ORIGINAL CIVIL.

Before Mr. Justice Jardine.

THOMAS FIELD EVANS, PLAINTIFF, *v.* THE TRUSTEES OF THE PORT OF BOMBAY AND SIRDA'R DILER DOWLAT BAHA'DUR (DEFENDANTS).*

1886. *April* 20, 27, 29, 30.

Negligence—Unfenced hole—Damages for personal injuries—Licensee—Contractor.

The plaintiff claimed to recover Rs. 63,500 from the defendants, as damages for injuries sustained by him by reason of his having fallen into a hole which had been dug upon certain land of the defendants on the 1st September, 1885. The land in question was the property of the first defendants (the Port Trustees), and was in their possession at the date of the accident to the plaintiff; but an agreement had been made, whereby it was to be leased by them to the second defendant, who was accordingly let into possession in January, 1886. For some years, the first defendants had been in the habit of letting out the greater part of the land for tenting purposes in lots marked out with pegs, but the tents were taken down each monsoon. For two or three years previously to the accident, people had been accustomed to cross the land without any hindrance or prohibition. The plaintiff himself had used the path across the land, as a short cut, for a period of eighteen months. This path led across the tenting ground to a gate, which was generally open, and which opened upon the high road. No express permission had ever been given to any of the persons who were in the habit of using this path. It was a mere beaten track, and, so far from being a public way, it was from time to time obstructed, in the tenting season, by the ropes and pegs of the tents. The plaintiff had for some time been in occupation of a bungalow belonging to the first defendants, which was situated in that part of the land which was furthest away from the high road. There was a regularly constructed roadway from the bungalow to the high road, which the plaintiff might have used, but, as a short cut, he and others were in the habit of using the beaten track. For this he had merely a tacit permission. On the morning of the 1st September, 1885, he left his bungalow and went to his business, as usual, by the short cut across the land. When returning by the same way at about 11 o'clock at night he fell into the hole, which had been dug in the afternoon of that day, and sustained the injuries complained of. The hole was several feet deep, and was dug right across the pathway. The plaintiff had no notice of the hole being dug, or of any intention to dig it. The night was very dark, and there was no negligence on the part of the plaintiff, nor any want of ordinary care and caution. There was no watchman and no fence, nor was there any light which might enable persons using the path to avoid the danger.

The second defendant, as above stated, had agreed to take the said land from the first defendants on lease for building purposes. On the day of the accident, some months before the execution of the lease, the second defendant, through his

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engineer and contractor, Hewson, applied to the first defendants for permission to make "borings" in the land, which permission was given. Hewson thereupon caused the hole in question to be dug.

In their written statement the first defendants contended that, in using the short cut across their land, the plaintiff was a trespasser, and that he had used it without their knowledge or consent; that the hole was dug without their knowledge, and that the "borings," for which they had given permission, were merely small holes of a diameter of six inches, or thereabouts, which could not have been a source of danger. The second defendant pleaded that at the time of the accident he was not in possession of the land, but had merely entered into an agreement for a lease of it; that he had employed a competent engineer and contractor, Hewson, to make borings, in order to ascertain of what the sub-soil consisted, and that Hewson contracted to do the work and obtain leave from the first defendants to enter on the land; that the said Hewson subsequently entered on the land, and according to his own discretion and without any control or interference from him, (the second defendant), took such steps as he thought necessary to ascertain the nature of the said sub-soil; and he, (the second defendant), contended that, if there had been negligence in the performance of the work, he was not liable.

1. *Held*, that there was negligence in digging the hole across a path used by several licensees, and in not placing any person or light to warn passengers of the danger arising from the hole and the excavated earth which was heaped up near it.

2. *Held*, that the first defendants were not liable to the plaintiff. The permission which they had given to Hewson was a permission to make "borings" only; and the hole, which was actually dug by Hewson, was dug without their knowledge or permission. Hewson was not shown to be, in any sense, their servant or agent. The plaintiff was a bare licensee, and the first defendants were under no obligation to him to keep the path in a safe state or in good order.

3. *Held*, that the second defendant was liable to the plaintiff. Hewson was not a contractor, in the legal sense, so as to exempt the second defendant from responsibility, but was the servant of the second defendant *pro hac vice*, and that the digging of the hole was within the course of his employment, or within the scope of his authority.

4. The Court of first instance awarded, as damages, a sum of Rs. 33,000, which, on appeal, was reduced to Rs. 17,000.

THE plaintiff sued to recover damages for injuries sustained by him on the 1st September, 1885, in consequence of his falling into a pit in the defendants' land. He claimed Rs. 63,500.

The first defendants were the owners of the land in question, known as the Wellington Reclamation in Bombay.

