1924
*Dec. 12.
1925
*Feb. 3.

THE CITY OF KITCHENER (DEFENDANT) ..... } APPELLANT;

AND

THE ROBE AND CLOTHING COMPANY (PLAINTIFF) ..... } RESPONDENT;

AND

THE STANDARD PAVING COMPANY (THIRD PARTY) ..... } RESPONDENT.

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

Negligence—Municipal corporation—Defective sewers—Alteration—Negligence of contractors—Obstructing natural drainage.

When, during a heavy rainstorm, the city sewers are incapable of carrying all the water that falls, and contractors employed to relay the pavement, in course of their work, obstructed the natural flow of the surface water and caused it to back and flood premises on the street, the corporation which must be deemed to have notice of the obstruction, is guilty of negligence in not having it removed and also responsible for the negligence of the contractors. *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (6 H. & N. 488) appl.

Judgment of the Appellate Division (55 Ont. L.R. 1) affirmed.

The contractors covenanted to indemnify the city against the consequences of any injury to property in the course of the work.

Held, reversing the judgment of the Appellate Division (55 Ont. L.R. 1), that as it was shown that the act of the contractors was the sole effective cause of the injury to said premises they were liable under said covenant notwithstanding the defective drainage system, and the negligence of the corporation. *City of Toronto* v. *Lambert* (54 Can. S.C.R. 200) and *Sutton* v. *Dundas* (17 Ont. L.R. 556) dist.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial as to the liability of the city to the plaintiff and reversing it as to the right of the city to claim indemnity from the third party dismissing such claim.

The two questions raised on this appeal are, whether or not the defendant is liable in damages for flooding of the plaintiff's premises during a heavy storm and whether or not, if liable, it had recourse over against the third party. Both depend on appreciation of the evidence on the record. The trial judge decided both questions in the affirmative.

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

(1) 55 Ont. L.R. 1.

The Appellate Division reversed him as to the liability of the third party.

R. S. Robertson and *Bray* for the appellant. The rainfall in this case was one which could not be expected and the city is not liable. *Faulkner* v. *City of Ottawa* (1).

The city can recover from the third party unless it is shown that its negligence was an active and proximate cause of the injury and was distinct from that of the third party. *Sutton* v. *Town of Dundas* (2).

Gideon Grant and *Scellen* for the respondent Kitchener Robe Co. Act of God or *vis major* cannot be pleaded as a defence. *Nitro-Phosphate Co.* v. *London and St. Katharine Dock Co.* (3) at pages 517-8.

Hattin for third party.

The judgment of the majority of the court (the Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The plaintiffs are manufacturers of woollen goods, carrying on business at the S.W. corner of Foundry street and Hall's Lane in the city of Kitchener. They sue the city for damages sustained through the flooding of the cellar of their warehouse by surface water which, after crossing the sidewalk, forced its way through basement windows facing Foundry street, during a severe rainstorm on the evening of the 26th of July, 1921. In third party proceedings the city claims indemnity from the Standard Paving Company to whose wrongful act in obstructing the natural passageway for such surface water down Hall's Lane it ascribes the flooding.

The learned trial judge found the city liable for $2,069.87 damages and costs and held the third parties obliged to indemnify it and condemned them to pay the costs of the third party proceedings.

The Appellate Divisional Court upheld the judgment against the city but dismissed, with costs, its claim for indemnification (4).

The city now appeals against its condemnation and also, should its main appeal fail, against the discharge of the

(1) 41 Can. S.C.R. 190.
(2) 17 Ont. L.R. 556.
(3) 9 Ch. D. 503.
(4) [1923] 55 Ont. L.R. 1.

1925

CITY OF KITCHENER v. ROBE AND CLOTHING COMPANY.

Anglin C.J.C.

third parties. If there be liability the amount of the recovery is not questioned either by the appellants or the third parties.

During heavy rainstorms the surface water of a considerable area which the storm drains could not carry converged from three directions, north, east and south, at the intersection of Foundry street and Hall's Lane. Owing to the paving of the city streets, and the recent construction of enlarged storm sewers under Foundry street, for which an inadequate outlet had been provided, thus causing a backing up of water through catch basins and manholes in the street, the rush of water towards the spot in question and the amount accumulated there during the storm of the 26th of July was increased. For this the defendant was responsible. But, on the whole evidence, it would seem to be highly probable that, but for the presence of the mound of earth thrown across the entrance to Hall's Lane by the third parties, notwithstanding the undoubted severity of the storm, the water which the storm sewers could not carry off would have flowed down that lane with such rapidity that flooding of the plaintiffs' cellar would not have occurred. That is what had happened for many years; and, as put by the learned trial judge,

> there was no evidence to convince me that with a clear opening down the lane even the extremely excessive flow might not have been taken care of sufficiently to have saved the plaintiffs' premises.

