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CONSOLIDATED MINING AND SMELTING COMPANY OF CANADA (DEFENDANT) ..... } APPELLANT;

*Oct. 18.
*Dec. 21.

AND

WILLIAM MURDOCH AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Negligence of servant—Liability of master—Scope of employment—Failure to extinguish fire started in wilderness for cooking purposes—Contract providing that the servant was to board himself—Mining.

The respondents had a license to cut timber on certain lands in British Columbia. The appellant company had also a license to prospect for phosphate on the same lands and employed two brothers, John and Robert Ewan, as members of one of their prospecting parties. Prior to May, 1926, the Ewan brothers were each receiving a wage of five dollars for an eight hour day and were paying the appellant one dollar per day for their meals. In May, 1926, they became dissatisfied with the boarding arrangements at the appellant's camp and at their request they were permitted to "board themselves." On June 4, they were directed to work at a certain place about three miles distant from the camp; and, on arriving there, they pitched their tent and built a small fire-place, in which, each morning and evening, they kindled a fire to cook their food. On June 7, an engineer of the company directed the Ewan brothers to commence work the next morning at a trench two thousand feet further on. On the morning of June 8, about 6.15 a.m., John Ewan kindled a fire to boil the breakfast coffee; and then he and his brother, after pouring water over the fire, left the place. Some time between ten o'clock and noon, smoke was observed in the vicinity of the place where the Ewan's tent had stood; and, before any one could reach the spot, fire overran the lands on which the respondents had the licence to cut timber and burned not only the standing timber but also a quantity of posts and poles. The respondents brought this action to recover damages.

Held that the appellant cannot be held liable on the ground that the Ewan brothers were acting in the course of their employment when they lighted the fire which escaped and did damage to the respondent's property, it having been shown that the lighting of that fire was an act which they were under no contractual obligation to perform as a duty to their employer, or which their employer had ordered them to do. Although their contract with the appellant called upon them to board themselves, this did not constitute a contractual obligation on their part as a duty to the appellant to cook their meals. In cooking their food, these employees were doing something for themselves rather than discharging a duty towards the appellant.

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

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Held, also, that the appellant was not liable (under the rule laid down in *Rylands* v. *Fletcher* (L.R. 3 H.L. 330)), because, although it was by virtue of its licence an occupier of the land from which the fire escaped, that escape was due not to any act or negligence of the appellant or anyone under its control, but was due to the negligence of the Ewan brothers at a time when their negligence must be deemed the negligence of a stranger.

Judgment of the Court of Appeal ([1928] W.W.R. 578) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Morrison J., and maintaining the respondents' action in damages.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

W. N. Tilley K.C. and *A. G. Cameron* for the appellant.

J. W. de B. Farris K.C. and *A. I. Fisher K.C.* for the respondents.

The judgment of the court was delivered by

LAMONT J.—The first question in this appeal is: Were the appellant's workmen, John and Robert Ewan, acting in the course of their employment when, on the morning of June 8, 1926, they kindled a fire which escaped and destroyed the respondents' property.

The material facts are: The respondents had a license to cut timber on certain lands in British Columbia covered by timber license 141, and the appellant had a license to prospect for phosphate on the same lands. John and Robert Ewan were employed by the appellant and were members of one of their prospecting parties. Prior to May, 1926, according to the terms of their employment, the Ewan brothers were each receiving a wage of five dollars for an eight hour day, and were paying the appellant one dollar per day for their meals. In May, 1926, they became dissatisfied with the camp arrangements and asked Burgess, one of the engineers in charge, if they might work by themselves. As the Ewans were good men and the appellant desired to keep them in its employ, Burgess agreed to their request. It was arranged that instead of taking their meals

(1) [1928] 1 W.W.R. 578.