For some years, it had been the practice of the first defendants to let out the said property, in lots, for tents, which were taken

down during the monsoon. The lots so let were marked out with pegs. A public road ran along one side of the land down to the Apollo Bandar, and on the other side, furthest from the road, there was a bungalow, which, at the time of the accident, (1st September, 1885), was in the occupation of the plaintiff. There was a roadway to this bungalow; but, for several years, persons visiting it had been in the habit of taking a short cut to it by crossing the tenting ground diagonally. The short cut was also used by the servants of the Bombay Yacht Club, which was situated close to the bungalow. No express permission had ever been given to the occupants of the bungalow, or to the servants of the Yacht Club, to make use of this path. It was a mere beaten track, and was from time to time obstructed, in the tenting season, by the ropes and pegs of tents. The bungalow, in which the plaintiff resided, had been for several years let by the Port Trustees, (first defendants), to Messrs. Green and Read, who were, at the time of the accident, paying them rent for it.

On the 19th June, 1885, the Port Trustees had entered into an agreement, whereby they agreed to lease the Wellington Reclamation land to the second defendant for building purposes.

Before the lease was executed, the second defendant, through his architect, John Hewson, on the 1st September, 1885, applied to the Port Trustees for permission to make certain borings in the land, which was obtained; and Hewson in the afternoon of that day dug a hole in the land in question, about eight feet square and four feet deep. On the morning of that day the plaintiff had gone to his business, and had, as usual, traversed the short cut leading from his bungalow to the public road. When returning late at night, and while passing along the short cut to his bungalow, he fell into the hole, and sustained severe injuries. The hole was not lighted, fenced, or protected in any way, nor had he received any warning that it had been or would be dug; and, as the night was dark, it was impossible for him to have seen it.

The plaintiff contended that both the defendants were liable to compensate him for the injuries he had received from the

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accident. The following paragraph of the plaint states his case against them:—

"8. The plaintiff believes that the said hole was dug by the agents, servants, or workmen of the second defendant by the permission or authority of the first defendants, or by the first defendants, who, in spite of the then subsisting demise and tenancy of the said bungalow and its appurtenances, including the said right of way, had granted to the second defendant a certain tenancy or license to dig or otherwise use the said plot of land; and the plaintiff charges that both the defendants are, jointly and severally, liable to compensate him for the injuries he has received as aforesaid. The plaintiff further charges that the first defendants, as the superior landlords of the said bungalow and plot of land, are, in any event, liable to compensate him as aforesaid."

The plaintiff was seriously injured by the accident. He had carried on the business of a watch-maker in Bombay, but had been obliged to give up his business altogether. The plaint stated: "The plaintiff is now of the age of thirty years, and has never been married, and has a widowed mother dependent on him, whom he has supported for the last ten years. He served a seven-years' apprenticeship, in London, to his former trade, and was a skilled, experienced, and able workman in his said trade, and was, at the date of the said accident, doing a valuable and rapidly increasing business on his own account. He has already sustained a pecuniary loss of Rs. 3,551, as *per* particulars given in the list hereto annexed, and estimates his further losses and damages at Rs. 60,000. The plaintiff has claimed compensation from the defendants severally for his said injuries; but they have both refused or failed to admit any liability in the matter."

In their written statement the first defendants (Port Trustees) admitted that the land in question and the bungalow in occupation of the plaintiff were their property. They stated that they had leased the bungalow to Messrs. Green and Read, and alleged that the latter had no right to sub-let the same to the plaintiff. They further alleged that they had provided a proper and convenient road to the bungalow, and they denied that the tenants and occupants of the bungalow had any right to make use of a

short cut across the adjoining land; and they contended that, if the plaintiff did so, he was a trespasser, and did so without their knowledge or consent. They further denied there was any pathway across the said land; and they alleged that the hole dug therein was not dug with their knowledge. The second defendant, to whom on the 19th June, 1885, they had agreed to lease the land for fifty years for building, had applied to them on the 1st September, 1885, through his architect, John Hewson, for permission to make three borings on the land, which permission had been given; but that such borings were merely small holes of a diameter of six inches or thereabouts, and, if made, would not have been a source of danger to persons crossing the vacant land.

The second defendant also filed a written statement. He admitted that, at the time of the alleged accident, he had agreed to take the land on lease from the first defendants, but he alleged that neither he nor his servants were then or had been in possession or occupation thereof, and he denied that the hole had been dug by or by the orders of himself or his servants.

He further stated that, when he had agreed to lease the said land, a Mr. Chisholm, an architect in Madras, who was about to make drawings of buildings to be executed thereon, desired to know of what the sub-soil consisted, and recommended that borings should be made for that purpose. He (the second defendant) accordingly employed a competent civil engineer and contractor, Mr. Hewson, to make such borings, and to report to him; and the said Mr. Hewson engaged to do the work and obtain leave from the first defendants to enter in the land. The said Mr. Hewson thereafter entered on the said land, and according to his own discretion and without any control or interference from him, (the second defendant), his servants, and workmen, took such steps as he thought necessary to ascertain the nature of the sub-soil; and he submitted that, if the plaintiff had sustained any damage from the negligent way in which the character of the sub-soil was, in fact, ascertained, he was not liable.

