[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;
DEFENDANT,

AND

HENRICKSON & KNUTSON . . . . RESPONDENTS.
PETITIONERS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 17, 18, 20.

Griffith C.J., Barton and O'Connor JJ.

Indemnity—Implied contract of—Act done by one person at another's request injurious to a third party.

In April 1907, H. & K., general contractors, entered into a written agreement with the Minister for Public Works for Western Australia to construct a sewer in a public street. In the course of their operations damage was caused to the buildings of one C. C. thereupon brought an action against the contractors in respect of that damage. The jury negatived any negligence on the part of H. & K., but found that C.'s property had been injured, and gave a verdict accordingly. In an action by the contractors against the Government claiming to be indemnified against the loss sustained by them in consequence of the verdict,

Held, that the principle laid down by Lord *Halsbury* L.C. in *Sheffield Corporation* v. *Barclay*, (1905) A.C., 392, at p. 397, viz., that when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done, applied, and that this implied right to indemnity was not excluded by the terms of the written agreement.

Judgment of the Supreme Court of Western Australia (*McMillan J.*) affirmed.

APPEAL from a judgment of *McMillan* J.

In April 1907 the respondents, who were general contractors,

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entered into a contract with the Minister of Works in connection with the construction of the Parry Street main sewer. In the course of the operations damage was caused to the buildings of one Janny Cohney, erected on certain land owned by her at the corner of Beaufort Street and Beaufort Lane, through which the sewer passed. Cohney brought an action against the respondents claiming damages.

The action was tried before *Rooth* J. and a jury. The respondents paid £375 into Court with a denial of liability. The jury found that the removal of lateral support, viz., sand, by the respondents caused the injury complained of but that there was no negligence in the conduct of their operations, and assessed damages at £224 5s. This amount was ordered to be paid out to Cohney despite the finding as to negligence, on the ground that there was no statutory authority for the construction of the works.

An action was then brought by the contractors under the *Crown Suits Act* 1898 claiming to be indemnified by the Crown to the extent of £830 12s. 8d., a sum covering both the costs of defending Cohney's action against them and the damages awarded in respect thereto. The basis of the petitioners' claim was an alleged implied contract by the Minister for Public Works to indemnify them for any loss or damage accruing to them through the performance of their contract. The action was heard before *McMillan* J., who gave judgment for the petitioners for £804 11s. 8d. with costs.

From this decision the Crown now appealed to the High Court.

Northmore K.C. (with him *Dr. Stone*), for the appellant.—The only contract that can be implied against the Minister is that he had all the authority with which he could by law be clothed. By the terms of the contract itself the petitioners were bound to restore any property that was damaged by them—see clause 12 of the specification and condition 25 of the contract.

[GRIFFITH C.J.—The "accident, damage or injury" referred to in condition 25 contemplates damage not to property but to individuals.]

The damage which occurred was damage which the contractors themselves undertook to repair, and is clearly covered by clause 12 of the specification. Moreover clause 4 assists to the conclusion that the price for which the contractors undertook to do the work was meant to cover damage of the kind that actually occurred.

[GRIFFITH C.J. referred to *Brand* v. *Hammersmith and City Railway Co.* (1).]

Counsel referred to the following cases:—*In re Henrikson and Knutson and The Crown* (2); *Metropolitan Asylum District* v *Hill* (3); *East Fremantle Corporation* v. *Annois* (4).

Pilkington K.C. (with him *Stone*), for the respondents. Condition 25 refers only to the method of executing the work, not the work itself. If the Crown's contention as to clause 12 is right the contractors would take over the whole liability of the Government, a liability that could not be within the contemplation of the parties. It cannot be contended that the mere putting in of the drain—mere obedience to superiors whom the respondents were bound to obey—would impose upon them a liability for damages which *primâ facie* should fall upon the building owner.

[He referred to *Ilford Gas Co.* v. *Ilford Urban District Council* (5).]

Where a contractor is authorized by a contract to put a drain down in a public street there is an implied contract on the part of the person giving the authority that he has power to enable the contractor to perform the contract. If the contract is performed without negligence the contractor is free from liability under it.