in the appellant's dining tent, they would thereafter board themselves. To assist them the appellant loaned them a tent, a pot and a frying pan. Although they had a right to obtain their food from any person from whom they could buy it, these workmen made an arrangement with the appellant, which purchased its supplies wholesale, to supply them with the provisions they required for 50 cents a day each. By cooking their own meals the Ewans were thus saving 50 cents a day. At this time the prospecting party was working in the vicinity of Lizzard Creek, at which place the camp was situated. On June 4, Burgess directed the Ewan brothers to go to trench 50, some two or three miles distant, and cut a trail along it. This trench was located between Bean Creek and Hartley Creek. On arriving there the Ewans made their camp and pitched their tent close to Bean Creek. They built a small fire-place in which each morning and evening they kindled a fire to boil their coffee and fry their bacon. On June 7, Telfer, another engineer, went to the Ewans' camp and directed them to commence work next day on trench 49 on Baldry Creek, which was about two thousand feet distant from trench 50. On the morning of June 8, about 6.15 a.m., John Ewan kindled a fire in the fire-place and boiled the breakfast coffee. After breakfast, he says, he and his brother extinguished the fire by pouring water over it. They then went to trench 49 taking with them their tent and a portion of their camp equipment. Some time between ten o'clock and noon smoke was observed in the vicinity of the place where the Ewans' tent had stood. Before anyone reached the spot a fire had got under way and, fanned by a strong wind, overran the lands on which the respondents had a license to cut timber and burned not only the standing timber but also a quantity of posts and poles belonging to the respondents. To recover damages for the loss they suffered on account of this fire, the respondents brought this action. In their statement of claim they allege that the fire was caused by the negligence of the appellant's workmen in the course of their employment, or alternatively, that the appellant's workmen set out a fire on the appellant's property in the midst of inflammable material and did not totally extinguish it but allowed it to spread and damage the respondents' property. To this claim the appellant set

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up two defences: first, that the fire in question was not kindled by its workmen and, secondly, that if it was, its workmen, in so kindling it, were not acting in the course of their employment.

The trial judge found in favour of the respondents, holding that the fire which destroyed the respondents' property had its origin in the fire kindled by the Ewan brothers for the purpose of cooking their meals, and that at the time it was so kindled they were acting in the course of their employment. This judgment was affirmed by the Court of Appeal (McPhillips J.A., dissenting). The defendant now appeals to this court.

Knowing the jurisprudence of this court to be against interference with the concurrent findings of two courts on a pure question of fact unless satisfied that the conclusion reached was clearly wrong, Mr. W. N. Tilley, K.C., who appeared for the appellant, confined his argument to the question of agency.

The Ewans were employed to cut trails and strip phosphate veins with tools provided by the appellant, for eight hours a day. For this they were to receive a daily wage of $5. The usual time for commencing work was eight o'clock in the morning. Having, by the terms of their employment, to board themselves, the appellant was under no obligation to cook their meals or to see that they obtained them. It was argued, however, that as eating was a necessary operation, the preparation of their meals was incidental to their employment and that therefore, while engaged in preparing their meals the workmen were acting in the course of their employment. The acts of a workman which come within the scope of his employment are in general determined by the terms of the contract, including the terms implied as well as those expressed, and many authorities were cited to us in which the terms to be implied had received judicial consideration. A number of these authorities were discussed in *St. Helens Colliery Company* v. *Hewitson* (1). In that case Lord Atkinson, at page 71, suggested the following test:

> A workman is acting in the course of his employment when he is engaged "in doing something he was employed to do." Or what is, in other and I think better words, in effect the same thing—namely, when he is

(1) [1924] A.C. 59.

doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment" as here used covers and includes things belonging to or arising out of it.

In the same case Lord Wrenbury, at page 92, said:

A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed the duty to obey it.

In *Parker* v. *Black Rock (Owners)* (1), the contract of employment contained a clause "crew to provide their own provisions." A fireman belonging to the steamship went ashore, with leave, to buy provisions for himself. When he endeavoured to return to the ship he fell off the pier where the ship was supposed to be (though in fact she had been moved) and was drowned. It was held that his widow could not recover as the deceased owed no duty to his employer to go ashore to buy provisions. In his judgment, at page 730, Lord Sumner, in commenting on the clause "crew to provide their own provisions," said:

I think it does not constitute any promise by the seamen severally to the master of the vessel that they would as a duty towards him provide themselves with their own provisions. Could he have recovered damages if one of them had provided no provisions or not enough? Could he have dismissed one of them because he preferred to be abstemious instead of providing himself amply with food? The answer in each case must be No.

And, at page 733, Lord Wrenbury expressed his opinion as follows:—

But then it was said that, contract or no contract, at any rate under the circumstances the man was bound to get provision in order to sustain himself during the next journey of the vessel, and that it was a duty which he owed, and he was performing that duty. It seems to me that from the stipulation that he was to get his own provisions this consequence ensued—that the master was bound to give him reasonable facilities from time to time for going to buy them, but it does not follow that when he was buying them he was discharging any duty towards his employer. The man was doing an act which under the circumstances he had to do, but he was not doing an act which he owed to his employer the duty to do.

