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*Nov. 21.
*Dec. 30.

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... } APPELLANT;

AND

ADA LAMBERT (PLAINTIFF) AND THE INTERURBAN ELECTRIC COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Negligence—Electric shock—Action against two defendants—Findings of jury—Joint liability—Agreement between defendants—Right to indemnity.

In an action against two parties claiming from them jointly and severally compensation for the death of plaintiff's son from electric shock caused by negligence, where there is no contributory negligence both defendants may be held liable if the negligence of each was a real cause of the accident. *Cf. Algoma Steel Corporation* v. *Dubé* (53 Can. S.C.R. 48).

By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to "save harmless and indemnify the said corporation * * * against all loss, damages * * * which the corporation may * * * have to pay * * * by reason of any act, default or omission of the company or otherwise howsoever." An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.

Held, that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity.

Judgment of the Appellate Division (36 Ont. L.R. 269) affirmed.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial against both defendants.

The action was brought by the respondent, Ada Lambert, against the appellants and the respondents, the Interurban Electric Company, Limited, to recover damages for the death of her son, Kenneth Lambert, a lineman in the employ of the respondents, the Interurban Electric Company, Limited, who was electrocuted while working for that company on one of their poles at the north-west corner of St. Clair Avenue and Bathurst Street, in the City of Toronto, on 13th March, 1914.

On the 13th March, 1914, the date of the accident to Kenneth Lambert, the Interurban pole and the Hydro-Electric pole were located on the north side of St. Clair Avenue, the Interurban pole being near the corner of Bathurst Street and the Hydro-Electric pole about six feet further west, and practically in line east and west.

The pole of the respondents, the Interurban Electric Company, was thirty-five feet in height and had attached to it two horizontal cross-arms, the upper of which was about nine inches below the top of the pole, and ran north and south, while the lower cross-arm was some two feet three inches below the top of the pole and ran east and west. This pole carried four high voltage wires carrying 2,200 volts each, which came north along Bathurst Street to the lower cross-arm, two of the wires being brought to the east and two to the west of the pole in the cross-arm. From this pole the easterly two wires continued northerly along Bathurst Street, but the westerly two wires were

(1) 36 Ont. L.R. 269.

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turned east along St. Clair Avenue. The turning was accomplished by taking the wires up from the west end of the lower cross-arm to the north end of the upper cross-arm by means of wire connections which are termed in the evidence "jumpers" or "risers."

The appellants' pole (the Hydro-Electric pole) was about six feet west of the Interurban pole, and was a higher pole, forty feet in height; on top of it was a lightning arrester, connected with the ground by a wire which ran down along the north side of the pole, and was fastened to it with staples. The two guy wires which supported this pole were tied to it at distances o fabout one foot three inches and three feet three inches, respectively, from the top and ran from this pole easterly to the far side of Bathurst Street, passing almost directly over the Interurban pole. The lower of these guy wires was either touching the top of the Interurban pole or a few inches above it, and the higher guy wire was about two feet above that. Both guy wires were protected by "strain insulators," porcelain articles of globular shape, placed on the guy wires about six feet east of the appellants' pole, and which were accordingly about opposite the Interurban pole. The lower guy wire where it was tied around the appellants' pole was in contact with the ground wire which ran down from the lightning arrester to the ground.

On 16th March, 1914, a gang of men in the employ of the respondent, the Interurban Electric Company, and in charge of their foreman, Angus Cameron, were engaged in removing the westerly two wires which turned from this pole to run east along St. Clair Avenue. The foreman sent the deceased, Lambert, up the Interurban pole to cut away these two wires.

Lambert went up the pole and cut the two "jumpers" or "risers" near the lower cross-arm, leaving exposed their live ends, called in the evidence "pig-tails." He was standing with his right foot on the lower east and west cross-arm between the pole and the first pin, toe to the north, and his left leg thrown over the upper north and south cross-arm between the pole and the first pin. He was facing west with his body on the east side of the pole and as he leaned over the top of the pole to reach for a rope the heel of his left foot dangling over the upper cross-arm came in contact with one of the live pig-tails that he had made, while his left side was touching the appellants' lower guy wire, completing a circuit from the Interurban high voltage wire, through his body, the guy wire, the ground wire, to the ground, and he was killed instantly.

