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*Feb. 10.
*Feb. 23.

THE VANCOUVER POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES HOUNSOME (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Tramway company—Construction of works—Independent contractor—Dangerous system—Injury to property—Negligence—Exercise of statutory authority — Correlative duty — Damages — Special release.

A company with statutory authority to construct a tramway acquired a strip of plaintiff's land for its right-of-way, the vendor granting a release for all damages which he might sustain by reason of the construction and operation of the tramway and the severance of his farm. The company let the work to a contractor who, in the construction of the road-bed blasted away a hillside by a method known as "top-lofting" thereby throwing large quantities of rock outside the right-of-way and upon plaintiff's adjoining lands in such a manner as to interfere with his use thereof. This injury could have been avoided by proper precautions.

Held, affirming the judgment appealed from (18 B.C. Rep. 81), Fitzpatrick C.J. *hesitante*, that the company was responsible in damages for the omission of their contractor to take precautions necessary to prevent his blasting operations producing the injury to the plaintiff's lands.

Held, further, that the general language of the release should be so construed as to restrict it to the matters in regard to which it had been granted with reference to the proper exercise of the powers of the company to construct the tramway in question, and that it could not apply to injuries caused through negligence.

Per Duff J. — Where statutory powers respecting the construction of works are being exercised through an independent contractor, the correlative obligation of the beneficiaries of those powers to see that due care is taken to avoid unnecessary injurious consequences to the property of other persons is not discharged when their contractor fails to perform that duty, and they are responsible accordingly. *Hardaker* v. *Idle District Council* ((1896) 1 Q.B. 335), and *Robinson* v. *Beaconsfield Rural Council* ((1911) 2 Ch. 188), referred to.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing in part the judgment of Morrison J., at the trial, and maintaining the plaintiff's claim in so far as it concerned the damages for injury to his lands.

In the circumstances mentioned in the head-note, the learned trial judge dismissed the plaintiff's action in respect of the damages claimed for injury to his lands occasioned by the blasting away of the hillside for the purpose of constructing the company's road-bed on the ground that the injuries were not caused by the company, but were the consequences of the methods followed by an independent contractor. By the judgment now appealed from, the Court of Appeal for British Columbia reversed this decision and maintained the plaintiff's claim for the damages in question.

Ewart K.C. for the appellants.
M. A. Macdonald for the respondent.

THE CHIEF JUSTICE.—I do not wish to enter a formal dissent, because I am not satisfied that, on the pleadings, the point with which I am concerned was properly raised. But I must say that the conclusion I reached at the argument and in which a careful examination of the evidence confirms me is that this is a case of collateral negligence by a contractor and that, if the work of blasting had been carefully proceeded with, no injurious consequences would have resulted to the adjoining proprietor.

It is common knowledge that, in this country, railways and other large undertakings are built by con-

(1) 18 B.C. Rep. 81.

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tractors, and that the work of excavation and blasting in connection therewith is carried on over large areas and in thickly populated centres with little inconvenience; such work cannot now be considered *per se* dangerous or of such a character that injury to the property of adjoining owners must be expected to arise in the natural course of its execution. I cannot find in the special circumstances of this case anything to justify the conclusion that the work was one from which mischievous consequences must arise unless preventive measures were adopted, and there was, therefore, no duty on the company to take special precautions. If, as is practically admitted here, there were two ways of carrying on this piece of work, one perfectly safe and the other dangerous, and, if the contractor chose to adopt the latter, the company is not responsible for the consequences.

For the general rule as to the liability of a contractor, see Halsbury, Laws of England, vol. 3, page 315, No. 669, para. 2.

DAVIES J.—I concur in dismissing this appeal.

IDINGTON J.—I think this appeal should be dismissed with costs.

The principle of law illustrated by the cases cited in the judgment of Mr. Justice Irving in the Court of Appeal and applied herein by the learned judge and that court must prevail. Whether stated too broadly or not in any particular case does not dispose of the existence of the principle relied upon or the possibility of its application to any given case. And it seems applicable to the facts in this case. The appellant offered no excuse and probably had none to offer for its conduct in ignoring the principle involved.

