W. W. SALES LIMITED (DEFENDANT) ....APPELLANT; 1942

* May 18, 19.
* Oct. 6.

AND

THE CITY OF EDMONTON (PLAINTIFF) ..... RESPONDENT.

W. W. SALES LIMITED (DEFENDANT) ....APPELLANT;

AND

ARMSTRONG - COSANS LIMITED (PLAINTIFF) ..... RESPONDENT.

W. W. SALES LIMITED (DEFENDANT) ....APPELLANT;

AND

B. SHELDON'S LIMITED (PLAINTIFF) ..... RESPONDENT.

W. W. SALES LIMITED (DEFENDANT) ....APPELLANT;

AND

ROBERT ARKINSTALL (PLAINTIFF) ....RESPONDENT.

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

Master and servant—Negligence—Servant instructed to clean premises—Burning of debris by servant without specific instructions—Fire causing damages—Liability of employer—Whether servant's act within scope of employment—Breach of city by-law—Commission of alleged illegal act by servant.

Respondents sued for damages to their properties from a fire which they alleged was caused by the negligence of servants of the appellant company. The latter's manager ordered two of its servants to clean out the basement of its store and place the rubbish in an ash can outside the premises. The employees did this and then, without any special instructions in that regard, tried to burn the rubbish. The fire spread out of control and damaged the property of the respondents. The trial judge held that the evidence, as to the actions of one of the servants and as to the instructions given him and the other servant, showed that the former had ignited the fire in the can, that in doing so he was negligent, and that he was at the time acting within the scope of his employment. The judgment of the trial judge was affirmed by the appellate court.

Held, affirming the judgment appealed from ([1942] 1 W.W.R. 375), that the appellant company was liable for the damage caused by the fire.—

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The findings of fact by the trial judge have been accepted by the appellate court, and the evidence does not disclose anything which would justify a reversal of these judgments by this Court.—The servants were "not on a frolic of their own"; but they were in fact doing work, which was intended to be of service to their master and was in fact closely connected with acts which they were specifically instructed to do. The burning of the debris was, therefore, as a matter of fact, within the course of the servant's employment. *Lockhart* v. *Canadian Pacific Railway Co.* ([1941] S.C.R. 270) followed.—Also, in view of the finding of the trial judge, the appellant cannot succeed on the ground raised by it, that the act of lighting a fire at the place and under the circumstances in which it was lit was an illegal act, being in breach of certain city by-law and that, there being no express order given by the appellant to the servant to light the fire, no authority to light could be implied. *Dyer* v. *Munday* ([1895] 1 Q.B.D. 742) ref.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Howson J. (2) and maintaining the respondents' actions to recover damages for loss occasioned to them, through appellant's servants' alleged negligence, by reason of a fire which damaged their buildings and their contents.

George Steer K.C. for the appellant.

H. H. Parlee K.C. for the respondents.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

HUDSON J.—Buildings belonging to the several plaintiffs were damaged by fire and it was claimed in these actions that the fire originated through the negligence of the defendant's servants while in the course of their employment.

The action was tried before Mr. Justice Howson, who held the defendants liable, and this decision was unanimously affirmed in the court of appeal.

The facts are set out in the judgment of Mr. Justice Clarke in the court of appeal as follows:

> The Powell Block, owned by the city, occupied the easterly half of the block. The plaintiff Armstrong-Cosans Limited occupied the eastern part as a printing and publishing office, and the plaintiff Arkinstall occupied the westerly part as a motor car exchange, and the Sheldon block occupied the westerly half of the block, there being a lane between the two blocks. The defendant carried on a general merchandising business

(1) [1942] 1 W.W.R. 375; [1942] 1 D.L.R. 516.

(2) [1941] 2 W.W.R. 329; [1941] 3 D.L.R. 737.

on the northeast corner of the intersection of 97th street and 101st avenue about two city blocks from the Sheldon block, and had the south half of the basement of the Sheldon block rented for the storage of its surplus merchandise. The basement is entered from the lane at the east end thereof.

