor upon the principle of *respondeat superior*, neither do they create any new duty from the defendant to the plaintiff, which, irrespective of the act and by-law would not arise at common law from the nature and character of the act done which caused the injury, so that the question of defendant's liability to the plaintiff as for a breach of duty owed by the former to the latter must be determined irrespective of any consideration whether or not the defendant had complied with the provisions of the statute or the by-law. Indeed, it seems to me to be contrary to reason and common sense to hold the defendant liable to the plaintiff by

reason of non-compliance with the provisions of the by-law for an injury which the jury has found, and is upon all sides admitted, to be attributable, not to non-compliance with the provisions of the by-law, but to a cause wholly independent of, and in no way connected with, these provisions. But as the case at the trial did not proceed upon any such point, nor is any such point raised by the pleadings, and as the verdict moved against must be regarded as given under the influence of a direction of the learned judge to the jury, which direction was not warranted by law, the only mode of redressing the wrong arising from this misdirection in the charge of the learned judge who tried the cause, is by granting a new trial, so that the liability of the defendant, if he be at all liable, may be presented to the jury upon some acknowledged principle of law applicable to the case. I am, however, of opinion that the present action cannot be maintained, and that the plaintiff's sole remedy is against his contractor, who alone is responsible to the plaintiff for the damage he has sustained. The order should, I think, be that the plaintiff undertaking by his counsel to enter a *nolle prosequi* as to the defendant *Sears*; it is ordered that such *nolle prosequi* be entered in the court below, and that the rule *nisi*, in the court below, be made absolute, with costs for a new trial, as between the plaintiff and the defendant *Walker*.

Appeal dismissed with costs, and cross appeal allowed.

Solicitor for Appellants: *E. G. Kaye.*

Solicitor for Respondent: *C. W. Weldon.*