The action was tried at Toronto by Sir William Mulock, C.J., with a jury. The jury in answer to questions submitted to them found as follows:—

1. What was the cause of the accident? A.—The accident was caused by Lambert's left heel coming in contact with the Interurban wire, and his left side touching the guy wire, which was in contact with the ground wire on the Hydro-Electric pole.

2. Was the Corporation of the City of Toronto guilty of any negligence which caused the accident? A.—Yes.

3. If yes, in what did such negligence consist? A.—By not having the strain insulators nearer the Hydro-Electric pole, and by not insulating the point of contact between the guy wire and the ground wire or lightning arrester on the Hydro pole.

4. Was the Interurban Electric Company guilty of any negligence which caused the accident? A.—Yes.

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5. If yes, in what did such negligence consist? A.—Before sending Lambert up the pole, the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position, and, that being so, should have directed his attention to the possibility of the guy wire being in contact with the ground wire on the Hydro pole.

6. Was the deceased guilty of any negligence which caused or contributed to the accident? A.—No.

8. What damages, if any, do you award the plain- A.—$2,700, $1,800 to be borne by the Hydro-Electric Company Company and $900 by the Interurban Electric Company.

Upon the findings of the jury the learned trial judge gave judgment against both defendants for $2,700, and subsequently gave reasons for judgment dismissing the claim of each defendant against the other.

Both defendants appealed to the Appellate Division of the Supreme Court of Ontario as against the plaintiff and as against their co-defendant, and that court composed of Meredith C.J.C.P., and Riddell, Lennox and Masten JJ., dismissed the appeals of both, the Chief Justice dissenting.

C. M. Colquhoun for the appellant. Under their agreement with the City the Interurban Co. could have no right of action against us and their employee would be in no better position. See *Grand Trunk Railway Co.* v. *Robinson*(1); *Jones* v. *Morton Co.*(2), at page 414; *Dominion Natural Gas Co.* v. *Collins*(3).

The negligence of the appellant was not of a nature to render probable the subsequent negligence of the

(1) [1915] A.C. 740. (2) 14 Ont. L.R. 402.
(3) [1909] A.C. 640.

Interurban Co and cannot have caused the accident. Beven on Negligence, 3 ed., p. 77; *McDowall* v *Great Western Railway Co.*(1); *Ruoff* v. *Long & Co.*(2).

As to our right to indemnity, see *Pyman S.S Co.* v. *Hull and Barnsley Railway Co.* (3); *Travers & Sons* v. *Cooper*(4).

B. N. Davis for the respondent Ada Lambert referred to *Till* v. *Town of Oakville*(5), at page 417; *Sault S.te. Marie Pulp and Paper Co.* v. *Myers*(6).

D. Inglis Grant for the respondent The Interurban Electric Co. cited *Price & Co.* v. *Union Lighterage Co.*(7); *Stott (Baltic) Steamers* v. *Marten*(8).

THE CHIEF JUSTICE.—I agree with Anglin J.

DAVIES J.—I think the agreement between the two defendant companies cannot be invoked by the defendant appellant, the City of Toronto, against its co-defendant, the Interurban Electric Co., to relieve the city from its liability for the death of the deceased. That agreement does not extend, as I construe it, to cases where the accident causing the injury sued for was caused "partly directly," to use Lord Esher's own phrase many times repeated in the case of *The Bernina*(9), by the defendant corporation's own negligence as is found to be the case here.

In this case the jury have found on evidence which I think sufficient, that the deceased was not guilty

(1) [1903] 2 K.B. 331.
(2) [1916] 1 K.B. 148.
(3) [1915] 2 K.B. 729.
(4) [1915] 1 K.B. 73.
(5) 31 Ont. L.R. 405, at p. 412.
(6) 33 Can. S.C.R. 23.
(7) [1904] 1 K.B. 412.
(8) [1916] 1 A.C. 304.
(9) 12 P.D. 58.

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of contributory negligence and I think that finding applies as well to the corporation defendant, the present appellant, as to its co-defendant the Interurban Company which employed the deceased.

The jury have also found the appellant-defendant, the Corporation of the City of Toronto, guilty of negligence which caused the accident

by not having the strain insulators nearer the Hydro-Electric pole and by not insulating the point of contact between the guy wire and the ground wire or lightning arrester on the Hydro pole.

It is true they also found the other defendant, the Interurban Electric Company, guilty of negligence which caused the accident as follows:—

Before sending Lambert up the pole, the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position and that being so should have directed his attention to the possibility of the guy wire being in contact with the ground wire on Hydro pole.