The learned judge adds:

> The mound must necessarily have obstructed the water until the sidewalk was flooded, and so soon as the flooding commenced the immediate cause of it must have been the mound. To what extent, had the mound not been there, the continued onrush of water might have been so fast that it would rise above the level of the curb and so overflow the sidewalk must be mere guesswork. * * * In my judgment the conclusion to be drawn from the established facts, as distinguished from those which consist of mere conjecture or are matters of calculation based upon conjectural premises is that the mound of earth and debris caused the flooding of the plaintiffs' premises. * * * The defendant corporation were fully aware of the fact that during some rainstorms the storm drains were not sufficient to carry off the water, and that Hall's Lane must necessarily be kept free from obstructions in order to carry off the surface water. The paving company's manager admitted that the danger of flooding at that corner was apparent. Under these circumstances it was, I think, the duty of the defendant corporation not to leave any obstruction in the lane which might block the flow of water and endanger the plaintiffs.

This concept of the facts is the fair result of the evidence. Notwithstanding Mr. Hattin's able attempt to demonstrate

by expert evidence based on the testimony as to water levels in Foundry Street during the storm that the flooding of the plaintiff's cellar would have occurred had there been no obstruction in Hall's Lane, with the learned trial judge we regard that conclusion as at the most conjectural. One obvious fallacy in the premises on which it is based is that the water levels in Foundry Street given in evidence, assuming their accuracy, were those which obtained with the obstruction of the mound in full operation. How much lower they would have been had the entrance to the lane been clear does not appear. We are, therefore, in accord with the view of Mr. Justice Riddell that " the sole tortious cause of the damage (suffered by the plaintiffs) was the barrier " placed across the entrance to the lane by the third parties and with that of the learned Chief Justice of the Common Pleas that " everything turned on that obstruction".

While the storm was no doubt unusually severe, the evidence in our opinion falls short of establishing that the rain-fall was so torrential and unprecedented that it can be said to have amounted to *actus Dei* or *force majeure*, *Greenock* v. *Caledonia Ry. Co.* (1). But, though it were of that character, the defendant would not thereby be excused if the true cause of the flooding complained of was the obstruction of the mouth of the lane and if responsibility for its presence attaches to it. *Nitro-Phosphate, etc., Co.* v. *London & St. Katharine Dock Co.* (2). There is no suggestion here that a case could be made for any apportionment of the damages.

While the paving of the city streets may have materially increased the accumulation of water at the intersection of Foundry Street and Hall's Lane, and the city's method of constructing storm sewers certainly cannot be commended from a common sense, and still less from an engineering, point of view, the conditions thus created were not the immediate and direct cause of the flooding. If they contributed to it, they were rather in the nature of a cause *sine qua non*. Indeed the circumstances in evidence make it probable that the obstruction across the entrance to the lane would have sufficed to cause the flooding even had the sewer outlet been adequate and that the only relevant effect

(1) [1917] A.C. 556. (2) [1878] 9 Ch. D. 503.

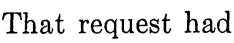
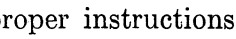
1925

CITY OF KITCHENER v. ROBE AND CLOTHING COMPANY.

Anglin C.J.C.

of its inadequacy was that the invasion of the plaintiffs' premises by the water may have occurred a few moments earlier than it otherwise would have happened. Nevertheless the creation of conditions so apt to cause a sudden accumulation of rainwater was an obvious menace which undoubtedly made it the duty of the civic officials to be more than ordinarily vigilant in regard to the means of carrying off the additional volume of surface water thus gathered. Failure to discharge that duty, if that be the proper inference from the evidence as a whole, and responsibility for the tortious act of its contractors, would seem to be the true bases of the defendant's liability.

Moreover, although the plaintiffs originally averred actionable negligence on the part of the city, both in its sewer construction and in regard to the obstruction of the lane, at the trial the former ground of claim was distinctly abandoned and the plaintiffs' case was rested solely on negligence both of commission and omission in regard to the mound of earth; and it was on that footing that the judgment against them proceeded. The third parties however, insisted on retaining any advantage to which they might be entitled from the proof of defective or improper sewer construction. By some of the members of the Appellate Division they were regarded as joint tortfeasors with the city and, as such, not liable to contribution; by others the indemnification provisions of the contract were held not to cover the case because the liability of the city rested on fault of its own officials.