About three o'clock on the afternoon of January 13th, 1940, S. P. Wilson, who was president and manager of the defendant company, ordered Roy A. Eckstrom, one of the defendant's employees, to take with him another employee, William Fleming, and to go to the basement of the Sheldon block, and there clean up these premises rented by the defendant. Eckstrom is 22 or 23 years old, is a mail order clerk, and had been in the defendant's employment for four or five years. Fleming is a general utility man, about 17 years old, and had been employed by the defendant only a few months.

Across the lane from the rear entrance to the basement of the Sheldon block, and within two feet of the rear wall of the Powell building, stood a fifty-gallon steel oil drum which was used as an ash can by the tenants of the Powell building. Eckstrom and Fleming, as ordered, went to the basement of the Sheldon block and swept up the debris on the floor, which consisted of paper, straw, dust and pieces of wooden boxes. They carried this debris into the lane and piled it in the said ash can. About four o'clock p.m., a fire occurred which consumed a considerable portion of the Powell building. Shortly before four o'clock the contents of this oil drum were burning, and the blaze reached three or four feet above the top of the drum. A strong wind was blowing. At about the same time or slightly later, the Powell building was seen to be afire in the vicinity of this ash can.

The trial judge found that the fire which ignited the building originated in the steel drum or ash can. He also found that Fleming ignited the material which he had brought from the defendant's rented premises and put into the can, in the belief that he was fully carrying out the instructions he had received. He also found that Fleming was negligent and that he was acting within the scope of his employment.

Mr. Justice Clarke, speaking on behalf of the court of appeal, agreed with these findings, which thus became concurrent findings of fact.

The arguments for the appellant before this Court were first, that the defendant's servants in depositing the refuse in the drum and igniting it were doing something which they had no authority to do and which had, in fact, been expressly forbidden by their employer. In support of this argument, reliance was placed on the evidence of Mr. Wilson, president and general manager of the defendant company. The trial judge on this point makes the following statement:

> Wilson testified that behind the store on the northeast corner of the intersection of 97th street and 101st avenue, an incinerator is constructed

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for the destruction of the debris from that store, and that there are standing orders to all employees to collect in cartons all waste material to be destroyed, and that the same should be burned only by the shipper or his assistant. It is quite evident that the complete cleaning-up process at that store consists in sweeping up, carrying out, depositing in cartons, and burning. Behind the Sheldon block there was no incinerator or other receptacle for either the destruction or accumulation of the debris from the defendant's premises there. Wilson swore that the above standing orders applied also to the Sheldon block premises. I do not accept that statement. There is nothing to indicate that the shipper or assistant shipper ever were at the Sheldon block. On the other hand, Eckstrom had done this cleaning-up on several previous occasions. I am satisfied that general orders "to go to the Sheldon block and clean up these premises" were given. It was left open to the employees to interpret those orders just as widely as Wilson left it to the plaintiffs' counsel to interpret what was meant when, as he says in answer to question 111: "What does your wife do when she cleans up?" It was left to Eckstrom and Fleming to carry out the complete process of cleaning-up—that is, to sweep up, carry out, pile up and burn. It was not a case of being ordered to do a specific act, but rather these employees received general instructions to clean up the premises, which involved a discretion in the method as well as unlimited judgment as to the extent of the operation. I find that Fleming was acting within the scope of his employment, and that the defendant is liable to the plaintiffs for such damages as may be proven. The plaintiffs will have their costs, including examinations, on the columns applicable to their respective ascertained losses.

The findings of fact were accepted by the court of appeal and perusal of the evidence does not disclose anything which would now justify a reversal by this Court.

The courts below relied on what was said by this Court in *Lockhart* v. *Canadian Pacific Railway Co.* (1). An appeal was taken from that decision to the Judicial Committee of the Privy Council and judgment recently has been given confirming same. In his judgment Lord Thankerton quotes with approval an extract from Salmond on Torts, 9th ed., p. 95:

> It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it * * * On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case, the servant is not acting in the course of his employment, but has gone outside of it.

(1) [1941] S.C.R. 270.

