MASTER AND SERVANT

Owner's Liability to Employee of Independent Contractor—Electricity Cases—Where Work Is Inherently Dangerous.

Defendant, an electric company, hired an independent contractor to put in some tranformers at defendant's substation. Plaintiff, an employee of the independent contractor, received injury from an electric shock caused by the contact of an assembled steel tower, which plaintiff was helping to guide, with the uninsulated high voltage wires on defendant's property. Plaintiff was aware of and had been warned by defendant of the dangers connected with the work. It is admitted that the independent contractor was negligent. Judgment for plaintiff in the trial court was reversed and judgment entered for defendant, one judge dissenting. *Cleveland Electric Illuminating Co.* v. *O'Conner, et al.*, 50 Ohio App. 30, 2 Ohio Op. 227, 19 Abs. 235 (Ohio Bar, Sept. 16, 1935).

The majority based their opinion on the theory that even though there be inherent danger an owner is not liable to the employee of his independent contractor even though under the same circumstances he would be to a stranger. They stressed the facts that the employees knew of the danger and that the defendant had warned the plaintiff thereof. The dissent disagreed with this theory, saying: granted the duty connected with inherent danger, then the owner is liable to any third party, stranger or employee of an independent contractor.

The result of the majority view can be reconciled with cases in other jurisdictions involving injury from the use of electricity. These cases hold that the duty to an employee of an independent contractor is the duty owed to an invitee. *Dunn* v. *Cavanaugh*, 185 Fed. 451, 107 C.C.A. 521 (1911); *Pennsylvania Utilities Co.* v. *Brooks*, 229 Fed. 93, 143 C.C.A. 369 (1916); *Gagnon* v. *St. Maries Light & Power Co.*, 26 Ida. 87, 141 P. 88 (1914); *Valparaiso Lighting Co.* v. *Tyler*, 177 Ind. 278, 96 N.E. 768 (1911); *Hoppe* v. *City of Wiona, et al.*, 113 Minn. 252, 129 N.W. 577, 33 L.R.A.N.S. 499, Am. Cas. 1912 A, 247 (1911); *Clark* v. *St. Louis & S. Ry. Co.*, 234 Mo. 396, 137 S.W. 583 (1911); *Sommer* v. *Public Service Corp. of N. J.*, 79 N.J.L. 349, 75 A. 892 (1910); *Galveston-Houston Electric Ry. Co., et al.* v. *Reinle, et al.*, 113 Tex. 456, 258 S.W. 803, 2 L.R.A. (N.S.) 777 (1924). Ohio, in a journal entry opinion in *The Toledo & Indiana Ry. Co.* v. *Baker, Admr.*, 81 Ohio St. 494, 91 N.E. 1141 (1909) seems to hold *contra.* It is generally held, however, that once the owner has warned the employee—not the independent contractor—of the

danger, the employee assumes the risk. *Dunn* v. *Cavanaugh, supra; Clark* v. *St. Louis & S. Ry. Co., supra; Gagnon* v. *St. Maries Light & Power Co., supra; Galveston-Houston Electric Ry. Co., et al.* v. *Reinle, et al., supra.*

It seems reasonable to apply to electricity cases this combination of the theories of duty to invitee and assumption of risk. While electricity is extremely dangerous, yet, it being confined spacially, does not have the inherently dangerous qualities that other things have which are not so confined and which the courts have called inherently dangerous, such as blasting, *Tiffin* v. *McCormick*, 34 Ohio St. 638, 32 Am. Rep. 408 (1878), or pulling down an old wall, *Covington & C. Bridge Co.* v. *Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N.E. 618, 7 Am. Neg. Rep. 154, affirming 4 O.N.P. 226, 6 Ohio Dec. (N.P.) 328 (1899).