In order to determine the governing legal principles it is necessary to have a correct appreciation of the facts in regard to the presence of the obstruction across the lane. The third parties were in the course of paving Foundry Street under a contract with the city. Enlarged sewers had already been constructed; the concrete foundation for the pavement had been laid; but the asphalt surfacing was still to be done. The plaintiffs had asked for what is known as a drop crossing () at Hall's Lane expressly to facilitate the flow of surface water into and down it. That request had been approved of by the city engineer. Either because proper instructions were not given or because, if given, they were overlooked, the contractors had put in a sloping crossing () somewhat similar

to what had formerly been there, the ends of which, when finished, would be level with the sidewalk and the centre slightly depressed. Noticing this mistake the plaintiffs' manager called the attention of the city engineer to it. He ordered the contractors to make the necessary change, which required the cutting out of the concrete foundation and some additional excavation. This the contractors proceeded to do some five days before the storm. They piled the broken concrete on Foundry Street, but the rest of the material they threw across the mouth of the lane, forming a bank, probably about a foot in height, which the learned trial judge finds

> was sufficient to obstruct the natural flow of surface water, even during a severe storm, down the lane.

The contractors' foreman says that he placed the pile of earth in the lane as a barrier to protect the concrete from traffic; that after long experience they had found such an obstruction more effective than the usual wooden barrier. The insistence of the plaintiffs on a drop crossing had brought to the immediate attention both of the city engineer and of the contractors the necessity of keeping Hall's Lane open to carry off the surface water in a heavy storm. Yet this dam of earth was placed across the mouth of the lane and kept there for five days and the foreman says similar barriers were placed at each street intersection. Notice to the city of the existence of the obstruction at the mouth of Hall's Lane seems, therefore, to be not merely a justifiable, but almost an inevitable inference.

Upon this state of facts it is impossible to suggest that the contractors' act in placing the pile of earth across the lane was mere casual or collateral negligence. To protect their fresh concrete from traffic entering Foundry street from the lane was a necessary incident of the work they had undertaken. The specifications expressly imposed that obligation and required that barriers should be put up and maintained. To provide such protection by means of a dam of earth thrown across the lane instead of the customary open barrier, which would not have interfered with the flow of water into the lane, was, under the circumstances, very gross negligence. Such a method of carrying out an integral part of the work contracted for was palpably wrong and involved the city in liability. *Hole* v. *Sittingbourne & Sheerness Ry. Co.* (1). Having undertaken the construc-

(1) [1861] 6 H. & N. 488.

1925

CITY OF KITCHENER v. ROBE AND CLOTHING COMPANY.

Anglin C.J.C.

tion of the drop crossing at Hall's Lane in connection with the paving of Foundry street, it became incumbent upon the city so to dispose of the material necessarily excavated in the course of that work as not to cause injury to neighbouring property owners. For the performance of the work itself and the discharge of that incidental duty it was, no doubt, authorized to employ contractors. But their failure to fulfil their obligation to the city in regard to the safe disposal of excavated material left the latter responsible for the resultant injury. Its duty to the plaintiffs remained undischarged and the contractors' fault of omission was not mere casual or collateral negligence for which the city would not have been responsible. Upon that ground, therefore, the city is responsible for the damages thus caused. *Vancouver Power Company* v. *Hounsome* (1); *Dalton* v. *Angus* (2); *Hardaker* v. *Idle District Council* (3); *Holliday* v. *National Telephone Company* (4); *Robinson* v. *Beaconsfield Rural Council* (5), per Buckley L.J.; *Ballentine* v. *Ontario Pipe Line Co.* (6); *Penny* v. *Wimbledon Urban District Council* (7); *Kirk* v. *Toronto* (8). But, if that were not so, on the ground that it had failed to require the removal of such an obvious cause of known danger, of which it must be held to have had notice, liability also attaches to it. Therefore, because of negligence both of commission and omission the municipal corporation was rightly held liable and the judgment condemning it must be upheld.

By their contract with the city the third parties had agreed that

> The corporation will not in any manner be answerable for any injuries to any person or persons, either workmen or the public, or for the damage from any cause arising from the conduct or operations of the company or their workmen or any one employed by them, all of which injuries and damages to persons or property the company must guard against, and make good all damages, being strictly responsible for the same.