But that finding of negligence on the part of the Interurban Company does not discharge the City of Toronto from the consequences following the finding of negligence against it.

Both companies have been found guilty of negligence which "partly directly" caused the accident and they are both and each liable for the consequences. To entitle the defendant, the City of Toronto, to shelter itself behind the negligence found against its co-defendant, the Interurban Electric Company, it must shew that this latter's negligence was

the conscious act of another volition

and was the real cause which brought the injury about and without which the accident could not have happened.

The negligence of the electric company was that of one of its foremen, a mere case of negligence in over-

looking the conditions existing when he ordered the deceased to climb the electric pole and do certain work. Such negligence does not come within the meaning of the words—

conscious act of another volition

which under certain circumstances will remove liability from one whose previous negligence has "partly directly" caused the injury complained of.

Construing the indemnity clauses of the agreement between the two defendants as I do, not to embrace or include a case of negligence on the part of both companies the negligence of each "partly directly" causing the accident, and holding the finding of the jury as to the absence of contributory negligence applicable to both corporation and company alike and that there was no

conscious act of another volition

intervening between the negligence found against the corporation and the happening of the accident, but merely an additional act of negligence on the part of its co-defendants, the electric company, I would dismiss the appeal with costs to both respondents.

DUFF J.—The appellant municipality's (The Hydro El.) pole, near the N.W. corner of Bathurst Street and St. Clair Ave., was about 6 ft. west of the Interurban Company's pole, and was about five feet higher. On the top of the appellant's pole was a lightning arrester connected with the ground by a wire running down the pole. One of the two guy-wires supporting this pole ran past the top of the Interurban pole touching, or almost touching, it. This guy-wire where it was tied around the appellant's pole was in contact with the ground-wire of the lightning arrester. It had

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on it a porcelain insulator which was situated about six feet east of the Interurban pole. The deceased Kenneth Lambert, a lineman in the employ of the Interurban, was killed by an electric shock received while working on the Interurban pole on the 13th March, 1914. The Interurban pole had two horizontal cross-bars, one about nine inches and another about two feet three inches below the top. The lower arm ran east and west parallel with St. Clair Avenue and the other north and south parallel with Bathurst Street. The lower cross-arm supported four high voltage wires coming up Bathurst Street from the south, two of which passed on along that street to the north, the remaining two turning here and running east along St. Clair Avenue. To accomplish this turning these two wires were connected by wire connections, called "risers" or "jumpers," with the two wires fastened to the northern arm of the upper wire and carried thence to the company's pole to the east. This was the situation on the 13th of March, 1914, when the deceased Lambert was sent by his foreman to the top of the pole to do some work; and this condition of affairs, it may be added, had existed since the 25th of November, 1912, a year and a half before. On the occasion in question the foreman with a gang of men was engaged in removing the two westerly wires just referred to, and Lambert was sent up to cut them away. To do this it was necessary to cut the "jumpers" or "risers," which he did, leaving the live ends exposed, referred to in the evidence as "pig tails." Unhappily Lambert, standing with his right foot on the lower, east and west, cross-arm, his left leg thrown over the upper, north and south, cross-arm, his left foot which was dangling from the cross-arm was brought into contact with one of these live ends as he

was reaching for a rope, while his right hand at the same time encountered the guy-wire of the appellant's pole, and a circuit being established through his body by way of the guy-wire and the ground-wire of the lightning arrester, he was instantly killed.

Two additional facts should be mentioned as introductory to the discussion of points in controversy. The first is that it was the practice in the Hydro-Electric system to attach guy-wires in contact with ground-wires to the Hydro Electric poles, the only protection being an insulation similar to that above described. The other point is that the Interurban poles and wires were erected under the provisions of an agreement with the appellant municipality one term of which is set out in the 7th paragraph of it, and is in the following words:—

> The company shall save harmless and indemnify said corporation against any action, claim, suit or demand brought or made by the granting of any of the privileges hereinbefore mentioned to the company, and all costs and expenses incurred thereby, and also against all loss, damages, costs, charges and expenses of every nature and kind whatsoever, which the corporation may incur, be put to or have to pay, by reason of the improper or imperfect execution of their works or any of them, or by reason of the said works becoming unsafe or out of repair, or by reason of the neglect, failure or omission of the company to do or permit anything therein agreed to be done or permitted, or by reason of any act, default or omission of the company or otherwise howsoever.

