THE WESTERN CANADA POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

PETER VELASKY (PLAINTIFF) ..... RESPONDENT.

1914

*Feb. 9, 10.
*Feb. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Dangerous works—Electric transmission line—Independent contractor — Master and servant — Strengthening poles — Stringing wires—Injury to linesman—Risk of Employment—Responsibility of owner.

The company having become aware that the poles for an electric transmission line erected by them had become insecure employed an independent contractor to strengthen the poles and to string wires upon them. The plaintiff, a linesman employed by the contractor, ascended a pole before it had been secured, without first having ascertained that it was safe for him to do so, in order to string wires upon it. The pole fell while he was at work upon it and he was injured.

Held, reversing the judgment appealed from (18 B.C. Rep. 407) that the accident was the result of the default of the contractor in relation to the work he had undertaken in regard to the strengthening of the poles and, consequently, the owners of the transmission line were not liable for the damages sustained by the plaintiff. *Marney* v. *Scott* ((1899) 1 Q.B. 986); *Indermaur* v. *Dames* (L.R. 2 C.P. 311), and *Lucy* v. *Bawden* ((1914) 2 K.B. 318), referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming, by an equal division of opinion, the judgment of Murphy J., at the trial, by which, upon the findings of the jury, judgment had been entered in favour of the plaintiff for $3,200, with costs.

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

(1) 18 B.C. Rep. 407.

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The circumstances of the case are sufficiently stated in the head-note.

Sir C. H. Tupper K.C. for the appellants.
M. A. Macdonald, for the respondent.

THE CHIEF JUSTICE.—In this case the relation of master and servant did not exist between the plaintiff and the defendants.

Lockwood, in whose service the plaintiff was at the time of the accident, was an independent contractor, and to his collateral negligence the injury to the plaintiff is attributable. It is quite true that the contract with the company was to string wires on the poles, and, if limited to that, a great deal might be said in favour of the view urged upon us so strenuously at the argument that the company would be liable as owner in occupation of the pole-line for having invited the workman to enter upon unsafe premises. But here, by his contract, Lockwood, the plaintiff's employer, assumed a duty to examine the poles and to make them safe before attempting to string wires upon them and to his breach of that duty the accident is attributable.

In such circumstances there is no recourse against the company appellant, and the appeal should be allowed with costs.

DAVIES J.—I concur in the allowance of this appeal with costs for the reasons stated by Mr. Justice Anglin.

IDINGTON J.—The respondent was not in any sense the servant of the appellant and hence all that has been said relative to care of him as a workman is beside the question.

There was, in fact, no contractual relation of any kind between appellant and respondent.

Appellant never invited the respondent to the place he calls a dangerous place.

Not until the respondent's master had so fixed the pole that wires could be properly strung upon it was there any permission, much less an invitation, to respondent to touch the pole.

And the respondent as an expert linesman, must have known that when he attempted to string wires on such a pole he was doing that which was sure to prove useless or worse, and that he ought, instead of trying to do so, to have pointed that out to his master.

I need not dwell on the case at length. I fail to see the slightest resemblance in all this to the invitation to stevedores, which was in question in *Marney* v. *Scott*(1), so much relied upon.

The appeal should be allowed with costs.

DUFF J.—The facts of this case can be stated in a sentence or two. The appellants are an electric power company and, in 1911, they erected a line of poles to support their transmission wires, but, before the wires were strung, the appellants became aware that some of the poles were not securely set and they, thereupon, entered into a contract with one Lockwood by which Lockwood agreed both to secure the poles and put the wires in place. The respondent was a linesman in Lockwood's employ and, while engaged in the work of wiring, was thrown to the ground and injured owing to the instability of the pole on which he was working at the time.

The question on this appeal is whether the appellants are answerable for the condition of the pole.

(1) [1899] 1 Q.B. 986.

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The respondent says they are answerable on the principle in *Indermaur* v. *Dames*(1). I think this contention cannot be sustained and that the appeal ought to be allowed.