They had also covenanted to construct the works in accordance with and upon the terms of the specifications. Paragraph 7 of the grading specifications reads:—

(1) [1914] 49 Can. S.C.R. 430.
(2) [1881] 6 App. Cas. 740, 829.
(3) [1896] 1 Q.B. 335, 340.
(4) [1899] 2 Q.B. 392
(5) [1911] 2 Ch. 188, 198.
(6) [1908] 16 Ont. L.R. 654.
(7) [1898] 2 Q.B. 212.
(8) [1904] 8 Ont. L.R. 730.

All surplus material not required by the city must be disposed of by the contractor off the line of work, but in such a manner as not to cause a nuisance, injury or inconvenience to the city or to public or private parties; otherwise the contractor must indemnify the corporation against all claims in respect thereof.

The material placed in the lane was "surplus material not required by the city." In direct violation of the clause just quoted the contractors so placed it that it became the cause of injury to private parties. Why should they not indemnify the city for the present claim for such injury?

It is argued that the clause was not meant to apply to a case in which negligence of the city itself is found to have involved it in liability and such authorities as *City of Toronto* v. *Lambert* (1) and *Sutton* v. *The Town of Dundas* (2), are invoked by the third parties. In each of those cases an independent act of negligence of the party asserting the right to indemnity under a contractual provision, which may for the moment be taken to have been somewhat similar to clause 7 of the specifications above quoted, had been the immediate and effective cause of the injuries sustained; in neither of them had a wrongful act of the contractor who had undertaken the obligation to indemnify, in the carrying out of the work contracted for, been the primary and sole effective cause of the damage suffered. In the case at bar, on the contrary, the city's liability arises either because responsibility for the tortious act of its contractors is by law attached to it, or because it had failed to remove a known source of danger, which a tortious act of its contractors had created. Where, as here, a tortious act of the party covenanting to indemnify, of the very class against the consequences of which such indemnity has been stipulated for, is the primary cause of injury, that party cannot escape the liability to indemnify merely because that act itself, or neglect to provide against its consequences, has also entailed liability to the person injured of the party in whose favour the stipulation for indemnity was exacted. It is upon the very liability thus entailed that the claim for indemnification rests. As put by the late Mr. Justice Rose in *Carty* v. *City of London* (3):

I would be unable to find any case to apply the indemnity clause to if this be not one, and indemnity implies liability against which indemnity is sought.

(1) [1916] 54 Can. S.C.R. 200. (2) [1908] 17 Ont. L.R. 556.
(3) [1889] 18 O.R. 122, at page 131.

1925

CITY OF KITCHENER v. ROBE AND CLOTHING COMPANY.

Anglin C.J.C.

See too *McIntyre* v. *Lindsay* (1), and *Gignec* v. *Toronto* (2). Had the evidence established that the faulty construction of the city sewer was a proximate cause of the flooding, the authorities relied upon by Mr. Hattin might have been in point and the application of the indemnity clause might have been excluded.

We are for these reasons of the opinion that the judgment of the learned trial judge holding the third parties liable to indemnify the respondent was right and should be restored. It is perhaps unnecessary to state that in affirming their liability we base our judgment solely upon the covenant for indemnification in their contract and not at all upon section 464 of the Municipal Act, or to add that the doctrine of the common law excluding contribution between joint tortfeasors does not apply to such a case as this.

The appeal of the City of Kitchener against the plaintiff will, therefore, be dismissed with costs. Its appeal against the Standard Paving Company will be allowed with costs here and in the Appellate Division and the judgment of the learned trial judge in the third party proceedings restored.

The defendant, however, is not entitled to recover from the third parties any costs which it may have to pay arising out of the appeals to the Appellate Division and to this court from the judgment in the main action.

IDINGTON J.—The respondent, the Robe & Clothing Co. Ltd., is a manufacturer of woollen goods carrying on business in the City of Kitchener in a factory fronting on one of the streets of said city, known as Foundry Street, and alongside it there has for many years been a lane fifteen feet in width running at right angles to said Foundry Street and known as Hall's Lane.