The jury found that the accident was attributable to the negligence of the appellant as well as the negligence of the Interurban Company, the deceased Lambert being acquitted of contributory negligence. The appellant corporation denies its responsibility on the ground that there is no evidence of actionable negligence, on the ground that the deceased Lambert is chargeable with contributory negligence and that their responsibility to him is precluded by the terms of the contract with the Interurban company

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above set out, and they further claim to be entitled to indemnity as against the Interurban under the same agreement.

First, as to contributory negligence It was a question for the jury, I think, whether Lambert, going about the execution of the manual work in which he was engaged, bent upon getting it done without waste of time, was acting reasonably in assuming that such sources of danger as might be created by the condition and situation of the poles and wires had been the object of attention on the part of his employers; I think it is impossible to say that the jury could not reasonably find affirmatively on that question and acquit Lambert, as they did, of contributory negligence.

As to the agreement. The point made against the respondent Ada Lambert, on the agreement is, as I understand it, that the Interurban pole was where it was and that Lambert, a servant of the Interurban company, was only entitled to be where he was by virtue of the agreement between the appellant and the Interurban company, and that consequently his rights, when there, must be such rights only as he could avail himself of against the appellant if he himself instead of the company were the contracting party This argument seems to be largely based upon the construction of the judgment of the Privy Council in *Grand Trunk Railway Co.* v. *Robinson*(1). I think the contention requires for its support a much broader principle than anything established by *Robinson's Case*(1) because their Lordships there, as I read the judgment, put their decision upon the specific conclusion at which they arrived that the person who contracted with the

(1) [1915] A.C. 740.

railway company was Robinson's agent empowered to bind himself by any terms he might make with reference to the company's responsibility for the carriage of Robinson. Here there is of course no suggestion of agency, express or implied, and I think that on this ground the agreement must be rejected.

It is convenient at this point to dispose of the question of indemnity also. The stipulation relied upon has not, in my judgment, the effect of casting upon the appellant municipality responsibility for a condition of things primarily due to the negligence of the appellant itself. Where harm is caused and the appellant municipality is answerable by reason of the fact that its own negligence is a proximate cause of that harm, I do not think such responsibility is fairly within the contemplation of clause 7.

It is true that the phrase "otherwise however" is a very broad one; but the language of the clause shews that it was framed *alio intuitu* and we should violate a fundamental rule of construction if sweeping words placed at the end of a more specific enumeration were to be read as embracing cases which it is abundantly evident from the clause (when read as a whole) the parties never had in contemplation. It is not the "act, default or omission" of the Interurban Company for which the appellant municipality is held responsible, it is the municipality's own wrongful act.

But is there evidence of wrongful act, or in other words, is there evidence of actionable negligence for which the appellant municipality is responsible and to which as a proximate cause Lambert's death may be attributable?

Now it is quite true that to affirm this is to affirm,

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first, that the appellant company was guilty of a breach of duty to Lambert, and, secondly, that Lambert's death was a consequence of that breach. It is quite true also that but for the placing of the Interurban pole in the situation in which it was, and but for the negligent omission of the servants of the Interurban Company to observe and warn their employees against the dangerous situation created by the proximity of the uninsulated guy-wire to the Interurban pole, this accident would not have happened.

The fact that the Interurban pole was brought into this position after the appellant municipality's pole had been placed where it was at the time of the accident, does not appear to me to be a circumstance of much importance. As I have already said, the situation created by the proximity of these poles and wires, the wires being in the condition in which they were, had been in existence unchanged for some eighteen months preceding the accident.

In these circumstances the jury were entitled to find as a fact that the appellant municipality was concurrently responsible with the Interurban company for the existence of this dangerous state of things; and as to the neglect of the servants of the Interurban company and particularly the neglect of the foreman to observe and give warning of this dangerous situation, the rule applies which is stated by Lord Sumner (then Hamilton L.J.) in *Latham* v. *Johnson & Nephew*(1), at page 413:—

> A person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook*(2); *Lynch* v. *Nurdin*(3), that injury would not have occurred.

(1) [1913] 1 K.B. 398.

(2) 4 Bing. 628.

(3) 1 Q.B. 29.

In such circumstances the duty not to neglect ordinary care incumbent upon both the appellant municipality and the Interurban Company was a duty owing by the appellant company to the servants of the Interurban Company. It follows that the appeal in both branches of it should be dismissed.