But the court in the principal case decided that this work was inherently dangerous and the contractor was negligent. Under such circumstances there is a non-delegable duty holding the owner liable to third parties. *Covington & C. Bridge Co.* v. *Steinbrock, supra; Tiffin* v. *McCormack, supra; Circleville* v. *Neuding*, 41 Ohio St. 465 (1894); *Hughes* v. *Railway Co.*, 39 Ohio St. 461, affirming 7 Ohio Dec. Rep. 502, 3 Bull. 558 (1883); *Railway Co.* v. *Morey*, 47 Ohio St. 207, 24 N.E. 269, 7 L.R.A. 701 (1890); *Bower* v. *Peate*, 1 L.R.Q.B. Div. 321 (1876); *McCann* v. *Hodgate Co.*, 282 Mass. 584, 185 N.E. 483 (1933); *Engel* v. *Eureka Club*, 137 N.Y. 100, 32 N.E. 1052, 33 Am. St. Rep. 692 (1893). That "third party" includes the employee of the independent contractor is the majority opinion of the decided cases. *Evans* v. *Dare Lumber Co.*, 174 N.C. 31, 93 S.E. 430 (1917); *Watson* v. *Black Mountain Ry. Co.*, 146 N.C. 176, 80 S.E. 175 (1913); *Black Mountain Ry Co., et al.* v. *Ocean Accident & Guarantee Corp.*, 172 N.C. 636, 90 S.E. 763 (1916); *Chicago Economic Fuel Gas Co.* v. *Myers*, 168 Ill. 139, 48 N.E. 66 (1897); *Mallory* v. *Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W. (2d) 617 (1928); *contra, Peoria, Bloomington & Champaign Traction Co.* v. *O'Conner*, 149 Ill. App. 598 (1909); *see, Schip* v. *Pabst Brewing Co.*, 64 Minn. 22, 66 N.W. 3 (1896); *Reilly* v. *Chicago & N. W. Ry. Co.*, 122 Iowa 525, 98 N.W. 464 (1904); *Salman* v. *Kansas City*, 241 Mo. 14, 145 S.W. 16, 39 L.R.A. (N.S.) 328 (1912). One Ohio case on the subject holds the owner liable to an employee of an independent contractor where the machinery was dangerous unless the employee was told how to operate it. *Jacobs* v. *The Fuller & Hutsinpiller Co.*, 67 Ohio St. 70, 65 N.E. 617, 65 L.R.A. 833 and note (1902). The principal

case distinguishes this case on the basis that in the *Jacobs* case the employee was not warned. This does not seem to be a valid distinction, since liability where the owner is under a non-delegable duty is not based upon the fact that the owner warned or did not warn an employee but is based upon the contractor's negligence. Such negligence is admitted in the principal case.

It is probable that by weight of authority and by logic, the owner should be liable to the employee of an independent contractor where there is inherent danger. The employee is in no contractual relation with the owner, *Mallory* v. *Louisiana Pure Ice & Supply Co.*, supra, and at the same time is the one most likely to suffer injury. The contrary doctrine is based on the theory that such recovery would save the independent contractor from the consequences of his own negligence. *Salmon* v. *Kansas City*, supra. But this overlooks the reason behind the doctrine of non-delegable duty where work is inherently dangerous. The owner is held liable in order to make him hire responsible contractors for such dangerous undertakings. See note in 23 A.L.R. 1129 (1921). That the independent contractor is also liable for his negligence under such circumstances see *Warden* v. *Pennsylvania Rd. Co.*, 123 Ohio St. 304, 175 N.E. 207 (1931).

It is thus concluded that while the majority in the principal case reached the correct result in cases dealing with electricity they used the wrong theory and, it would seem, incorrectly stated that an owner under a non-delegable duty is not liable to an employee of his independent contractor.

JUSTIN H. FOLKERTH.

MUNICIPAL CORPORATIONS

POWER OF COUNCIL OF NON-CHARTER CITY TO AMEND OR REPEAL INITIATED ORDINANCES.

By virtue of an initiated ordinance adopted at the election on November 2, 1926, the people of Steubenville, Ohio, enacted legislation in regard to the municipal fire department. The provisions of the ordinance determined the number of the personnel of the department and also fixed the salaries and compensation of the officers and members thereof. Subsequently, the city council of Steubenville, which is a non-charter municipality, enacted several ordinances materially affecting the wages of the firemen and also the number of the members of the department. The relators, members of the department, whose salaries had been re-