On the 26th of July, 1921, an unusually heavy rain storm occurred in said city which resulted in the water being more than the appellant's sewer pipes on Foundry Street could carry, and therefore the water on that street overflowed part thereof and ran down in the side ditches thereof to the said junction of Hall's Lane with Foundry Street and probably would have found an easy outlet at and over

(1) [1902] 4 Ont. L.R. 448. (2) [1906] 11 Ont. L.R. 611.

said lane (which had a fall of about four feet per hundred feet in length) as it usually did in cases of heavy rains, but for an obstruction put thereon by the respondent the Standard Paving, Limited, under circumstances which I am about to refer to.

The result was an overflow of water into the cellar of the said Robe & Clothing Company, which caused heavy damages to the goods of the said company.

Hence this action was brought against the said city to recover from it said damages.

The conflicting evidence given at the trial before Mr. Justice Orde, without a jury, was such as to lead to a change of opinion by those conducting the plaintiff's case at said trial, and to the diversity of judicial views we find expressed throughout the course of this case in the courts below.

The appellant, before pleading to the action so brought, served the said Paving Company with notice of bringing it in as a third party, bound by the terms of its contract with appellant to indemnify the latter against the results of the action.

To this it responded denying all liability.

An order was made by the local judge providing for such proceeding and its results as required by the practice in such cases in Ontario.

That resulted in all parties so concerned appearing at the trial and taking part therein before the learned trial judge.

The contention as between the defendant and the said third party was, of course, that the other fellow was entirely to blame.

And as between each of them and the plaintiff, now a respondent, the respective contention of each was, by the plaintiff up to a certain point that both the original defendant, now appellant, and the third party were to blame and, conversely, each of the latter tried to shew that the other was to blame.

According to the findings of fact by the learned trial judge his view of the law as applied thereto seemed to me absolutely correct.

Therefore I decided to read the entire evidence and see if that justified his findings of fact being departed from and I am pleased to find that he had paid close attention

1925

CITY OF KITCHENER v. ROBE AND CLOTHING COMPANY.

Idington J.

to the case throughout and took pains, by questioning many of the witnesses, to have many points in the evidence cleared up instead of being left in the confusing condition in which it had been presented and possibly would have been left out but for his doing so.

When one understands the actual facts and appreciates correctly their bearing the case is comparatively simple.

The junction of Hall's Lane with Foundry street is at the lowest point of said street, which is comparatively a short street crossing three blocks.

The more the streets are improved by paving or otherwise the more rapidly the rainfall moves, and what seems to have happened in the part of Kitchener, on Foundry street, by reason of the city's rapid growth, was that the pipes for carrying the water off had been found to be too small and along said street had been renewed and enlarged, but when it came to renewing and enlarging correspondingly the continuation thereof on and along said Hall's Lane, there was no need for haste in doing so inasmuch as the surplus water could find an easy outlet down that lane and be taken care of thereby without risk of injuring any one.

The title to that lane was in the respondent, the Robe & Clothing Company, Limited, and had been for many years past.

Evidently there was a movement on foot by the appellant city to change that situation of things, for we are told on argument, in addition to what appears in evidence, that the offer, contained in the letter from said owner to the city, to sell said lane to the city, had been accepted by resolution of the latter's council shortly before the accident in question herein, but it was some months later before the title was completed.

The pipes had been found to be quite capable of carrying all the water for years past, except on the occasion of unusually heavy rains, which might be three or four times a year, and on such occasions the surplus water ran down the said lane and, on the occasion of the storm in question, beyond a shadow of doubt in my mind (despite the theory of an engineer witness based on the evidence of two witnesses, who spoke of what they had seen when unconsciously magnifying the severity of the storm) would have

done the same but for the interference of the situation by the respondent, the Standard Paving, Limited.

The most convincing tests from actual facts, instead of many theories, is that given by Richardson, a witness living in another part of the city, who tells of a storm some seven or eight years before which brought the water from the streets in such a volume as to bring it into his cellar, but this storm did not. That storm did no injury to the premises now in question, though the buildings had been built before that time.

The Standard Paving, Limited, had entered into a contract with the appellant to do some paving for it, which included Foundry street, and when it came to Hall's Lane the manager of the Robe & Clothing Company, knowing the actual situation and the need of the entrance of surplus water into said lane being protected for the very purpose of meeting the requirements of the street drainage, explained this to those engaged in the work. Somebody forgot, or paid no heed, until a few days before the accident in question, and all concerned then met and agreed that the crossing from Foundry street (main part of the highway) over the sidewalk thereon into said lane, should be, when finished, so shaped as to provide for the anticipated possibilities of surplus water needing its outlet into the lane.