Further the alleged Order in Council which the Crown relies on as authorizing the laying down of the specific drain in question is not an Order in Council at all but a mere general authority approving of a general scheme. It did not and was not intended to authorize any public work. Each piece of work to be performed by a contractor should be authorized. The Crown has

(1) L.R. 4 H.L., 171.
(2) 12 W.A.L.R., 19.
(3) 6 App. Cas., 193.
(4) (1902) A.C., 213.
(5) 67 J.P., 365.

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had a drain put down in a place where it had no authority to put it, contracting that it had authority. For that the respondents are entitled to an indemnity.

In any event the respondents are entitled to an indemnity upon the statement of the law by Lord *Halsbury* L.C. in *Sheffield Corporation* v. *Barclay* (1).

[GRIEFITH C.J.—That is the respondents' real cause of action].

It is impossible to read into clause 12 of the specification the liability contended for by the Crown. To do so would impose on the respondents a liability which might amount to the whole value of his contract.

Northmore K.C., in reply. The damage done is covered by the plain meaning of the words in clause 12 and condition 25 before referred to.

Cur. adv. vult.

The following judgments were delivered:—

October 20.

GRIFFITH C.J. The history of this case is rather peculiar. The respondents entered into a contract with the Government of Western Australia for the execution of certain drainage works in the City of Perth. In the course of the execution of those works the natural support was withdrawn from the land owned by a Mrs. Cohney, which resulted in injury to buildings of hers standing upon it. She brought an action against the respondents, alleging wrongful removal of support, and also alleging negligence on their part in the execution of the work. They gave notice of the action to the Government, and invited the Government to say what they desired to be done in the defence of the action. The Government merely acknowledged the receipt of the notice, and disclaimed any liability in the matter. The case then came on to be tried before Mr. Justice *Rooth* and a jury, who negatived any negligence on the part of the defendants, but found that Mrs. Cohney's property had been injured, and assessed the damages at £225. The proper inference to be drawn from these findings—and this is not disputed—is that the damage caused to Mrs.

(1) (1905) A.C., 392, at p. 397.

Cohney was a necessary consequence of the execution of the work itself, and was not due to any default on the part of the respondents.

In that action a defence was set up that the Government were authorized by law to execute the work, and that consequently no cause of action arose either against them or their agents, the respondents in this action, for any injury caused by the mere execution of the work, apart from any negligence in the execution; and it seems to have been assumed that that was the law, and that all that was necessary, therefore, to afford a complete defence to the action was to prove that the Government had such an authority. The Statute relied upon was the *Public Works Act* 1902, which provides (sec. 11) "The Governor by Order in Council, may authorize the Minister to undertake, construct, or provide any public work subject as to railways to Section 96, and such authorization shall be deemed an authority to such Minister by and under this Act." It seems to have been assumed that as soon as an Order in Council is made under that section authorizing the construction of a public work, anything done in pursuance of the order is not actionable unless there is some negligence or default in the manner of the execution; and the question principally litigated in that action was whether there was such an Order-in-Council in fact. The point taken was a rather curious one. Evidence was given before the learned Judge to show that an Order in Council is a formal document drawn up in a particular form and promulgated in the *Gazette*. No such document was formally drawn up in this case; the only written record of the proceedings of the Governor in Council being a recommendation made to the Governor with his approval written upon it in Council. Those who are familiar with the practical working of Executive Government in the Australian States know that, probably, in more than ninety-nine per cent. of cases in which Orders in Council are made they are not formally drawn up. The only record kept is a copy of the recommendation itself and of the approval. Therefore, so far as the question of fact goes, I have no doubt that there was an Order in Council in the sense in which that term has always been understood in Australia. But when we come to look at the