The economies involved in the operation of the contractors do not appear to me to have been as alleged only for their own benefit.

The fair inference, in the absence of any evidence to modify such inference, is that it was absolutely necessary for these contractors to adopt the cheap and reckless methods used to save themselves from loss when working within what was possible in that regard, on the basis of prices promised by appellant. Else why should they incur the responsibility for what they as well as appellant might have been called upon to answer for ?

Primâ facie, at least, it is to be so presumed or we should have heard pretty loudly from appellant to the contrary, unless the nature of contractors or human nature, has recently changed.

The condition of things and of work to be done or dealt with by appellant being dangerous the appellant was bound to take some precaution, but apparently took none.

DUFF J.—The appellant company is a company incorporated under the provisions of the British Columbia "Water-Clauses Act," ch. 190, R.S.B.C., 1897, having power *inter alia* to construct certain tramways. The course of one of these tramways being through the respondent's lands, the strip required by the appellant for its right-of-way was purchased from the respondent in June, 1910. At the locality in question the line follows the side of a hill and the construction of the road-bed necessitated the blasting out of the rock of which the hill is formed through the whole width of the right-of-way. The result of this operation as conducted (by the contractor to whom the work

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had been let) was that large quantities of rock were thrown upon the plaintiff's property in such a way as to constitute a substantial interference with his enjoyment of it. For this the court below has held the appellant company to be responsible and assessed the damages at $500.

There are two questions: 1st. Was the appellant company responsible for the wrongful act of its contractor? And 2ndly. Is a certain release contained in the deed of conveyance of June, 1910, from the respondent to the appellant company an answer to the respondent's claim?

The points of fact material to the consideration of the first question are: that in letting the contract for the construction of the road-bed the appellant company must have contemplated the use of high explosives for breaking up the rock and (owing to the fact that the blasting was to be done on a hillside immediately adjacent to the respondent's land) they must have known that in the ordinary course of things, unless proper precautions should be taken to prevent it, large quantities of rock would be thrown, as in fact happened, upon the respondent's land. It is not disputed, on the other hand, that by the exercise of proper care the contractors could have avoided the injurious consequences from which the respondent suffered. In these circumstances I can entertain no doubt that the court below rightly held the appellant company answerable for those consequences.

Under the provisions of the "Water-Clauses Consolidation Act" the appellant company had authority to construct and work this tramway. It was entitled, therefore, to make use of all necessary and reasonable measures to accomplish that object. But in

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doing so it was under a duty to exercise all proper care in order to avoid doing harm to others in exercising the powers conferred upon it. The company was entitled, of course, to make use of explosives in effecting the necessary excavations for the construction of its right-of-way, and in doing so, as it was acting under statutory authority, it would escape the somewhat stringent rule (in *Rylands* v. *Fletcher*(1)) which, in the absence of such authority, would have determined its responsibility for any injurious consequences arising from the use of such agencies. But while the legislative authority under which it proceeded protects it from the more rigorous rule, there arises out of the grant of that authority a correlative duty which is to employ all proper means and to take all proper care to see that, in the exercise of its powers, it does no unnecessary harm to the property of third persons. In the present case the company was exercising its powers not through its own servants but through the contractors whom it employed to construct its road-bed. That it may properly do; but it does not thereby escape responsibility for the performance of its own duty, the burden of which it necessarily undertakes when it puts in exercise the authority the legislature has conferred upon it. The beneficiary of statutory authority, such as a railway company, cannot appropriate the benefit of the powers with which the legislature has invested it without at the same time assuming full responsibility for the performance of the obligations by which its right to exercise those powers is conditioned. This is very clear law, and there ought to be no necessity for citing authority in support of it. The observations of Lindley L.J., how-

(1) L.R. 3 H.L. 330

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ever, in *Hardaker* v. *Idle District Council*(1), at pages 340 and 342, are so apt that I cannot forbear quoting them verbatim:—

> The powers conferred by the "Public Health Act, 1875," on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves, *i.e.*, by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. This principle lies at the root of the modern decisions on the subject.
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> I pass now to consider the duty of the district council in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under; this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all.