ANGLIN J.—In the appellants' factum four distinct objections taken to the judgment holding them liable to the plaintiff for the death of her son and not entitled to indemnity from their co-defendants are stated as follows:—

(1) The deceased as an employee of the Interurban Electric Company could claim no greater right than his employers who were on the street at their own risk and on condition that their presence should not result in loss or expense to the appellants.

(2) The deceased was, as against the appellants, guilty of contributory negligence which caused the accident.

(3) The negligence of the appellants as found by the jury was not the real or proximate cause of the accident.

(4) By the provisions of the agreement between the appellants and the respondent, the Interurban Electric Company, the said respondent agreed to indemnify and save harmless the appellants against liability in this action.

For convenience I shall refer to the Municipal Corporation as the corporation, and to the Interurban Electric Company as the company.

Apart from the question involved in the first ground of appeal—whether the deceased as a servant of the company was so identified with his employers that his right of recovery must depend upon the existence of facts which would give them a right of action against their co-defendants, the corporation, for any damage they might sustain through fault of the latter (which I must not by any means be taken to regard as concluded in favour of the appellants)—

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see *Algoma Steel Corporation* v. *Dubé*(1) —the first and fourth grounds of appeal rest upon the following clause of an agreement made between the two defendants:—

> The Company shall save harmless and indemnify said Corporation against any action, claim, suit or demand brought or made by the granting (*sic.*) of any of the privileges hereinbefore mentioned to the Company and all costs and expenses incurred thereby, and also against all loss, damages, costs, charges and expenses of every nature and kind whatsoever, which the Corporation may incur, be put to or have to pay by reason of the improper or imperfect execution of their works or any of them or by reason of the said works becoming unsafe or out of repair or by reason of the neglect, failure or omission of the Company to do or permit anything herein agreed to be done or permitted, or by reason of any act, default or omission of the Company *or otherwise howsoever,* and should the Corporation incur, pay or be put to any such loss, damages, costs, charges or expenses, the Company shall forthwith upon demand repay the same to the Corporation.
>
> The Company shall repair broken wires forthwith and make all other repairs on reasonable notice and shall keep same in good repair.

While it would, no doubt, have been quite possible for the corporation to have guarded against any liability to the company and to have provided for indemnification by it for any damages arising however indirectly out of the presence on its streets of the poles and lines of the company, even where such damages should be directly occasioned by the negligence of corporation employees, it would undoubtedly be necessary that such a provision should be expressed in clear and explicit language. Here there is nothing of the kind. There is nothing from which any implication of an intention to provide for such a right of indemnification can be inferred. The application of the words "or otherwise howsoever," invoked by counsel for the appellants, having regard to one of the most familiar rules of construction cannot extend to some-

(1) 53 Can. S.C.R. 481.

thing so entirely foreign to the context as damages caused by negligence of the other party to the agreement.

Neither should the clause be read as relieving the corporation from liability for, or entitling it to indemnity against claims for injuries partly occasioned by its own negligence, though operating in conjunction with negligence of the company or its servants. Only an explicit provision couched in unmistakable terms could be given that effect. Here damages due to negligence of the corporation, either as a sole cause or as a contributing causative factor, are not even hinted at. To import such a case by implication as one of the things for which the company assumed entire responsibility would be quite unjustifiable. If under the agreement the company would itself be entitled to recover damages from the corporation for injuries to its property placed upon the streets in the exercise of the franchise thereby conferred, caused by negligence imputable to the corporation, as I think it would, an employee of the company, who has sustained such an injury, must *a fortiori* have a right of action against the corporation. Fault imputable to the company (such as the negligence of its foreman found by the jury in this case), which might under a plea of contributory negligence afford the corporation a defence in an action brought by the company for damages to its property caused by negligence of the corporation's servants, may not be ascribed to the plaintiff's son as an employee of the company so as to debar recovery for personal injury to him under such a plea. It follows that the first and fourth objections fail.

The second objection is conclusively disposed of by the adverse finding of the jury upon it, which is clearly

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made against both defendants. It is impossible to say that this finding, negativing personal contributory negligence on the part of the plaintiff's deceased son, affirmed in the Appellate Division, is so preposterous that no honest or reasonable jury could have made it.

