Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of The Dominion Natural Gas Company, Limited v. *James H. Collins; and of The Dominion Natural Gas Company, Limited* v. *Florence Mary Perkins and others, from the Court of Appeal for Ontario; delivered the 30th July,* 1909.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DUNEDIN.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Dunedin.*]

The Defendants, the Dominion Natural Gas Company, recover natural gas from certain gas-bearing strata situated at a considerable depth below the surface of the ground and distribute this gas as a commercial product. In order to obtain a way-leave for their main, they entered into a contract with the Defendants, the Toronto, Hamilton & Buffalo Railway Company, of which one of the terms was that they should supply the Railway Company with gas at reduced rates at certain buildings belonging to the Railway Company, and should furnish meters and regulators for the gas so supplied. The Railway Company wished to have a supply, and

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the Gas Company installed a supply plant for the purpose, at the repair shops of the Railway Company, in the City of Hamilton. The gas, as it issues from the ground, is at a very high pressure. This pressure is reduced by a transforming device, before the gas is admitted to the mains. But the pressure in the mains is still too high for actual working, and it is therefore necessary still further to reduce the pressure before the gas is admitted to the burning jets, the ultimate pressure desirable being that of a few ounces, whereas the pressure in the mains is reckoned in pounds. This is effectuated by means of a very simple and ingenious regulator. This may be described as follows:—The gas from the service pipe is admitted into a chamber with an exit at the other side, and this chamber can be closed against the passage of the gas by means of a door working after the fashion of a portcullis. On the exit side the pipe branches; one branch, the direct one, going to the burners, the other, which forms part of the regulator, being taken vertically upwards and then bent back so as to fill a chamber situate vertically immediately above the portcullis. This chamber is divided into two parts horizontally by a diaphragm of indiarubber arranged on a metal frame. The lower surface of the diaphragm connects with a piston rod, which is free to move up and down and is attached at the lower end to the top of the portcullis door. In the side of the piston rod, about the middle, there is a slot into which is inserted the end of a lever supported on a fixed fulcrum. On the other end of the lever is a sliding weight, so that by receding the weight from, or approaching it to, the fulcrum, the upward pressure of the end of the lever which is in the slot can be increased or diminished. The apparatus then works as follows:—The weight on the lever,

which of course tends to keep the portcullis door open, is adjusted at the number of ounces pressure required. The portcullis door being open, the gas is admitted at the high pressure. The moment, however, it has passed through the chamber, it goes, not only to the burners, but also up the vertical pipe, and gains admission to the top of the diaphragm. Its pressure being greater than is necessary to overcome the upward pressure effected by the lever and weight, it depresses the diaphragm and the piston rod, and gradually shuts the portcullis, till the opening becomes so small that the pressure of the system is reduced and equalizes itself. Inasmuch, however, as at the first moment of admission there may be a strong rush of gas before the regulator action has time to work, and also in order to provide for any sticking of the portcullis, there is an extra precaution employed by means of a safety-valve inserted at the angle where the vertical pipe turns backwards towards the diaphragm chamber. The valve is a simple weight valve, the pressure being of course calculated at a little greater than the working pressure of the system.

Now, the Gas Company installed this system in the blacksmith's shop, an enclosed chamber. It seems to be usual, and is obviously conducive to safety, to put a pipe on the emission nozzle of the safety-valve, and take the outlet of the pipe to the open air. The Company, however, did not do so, but simply allowed the emission nozzle of the safety-valve to discharge, when it acted, into the air of the chamber.

The whole system was installed and worked, so far as is known, well for upwards of a year. It was from time to time inspected by the workmen of the Gas Company.

On the 1st November, 1906, the Plaintiff Collins and the deceased Perkins, whose repre-

sentatives are the other Plaintiffs, being workmen of the Railway Company, and having charge of the boilers which are heated by the gas, found that the gas was not coming easily to the boilers. They went into the chamber and found there had been some escape of gas. They then went away, but shortly afterwards returned. This time, on opening the door, or a few seconds after, they were met with a rush of gas; the gas caught fire from the jets of the boilers. There was an explosion, and Perkins was killed and Collins injured.

In the circumstances, the Plaintiffs sued both the Railway Company and the Gas Company for damages. The Railway Company deny liability on the ground that there was no negligence on their part. They had employed capable persons in the Gas Company to instal the machine, and if there was any fault in the system, it was the Gas Company who were to blame. The Gas Company denied liability on the ground that the system as installed was proper and safe, and that the escape which took place must have been due to improper practices on the part of the Railway Company's servants for which they were not responsible.