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contents of the Order in Council, it is extremely doubtful whether it authorized the construction of any works at all. It is not, however, necessary to express an opinion upon the point. Assuming that it did, it is still more doubtful whether such an Order would afford an absolute protection to the Government or their contractors. Sec. 11 is one of a series of sections in Part II. of the Act, which deals with taking land for public works. Sec. 10 provides that when the Government or local authorities are authorized by law to undertake, construct or provide any public work, any land required for the purposes of such work may be taken under the provisions of the Act. Then comes sec. 11, showing what is an authority to the Minister for the purposes of that Part of the Act. As soon as an authority of that sort is given, the power to take land comes into operation, and elaborate provisions are made for taking it, and for giving compensation to the owners. But to say that the Government, by reason of this provision, are immune from any claim for damage inflicted upon private persons is a very long step indeed, and it would take a good deal of argument—indeed more than argument, positive authority—to convince me that such a provision would bring the case within the rule laid down by Lord *Watson* in his speech in the *Metropolitan Asylum District* v. *Hill* (1). Lord *Watson* there said, "I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the legislature; and in the second place, that they cannot possibly obey those orders without

(1) 6 App. Cas., 193, at p. 212.

infringing private rights. If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the Statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the Statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the Statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose."

The case in which the learned Lord said this was one of a building, but the principle is applicable to all cases. So much for that point. *Rooth* J. held that the authority set up was not proved in fact. I think that the document relied upon was proved in fact, but whether it amounted to an authority is more than doubtful for the two reasons I have given.

Another defence was also set up, that the contractors, the respondents, did what they did under a licence from the Municipal Council of Perth, who were the registered owners of the land through which the drain in question was constructed. But the Municipal Council of Perth had no authority to grant a licence to anyone to interfere with private property. Nothing more seems to have been heard of that defence. The result was that Mrs. Cohney had judgment against the respondents for £225.

The respondents then brought this action by petition of right against the Crown, claiming to be recouped that sum, and also the costs to which they were put in defending that action. No question has been raised as to the measure of damages or as to their right to maintain their action to recover both the costs and the damages. The statement of claim sets out their case in this way. It alleges that they were employed by the Minister for Public Works by authority of the Executive Council to construct drainage works, and that in the course of the construction of the works damage was occasioned to the land and buildings of Mrs.

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Cohney; but that such damage was not occasioned by any wrongful act or default on the part of the petitioners in the execution of the work. Then paragraphs 2 (*a*) and 2 (*b*) alleged: 2 (*a*) "By the said contract the Minister for Public Works impliedly covenanted that he had the right to have the said works constructed and that he would indemnify your petitioners for any loss or damage accruing to them through the performance of the said contract by them;" 2 (*b*) "In fact the said Minister had no such right, and the execution of the said works was unlawful and created a public nuisance." The substantial point intended to be made on those pleadings was apparently that the Government had impliedly contracted that they had obtained a proper Order in Council under the *Public Works Act* which would have offered absolute immunity from any action except for negligence; and a question was referred to the Full Court on that point and decided by them. An attempt was made at the Sittings of this Court here last year to have that decision reviewed, but the Court for reasons given declined to entertain the matter. The Crown do not now set up the *Public Works Act* as conferring complete immunity from action. The petitioners' claim, therefore, now rests upon the doctrine which was thus laid down by Lord *Halsbury* in *Sheffield Corporation* v. *Barclay* (1): "In *Dugdale* v. *Lovering* (2) Mr. *Cave*, arguing for the plaintiff, put the position thus:—'It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.' This though only an argument of counsel was adopted and acted upon by the Court, and I believe it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One qualification is that there is no right of contribution between tortfeasors; and the other is to distinguish

(1) (1905) A.C., 392, at p. 397. (2) L.R. 10 C.P., 196.

the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood. Neither of these questions has any relation to what is here in debate. The principle insisted upon by Mr. *Cave* in his argument quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think the principle as enunciated is well established." In the present case I think it is clear that the acts done by the respondents, which have given rise to this litigation were done by them at the request of the Government: I think it is clear that the acts were not in themselves manifestly tortious to the knowledge of the respondents in doing them; and thirdly they turned out to be injurious to the rights of a third party, Mrs. Cohney. Then it follows that the person doing the acts is entitled to an indemnity from the person who requested that they should be done. That case, I think, is sufficiently made by the petition of right although it does not seem to be the case originally intended to be made, and a good deal of time and energy has been expended in arguing other questions.