I think that this statement has a close application to the present case. Here the servants were "not on a frolic of their own." They were in fact doing work which was intended to be of service to their master and was in fact closely connected with acts which they were specifically instructed to do.

The second point pressed before us is that the act of lighting a fire at the place and under the circumstances in which it was lit was an illegal act and, there being no express order given by the defendant to Fleming to light the fire, no authority to light could be implied. This point is not dealt with by the trial judge, but is discussed by Mr. Justice Clarke in the court of appeal and dismissed.

In the case of *Dyer* v. *Munday* (1), the question of the responsibility of a master for the commission of criminal offences by a servant in the course of his employment was discussed and Lord Esher at page 746 states the position thus:

> Then it is suggested that if the excess complained of amounts to the commission of a criminal offence, that would take the case out of the rule which makes the master liable for the acts of his servant. But if we look at *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2) and *Seymour* v. *Greenwood* (3) it appears that the acts complained of in both those cases were criminal acts. In neither case was the ground taken that because part of the excess was criminal the master was exempt from liability, and in view of that fact the proposition put before us will not hold good. I do not at all say that the criminal act may not be of such a character as to induce the jury to say that it could not have been done in furtherance of the master's business, or at all in the interests of the master. It may well be that the question whether the offence is a criminal one may be a material fact for the jury to consider from that point of view, but the mere fact that it is a criminal offence is not sufficient to take the case out of the general rule. The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable. There was evidence in this case on which the jury might be properly asked to give their opinion.

In view of the finding of the trial judge in the present case, the second argument is adequately answered.

I would dismiss the appeal with costs.

(1) [1895] 1 Q.B.D. 742. (2) L.R. 8 C.P. 148.
(3) (1861) 30 L.J. Ex. 189, at 327.

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GILLANDERS J. *ad hoc*—These four actions were brought by the plaintiffs to recover damages caused by fire to their buildings and contents. The defendant was found liable at the trial, and an appeal to the Appellate Division of the Supreme Court of Alberta was dismissed by that Court. The defendants appeal to this Court.

The material facts may be conveniently taken from the judgment of Mr. Justice Clarke in the Appellate Division. (See *supra* p. 469.)

Mr. Justice Clarke also continued:

> The trial judge also found that Fleming ignited the material which he had brought from the Sheldon block and put into the can, in the belief that he was fully carrying out the instructions that he had received, and he also found that Fleming was negligent.

On the argument of this appeal appellant's counsel conceded that Fleming placed the debris in and ignited the fire in the ash can, and did so in the belief that he was carrying out the instructions he had received, but it was ably argued that the defendant was not liable because (1) what Fleming did was beyond the scope of his employment, and (2) he (Fleming) had no express authority to ignite or burn the rubbish, and, under the circumstances, that authority could not be implied because it was an illegal act.

The question involves the responsibility of a master for the negligence of his servant. The principles to be kept in mind are authoritatively discussed in the recent case of *Lockhart* v. *Canadian Pacific Railway Co.* (1), in which judgment was delivered (not yet reported) on August 5th, 1942, in the Privy Council. In that case I thought, in the Court of Appeal, that the defendant was not liable, and the error of that conclusion is made clear in the unanimous judgment of this Court and of the Privy Council. Lord Thankerton, who delivered the opinion of the Lords of the Judicial Committee, says in part:—

> The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmond on Torts (9th ed.), p. 95, viz.:—
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> "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is

(1) [1941] S.C.R. 278.

liable even for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it * * * On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

The well known dictum of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Company Limited* (1), that "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment," may be referred to. Their Lordships may also quote passages from the judgment of this Board in *Goh Choon Seng* v. *Lee Kim Soo* (2), which was delivered by Lord Phillimore: "The principle is well laid down in some of the cases cited by the Chief Justice, which decide that 'when a servant does an act which he is authorized by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act. * * *' As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes; then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized had he known of it. In these cases the master is nevertheless responsible."

