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Present: Wood Renton C.J. and De Sampayo J.

THE COLOMBO ELECTRIC TRAMWAY COMPANY *v.* THE COLOMBO GAS AND WATER COMPANY, LIMITED.

104—D. C. Colombo, 38,009.

Action for damages against gas company—Negligence—Nuisance—Is gas company exempted from liability for nuisance?—Gas Company Ordinance (No. 1 of 1869), s. 25—Continuing nuisance—Not taking precaution to stop the nuisance—Civil Procedure Code, s. 174—Experts—Evidence—Production of documents.

The plaintiff company (the Colombo Electric Tramway Company) sued the defendant company (a gas company) for damages caused to the plaintiff company's electric main by an explosion consequent on leakage of gas. The explosion was due to a crack in the defendants' syphon-box, through which gas escaped, and another crack in plaintiffs' junction-box. The cracks in both boxes were caused by a steam roller belonging to the Municipal Council of Colombo.

Held, (1) In the circumstances of this case the plaintiffs' claim on the ground of negligence in regard to the original leakage must fail.

(2) The circumstances prior to and attendant upon the explosion disclosed a nuisance in the eye of the law.

(3) The gas company (defendant company) were not exempt from liability for nuisance in view of section 25 of Ordinance No. 1 of 1869 (Ordinance incorporating the gas company).

(4) As the act constituting the nuisance was not done by the defendant company, but by the Municipal Council, over whom the defendant company had no control, and whose acts they could not reasonably be expected to foresee or guard against, the defendant company were exempted from liability in respect of it.

(5) The defendant company would be liable for the continuance of the nuisance if they knew of the nuisance, and were in a position to prevent its further continuance, and did not do so.

WOOD RENTON C.J.—In spite of the language of section 174 of the Civil Procedure Code, the Court has a discretionary power to allow experts, whose presence was practically necessary in order that the case of one side or the other might be adequately put forward, to remain in Court.

WOOD RENTON C.J.—Whenever it appeared that reports which had been made by the defendants' manager to the Board of Directors in London, had been so made with a view to their submission to the company's legal advisers, and related solely to the defendants' case, the plaintiffs' counsel was not entitled to compel their production, although there might have been nothing to prevent him from asking defendants' manager whether in those reports he had stated that the defendants or their employés had been to blame for the accident.

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APPEAL from a judgment of the Acting District Judge of Colombo (G. S. Schneider, Esq.). The facts appear from the judgment:—

Elliott (with him *R. L. Pereira*), for plaintiffs, appellants.

Bawa, K.C. (with him *F. J. de Saram*), for defendants, respondents.

Cur. adv. vult.

August 5, 1915. WOOD RENTON C.J.—

This appeal has been argued by both sides on the basis of the findings by the learned District Judge that the explosion was due to a crack in the defendants' syphon-box, through which gas escaped, and another crack in the plaintiffs' junction-box, through which that gas forced an entry into the junction-box, and that the damage to both boxes was caused by a fifteen-ton steam roller belonging to the Municipal Council, which had been at work about the scene of the accident on October 21 and 22. I see no reason to differ from the finding of the learned District Judge that the plaintiffs' claim on the ground of negligence in regard to the original leakage must fail. The next question is whether the plaintiffs' action can be maintained, apart from negligence of that character on the ground that by their statute of incorporation[1] the defendants are responsible for nuisance. Although there is no express reference to nuisance in the issues, it is clear from the arguments of counsel that this point was taken in the District Court, and we have before us all the materials necessary for its determination. The circumstances prior to, and attendant upon, the explosion certainly disclose a nuisance in the eye of the law.[2] It is well settled that a gas company is not, by reason of the statutory authorization of its undertaking, exempt from liability for nuisance, where the enabling Act contains such a clause as the following: "Nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance, in the event of any nuisance being caused by them."[3]

Section 25 of the defendants' statute of incorporation is expressed in different language. The section is taken *verbatim* from the English Gas Works Clauses Act, 1847.[4] I do not think, however, that any distinction in substance can be drawn between that enactment and the corresponding provision in the Gas Works Clauses Act, 1871,[5] under which *Jordeson v. Sutton, Southcoates, and Drypool Gas Company*, and *Batchellor v. Tunbridge Wells Gas Company*[3] were

[1] *No. 1 of 1869, section 25.*

[2] *Charing Cross Electricity Supply Company v. Hydraulic Power Company, (1914) 3 K. B. 772.*