The machine itself was examined, and it was found that there was an accumulation of dirt which prevented the portcullis door closing tight. It was also proved that the Railway Company's servants had inserted a tap valve with a controlling cock in the pipe just before it enters the regulator, *i.e.*, on the high-pressure side; also that some workers of the Railway Company, annoyed by the noise which it made, had put a punch on top of the safety-valve and hammered it.

In this state of matters, the learned Judge at the trial put certain specific questions to

the jury, which, with the answers, were as follows:—

> 1. Was the injury to the Plaintiff Collins and to Perkins caused by any negligence of the Defendants, the Railway Company? A. Yes.
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> 2. If so, wherein did such negligence consist? A. By the Company allowing their men to tamper with the gas plant
>
> 3. Was the injury to the Plaintiff Collins and to Perkins caused by any negligence of the Defendants, the Gas Company? A. Yes.
>
> 4. If so, wherein did such negligence consist? A. By not running a pipe up through the roof.
>
> 5. If you find the accident was caused by the escape of gas, from which valve do you find the gas escaped? A. Safety valve.

They also, by their answers to certain other questions (which it is unnecessary to quote) negatived contributory negligence.

Upon these answers the Trial Judge found for the Plaintiffs against the Gas Company, but dismissed the suit as against the Railway Company.

The Gas Company appealed, and the Plaintiffs resisted the Appeals, but acquiesced in the decision absolving the Railway Company.

The Appeal Court affirmed the Judgment of the Trial Judge in each case, and the present Appeals are against these Judgments.

To come now to the position of the Gas Company. The Gas Company were not occupiers of the premises on which the accident happened. Further, there being no relation of contract between the Company and the Plaintiffs, the Plaintiffs cannot appeal to any defect in the machine supplied by the Defendants which might constitute breach of contract. There may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary

according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the Defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell*, 5 M. & S., 198, *Thomas* v. *Winchester*, 6 N.Y., 397, and *Parry* v. *Smith*, 4 C.P.D., 325, are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the Defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

In applying these principles to the facts in hand the basis of consideration must be sought in the findings of the jury, unless it can be said of these findings that they are incapable of support by the evidence.

Now, the jury has affirmed negligence on the part of the Gas Company in respect that they installed the safety-valve with an emission direct into the shop instead of into the open air. This finding seems to their Lordships not only capable of support upon the evidence, but really reasonable in itself. For the safety-valve by its very existence was meant to work

from time to time; and the frequency of its working would seem to depend on causes which might be quite independent of negligence, *e.g.*, sudden pressures of gas, and also accumulations of dirt which would prevent the portcullis closing tight. When the valve did work, gas was necessarily emitted, and it would seem both an easy and a reasonable precaution that that emission should be led to the open air, where it would be harmless, rather than put into the closed chamber where it might become a source of danger.

That being so, have the Defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition, *i.e.*, the tampering with the machines by the Railway Company's workmen ?

In truth, their Lordships think that on the evidence the true cause of the escape is left in doubt. It is found by the jury, and their Lordships think rightly, that it took place at the safety-valve, and not at the valve put in by the Railway Company's workmen on the high-pressure side. But the escape at the safety-valve itself could equally have been caused either (1) by the destruction of the valve as a tight-fitting valve owing to the hammering, or, in other words, by the negligence of the Railway Company's workmen; or (2) by the fact that the portcullis had got clogged with dirt, which, by preventing it from shutting, would allow of a constant pressure greater than the restraining power of the safety-valve. Now, there is no evidence to show that the accumulation of dirt was due to the action of the Railway Company's workmen. It was indeed suggested that, in putting in the tap valve, they may have broken a wire gauze screeen which was found with a hole in it, and which is meant to protect the portcullis

chamber from dirt. But first, this is only a suggestion unsupported by actual testimony, and, second, it is certain that it is only a question of time, the gauze screen being unable to prevent a certain amount of dirt gaining admission, and the dirty state of the portcullis chamber being either a natural result to protect against which the safety-valve was in one aspect designed, or the result of the negligence of the Gas Company's servants, whose duty it was from time to time to inspect the apparatus and see that it was in good order.

Accordingly their Lordships hold that the Defendants, the Gas Company, have failed to show that the proximate cause of the accident was the act of a subsequent conscious volition, and that, there being initial negligence found against them, the Plaintiffs are entitled to recover.

Their Lordships will therefore humbly advise His Majesty to dismiss these Appeals and to affirm the Judgments of the Court of Appeal.

The Appellants will pay one set of the Respondents' costs of the Appeals, but the Taxing Officer will allow such additional items (if any) as are, in his opinion, justified by the circumstances of the case.

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