Lang and *Russell* for the plaintiff:—The defendants are jointly and severally liable to the plaintiff. The first defendants are the owners of the land on which the hole was dug. They

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gave implied permission to the plaintiff to go across the land to the bungalow, and there was, therefore, a duty upon them not to allow such an obstruction to be placed on the path. The plaintiff had used this path for eighteen months. The first defendants had agreed to give a lease for building purposes to the second defendant. Such a lease gives implied permission to dig holes in the land. Hewson, who was employed by the second defendant, got permission from the first defendants to make borings. They had control over him. Hewson says the fault was that of the *maistry*. The *maistry* was paid by the second defendant, on whose behalf the work was done. Shallow borings were considered not sufficient, as the soil was sandy and shifting. Counsel referred to *Laugher* v. *Pointer*(1); *Quarman* v. *Burnett*(2); *White* v. *Jameson*(3); *Barnes* v. *Ward*(4); *Corby* v. *Hill*(5); *Hounsell* v. *Smyth*(6); Roscoe on Evidence (13 ed.), p. 720; *Wilkinson* v. *Fairrie*(7); *Indermaur* v. *Dames*(8); *Bolch* v. *Smith*(9); *Smith* v. *London and St. Katharine Docks Company*(10); *Gallagher* v. *Humfrey*(11); *Axford* v. *Prior*(12); *Sullivan* v. *Waters*(13); *Heaven* v. *Pender*(14); *Stevens* v. *Wabie*(15); *Ivay* v. *Hedges*(16); *Southcote* v. *Stanley*(17); *Barnes* v. *Ward*(18); *Bird* v. *Holbrook*(19); *Hardcastle* v. *South Yorkshire Railway and River Dun Company*(20); *Collis* v. *Selden*(21); *Directors, &c., of North Eastern Railway Company* v. *Wanless*(22); *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*(23); *Hadley* v. *Taylor*(24); *Mackey* v. *Commercial Bank of New Brunswick*(25); *Burmah Trading Corporation, Limited,* v. *Mirza Mahomed Ali Sherazee*(26); *Bower* v. *Peate*(27); *Percival* v. *Hughes*(28).

(1) 5 B. & C., 547.
(2) 6 M. & W., 499.
(3) L. R., 18 Eq., 303.
(4) 9 C. B., 392.
(5) 27 L. J. C. P., 318.
(6) 7 C. B. (N. S.) at p. 744.
(7) 1 H. & C., 633.
(8) L. R., 1 C. P., 274. S. C. on appeal, L. R. 2 C. P., 311.
(9) 7 H. & N., 736.
(10) L. R., 3 C. P., 326.
(11) 10 W. R., 664.
(12) 14 W. R., 611.
(13) 14 Ir. Com. Law. Rep., 460.
(14) 11 Q. B. Div., 503.
(15) 6 Q. B., 322.
(16) L. R., 9 Q. B. Div., 80.
(17) 1 H. & N., 247.
(18) 9 C. B., 392.
(19) 4 Bing., 628.
(20) 4 H. & N., 67.
(21) L. R., 3 C. P., 495.
(22) L. R., 7 H. L., 12.
(23) 3 App. Cas., 1155.
(24) L. R., 1 C. P., 53.
(25) L. R., 5 P. C., 394.
(26) L. R., 5 Ind. Ap., 130.
(27) L. R., 1 Q. B. Div., 321.
(28) 8 App. Cas., 443.

Farran and *Jardine* for the first defendants:—The first defendants are not liable to the plaintiff. He was a trespasser on their land. He occupied a bungalow, which had been let to Messrs. Green and Read, who had no power to underlet it to the plaintiff. No one had any right to cross the defendants' land, instead of going by the road. The part of the land, in which the hole was dug, had been in previous years occupied by tents. If the plaintiff was a trespasser, the defendants are not liable—*Houlden* v. *Smith*(1). He may have supposed he had a license from the first defendants to cross the land. He cannot put his case higher than that. But, if so, there was no duty, on the first defendants, to provide him with an uninterrupted path across their land. Their utmost duty was not to set a trap for a licensee, or knowingly to allow such a trap to remain unfenced on their ground. They must be shown to have actively participated in digging the hole, or to have known the hole was there. Here a third person dug the hole. As to liability in such a case, see *Stevens* v. *Woodward*(2). On the 8th July, 1885, the first defendants agreed to lease the land to the second defendant. They knew the lease was for building purposes; and on the 1st September, 1885, Hewson, on behalf of the second defendant, obtained permission from them to make borings. Such borings, which are only six inches in diameter, are not dangerous. There was, therefore, no knowledge nor negligence in the first defendants in reference to the hole which was actually dug. Hewson's letters show that he knew he had no authority from the first defendants to dig such a hole. He was, therefore, in the position of a trespasser, who came upon the land, and did something he had no authority to do. The plaintiff must show he was rightfully on the land; and that the first defendants knew of the hole. Counsel cited *Bolch* v. *Smith*(3); *Indermaur* v. *Dames*(4); *Ivay* v. *Hedges*(5); *Corby* v. *Hill*(6); *Gautret* v. *Egerton*(7); *Saxby* v. *Manchester, Sheffield and*

(1) 19 L. J. (N.S.), Q. B., 170.