But it is clear that this implied right to indemnity may be excluded by the terms of the contract between the parties, and the Crown set up in that defence that by the terms of the particular contract it was excluded. They rely upon two provisions of the contract, one contained in the General Conditions and one in the Specification. General Condition 25 is as follows: "The contractor shall be liable for any accident, damage, or injury whatsoever to the public or to any individual which may be caused by his operations, or by those of any subcontractor, during the progress of the works or during their maintenance." The construction of that provision has been much debated and without criticising in detail the arguments urged I think it sufficient to say that, in my opinion, it relates to damage caused by the operations of the contractor as an independent actor in the execution of the work, as distinguished from damage caused by the execution of the work itself in whatever manner it is carried out. If that execution is carried out by the contractor without any default or negligence on his part, then condition 25 has no application. It is conceded here that

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there was no default on the part of the contractors. I think, therefore, that the Government cannot rely on condition 25.

The other stipulation relied upon is a provision in the specification, which, of course, is an enumeration of the work to be done under the contract. Clause 12 is in these terms, "All buildings, walls, fences, and works of any description that it is found necessary to remove or that may be disturbed through the operations of the contractor, shall be replaced or repaired at his sole cost and left, at the completion of the works, in their original order and condition." The injury in the present case was the disturbance of the foundations of Mrs. Cohney's buildings; a disturbance to such an extent that some of the walls had to be rebuilt. It is contended that those facts bring the case exactly within the terms of the stipulation, that it is a case of buildings and walls which were disturbed through the operations of the contractor. I quite agree that in a particular context that might be the plain and necessary meaning of the words, but you must always look at the context. On referring to the whole of the specification it appears that this clause 12 is one of a group of provisions, to one or two of which I will refer. Clause 7 provides for the Government giving the contractors access to the site of the works. The works to be executed, being a drain extending over a considerable area, were not confined to streets, but would necessarily go through private property. It was therefore stipulated that, for the purpose of sinking shafts on lines of streets and on private ground, the contractor should have temporary possession of a specified area on the site of each shaft, with the implied obligation on the Government to put him in possession of that land and to acquire the right of possession from the private owners; and there are other provisions in the same clause on the subject. Clause 10 provided that due care should be taken by the contractor in the event of his making excavations under or near a railway or tramway. Clause 11 required the contractor to provide temporary bridges, footways, flumes, &c., over watercourses, open trenches, and underneath railways, tramways, roads, streets, and footpaths so as to prevent interruption to traffic. He was also to provide temporary fences and barriers for the protection of the public. Then comes clause 12, "All buildings, walls,

fences, and works of any description that it is found necessary to remove, or that may be disturbed through the operations of the contractor, shall be replaced or repaired at his sole cost and left, at the completion of the works, in their original order and condition." Read in their place, and with what has gone before, these words appear to bear a more limited meaning than they might be capable of bearing in a different context. In a later clause—15—headed "Temporary Timbering," it is provided, amongst other things, that the contractor must "execute whatever may be required to prevent any buildings or other superstructures, roads and other surfaces over and adjacent to the line of drain or sewer from settling, cracking, being shaken, slipping, or falling in, and to prevent any portion of the floors from slipping," and so on; and he is to do this at his own cost until the completion of the work. Finally, clause 43 provides that upon completion of the work the contractor must remove from the Government, municipal, and private property all temporary buildings, &c., and must also remove all surplus earth and rubbish and leave the works in clean condition to the entire satisfaction of the executive engineer.