[3] *Jordeson v. Sutton, Southcoates, and Drypool Gas Company, (1899) 2 Ch. 217; cf. Batchellor v. Tunbridge Wells Gas Company, (1901) 84 L. T. 765.*

[4] *10 and 11 Vict. c. 15, s. 29.*

[5] *34 and 35 Vict. c. 41, s. 9.*

decided. The preamble to Ordinance No. 1 of 1869 shows that the making and supplying of gas was the object for which the defendants were incorporated, and these terms, as used in section 25, indicate, in my opinion, the primary purposes of the undertaking, in contradistinction to some of the incidental and preliminary operations referred to in the preceding sections. The question, however, still remains, and this has been the *ratio decidendi* in the District Court, whether the defendants are not protected by the principle enunciated in such cases as *Richards v. Lothian*[1] and *Box v. Jubb*,[2] that where a nuisance is due either to the act of a stranger or to inevitable accident, which the party otherwise responsible for the nuisance, could not control, and against which no reasonable precaution would have been of any avail, he is exempted from liability in respect of it. The plaintiffs' counsel, relying on the recent decision of a Divisional Court in England in *Wheeler v. Morris*,[3] contended that the defendants in the present case could not be exonerated from responsibility for the continuance of the nuisance and the consequent explosion, because their manager, Mr. Edwards, had himself stated that all the employés of the company had instructions to keep a watch for, and at once to report, leakage, especially whenever the roads were opened and steam rollers were at work. I am not satisfied that there is any finding by the learned District Judge on this aspect of the case, or, indeed, that either side had its attention specially directed to it at the trial. The point is one which it should not be difficult to elucidate by further evidence.

Before formally disposing of this appeal, I desire to add that I agree with the learned District Judge on two incidental questions of procedure and evidence that arose in the course of the trial. In spite of the language of section 174 of the Civil Procedure Code, I think that the Court had a discretionary power to allow experts, whose presence was practically necessary in order that the case of one side or the other might be adequately put forward, to remain in Court. *Thilippo v. Domingo*,[4] a decision under an analogous provision in the General Rules and Orders, 1833, is an authority to that effect. Again, I am of opinion that whenever it appeared that reports which had been made by the defendants' manager to the Board of Directors in London had been so made with a view to their submission to the company's legal advisers, and related solely to the defendants' case, the plaintiffs' counsel was not entitled to compel their production, although there might have been nothing to prevent him from asking the defendants' manager whether in those reports he had stated that the defendants' or their employés had been to blame for the accident—a line of examination, however, which he did not adopt.

[1] *(1913) Appeal Cases 263.*
[2] *(1879) 4 Ex. D. 76.*
[3] *(1915) 112 L. T. 412.*
[4] *(1846) Ram. (1833-55) 77.*

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I would set aside the decree under appeal, and send the case back for further inquiry and adjudication solely on the question whether the defendants ought to have had knowledge that the steam roller was working about the scene of the accident on October 21 and 22, and that there was a leakage of gas commencing on the 22nd and going on till October 24. All costs, including the costs of the appeal, should abide the event.

It appears to us to be desirable that the further inquiry into and adjudication upon this case should be disposed of by the Acting District Judge who presided at the trial, and against whose decision this appeal is brought. It would greatly facilitate the expeditious termination of the litigation if this course should be adopted.

DE SAMPAYO J.—

This is an action for damages in respect of the injury caused to the plaintiff company's electric main and other works at Queen street, Colombo, by an explosion consequent on a leakage of gas from a service pipe of the defendant company. The plaintiff company based their action, firstly, on the negligence of the defendant company, and secondly, and in the alternative, on their liability as for a nuisance. The learned District Judge on the evidence before him has acquitted the defendant company "of any negligence in taking all necessary precautions against accidents." In view of the manner in which he has summed up the facts leading to that conclusion, I think the above finding is confined to the circumstances prior to the original leakage of gas. I shall first deal with this aspect of the case.