Another instructive case in point is *Philbin* v. *Hayes* (2). In that case the contract of employment provided that the plaintiff should be paid by the hour, his hours of work being from 7 a.m. to 5.30 p.m. It also provided that the employer, for the sum of two pence per day, would furnish a hut in which the plaintiff could live and sleep. He was

(1) [1915] A.C. 725. (2) (1918) 87 L.J.K.B. 779.

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not, by the contract, bound to take the hut, but, as it was difficult to obtain other sleeping accommodation, a number of workmen, including the plaintiff, took huts. While the plaintiff was asleep in the hut a strong wind blew it down and the plaintiff was injured. It was held that the accident did not occur in the course of his employment. In his judgment Swinfen Eady J., at page 782, said:—

> This man was not living in the hut upon any term of contract for his employer's benefit that he should be there. He was given the choice, and was as free as possible to come and go. Counsel for the applicant urged that there was a difficulty in obtaining lodging in the village. That I quite accept, and, of course, the man could only obtain such lodging as was available, but if he could have obtained accommodation elsewhere suitable to his means, he was perfectly free to avail himself of it. The employer had no right to make him live in the hut.

and Neville J., said:—

> It seems to me impossible to say that when the man was in the hut, sitting there or resting there, he was doing anything within the scope of his employment. I think he was no more doing something within the scope of his employment while sleeping in this hut than he would be sleeping in a lodging. Therefore, it is impossible to say that the accident happened in the course of the employment.

In view of these and other authorities to which we were referred, I am of opinion that before it can be held that the Ewan brothers were in the course of their employment when they lighted the fire which escaped and did damage to the respondents' property, it must be shewn that the lighting of that fire was an act which they were under a contractual obligation to perform as a duty to their employer, or which their employer had ordered them to do. The appellant in this case did not order its workmen to light a fire nor were the workmen under any contractual obligation to do so. Their contract called upon them to board themselves which, as Lord Sumner and Lord Wrenbury, in the passages above quoted, point out, did not constitute a contractual obligation on their part as a duty to the appellant to cook their meals. It was necessary for them to have food if they wished to be in physical condition to do their work, just as it was necessary for them to wear stout boots while performing it, but in securing these necessary things they were doing something for themselves rather than discharging a duty towards the appellant.

If, instead of cooking their own food, the Ewan brothers had, without loss of time to their employers, gone elsewhere for their meals the appellant could not have ob-

jected thereto for it was none of its concern. Once the workmen had finished their eight hours' work in any one day they were, it seems to me, at liberty, so far as the appellant was concerned, to go where they wished and to do what they pleased until they commenced their next day's work.

I am, therefore, of the opinion that when they lighted the fire which escaped and damaged the respondents' property, the Ewan brothers were not acting in the course of their employment.

For the respondents it was argued that even if the Ewan brothers were not acting in the course of their employment in lighting the fire in question, yet the appellant should be held liable because it was the occupier of the area covered by timber license 141, and a fire having arisen thereon the appellant failed to prevent its escape.

At the trial this ground does not appear to have been urged and it was not shewn who owned the soil covered by the timber license. It was, however, established that both appellants and respondents were licensees entitled to be in possession of the area for the purpose of their respective operations. The fact that the respondents were licensees only, would not, in my opinion, prevent them, if otherwise entitled, from recovering for the loss they suffered as the result of fire escaping from the land occupied by the appellant. (*Charing Cross Electric Supply Company* v. *Hydraulic Power Company* (1)). It was also established that, although the Ewan brothers were not in the course of their employment when they kindled fires with which to cook their meals, the appellant knew they had pitched their tent close to Bean Creek within the area covered by the timber license, and knew also that morning and evening they kindled a fire; and yet it raised no objection whatever either to their occupation of the camp site or to the use of fire for cooking purposes. Knowledge on the part of the appellant of such acts without objecting thereto may be evidence of a tacit acquiescence therein which would thereafter prevent the appellant from treating these workmen as trespassers. *Lowery* v. *Walker* (2). But passive acquiescence while it might as against the appellant give the

(1) [1914] 3 K.B. 772. (2) [1911] A.C. 10.

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workmen the status of bare licensees, would subject the appellant to no other obligation.

