GEORGE KENT (PLAINTIFF) ..... APPELLANT;

AND

CHARLOTTE BELL and ARCHIBALD BELL (DEFENDANTS) ..... RESPONDENTS.

1949

*June 14
*Oct. 4

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and Servant—Tenant injured assisting landlord's husband with repairs—No agreement for wages—Liability of landlord—Of landlord's husband—Whether tenant a servant—Invitee—Volunteer or volunteer with interest.

The appellant was a tenant of premises owned by the respondent wife. The latter, to meet the needs of the tenant, had undertaken to enlarge the upper part of the house. The husband respondent, acting for his wife, commenced the work, and asked the tenant to assist him. The tenant, although regularly employed, replied he "guessed he would have to help". While descending from the roof at the direction of the husband, he placed his weight on a facia board that was insecurely nailed to the end of the joists; it gave way and he fell to the ground, sustaining serious and permanent injuries.

Held: That the tenant was not a volunteer. The work was entirely that of the landlord. The tenant approached it as an independent party conferring a benefit that had been sought; he was giving his services but not surrendering himself as an employee, the landlord therefore became liable to the tenant for the negligence of her agent, the husband.

Hayward v. *Drury Lane Theatre* [1917] 2 K.B. 899, followed.

Held: Also, that the finding of the trial judge that the husband had been negligent in creating a trap, reversed by the Court of Appeal, was amply supported by the evidence and nothing had been shown to warrant its reversal.

Appeal allowed and judgment at trial restored.

APPEAL from a judgment of the Court of Appeal for Ontario (Henderson, Roach and Hogg JJ.A., Roach J.A., dissenting) (1), which set aside the judgment of the trial judge, Wilson J. by which it was adjudged that the plaintiff recover from the defendants the sum of $5,271.75.

J. J. Robinette, K.C., for the appellant.

J. R. Cartwright, K.C., for the respondent.

The judgment of the Court was delivered by

RAND J.:—The facts of this case are simple. The appellant was a tenant of premises owned by the respondent

(1) [1946] O.R. 743; [1947] 1 D.L.R. 115.

*Present: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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wife. The latter, to meet the needs of the tenant, had undertaken to enlarge the upper part of the house. The husband, acting for his wife, with two helpers commenced the work and had been at it a day when he asked the tenant to assist him on the next afternoon, Saturday, in order to have as much work as possible done for the weekend. Although the tenant had a regular employment at which he would have worked that afternoon, his reply was that he "guessed he would have to help". Accordingly he presented himself and entered upon the work. While descending from the roof, at the direction of the husband, he placed his weight on a facia board that was insecurely nailed to the ends of the joists; it gave way and in the fall he was badly injured.

The trial judge found the husband to have been negligent in creating a trap, and this finding was reversed by the Court of Appeal (1), Roach, J.A. dissenting. With the greatest respect for the majority opinion, I agree with the finding at the trial; the evidence was ample to support it, and nothing has been shown to warrant its reversal. The judgment against the husband must, therefore, be restored.

A more involved question is raised in the claim against the wife. I am unable to find a contract of employment between the parties. There was an interest in both the tenant and the landlord in having the addition made; and the tenant's consent to "help" excludes, in the circumstances, an implied promise on the part of the wife through the husband to remunerate him.

The question, then, is, on what terms did the appellant engage in the work? Mr. Cartwright contends that he is a mere volunteer and as such is in no better position than a fellow servant, on which footing his claim would fail. Whether taking the appellant to have assumed the relation of an employee, the negligence could be viewed as a failure on the part of the master to furnish and maintain reasonably safe plant and working conditions within the rule laid down in *Marchment* v. *Borgstrom* (2), it is unnecessary to determine, because that is not, in my opinion, the true interpretation of the circumstances.

(1) [1946] O.R. 743; [1947] 1 D.L.R. 115.

(2) [1942] S.C.R. 374.

A volunteer does no doubt submit himself to the risks of the work he enters upon to the extent at least accepted by an actual employee, but the tenant here was not a volunteer. He had acquiesced with some reluctance in the request that he give the afternoon to the work. But he was under no obligation either to enter upon it or to continue at it, and conversely the respondents were free to dispense with his assistance at any time they saw fit. It was, therefore, a situation in which the tenant, having an interest in the completion of the work, gratuitously gave his services to the landlord on the latter's request, and the inquiry is, what legal incidents attached to the relation so entered upon?

The assumption of certain risks by the workman, including that of the negligence of fellow servants, is deemed to result from the presumed intention of the parties; and as the question here is that of such assumption, it must be determined in the same manner. Being free to continue or not as he pleased, and being concerned with his own interest, it is, I think, impossible to presume that he can be taken to have agreed to accept the risk of the negligence of the others engaged on the work. If the terms had been spelled out in detail, can we imagine the tenant; in such a position, doing so? I think not. The work was entirely that of the landlord; the tenant approached it as an independent party conferring a benefit that had been sought; he was giving his service but not surrendering himself as an employee. His own interest led him to do the first, but it held him from the second.

That was the view taken by the Court of Appeal in *Hayward* v. *Drury Lane Theatre* (1). In that case, a dancer willing to be employed and the company interested in her ability, but neither being under any obligation, entered into and took part in a rehearsal. In the course of it, she was told to stand on a staircase. It was defective and fell and she was injured. The Court reviewing the cases of *Degg* v. *Midland Railway* (2), in which the person injured was a volunteer; *Holmes* v. *Northeastern Railway Company* (3), where the victim was a consignee who undertook to help to move the car containing his goods to a place

(1) [1917] 2 K.B. 899.
(2) (1857) 1 H. & N. 773.
(3) (1869) L.R. 4 Ex. 254, and (1871) 6 Ex. 123.

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of delivery; and *Johnson* v. *Lindsay* (1); held her not to be a volunteer and found that her participation had not involved an acceptance of the risk of negligence of the employees with whom she was associated. In *Johnson* v. *Lindsay,* Lord Herschel stated the position of volunteers thus:— "These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the definition of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of *A* may for a time or on a particular occasion be the servant of *B*, and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer. * * * The exemption can never be applicable when there is no relation between the parties from which such an undertaking can be implied. * * * I do not see how such an obligation can arise otherwise than from some contractual relation." Applying the principles of these cases to the circumstances here, the landlord becomes liable to the tenant for the negligence of her agent, the husband.

The appeal must, therefore, be allowed and the judgment at trial restored with costs here and in the Court of Appeal.

Appeal allowed and judgment at trial restored with costs here and in the Court of Appeal.

Solicitors for the Appellant: *Kerr and Kerr.*

Solicitors for the Respondent: *Clunis and Kee.*

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(1) [1891] A.C. 371 at 377.