I think that the word "disturbed," although capable of bearing the wider sense contended for, is an apt word to describe such interference with structures or works, gas pipes, water pipes, &c., on the actual site of the drainage works, as is incidental to the execution of the work, as distinguished from removal of buildings dealt with by the first part of the clause. The word "repair," again, is an apt word to express what is to be done in such a case. Again the word "left" in the stipulation that the buildings that may be disturbed shall be repaired by the contractor and "left in their original order and condition" seems to assume a temporary possession or control during the contract, and which the contractor will relinquish on its completion. On the whole, therefore, I have come to the conclusion that this stipulation refers only to such disturbance as is incidental to carrying out the work as a work, and has no reference to damage in the nature of disturbance caused to the property of private owners over which the contractor has no control. I think, therefore, that the express qualification set up by the Govern-

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ment of the implied obligation arising from their employing the respondents to do the work for them, is not established, and that the plaintiffs are entitled to judgment on the principle of the doctrine laid down in the passage which I have quoted from Lord *Halsbury's* speech. That is practically the conclusion at which *McMillan* J. arrived. I think, therefore, that the appeal fails.

BARTON J. The case as heard before us is really narrowed down to one or two points. Whether the Crown by reason of sec. 11 of the *Public Works Act* 1902 and of the minute of the Governor in Council had statutory authority for the construction of the works is now scarcely material. Until the point comes before us as a question vital to the decision of some case I shall refrain from pronouncing an opinion on it. In the meantime I do not wish to imply dissent from the opinion acted upon in the Supreme Court. It is conceded by the Crown that, even if it had such authority, it was not freed from liability in respect of damage done to an owner. But as between itself and the respondents, the Crown bases its appeal on considerations which arise out of the terms of the contract, and it claims immunity in this action even if we assume the absence of statutory authority. The respondents under these circumstances now rest their claim wholly on the principle stated by Lord *Halsbury* L.C. in *Sheffield Corporation* v. *Barclay* (1), adopting the words of Mr. *Cave* in argument in the case of *Dugdale* v. *Lovering* (2): "It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." That principle is not denied by the appellant, who does not contend that it would not be applicable in ordinary cases. But the appellant's counsel argued that its application was prevented by the terms of this contract, chiefly by the effect of one of the general conditions and one of the specifications. The respondents' tender was made and accepted on

(1) (1905) A.C., 392, at p. 397. (2) L.R. 10 C.P., 196.

the footing of the general and special conditions and the specification, and they have contracted with reference to both. The condition is No. 25 (1), which renders the contractor "liable for any accident, damage, or injury whatsoever to the public or to any individual which may be caused by his operations, or by those of any sub-contractor, during the progress of the works or during their maintenance." The period of maintenance was to last for a specified number of months after the engineer's final certificate. (See Special Condition 5). The appellant contended, first, that this condition applied in the case of injury to property as well as to the person, and, secondly, that it rendered the contractor liable to the Crown, not only in the case of injury due to the manner in which the contract was executed, but in the case of injury arising out of the nature of the work he was bound by the contract to perform. Consequently it was claimed that the condition operated as an indemnity to the Crown against the contractor, and therefore excluded the general principle. There is no reference to property in this condition, and in the case of *In re Henrikson and Knutson and The Crown* (1) *McMillan* J. was inclined to think that it was intended to deal merely with injuries of a personal kind. The words "to the public" may cause some difficulty in adopting that construction, but the question need not be discussed because, if the second contention of the Crown is not sustained, it cannot have any advantage from the condition. For, as the respondents point out, damage, if it did not arise from the nature of the work to be done, could in the present case only be attributable to negligence, the existence of which has been negatived by the jury. On the other hand, if the nature of the work itself has caused the damage—which is the only alternative—the Crown cannot successfully contend that the contractor must bear a loss for the mere doing of that which the Crown exacted from him, and the contractor is entitled to his indemnity. I am of opinion that the respondents have placed the true construction on General Condition 25, namely, that it does not expose the contractor to liability where the injury arises out of the nature of the work. They are justified in relying on the case of *Ilford Gas Co.* v. *Ilford Urban District Council* (2) which I regard as

(1) 12 W.A.L.R., 19.

(2) 67 J.P., 365.

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a distinct authority in favor of the respondents. By parity of reason it clearly supports the limitation their argument places on the extent of the indemnity granted by the conditions.