(2) L. R., 6 Q. B. Div., 318.

(3) 7 H. & N., 736.

(4) L. R., 1 C. P., 287. S.C. on appeal L. R., 2 C. P., 311.

(5) L. R., 9 Q. B. Div., 80.

(6) 4 C. B. (N. S.), 556.

(7) L. R., 2 C. P., 371.

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Lincolnshire Railway Company[1]. As to damages, counsel cited *Phillips* v. *London and S. W. Railway Company*[2].

Starling and *Anderson* for the second defendant:—At the time of the accident the second defendant was not in possession of the land. He had only entered into an agreement with the first defendants for a lease of it. He did not get possession until January, 1886. He employed Hewson to examine the land before beginning to build upon it. Hewson was a competent contractor, who undertook to do the work. He was not under the second defendant's control. The plaintiff must show that Hewson acted under the second defendant's instructions, and was under his control. Hewson got leave to dig the hole—not from the second defendant, but from the first defendants. The whole matter was left to Hewson by the second defendant—*Daniel* v. *Metropolitan Railway Company*[3]; *Jones* v. *Corporation of Liverpool*[4]; *Reedie* v. *London and N. W. Railway Company*[5]; *Steel* v. *S. E. Railway Company*[6]; *Brown* v. *Accrington Cotton Spinning and Manufacturing Company*[7]; *Murray* v. *Currie*[8]. An employer need not assume negligence in his contractor, and take precautions against him. The same principle applies between contractors and sub-contractors—*Rapson* v. *Cubitt*[9]; *Knight* v. *Fox*[10].

JARDINE, J.:—Before dealing with the different questions of law, which have been argued by the learned counsel, I will state what I take to be the principal facts admitted or proved regarding the accident which occurred to the plaintiff on the night of the 1st September last, when he fell into a hole dug on the land known as the Wellington Reclamation. This land belongs to the Port Trustees, and was in their possession on that date; but an agreement had been made, whereby the land was to be leased by them to the second defendant, who was accordingly let into possession in February last. I find it proved that, for

(1) L. R., 4 C. P., 198.
(2) L. R., 4 Q. B. Div., 406. S. C., L. R., 5 Q. B. Div., 78.
(3) L. R., 5 H. L., 45.
(4) 14 Q. B. Div., 890.
(5) 4 Ex., 244.
(6) 16 C. B., 550.
(7) 34 L. J. Ex., 208.
(8) L. R., 6 C. P., 24.
(9) 9 M. & W., 710.
(10) 5 Ex., 721.

some years, the Port Trustees have been in the habit of letting most of this land for tenting purposes in lots marked out with pegs; but the tents were taken down each monsoon. Besides this, the Trustees have for several years let some bungalows, situated on the side near the Dockyard, to a Mrs. Nicholl and a Mr. Green. A road, along which carts could pass, led from the Apollo Bandar road to these bungalows. But there is an ample body of evidence to show that people have been in the habit of crossing the land diagonally, for the last two or three years at least, without any hindrance or prohibition. This is proved by the plaintiff, who used the path for the last eighteen months, by different witnesses who used to visit the bungalows, and by the head butler of the Royal Bombay Yacht Club, who says that he and the other club servants used it. The path was a short cut to the Fort. It went across the tenting ground to a small gate which was generally open, at a corner described by most of the witnesses as the corner near Muraglia's shop, which adjoins the highway. No express permission had ever been given to the occupants of the bungalows, or the members or servants of the Yacht Club, to make use of this path. It was a mere beaten track, and, so far from being a public way, it was from time to time obstructed in the tenting season by the ropes and pegs of the tents. The plaintiff had, for some time, been in occupation of the bungalow belonging to the Port Trustees, but let to Messrs. Green and Read, who were paying them rent for it at the period when the accident occurred. He had the option of using the broad road leading to the Apollo Bandar. But to go to the Fort where his business was, by that way, would be traversing two sides of a triangle, and, like the occupants and servants of the Yacht Club and the visitors to the bungalow, he used the beaten track across the tenting spaces in his going to and fro. For this he had no more than a bare tacit permission; his user was by license, and not of right. This is proved by the witnesses for the defence. On the morning of the 1st September last, he left his bungalow and went to his business in the Fort, as usual, by the short cut. He returned about eleven o'clock at night, when, as usual, he entered on the short cut by the gateway near Muraglia's shop. After walking about twelve paces he kicked against something,

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and then tumbled into a hole, from which fall he certainly sustained bodily injury and pecuniary loss.