The third ground of appeal involves the familiar question as to liability where negligence of two independent persons or bodies is found to have been the cause of the plaintiff's injuries. The first of Lord Esher's well-known propositions upon the law of negligence, stated in *The Bernina*(1), at page 61, and the decisions in such cases as *Burrows* v. *March Gas and Coke Co.*(2), are conclusive against the appellant. The authorities upon this branch of the case are conveniently collected in Halsbury's Laws of England, *vo.* "Negligence," par. 649. That a lineman of the company might be injured just as the plaintiff's son was, was a natural consequence of the appellants' negligence. That the injuries sustained by the plaintiff's son were a direct consequence of that negligence is incontestible. There was no intervention of a conscious act of another volition operating as a real cause to interrupt the chain of causation between the appellants' negligence and the consequences complained of. They cannot invoke as an excuse the failure of their co-defendants' foreman to prevent that negligence becoming operative. Both it and the negligence of the company's foreman (assuming the correctness of the jury's finding as to the latter, which is now not open to question) were in fact operative at the moment when Lambert was killed. Both were truly active causes. Neither can be said to have been merely a condition

(1) 12 P.D. 58. (2) L.R. 5 Ex. 67; 7 Ex. 96.

sine qua non of that which occurred. *Algoma Steel Corporation* v. *Dubé*(1).

The appeal, in my opinion, fails and should be dismissed with costs to be paid by the appellants to both respondents

BRODEUR J.—This is an action instituted under Lord Campbell's Act.

The plaintiff's son was an employee of the defendant, the Interurban Electric Company, as lineman, and while working on the cross-arms of the electric poles of that company he met his death from an electric current.

The appellant, the City of Toronto had a pole carrying light and power wires situated near the one on which the victim, Lambert, was working. The guy wire which assisted in the support of this city pole was fastened tightly around that pole and was coming in direct contact with a ground wire running down the city pole to the ground That guy wire extended over the pole of the Interurban Electric Company and the guy wire then in its direct contact with the ground wire on the city pole was loaded with electric current at high voltage and the victim, in working near by that guy wire, came in contact with it and was killed.

The action was instituted against the City of Toronto and against the company for which Lambert was working and by the verdict of the jury the City of Toronto was declared guilty of negligence for not having the strain insulators nearer their pole, and by not insulating the point of contact between the guy wire and the ground wire.

(1) 53 Can. S.C.R. 481.

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Nobody can find fault with that verdict. This guy wire was for the purpose of sustaining the pole belonging to the city. It was their duty to see that this guy wire should not come in contact with the loaded wires, and if it was exposed to come in contact they should also have put insulators at such a place where accidents could be avoided.

There is, in this case, an insulator; but the insulator, instead of being placed between the poles and so avoiding any accident to those who would have to work on the company's pole, was placed further away.

The verdict of the jury also stated that the company was liable because its foreman, before sending Lambert up the pole, should have noted that the insulator was in a wrong position. There is no appeal before us with regard to the verdict rendered against the company.

The aggregate amount which was given by the verdict to the plaintiff was $2,700: 2-3 to be paid by the City of Toronto and $900 by the respondent company.

This verdict should be sustained because there was, no doubt, negligence by the City of Toronto.

But the latter claims that under a contract existing between the company and itself it should be indemnified for that judgment.

When the company desired to erect poles in the place in question they applied to the municipal authorities then having jurisdiction and the counci consented to grant such permission, subject to certain conditions. One of those conditions was that the company should indemnify the municipal corporation against any action in consequence of the granting of the

privilege mentioned in the contract, and also against all damages which the corporation might incur by reason of the imperfect execution of their work

or by reason of any act, default or omission of the company or otherwise howsoever.

The jury have found, it is true, that the foreman of the respondent company gave improper orders to the victim. But at the same time the jury stated that the City of Toronto was mostly responsible for the accident because it was due to defective connections or stringing of their wires.

It is not a case, in my opinion, covered by the indemnification clause above mentioned. It is clear that no injury would have been suffered by the deceased if the defendants had not fastened their guy wire in direct and immediate contact with their ground wire and if they had placed their insulator in the proper position The liability of the City of Toronto results because of its own negligence and the condition on which the City of Toronto relies does not go so far as to state that the company will be bound to indemnify it for the appellant's own negligence.

I come to the conclusion that the judgment rendered by the Appellate Division should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William Johnston.*

Solicitor for respondent Ada Lambert: *Henry C. Forster.*

Solicitors for the respondents Interurban Electric Co.: *Johnston, McKay, Dods & Grant.*