In this case I am not sure that the Ewan brothers can be considered even bare licensees of the appellant. Subsections 2 and 3 of section 95 of the *Forest Act* (R.S.B.C., 1924, c. 93), provide that, subject to the observance of all obligations and precautions imposed by the Act, or the Regulations, a person may set out, start or kindle a fire for, *inter alia*, " cooking or preparing food," but no person shall do so for that purpose in any forest or wood-land without first obtaining a written permit authorizing the kindling of such fire, and every person kindling a fire pursuant to such permit " shall totally extinguish the fire before leaving the vicinity of the fire." It was not suggested by the respondents that the Ewan brothers did not have a permit to light a fire to cook their food, and, in the absence of any such question being raised, I think it must be assumed that they complied with that requirement of the law. Having a permit to light a fire, where they did, they would not require any license from the appellant to justify their occupation of the camp site or the kindling of the fire. They were totally independent of the appellant which had no control over them until they commenced to work.

Assuming however that they were bare licensees of the appellant, the question we have to determine on this branch of the case is the extent of the liability of an occupier of land towards an adjoining proprietor for damage occasioned by fire escaping from the occupied land through no fault of the occupier but which was kindled thereon by a bare licensee, and allowed to escape by reason of the licensee's negligence.

At common law all householders were under obligation to keep their fires from damaging their neighbour's property. Hence if a fire arose in a house by the act of a servant or guest and damage was done to the house of another, the householder was liable. He could only escape liability if he could shew that the fire originated from the act of a stranger. Holdsworth's History of English Law, vol. 3, p. 385.

By a statute passed in the reign of Queen Anne (6 Anne, c. 31, s. 6) the rigour of the common law was mitigated and thereafter an owner was not liable in cases where the

fire "accidentally began." And by a subsequent statute (14 Geo. III, c. 27, s. 86) this provision was made to apply to fires occurring in the fields as well as those occurring in a building. The reason for holding an occupier liable for a fire started by a servant or agent is stated by Littledale J. in *Laugher* v. *Pointer* (1), as follows:—

> The injuries done upon lands or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do any mischief to others.

Over the acts of persons whom he brings upon his land an occupier is supposed to exercise control.

The common law was based upon the broad maxim "*sic utere tuo ut alienum non laedas*," which found expression in the rule laid down in *Rylands* v. *Fletcher* (2), which may be formulated thus:—

> The occupier of land who brings and keeps upon it anything likely to do damage if it escapes, is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape, even if he has been guilty of no negligence.

Under this rule an occupier is liable not only where he causes, but also where he fails to prevent the escape from his land of the dangerous agency. Fire is a dangerous agency if not kept under control, and a person who has fire on his land must keep it under control at his peril. The rule, however, is subject to a number of exceptions. It is not applicable where the dangerous agency is brought on, or kept on the land of the occupier with the consent of the person damnified; nor, perhaps, where it escapes in consequence of an act of God, or *vis major*. Neither has it any application where the damage is caused by the act of a stranger or third person, whether such act be malicious or merely negligent. *Richards* v. *Lothian* (3); *Smith* v. *Grand Trunk Ry. Co.* (4).

Even in the case of a servant the rule has no application if the act of the servant, which caused the damage, is outside of his employment. But where the servant's act is done in the course of his employment and for his master's benefit the rule applies and the employer is liable not only where the act had not been authorized by the employer,

(1) 5 B. & C., 547, at p. 560.
(2) L.R. 3 H.L. 330.
(3) [1913] A.C. 263.
(4) (1926) 42 T.L.R. 391.

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but even if the servant has been expressly forbidden to do it. *Black* v. *Christ Church Financial Co.* (1).

In the old case of *Rich* v. *Basterfield* (2), the head-note reads as follows:—

> Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants,—such liability attaches only upon parties in actual possession.

In commenting on that case in *Barker* v. *Herbert* (3), Vaughan Williams L.J., says:

> The responsibility of the possessor of land as defined in that case would appear to be limited to cases where the injury has arisen from the acts of himself, or of his agents or servants, or those persons who, though not his agents or servants, are upon his premises by his permission, and are therefore under his control.

It is this control over the acts of those whom he brings or permits to come upon his land that differentiates the cases in which an occupier is held vicariously liable for such acts, from those cases in which he is held not liable for the acts of a stranger. In *Job Edwards Limited* v. *Birmingham* (4), Scrutton L.J., at page 355, states the cases in which an occupier will be held liable for a nuisance on his land which spreads and damages his neighbour's property. His language is as follows:—

> In my view it is clear that a landowner or occupier is liable to an action by a private persons damaged by a nuisance existing on or coming from his land: (1) if he or his servants or agents created the nuisance; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment; (3) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it.