See also *Robinson* v. *Beaconsfield Rural District Council*(2).

That the contractors were exercising the statutory powers of the power company cannot be disputable. Conceive an action brought against them to recover damages for injury caused by the use of dynamite upon this particular section of the line. They could not be successfully charged with responsibility under

(1) [1896] 1 Q.B. 335. (2) [1911] 2 Ch. 188.

the rule in *Rylands* v. *Fletcher* (1); the answer would be that they were exercising statutory powers and were, consequently, only chargeable for negligence under the rule in *Dumphy* v. *Montreal Light, Heat and Power Co.* (2). The power company and the contractors must be presumed to have settled the terms of their bargain on the footing that the contractors, in the executing of their contract, would be entitled to all the protection afforded them by the legislative authority under which the work was being carried out.

Sufficient has been said to dispose of the first point.

The second question ought also, I think, be answered in the sense contended for by the respondent. The words in which the release upon which the appellant company relies are not apt to cover, that is to say, they do not necessarily cover, claims based upon a charge of negligence against the company. They do, doubtless, cover all claims for compensation in respect of the loss suffered by reason of the proper exercise of the appellant company's statutory powers in respect of the construction or working of its tramway. But there is abundance of authority for holding that such general words do not afford an answer to a claim based upon such a breach of duty as that in respect of which the courts below held the appellant company to be liable.

I think the appeal should be dismissed with costs.

ANGLIN J.—The Court of Appeal of British Columbia, reversing Morrison J., awarded to the plaintiff $500 as damages for injury done to his land by contractors, who threw large quantities of rock upon it

(1) L.R. 3 H.L. 330. (2) [1907] A.C. 454.

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while blasting, in the course of constructing the defendant's railway. The defendants seek to have this judgment set aside on two grounds, viz., that these damages are covered by a release given them by the plaintiff, and that what is complained of was a deliberate, wilful and wanton act of independent contractors for which the defendants are not responsible.

The defendants acquired a strip of land through the plaintiff's farm for their right-of-way. The release, which is found in the conveyance of this strip, was given for damages to which the plaintiff might be or become entitled by reason of the taking of this land, the severance of his farm and the construction and operation of the defendant's railway in the ordinary manner and with due care. The general language in which it is couched must be given a construction which will restrict its application to the subject-matter that the parties had in mind when it was executed. Negligence, whether in operation or construction, was something they did not contemplate and against the consequences of which they did not intend to provide. The release does not seem to have been relied upon in the provincial courts as affecting this cause of action. This ground of appeal, in my opinion, fails.

On the other branch the defendant is without a finding that what is complained of was a deliberate, wilful and wanton act of the contractors. And that is not surprising, because, so far as the record discloses, this contention was not made at the trial. It is very questionable whether the evidence sufficiently supports it. Had this defence been pleaded and an issue upon it clearly raised, it is impossible to say what evidence might have been adduced by the plaintiff to

meet it. He might have shewn by the contractors that what they did was in the ordinary course of blasting operations such as they had undertaken and was not, as now charged, a wanton trespass; or he might have established that the contract under which the work was done contemplated its being done in the manner in which it was. No reference is made to this point in the judgments delivered in the Court of Appeal, which proceeded on the ground that the defendants are responsible for the failure of their contractors to take proper precautions to avoid the doing of injury, which, unless such precautions were taken, was likely to be caused in the execution of the inherently dangerous work that they undertook. If the defendants proposed to contend that this case does not fall within the well-known rule which holds proprietors responsible under such circumstances, because the injury was ascribable not to mere negligent omission, but to a wilful and wanton act of commission by the contractors, they should have alleged that fact specifically in their plea and should have clearly taken that position at the trial. They appear to have done neither. It is too late now to set up such an answer to the plaintiff's claim.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*
Solicitors for the respondent: *Ogilvie & Brown.*