Specification 12 was next relied on by the appellant, who contends that this is a case of a building "disturbed through the operations of the contractor," which he was bound to replace or repair at his own cost and to leave, at the completion of the works, in its original order and condition, so that the specification negatived the implication of an indemnity of the contractor by the Crown. The respondents had a twofold answer—First, that the specification operated, as to structures "disturbed," in case only of the contractor's negligence, and they pointed out that the term "the operations of the contractor," was equivalent to "his operations" as occurring in General Condition 25, and "the execution of the works" in the *Ilford Gas Company's Case* (1) just cited. Secondly, they urged that the specification extended only to structures on the site of the works, or if it applied to any structures disturbed outside that area, then it covered only cases in which the structure was so nearly included in the site that the execution of the works directly and physically, and not as a mere consequence, operated as a "disturbance."

Though it is not necessary, in the view I take, to decide as to the first of these answers, I may say that I am not as at present advised convinced by it, as there is ground for thinking that in their collocation with the rest of the specification the words relied on are not to be read in the sense in which the words "his operations" in General Condition 25 seem clearly to have been used.

As to the respondents' second answer, I am of opinion that it is justified. Taking the whole of the specifications together, their scope appears to be limited to things to be done on and immediately abutting on the site of the works. There are many of the individual clauses which tend to show this, and I would point especially to Clause 43. Moreover it seems unreasonable to suppose that the contractor should be liable for injuries in places apart from the works, of which he could not obtain possession except with the consent of the owners and the assistance of the

(1) 67 J.P., 365.

engineer (see General Condition 23): while as to the site of the works he is protected by General Condition 33 (1), under which the Minister is bound within thirty days after the signing of the contract and from time to time afterwards as required, to put him in possession of such parts of the land required for the works as may be necessary for their proper prosecution.

The contrast between these provisions throws much light on the construction of Specification 12, and renders it more improbable, in my view, that that specification should have been intended to apply to areas over which the contractor could not, except with the consent of the private owner and the assistance of the engineer, have obtained the possession which was necessary, if the construction of the Crown is right, to enable him to carry out that specification. For these reasons I think that the portions of the contract and specifications relied on to derogate from the application of the general principle have not that effect; that the principle applies; and that therefore the respondents are entitled to succeed in the action and the appeal should be dismissed.

O'CONNOR J. As this case was presented to Mr. Justice *McMillan* in the Court below he found himself constrained to follow the judgment of Mr. Justice *Rooth* in Mrs. Cohney's action against the respondent contractors. In that action Mr. Justice *Rooth* decided that the Minister for Public Works was not legally and properly authorized to carry out the work under the provisions of the *Public Works Act* 1902. In following that decision Mr. Justice *McMillan* is careful to say that he expresses no opinion whether it is right or wrong. As the case has been presented before this Court it becomes unnecessary to decide that question. If it were necessary I must say that I have not been able to discover any section of the *Public Works Act* 1902 which requires any other or further authority than that contained in the executive approval established by the documents in evidence. The Executive Minute taken in connection with the plans to which it refers describes a definite scheme of sewerage and drainage, and delimits the land upon which it is to be carried out. For my part I am not satisfied that that is not a sufficient

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authority under sec. 11. I agree, however, that, even if the authority is sufficient, it does not necessarily relieve the Government or the contractors from all responsibility except for negligence. As to that, no question at present arises because the Crown does not deny its liabity for injuries resulting from the carrying out of the work, even though its operations were carried on without negligence. On this appeal, therefore, we need not consider either of the matters to which I have referred, because the respondents, relying on an allegation in their petition of right, have rested their case upon another ground in their argument before this Court. They contend that, having carried out the work without negligence, they are entitled to be indemnified against all damages and costs which they have become liable to pay under claims lawfully made against them in respect of the work, and they rely upon the principle laid down by Lord *Halsbury* L.C. in *Sheffield Corporation* v. *Barclay* (1). That principle is, in my opinion, applicable, and the respondent contractors are clearly entitled to the indemnity they are claiming in the present action unless they have by the terms of their contract disentitled themselves. Their right now to succeed therefore depends entirely upon whether or not the provisions of the contract upon which the Crown rely—General Condition 25 and Specification No. 12—are such as to deprive them of the right of indemnity. As to General Condition 25, I agree that it is not applicable, though I would not limit its operation as Mr. Justice *McMillan* apparently thought it should be limited in the case of *In re Henrikson and Knutson and The Crown* (2). The learned Judge there expressed the view that the clause is limited to liability for injury of a personal character. I think its meaning is not so restricted as that, but I am of opinion that it is limited to damage or injury caused by the actual operations of the contractor in the carrying out of the work, either upon the land itself or upon those portions of streets or other places which were put into his possession for the purpose of carrying out the contract. There are many ways in which the contractors are brought into direct contact with the public and with individuals in performing this contract. For instance, at the crossings of streets and in doing the work in the