In *Goh Choon Seng's* case (2) the appellant's servants had been employed by him to burn vegetable rubbish collected on his land, and they burnt some of it by lighting fires on Crown land left waste and uncultivated, which was wedged in between the appellant's land and that of the respondent, with the result that the fires spread to the respondent's land and caused damage to his property. The appellant was held liable to the respondent.

The Chief Justice of this Court in the *Lockhart* case (3) refers to passages from Story adopted by Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.* (4), and one of these passages is in part as follows:—

The passage in the judgment of Blackburn J. as reported in *McGowan & Co.* v. *Dyer* (5) is as follows: "In Story on Agency, the learned author

(1) [1914] A.C. 62, at 67.
(2) [1925] A.C. 550, at 554.
(3) [1941] S.C.R. 278.
(4) [1912] A.C. 716.
(5) (1937) L.R. 8 Q.B. 141.

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states, in s. 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasance or misfeasances, and omissions of duty on his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.' He then proceeds, in s. 456: "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit."

The instructions given to Eckstrom and Fleming were to go to the basement of the Sheldon block and "clean up" the premises. It is urged that these instructions, while they might be authority to sweep up the debris in the basement, consisting of paper, straw, dust and pieces of wooden boxes, and to remove and pile it, did not, and should not be interpreted to, include the burning of it, and that any burning was, under the circumstances, outside the course of employment. The trial judge says in part:

> * * * behind the store on the northeast corner of the intersection of 97th street and 101st avenue, an incinerator is constructed for the destruction of the debris from that store, and that there are standing orders to all employees to collect in cartons all waste material to be destroyed, and that the same should be burned only by the shipper or his assistant. It is quite evident that the complete cleaning-up process at that store consists in sweeping up, carrying out, depositing in cartons, and burning. Behind the Sheldon block there was no incinerator or other receptacle for either the destruction or accumulation of the debris from the defendant's premises there. Wilson swore that the above standing orders applied also to the Sheldon block premises. I do not accept that statement. There is nothing to indicate that the shipper or assistant shipper ever were at the Sheldon block. On the other hand, Eckstrom had done this cleaning-up on several previous occasions. I am satisfied that general orders "to go to the Sheldon block and clean up those premises" were given.

Whether or not one accepts Wilson's statement which the trial judge rejected, it must, I think, be concluded that the burning of the debris was within the course of the servant's employment. By putting debris in the ash can and burning it he did not divest himself of the character of the servant and become in law a stranger to his employer. Even, although one concedes that had his employer known of the steps proposed to be taken he would not have approved of this method of "cleaning-up",

under all the circumstances the burning was not so divorced from the cleaning-up that it could be said to be done other than in Fleming's character as a servant.

Having concluded that the burning of the debris was, as a matter of fact, in the course of the servant's employment, it is, I think, immaterial whether the burning was or was not in breach of a city by-law. It was urged that it was in breach of certain city by-laws, was therefore illegal, and that authority could not be implied. We are referred to certain provisions in by-laws of the city of Edmonton providing, in short, that inflammable trade refuse may be destroyed in a properly constructed incinerator of approved design; that it is unlawful to collect or dispose of refuse except under the provisions of the by-law, and prohibiting the lighting of any fire of any kind in the open air without a written permit from the fire chief, and without keeping a competent person in charge of it till extinguished. In the circumstances here, even though if it might, on the record, be concluded that the burning was in breach of a by-law, this would not avail as a defence. This is not a case where the defendant had no authority to "clean up" its premises, or to burn the refuse. The fact that the mode of doing it adopted by the servant may have been an improper mode, cannot avail the defendant since what the servant did was in the course of his employment. If the wrongful act had been so divorced from the servant's employment to be, not a method, though improper, of carrying it out, but an independent act lying beyond the course of employment, the absence of express authority would be of importance.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Friedman, Liberman & Newson.*

Solicitors for the respondents City of Edmonton and B. Sheldon's Limited: *Parlee, Smith & Parlee.*

Solicitors for the respondents Armstrong-Cosans Ltd. and Robert Arkinstall: *Wood, Buchanan, Macdonald & Campbell.*