Now, it is admitted that the digging of this hole was only begun about 3 o'clock in the afternoon of that day. The plaintiff had, apparently, had no notice of its being dug, or of any intention to dig it. The night was very dark. He had been at the Volunteer Club after his dinner; and many questions have been put as to his sobriety that night. There is direct corroboration of his own statement that he was perfectly sober; and many respectable witnesses have confirmed his statements about his general abstemiousness and sobriety. I am quite satisfied, therefore, that he was not at all under the influence of liquor. I find that there was no negligence on his part, nor any want of ordinary care and caution. It is admitted that there was no fence round the hole, nor any light which might enable persons using the path to avoid the danger, nor any watchman present. Plaintiff says the hole was cut across the pathway, and that there was earth lying about on the path when he examined it next day. He gives the dimensions as about eight feet square and five or six feet deep. Mr. Green says the hole was cut into the path, so as to prevent the path being used. He thinks it was five or six feet square and four or five feet deep. A police inspector, Mr. Saunders, saw the place the next day. He says: "There had been a path, but three feet thereof was covered by earth, and a portion of the path dug away." Mr. Squires, an engineer of the Port Trust, saw the place on the 5th September. The hole then appeared to be three feet six inches in depth. In his report he mentions the diameter as eight feet. This evidence appears to me to corroborate the plaintiff's statements. I am not disposed to believe the *maistry*, Ghellábhái, whose labourers dug the hole, and who suggests a depth of only two or two and a half feet and a length of only four. He says the hole was one and a half feet distant from the path, and that he carried away the excavated earth. I do not believe those uncorroborated and contradicted statements. He tries to minimize the cause of the accident, while the plaintiff exaggerates the size of the hole a little. I see no sufficient reason to believe Ghellábhái's uncorroborated statement about his having tied two bámboos across the gateway to pre-

vent the entrance of animals. No one else has seen these bámboos. The matter is not mentioned in the written statement. The story is contradicted by the plaintiff, who in most of his statements is corroborated by respectable witnesses, and whose veracity can more safely be trusted.

Before adverting to the less or more of the injury sustained by the plaintiff, I may here state that, in my opinion, he did sustain damage, personal and pecuniary, through his falling into this hole. I am of opinion that there was negligence in digging a hole, like the one in question, across a path used by several licensees, and in placing no person nor light to warn passengers using the path of the danger arising from the hole and the excavated earth which was heaped up near it. Two circumstances rendered the giving of some notice or warning more important. The excavation was begun late in the day; the night was very dark. Mr. Ormiston says he would have put a light up under such circumstances. The digging of the hole is described by Ghellábhái, who was the servant of Mr. Hewson, a civil engineer in this business. Mr. Hewson employed him at a money wage, and by Hewson's orders Ghellábhái bought tools and a pump. Hewson had told him he meant to make a trial-pit to ascertain a good foundation for a big building. He is not shown to have taken or directed any precautions to prevent injury to people using the pathway Ghellábhái says about this: "He did not return till 3 P. M., and then pegged out a spot, and asked us to dig that spot. We dug it. Having pointed out that spot, and pegged it out, he went away. We dug till 5-30 P. M."

The plaintiff seeks to make the Port Trustees liable, on the grounds stated in the plaint, *viz.*, that they gave Hewson the permission to dig, although there was a right of way appendant to the occupation of Green's bungalow over the short cut. In the letter from the plaintiff's solicitors dated the 29th January (exhibit D), it is suggested that the Trustees are liable as the owners of the property. In his argument, Mr. Russell has urged that Hewson's digging was done under permission of both the defendants. The second defendant, who repudiates all liability, is sued on the ground that he dug the hole by his servants, agents,

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or workmen. Among other defences, the second defendant pleads that he employed Hewson, a competent engineer and contractor; that he himself was not in possession; and that the hole was not dug by his orders, or by his servants or workmen; and that Hewson, having got the Port Trustees' permission, entered on the land, and without any control or interference from him took such steps as he thought necessary. In fact, the defence, shortly stated, is that Hewson was not an agent or servant of the second defendant, but a contractor.

We have on these pleadings to see what relation the evidence shows Hewson to have borne to the different defendants. I will take his relation to the Port Trustees first. It has been admitted by the learned counsel for the plaintiff that Mr. Hewson is a civil engineer of considerable experience; and it has not been suggested that he is incompetent, or that he is a careless man, or in any way professionally unfit. What passed between him and the Port Trustees is contained in his letter of the 1st September and their engineer's reply. Hewson says he is instructed by the second defendant to make three borings, which, as Mr. Ormiston has told the Court, are small holes, about five inches in diameter, easily filled up. He got this permission, and no other. Instead of making borings, he made the pit already described, without, so far as the evidence shows, the knowledge or sanction of the Trustees. The accident occurred the same night; so no question of the continuance of the nuisance, or danger, being allowed by the Port Trustees, arises on the evidence. There is no evidence that Hewson was, in any respect, an agent or servant of the Trustees. The law seems settled by authorities. The Port Trustees were under no special obligation or duty to the plaintiff—a bare licensee—who had no right except their permission to use the path, to keep that path in a safe state or in good order—*Hounsell* v. *Smyth*[1]; *Wilkinson* v. *Fairrie*[2]; *Bolch* v. *Smith*[3]; *Sullvan* v. *Waters*[4]; which sums up a great many of the same kind. Under the circumstances, the plaintiff took the permission with its concomitant circumstances and, it may be, perils. He was his own