(1) (1905) A.C., 392, at p. 397. (2) 12 W.A.L.R., 19.

midst of street traffic, they are bound to make proper provision for carrying on the traffic without interruption. If in so doing any damage is done either to person or to property they are made liable for damage under General Condition 25, but I am clearly of opinion that the condition cannot be applied to an injury of this kind which though consequent on, does not arise in the performance of, work being carried out under the contract. Turning now to the other provision relied on, Clause 12 of the specification, I agree with the view that my learned brothers have put forward, that the section cannot be applied to the condition of things which has arisen here. Clause 12 is part of the work which has to be carried out under the contract itself and its complete performance is necessary for the completion of the contract itself. Until all the work included in Clause 12 is carried out to the satisfaction of the engineer, the general certificate of completion of the contract, under which the contractor is entitled to claim the balance of his payment, cannot be issued. It is, therefore, obvious on the face of it, that the work to be done under Clause 12 is part of work to be carried out in the course of the contract. The work of the contract is to be carried out on land to be put in the possession of the contractor by the engineer for the purposes of the work and the contractors have no right to enter upon any other land than that of which they are so given possession, either land originally set out under the provisions of the specification or land which in the engineer's opinion it becomes necessary to enter upon for the purpose of the work. Under General Condition 23 the contractors are prevented from entering upon private land without the consent of the owner. If, therefore, it became necessary, as it undoubtedly would be necessary, to enter upon Mrs. Cohney's land for the purpose of making good the disturbance complained of, it is clear that that work could not be carried out if Mrs. Cohney objected or if the engineer refused to put the contractors in possession of the land for that purpose. Under these circumstances it seems to me impossible to reasonably construe the clause in question as imposing upon the contractors an obligation to perform work on land outside the site of the works and on which neither the engineer nor the contractors had any right of entry except by consent of the owner. I therefore agree that

H. C. OF A. 1911.

THE CROWN v. HENRICKSON & KNUTSON.

O'Connor J.

Specification 12 cannot be applied to take away from the contractors the right of indemnity which they have at common law under the principle laid down by Lord *Halsbury* L.C. in *Sheffield Corporation* v. *Barclay* (1). I therefore concur in the view at which Mr. Justice *McMillan* arrived and am of opinion that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *The Crown Solicitor.*
Solicitors, for the respondents, *Stone & Burt.*

J. H.

[HIGH COURT OF AUSTRALIA.]

THE ENGLISH AND AUSTRALIAN COPPER CO. LTD. . . . . DEFENDANTS, APPELLANTS;

AND

THOMAS JOHNSON . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *Dec.* 1, 4, 5.

Griffith C.J., Barton and O'Connor JJ.

Master and servant—Wrongful dismissal—Plea of justification—Misconduct of servant—Failure to carry out agreement made by employer with his customer—Duty of trial Judge—Allegation of fraud—Onus of proof.

The plaintiff had been engaged by the defendants to manage their smelting business. The defendants' course of dealing was to purchase metallic ores at a price depending upon the metallic constituents of the ore as ascertained by assay of a sample of the ore. Independent assays were made by the defendants and the sellers of the ore of different portions of the parcel of ore which

(1) (1905) A.C., 392.