It was argued on the authority of *Moss v. Hastings and Saint Leonards Gas Company* [1] and *Price v. South Metropolitan Gas Company* [2] that the absence of a system of regular inspection of the defendant company's mains and pipes in order to detect escapes of gas proves negligence. I do not read those decisions as laying down a hard and fast rule as to what amounts to negligence. What is reasonable inspection is and must always be a question of fact depending on the circumstances of each case, and what is insufficient at one place and time may be reasonably sufficient at another place and time. As a matter of fact, in the second of the decisions above cited, which was most strongly pressed, the Court of first instance had found there was negligence, and the Divisional Court only affirmed that view of the evidence. The defendant company have been in existence for over forty years, and it appears that, in addition to the general supervision of the European staff, the servants of the company who daily go round the town in connection with gas lighting have been instructed to note and report any escapes of gas, and rewards are also offered to members of the public generally for reporting such cases. This system has been found during all

[1] *(1863) 4 F. & F. 324.* [2] *(1895) 65 L. J. Q. B. 126.*

that time to be effective, and in my opinion the learned District Judge had sufficient material to express his opinion that up to the time of the fracture of the pipe which caused the escape of gas the defendant company was not guilty of negligence. I shall hereafter deal with the circumstances which followed that event as they bear on the case.

There is no ground for the suggestion on behalf of the defendant company that the injury did not in law amount to a nuisance. The only questions are whether the defendant company are protected by statute; if they are not so protected, are they legally responsible for the explosion which is the effective cause of the damage to plaintiff company's property ?

In respect of nuisances of this nature there is no essential difference between the English law and the law applicable in Ceylon, as was pointed out in *Eastern and South African Telegraph Company v. Cape Town Tramways Company, Limited,* [1] and the English authorities are constantly referred to and are applied by our Courts. Now, the defendant company are governed by the Gas Ordinance of 1869, by which they are empowered and entitled to establish gas works and lay down pipes, conduits, service pipes, and other works necessary for the purpose of making and supplying gas in any municipal town. It is, I think, well settled that the principle of *Rylands v. Fletcher* [2] does not apply to persons having statutory powers unless there has been negligence, or unless the statute itself removes the protection. The cases of *Green v. Chelsea Waterworks Company* [3] and *Jordeson v. Sutton, Southcoates, and Drypool Gas Company* [4] need only be cited on that point. In the view I take of this part of the case it is not necessary to consider any distinction which may arise from the fact that the defendant company are only empowered to make and supply gas, but not obliged to do so by the Ordinance. It remains to consider the effect of section 25 of the Gas Ordinance of 1869, which provides as follows: " Nothing in this Ordinance contained shall prevent the said company from being liable to an indictment for nuisance or to any other legal proceedings to which they may be liable in consequence of making or supplying gas."

This section is a reproduction of section 29 of the Gas Works Clauses Act, 1847. The Gas Works Clauses Act, 1871, by which the Act of 1847 is amended and extended, provides, by section 9, that nothing in that Act " shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. So far as I can see, the only difference between the Act of 1847 and the Act of 1871 is that the latter Act embraces a larger class of nuisances, and not merely those consequent upon the making or supplying of gas; for

[1] *(1902) A. C. 381.*
[2] *(1862) L. R. 3 H. L. 330.*
[3] *(1894) 70 L. T. 547.*
[4] *(1899) 2 Ch. 217.*

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example, it does not protect nuisances caused in the construction of the authorized works themselves, as illustrated by *Jordeson v. Sutton, Southcoates, and Drypool Gas Company (supra)*, in which the gas company were restrained from withdrawing support from adjoining land by the draining of running silt during the excavation of their own land for the purpose of erecting a gasometer. Mr. Bawa, for the defendant company, sought to make the difference even greater by suggesting that the nuisances contemplated in the Act of 1847 and the local Ordinance are those committed in the course of manufacture, such as the emission of offensive smells, and do not include leakage of gas from defective pipes. I cannot accept this suggestion. Mains and service pipes are only a means of supplying or distributing gas to consumers, and it is clear to me that, if gas escapes from them and causes an explosion it is the cause of a nuisance, for which the defendant company are liable "in consequence of supplying gas." Moreover, any statutory authority to commit a nuisance must be strictly construed, and in my opinion, section 25 of the Ordinance itself affords no protection to the defendant company from liability. Such liability was held to exist in *Batchellor v. Tunbridge Wells Gas Company*,[1] in the case of a gas company which was governed by the Gas Works Clauses Act of 1847, and that decision is therefore an authority in this case. The principle of the decisions in *Midwood and Company v. Manchester Corporation*[2] and *Charing Cross Electricity Supply Company v. London Hydraulic Power Company*[3] is, I think, also applicable on the point.