(1) 7 C. B. (N. S.), 774.
(2) 1 H. & C., 633.
(3) 7 H. & N., 736.
(4) 14 Ir. Com. Law. Rep., 460.

insurer. The principle is thus expressed in *Gautret* v. *Egerton*[1] with its limitations. *Per* Willes, J.: "If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences; but, if I do nothing, I am not." "To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license. Every man is bound not wilfully to deceive others, or to do any act which may place them in danger." *Ivay* v. *Hedges*[2] is even stronger. I am not aware of any principle, and the industry of the learned counsel has not availed to cite any authority under which an owner or occupier who, without any negligence, either of commission or omission, licenses a proper person to enter on his land to do a lawful act, not in its nature dangerous or injurious to others, can be held liable in damages if the person so licensed does something of a different kind, unknown to the owner or occupier, which may make the person who does it or his employer or principal liable for negligence. For these reasons I am of opinion that the suit must fail as against the defendants, the Port Trustees.

The question of the liability of the second defendant is somewhat more difficult. He seeks to evade it by showing that Hewson was not his agent or servant, but a contractor, in the sense in which that word is used, in opposition to agent or servant. There is no suggestion that the digging of the pit was with any malicious intention. For the negligence, then, the superior would be responsible to a third person in damages, if the relationship of principal and agent, or master and servant, is proved. In this matter I am obliged to form an opinion on such evidence as is produced. The second defendant has not produced all the instructions which he gave to Mr. Hewson. Some of them were given through the witness, Morris, who sent Hewson a sketch-plan (not produced after notice) prepared by

(1) L. R., 2 C. P. at pp. 373, 374. (2) L. R., 9 Q. B. Div., 80.

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an architect, Mr. Chisholm, showing where the borings were to be made. But from a letter, dated the 27th August, from Morris to Hewson it appears that the second defendant had personally instructed Hewson, some time in August, to deviate so far from Mr. Chisholm's plan as might be required in going deeper, if necessary, to reach a good foundation. The defendant has not appeared in person, nor called Hewson, in order to disclose what the personal instructions were. This is a matter of importance, as on the 20th August, (exhibit Q), Hewson writes to the second defendant about making, not borings, but trial shafts, and he at once, when he began work, made a pit instead of the boring for which he had got leave that same day. The remaining correspondence leads me to the opinion that Mr. Hewson was not a contractor in the legal sense, but a servant of the second defendant *pro hac vice*, as contended by Mr. Russell. In his letter of the 20th August he solicits orders from the second defendant about engaging a man in the work. He got personal instructions from the second defendant about the depth. He did not do the work at his own cost, but by means of advances of money from the second defendant, to whom and to whose agents, Messrs. Forbes & Co., he was held to strict account. He asks for orders as to making other pits, and as to retaining a night watchman. In every respect, it appears to me, he submits his acts and opinions to the judgment of the second defendant. He undertakes a supervision. The employer pays from time to time as expenses are incurred. Hewson is to get a fee of Rs. 50 for his services. He appears to me to have been a sort of clerk of the works. The general rule, no doubt, is that when one has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, free from the control of the employer and according to his own methods, he will not be liable for the torts of such contractor, his sub-contractors, and his servants. A number of cases to this effect have been cited by Mr. Starling—*Steele* v. *S. E. Railway Company*[1]; *Brown* v. *Accrington Cotton Spinning and Manufacturing Company*[2]; *Murray* v. *Currie*[3]; *Quarman* v. *Burnett*[4];

(1) 16 C. B., 550.
(2) 34 L. J. Ex., 208.
(3) L. R., 6 C. P., 24.
(4) 6 M. & W., 499.

Laugher v. *Pointer*(1). *Daniel* v. *Metropolitan Railway Company*(2) is an authority for holding that the employer is not bound to assume and provide against the possible negligence of a competent contractor. But these and the other cases appear to me not to be in point, as I am of opinion that Hewson was a servant. The test in some of the cases is whether the employer retained the powers of controlling the work, and whether he personally interfered—*Sadler* v. *Henlock*(3); *Peachey* v. *Rowland*(4); Story on Agency, s. 454. I find that the second defendant had exercised the right to command; that he had and exercised a close control; that he directed all the operations, even as to deviations from what the architect proposed; that the operations were for his benefit; and that he could, if he had thought fit, have given proper directions to prevent people falling into pits, or being injured by other obstructions. As he pressed on the execution of the works without finding the funds for a watchman, or giving Hewson any hint that he might entertain a watchman, I think the defendant's close personal control over the expenditure is an important point to notice. Under the circumstances of his using that control, he ought, I think, to have thought of these things. I am not at all satisfied that the word "boring" in Morris' letter of the 27th August was meant to refer merely to boring with a bore; the word used in Hewson's letter of the 20th was "shaft," and in the absence of Mr. Chisholm's direction, or any evidence about the defendant's personal instructions, I am of opinion that the defendant's expressed desire to get digging made down to the point where a good foundation would be reached, left Hewson with a considerable discretion. That was one consideration he was to attend to; another, pressed on him, was cheapness; these two considerations explain his conduct. He was put in difficulties, as his telegrams show, from want of advances. Now, I think, it may fairly be supposed that he, being willing to please the second defendant, wished to save him what incidental charges he could; and also that he wished to oblige him by getting deep