The principle invoked may be stated, I think, in the language of Mr. Justice Atkin, in delivering judgment in *Lucy* v. *Bawden*(2). At page 322, he says:—

> This obligation was expressed in *Indermaur* v. *Dames*(3), *per* Willes J.: "And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger, which he knows or ought to know." Those words are adopted in the judgment of the Exchequer Chamber(4). In *Smith* v. *London and St. Katharine Dock Co.*(5), where the defendants were sued for providing a gangway from dock to ships insufficiently secured whereby the plaintiff, who had business on the ship, was damaged, Bovill C.J. said: "The case then comes within the principle that persons inviting others on to their premises are answerable for anything in the nature of a trap." Then Byles J. said: "there was a duty, on the part of the defendants to the plaintiff, not to permit the gangway to be insecure without warning the plaintiff of it."

And then again, at page 325, he refers to the obligation resting upon the occupier under such circumstances as "an obligation to avoid traps."

It seems to me that this principle can have no application whatever in the circumstances of this case. Where a contractor is engaged, as here, to make safe something that is known to be unsafe, it would be absurd to suggest that, on this principle, the employees of the contractor could hold the occupier responsible for the very condition of affairs which they are employed in rectifying. The principle invoked can have no application where the existence of the danger complained of is one of the ordinary risks

(1) L.R. 2 C.P. 311.
(2) [1914] 2 K.B. 318.
(3) L.R. 1 C.P. 274, at p. 288.
(4) L.R. 2 C.P. 311, at p. 313.
(5) L.R. 3 C.P. 326.

of the particular business which the invitee comes on the premises to do.

Nor can the invitee (whose only invitation is that implied in the fact that he is engaged in the service of a contractor employed by the person who is sought to be charged as occupier) be said to be exposed to a trap for which the occupier is responsible within this principle where the danger arises from the negligent default of his own employer in relation to that which he has contracted to do. The implied invitation must be taken to be given and accepted upon the footing that the invitee knows as well as the occupier the risk of negligence by his own employer or his own fellow-servants, and, as between himself and the occupier, he must be taken to have assumed that risk.

On this short ground I think the appeal should be allowed and the action dismissed.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

The plaintiff while engaged as a linesman, employed by a contractor, one Lockwood, in stringing wires, was injured by falling with a pole of the defendant company, which was insecurely planted.

The ground on which he seeks to hold the defendants liable to him is that he went upon their property to string wires by their invitation and that they owed him the duty of having their poles in such a condition that he could safely ascend them for that purpose.

The uncontradicted evidence establishes — and it was admitted at bar — that it was part of Lockwood's undertaking that the defendants, before stringing the wires, should strengthen certain poles, from which the supporting earth had been washed away, one of them

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being that with which the plaintiff fell. Lockwood or his employees failed to do this, and the plaintiff's misfortune was due to that failure. The case was not one of an unqualified invitation to the workmen of Lockwood to come upon the defendant's premises involving a representation or holding out on their part that those premises were safe for the purpose for which the invitation was given. The only invitation to the plaintiff, as a workman of Lockwood, was to ascend the pole in question after it had been properly strengthened or secured. Taking this view of the case, two of the learned judges of the Court of Appeal would have set aside the verdict for the plaintiff rendered at the trial. I concur in that conclusion. In the circumstances the defendants owed no duty to the plaintiff in respect of the security of the pole from which he fell.

BRODEUR J.—Velasky, the respondent, was injured by falling from a pole of the appellant company. He was then in the employ of an independent contractor who had undertaken to strengthen that pole. He was entirely under the control of that contractor.

The pole to be made use of by Velasky was unsafe to the knowledge of his master, the contractor, since he had undertaken to repair it. That contractor was then bound to give notice of that fact to his employee. He neglected to do so.

No negligence has been established against the appellants.

When a person employs an independent contractor to do a specified work he does not thereby render himself liable for injuries caused by the sole negligence of such contractor.

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The action should have been dismissed.

This appeal should be allowed with costs of this court and of the courts below.

Appeal allowed with costs.

Solicitors for the appellants: *Tupper, Kitto & Wightman.*

Solicitors for the respondent: *Russell, Mowat, Hancox & Farris.*