There is, however, another principle on which the ultimate issue of the case seems to me really to depend. Where the act constituting the nuisance is not done by the party sought to be made liable, but by a third party, over whom he has no control or whose acts he cannot foresee or guard against, he is not legally responsible for the consequences. *Box v. Jubb*,[4] *McDowall v. Great Western Railway Company*,[5] *Barker v. Herbert*,[6] *Richards v. Lothian*.[7] The facts as found by the District Judge, are that on October 21 and 22, 1913, a heavy steam roller used by the municipal authorities in the repairing of the street in question passed over a spot where both the gas main and electric main are laid, and caused a fracture of the service pipe which supplied gas to the General Post Office, and that gas thus escaped, and somehow ignited, and an explosion took place causing the damage complained of. The defendant company could not of course prevent the Municipal Council from exercising their undoubted power and right to use a steam roller for the purpose of repairing the street, nor could they reasonably be

[1] *84 L. T. 765.*
[2] *(1905) 2 K. B. 597.*
[3] *(1913) 3 K. B. 442 and ibid. (1914) 3 K. B. 772 C. A.*
[4] *(1879) 4 Ex. D. 76.*
[5] *(1903) 2 K. B. 331.*
[6] *(1911) 2 K. B. 633.*
[7] *(1915) A. C. 263.*

expected to foresee or guard against the consequence of such use. I may note incidentally that the steam roller broke and damaged even the plaintiff company's junction-box, and that they were not aware of the fact until after the explosion, so that, as regards any anticipation of the results of the action of the steam roller, the plaintiff company were in the same situation as the defendant company. As against the authorities above referred to, Mr. Elliot, for the plaintiff company, cited the recent case of *Wheeler v. Morris*.[1] There the defendant, who was a shopkeeper, had in front of his shop a sun-blind projecting over the pavement by means of rods, and a boy who was passing along having jumped up and caught hold of one of the rods, the sun-blind fell on the head of the plaintiff and injured him, and it was held that the defendant was liable. The ground of the decision was that in the circumstances of that case the mischievous acts of irresponsible persons should have been foreseen and guarded against, and that case is therefore distinguishable from the present. Mr. Elliott lastly argued that even though the defendant company were not responsible in the first instance for the fracture of the service pipe and the consequent leakage of gas, it failed to take prompt measures to stop the leakage and prevent any explosion. This amounts to an argument that the defendant company, though they did not cause the nuisance, were responsible for the continuance of it, and I think this point is entitled to fuller consideration than it has received. It appears that the smell of escaping gas was first perceived on October 22 at the office of Messrs. J. M. Robertson & Co. close by; that the smell continued in an increasing degree during the next two days; that on October 24, about 10.15 A.M. a telephone message was sent from that office to the Gas Works; and that the explosion took place about noon, before the representatives of the defendant company were able to reach the place. In this state of circumstances the question is whether the defendant company was negligent during the interval of two days and are liable for the continuance of the nuisance. The explanation of the defendant company is that they received no information prior to the telephone message; that they were on the spot as promptly as circumstances allowed; and that even if they were there immediately after the message they would not have been able to locate the cause of the leakage in time so as to prevent the explosion. These matters require further investigation. I need only here allude to the law bearing on this point. A person would be liable for the continuance of a nuisance which is created by the act of a third party, even though incapable of being foreseen and guarded against, if he knew of the nuisance and was in a position to prevent its further consequences. On this point I may quote the following passage from the judgment of Fletcher Moulton L.J. in *Barker v. Herbert* (*supra*): "In the case

[1] *11 2 L. T. 412.*

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where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognizes that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance and not the original causing of it. An owner of premises may have a duty to prevent the continuance of the nuisance, but it is obvious that, just as where the allegation is that he has caused the nuisance it must be proved that it was there by his act or that of some one for whose action he is responsible, so, where it is alleged that he is responsible for the continuance of the nuisance it must be proved that it was continued by his permission. He cannot be said to have permitted the continuance of that of which he had no knowledge." What is here said about the act of a trespasser is equally applicable to the lawful act of a superior authority. The question then is, whether the defendant company neglected their duty, and if they did not know of the leakage of gas, whether they ought to have known of it? The point was not directly put before the Court at the trial, nor has the District Judge considered it.

In my opinion the decree under appeal should be set aside, and the case sent back for further inquiry as above indicated. The costs of appeal should be costs in the cause.

Sent back.