(1) 5 B. & C., 547.
(2) 6 L. R., 5 H. L., 45.
(3) 24 L. J. Q. B., 138.
(4) 13 C. B., 182.

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down to a foundation, and so—it may or may not have been on a previous understanding—he having got leave to make a boring, set to work, and made the pit which he in no way guarded. I think, then, the excavation, however performed, was within the course of Mr. Hewson's employment, or within the scope of his authority.

The case is thus distinguishable from mere trespass of a servant, as in *Stevens* v. *Woodward*(1) and the cases there quoted. What Mr. Hewson did was "something incident to the employment" for which he was hired, and which it was his duty to perform. The second defendant had put Mr. Hewson in his place to do a particular class of acts; and the cases of *Mackay* v *Commercial Bank of New Brunswick*(2) and *Burmah Trading Corporation, Limited*, v. *Mirza Mahomed Ally Sherázee*(3) are authorities for holding the second defendant liable for Mr. Hewson's acts.

With regard to the duty cast on the second defendant and his servants in respect of the plaintiff, Mr. Russell has relied strongly on the judgment of Brett, M.R., in *Heaven* v. *Pender*(4). The principle is stated by Brett, M. R., that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. The Lords Justices Cotton and Bowen declined, however, to concur in laying down this principle; and although I think that the fact of many people being then and having been for a long time past in the habit of using the pathway ought to have had weight with the defendant and his servants, I prefer to rest the right of the plaintiff to the observance and care on the defendant's part upon the principle stated in another authority quoted, *viz.*, *Corby* v. *Hill*(5). There the facts

(1) L. R., 6 Q. B. Div., 318.
(2) L. R., 5 P. C., 394.
(3) L. R., 5 Ind. Ap., 130.
(4) L. R., 11 Q. B. Div., 503.
(5) 27 L. J. C. P., 318.

were that on a private road leading to the Hanwell Lunatic Asylum, along which persons had been accustomed to pass by the leave of the owners, and were likely to continue to pass, the defendant, being about to build, received leave to place materials, and in pursuance thereof placed his materials in such a way as to obstruct the road, and make it dangerous to persons using it, and did not give notice to such persons by signal or otherwise. The defendant was held liable. In the absence of positive testimony to the contrary, it was held by Cockburn, C.J., that the defendant's leave was subject to the condition of taking reasonable precaution to protect the public. As a subsequent licensee, he had no right to negligently erect obstructions on the way which the prior licensees used. A person coming on lands by license has a right to suppose that the person who gives the license, and much more a person who is a wrong-doer, will not do anything which will cause him an injury. *Gallagher* v. *Humfrey*(1) is an authority of the same sort. See, too, *Directors of North-Eastern Railway Company* v. *Wanless*(2) and *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*(3), which have also been cited in support of the same principle.

With regard to the amount of damages, I agree with Mr. Starling that some of the smaller items, such as the advertisements, &c., are not proved. As to the pecuniary damage already sustained, I see no reason however to differ much from the plaintiff's estimate. I see no reason to suppose that he makes fraudulent statements, although his account of his profits is corroborated only by his own books. His general veracity may be inferred from the general corroboration found as regards the accident, and out of the medical witnesses as regards his symptoms. I think he was a good workman, earning money in the different ways he has stated. On this part of the claim I will award Rs. 3,500, which is liberal enough, but will also take the amount into consideration in fixing the lump sum. *Phillips* v. *South-Western Railway Company*(4) shows the principle on which the award of damages is to be made. A jury has to take

(1) 10 W. R., 664.
(2) L. R., 7 H. L., 12
(3) L. R., 3 App. Cas., 1155.
(4) L. R., 4 Q. B. Div., 406.