The third of these classes has no application here, and the other two, it will be noted, are limited to persons over whose acts the occupier has control, or who, in creating the nuisance, are acting for the occupier's benefit. The appellant in the case at bar does not come within either of these classes. In lighting the fire which escaped and created a nuisance, the Ewan brothers were not acting for the appellant's benefit but solely for their own, and their act in lighting the fire must, as regards the appellant, be deemed the act of a stranger.

If a farmer sees a workman taking a short cut across his field to and from his work, and smoking as he goes, must

(1) [1894] A.C. 48.
(2) 136 E.R. 715.
(3) [1911] 2 K.B., at p. 638.
(4) [1924] 1 K.B. 341.

he forbid him to smoke on his premises on pain of being liable for damages in case the smoker, after lighting his pipe, throws down a lighted match which sets fire to the grass, spreads to the adjoining property and there occasions damage. I do not think the law goes so far. I am unable to see how an occupier can be said to bring a person upon his land simply because when he sees him there he takes no steps to put him off.

In *Williams* v. *Jones* (1), the plaintiff had gratuitously permitted the defendant to use his shed for the purpose of having a sign-board made therein. The defendant employed a carpenter to make the sign-board for him in the shed. Whilst at work making the sign-board the carpenter lighted his pipe with a shaving which he dropped setting fire to the shed with the result that it was totally destroyed. In an action by the plaintiff against the defendant for the loss sustained it was held that he could not recover because the carpenter, although he had leave and license to occupy the shed for the defendant's purpose, was not in the course of his employment in lighting his pipe as he did. Mr. Justice Blackburn and Mr. Justice Mellor dissented, but, as pointed out by Bankes L.J., in *Jefferson* v. *Derbyshire Farmers, Ltd.* (2), the judges in that case did not differ on any question of law but as to the proper inference to be drawn from the fact that the man lit his pipe while working at a sign-board.

In *Williams* v. *Jones* (1), the majority of the court were of opinion that the negligent act of the carpenter was unconnected with the work he was employed to do.

In *Whitmore's Limited* v. *Stanford* (3), Eve J., after quoting the rule in *Rylands* v. *Fletcher* (4), said:

> The rule so stated does not appear to me to extend to make the owner of land liable for consequences brought about by the collecting and impounding on his land, by another, of water, or any other dangerous element, not for the purposes of the owner of the land, but for the purposes of such other.

This statement of the law applies to the case before us: The Ewan brothers introduced to the land covered by the appellant's license, a dangerous element, not for the purposes of the appellant but for their own. They were not

(1) 3 H. & C. 602.
(2) [1921] 2 K.B. at p. 286.
(3) [1909] 1 Ch. D., 427 at p. 438.
(4) Q.R. 3 H.L. 330.

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there either by the command or invitation of the appellant, and the appellant, at the time they set out the fire which escaped, had no control over their acts. In my opinion, therefore, the respondents' action fails.

Counsel for the respondents referred us to the case of *Port Coquitlam* v. *Wilson* (1), as supporting the respondents' argument. That case is clearly distinguishable as the facts appearing therein bring it within the general rule that an employer is liable for the tortious act of his servant acting in the course of his employment. At page 247 of the report my brother Duff, whose judgment was concurred in by the Chief Justice and Anglin and Brodeur JJ., said:

> On the other hand it has been laid down that the occupier is not responsible for the fire brought about by the act of a servant who is doing something entirely outside his employment (*McKenzie* v. *McLeod* (2)); the theory apparently being that the act of the servant in such circumstances is the act of a "stranger."
>
> But here we have a servant who admittedly as servant occupies for his master and whose occupation is therefore his occupation and who moreover as incidental to his occupation has his master's authority to light fires.

Idington J. gave judgment to the same effect, while my brother Mignault, who dissented, did so not because of any difference of opinion as to the law but because he thought the proper inference from the facts established was that the employee was acting outside of his employment when he started the fire in question.

I would therefore allow the appeal, set aside the judgment below and enter judgment for the appellant, dismissing the action with costs in all courts.

Appeal allowed with costs.

Solicitor for the appellant: *R. C. Crowe.*

Solicitors for the respondents: *Lowe & Fisher.*

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(1) [1923] S.C.R. 235. (2) 10 Bing 285.