The men engaged in executing said work on behalf of the said Standard Paving, Limited, bungled it by throwing the refuse or debris of the old sidewalk, and earth and other materials under it, to make way for the new, on the lane, forming what proved to be a dam, when the storm came, and the old outlet for the surplus water being gone or impaired thereby, it ran into the cellar of the respondent, the Robe & Clothing Company, Limited, and did the damage for which the learned trial judge entered judgment against the appellant and gave it relief over against said respondent, the Standard Paving, Limited.

The latter had by its contract agreed with appellant to indemnify it against just such claims, in the following terms:—

> The corporation will not in any manner be answerable or accountable for any injuries to any person or persons, either workmen or the public, or for damage from any cause arising from the conduct or operations of the company or their workmen or any one employed by them,

1925

CITY OF KITCHENER v. ROBE AND CLOTHING COMPANY.

Idington J.

all of which injuries and damages to persons or property the company must guard against, and make good all damages, being strictly responsible for the same.

That seems comprehensive enough to cover all that is in question herein, and why the said company failed to respond thereto without litigation puzzles me.

Seemingly the storm was looked upon as such an Act of God as to excuse the fulfilment of the said contract of indemnity. And hence I fear the gross exaggeration of the storm.

No judicial opinion seems to have countenanced that view, but the Appellate Division for Ontario seems to have looked upon the appellant and the Standard Paving, Limited, as joint tortfeasors, and it varied the said judgment so as to deprive the appellant city of its remedy over against said third party, the Standard Paving, Limited. Hence this appeal here.

With great respect I cannot agree with the view taken, either as to the facts or the law, by those who, in said court, have written opinions tending to allow said appeal.

I have set forth as briefly as I can the relevant facts, and I submit that the learned trial judge was in much better position to hear and determine the facts than any one else judicially concerned in this case, and all the more so by reason of the somewhat confusing manner in which the evidence was presented and the tendency on the part of some of the witnesses apparently to magnify the storm.

The evidence of a witness who had an instrument for use in measuring rain-falls tells us it lasted for an hour and a half, and the total fall was a trifle over two inches which, if we apply common knowledge, is not so great as pretended.

Turning now to the law governing the case, the learned trial judge seems to have taken, as his chief guide, the judgment of Lindley L. J. in *Hardaker* v. *Idle District Council* (1).

In said judgment he quotes from the opinion of Lord Blackburn, in *Dalton* v. *Angus* (2), as follows:

> Ever since *Quarman* v. *Burnett* (3), 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

(1) [1896] 1 Q.B. 335. (2) 6 App. Cas. 740, at 829.
(3) 6 M. & W. 499.

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 to him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (1); *Pickard* v. *Smith* (2); *Tarry* v. *Ashton* (3).

These cases cited seem to support the proposition laid down in the foregoing quotation. And I submit that it is because of the relations between the appellant and the said contractor (The Standard Paving, Limited) by virtue of the contract between them and the duty resting upon the appellant to get said work done that appellant is at all liable herein, and not by reason of anything that the appellant itself did or did not do, that it should be held liable.

For if the learned trial judge is, as I hold he is, quite right in his findings of fact, there is, and can be, no ground for holding that the appellant is a joint tortfeasor.

The duty to protect the plaintiff herein rested in law upon the appellant, and the rule as to tortfeasor is not applicable to defeat the right of the appellant to look to and recover over as against the third party upon the latter's covenant for indemnity, which is perfectly legal.

On the facts as found nothing further need be said. But I would refer to the discussion of the principle involved as to the right to recover from him who indemnifies against his own acts, on pages 198 and 199 of Pollock on Torts, 12th ed., and cases there cited, and also the case of *Moxham* v. *Grant* (4), as a means of illustrating the modern and more reasonable doctrine than that so widely laid down in *Merryweather* v. *Nixon* (5).

In my opinion for the foregoing reasons this appeal should be allowed with costs here and in the appellate court below, and the judgment of the learned trial judge be restored.

Appeal defendant v. *plaintiff dismissed with costs.*
Appeal defendant v. *third party allowed with costs.*

Solicitors for the appellant: *Sims, Bray & McIntosh.*
Solicitors for the respondent: *Scellen & Weir.*
Solicitors for third party: *Clement, Hattin & Snider.*

(1) 6 H. & N. 488.
(2) 10 C.B. (N.S.) 470.
(3) 1 Q.B.D. 314.
(4) [1900] 1 Q.B. 88.
(5) [1799] 8 T.R. 186.