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into consideration all the heads of damages—"the bodily injury sustained; the pain undergone; the effect on the health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend a business or profession; as to which, again, the injury may be of a temporary character, or such as to incapacitate the party for the remainder of his life." I will now read the evidence of the plaintiff on the subject of the injuries and that of the three medical witnesses. I think it clear that the plaintiff has suffered serious injury of a nervous kind; but it is very difficult to say what extent of injury will result in future, or how far it will be permanent. The plaintiff was under Dr. Hojel and Dr. Church from the 10th September till the 8th October. In Dr. Hojel's opinion, the symptoms indicative of severe concussion were absent. He did not think the plaintiff was shamming. He treated him for nervous shock; but, as a matter of caution, blistered him, thinking there might be congestion of the membranes of the spinal cord. Dr. Hojel thought him more frightened than hurt. Dr. Church says that when he went away to Kirkee for change of air, the plaintiff's symptoms had not disappeared. He observed none of those indicating injury to spine. After this, the plaintiff was under the care of Dr. Sydney Smith, who first saw him on the 27th January, and on the last occasion on the 11th April. He saw him eleven times. He says he diagnosed him carefully, and that, in his opinion, he is suffering from concussion of spine. He has seen no improvement since January. He thinks there is effusion of serum, and probably a clot of blood between the covering of the spinal cord and the cord itself. From the touch he thinks there is fulness in the neck. He thinks the plaintiff is in a nervous state; sometimes he cannot focus his eyes. He has noticed that the plaintiff has lost his memory, and cries without provocation. The only reason for supposing that the injury may increase, is the long want of improvement. The clot, if there, may or may not be absorbed; it may, if there, possibly occasion paralysis. He noticed the stiffness of the head, and does not think that he can, for some time at least, follow his trade as a

watchmaker. He says that such cases are seldom completely cured, and he has known many cases of slight concussion from which the patient has never recovered. Now the evidence of Dr. Smith is not consistent with that of Dr. Hojel and Dr. Church. He speaks of a later period, and I have to notice that neither party to the suit has taken means to get the plaintiff examined by any other medical man, so as to do away with the effect of the above evidence. I think it shows that the plaintiff is seriously injured, and, for some years at least, will be unable to follow the trade by which he earned his living. But the evidence to show that the plaintiff is likely to suffer severe physical injury in future, is only of a problematical kind; and on this ground I must reduce the sum claimed on this account. It is Rs. 60,000; and as no great stress was laid by counsel for the defendants on the objection to this amount as being excessive, in the event of the Court holding that the injury would be permanent, and would be more serious in the future than at present, I think the considerable reduction which I am about to make on account of the evidence as to the future being so problematical may, with the order about costs, leave the sum I award an adequate, but not excessive, amount for the injury sustained. His health is not improving; he cannot work at his trade; he will have to go away for change of air; and, if he attends to his medical adviser, will have, for a long time, to be careful in all that he does, and be in a state of considerable anxiety. He is much inconvenienced now. He cannot walk fast. He has difficulty in moving his head and has other nervous symptoms. It is difficult to say how much a jury would award; but, on the whole, I think I ought to give weight to the medical opinion expressed by Dr. Smith after recent and repeated observations; and in the absence of contradiction, the defendants not having acted on the plaintiff's offer to submit himself to further medical examination, I will award for the injury, in future, a sum which, with the amount awarded for losses already incurred, will amount to Rs. 33,000. I think the plaintiff was entitled to some considerate treatment from the defendant, instead of a repudiation of all liability. Mr. Macpherson asks for costs of the Port Trustees out of the sum awarded; and as I see no reason why the plain-

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tiff here should be exempted from the ordinary rule by which a successful party gets his costs paid, I order the costs of the Port Trustees to be paid by the plaintiff and out of the damages if recovered. As regards the usual costs of the pauper plaintiff and his Court fees, I order the second defendant to pay them.

The second defendant appealed. The only point argued at the hearing of the appeal was as to the amount of damages, which the Court (Sargent, C. J., and Bayley, J.,) reduced to Rs. 17,000.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *February* 11.

CURSETJI PESTONJI TA'RA'CHAND, (PLAINTIFF), *v.* RUSTOMJI DOSSA'BHOY AND GOOLBA'I AND MANCHERJI CURSETJI BHATGARA, (DEFENDANTS),*

Married Woman's Property Act III of 1874—*Husband and Wife—Settlement—Property settled on married woman to her separate use and without power of anticipation—Power of married woman to charge such property with payment of debts incurred subsequently to marriage.*

Held (following *Hoppolite* v. *Stuart*(1), but doubting) that, under section 8 of Act III of 1874, a married woman has power to charge property settled upon herself, for her separate use without power of anticipation, with the payment of debts incurred by her subsequently to her marriage, and that such a charge is valid and binding.

THE second defendant, Goolbai, was the wife of the first defendant.

By an indenture, dated the 10th April, 1876, it was agreed and declared that the defendants, Rustomji Dossábhoy and Mancherji Cursetji, (defendants Nos. 1 and 3), should stand possessed of Government four per cent. promissory notes of the nominal value of Rs. 2,500 upon trust, to pay the interest, dividends, and income thereof to the defendant Goolbái, (defendant No. 2), for her separate use, and without power of anticipation during her life, and after her death in trust to pay and divide the same absolutely to and among such persons as, according

* Suit No. 408 of 1886.

(1) I. L. R., 12 Calc., 522.