THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

JOHN ANDERSON (PLAINTIFF) ..... RESPONDENT.

1911
*Oct. 18.
*Dec. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Negligence—Employer and employee—Dangerous work—Dangerous materials—Risk of employment—Warnings and instructions—Employer's liability—Damages—Limitation of action—Construction of statute—"Railway Act," R.S.C. 1906, c. 37, s. 306—"Construction and operation" of railway.*

Where instructions and warning are necessary to enable employees, in circumstances involving danger, to appreciate and protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions and warnings are given. The employer may delegate that duty to competent persons, but, where compensation is sought for injuries sustained by an employee owing to neglect to give such instructions and warning, the onus rests upon the employer to shew that the duty was delegated to a person qualified to discharge it or that other adequate provision was made to ensure protection against unnecessary risk to the employees. The failure of the employer to take reasonable care in the appointment of a properly qualified superintendent, to whom the duty of selecting persons to be employed is entrusted, amounts to negligence involving liability for damages sustained in consequence of the acts of incompetent servants. *Young* v. *Hoffman Manufacturing Co.* ((1907) 2 K.B. 646) applied; judgment appealed from (21 Man. R. 121) affirmed. In this case, as the risk incident to the employment of an incompetent foreman was not one of those which are assumed by an employee, the plaintiff was entitled to recover damages at common law. Judgment appealed from (21 Man. R. 121) reversed.

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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The limitation of one year, in respect of actions to recover compensation for injuries sustained "by reason of the construction or operation" of railways, provided by section 306 of the "Railway Act" (R.S.C. 1906, ch. 37) relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway. *Canadian Northern Railway Co.* v. *Robinson* ([1911] A.C. 739) applied; judgment appealed from (21 Man. R. 121) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), varying the judgment, at the trial, by which the plaintiff's action was maintained with costs.

At the trial, before Cameron J. with a jury, judgment was entered upon the findings of the jury in favour of the plaintiff for $7,000, assessed by the jury as damages at common law. By the judgment appealed from the judgment entered at the trial was sustained except in respect of the amount of the damages awarded which were reduced to the sum of $1,200, assessed under the "Workmen's Compensation for Injuries Act," R.S.M. 1902, ch. 178.

The circumstances of the case are stated in the judgments now reported.

*Wallace Nesbitt K.C., O. H. Clark K.C.* and *Christopher C. Robinson* for the appellants.

*J. B. Coyne* for the respondent.

THE CHIEF JUSTICE.—The facts of this case are fully explained by Mr. Justice Duff and I agree with him as to the general effect of the evidence. The fair

(1) 21 Man. R. 121.

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inference from all that evidence is: By the exercise of reasonable care in the choice of their servants and appliances the appellants could have prevented, or greatly decreased the dangers incident to the work in which Anderson was engaged, the thawing of frozen dynamite. The trial judge, in his charge, clearly put the question of contributory negligence and of assumption of risk, the two main defences, to the jury; they found that there was no negligence on the part of the respondent and that he was ignorant of the danger to which he was exposed, and there is abundant evidence to support these findings. This verdict was subsequently, on appeal, set aside in part and judgment entered for $1,200 damages under the "Workmen's Compensation Act." Hence the appeal and cross-appeal. I will deal only with the cross-appeal and the verdict awarding the respondent $7,000 damages at common law. I would have dismissed the main appeal without a word.

May I say it with all respect: The judgment of the majority in appeal is wrong, in my opinion, in that it fails to distinguish between the liability which attaches to the master in the case of an accident to a servant caused by the negligent act of a competent fellow servant, and his liability for an accident which results from and is attributable to the employment of a fellow servant who is incompetent. It must be accepted as settled law, under the English system, as I understand it, that the master is not responsible to his servant for an accident resulting from an isolated act of negligence of an otherwise competent fellow servant. *Cribb* v. *Kynoch, Limited*(1), approved of in *Young* v. *Hoffman Manufacturing Co.*(2). But it is equally

(1) (1907) 2 K.B. 548. (2) (1907) 2 K.B. 646.

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well established by the authorities that the risk incident to the employment of an incompetent servant is not one of those which an employee assumes. If the injury could have been prevented by the exercise of reasonable care in the choice of his servants, and he fails in that respect, the master is liable. I can see no difference in principle between the liability, which attaches in the case of an accident to his servant, due to the employment of an incompetent foreman, as was undoubtedly the case here, and that to which a master is subject in case he provides a defective piece of machinery for the purpose of that servant's employment. Whether the accident is due to a defective system or to defective machinery the liability is the same. In *Johnson* v. *Lindsay & Co.*(1), Lord Herschell, at page 378, states the rule which, in my opinion, is applicable here:—

> It must be remembered that whilst a servant contracts with his master to be at the risk of the negligence of his fellow servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take care to select competent servants; and it would be most unreasonable to hold that he is exempt from liability for his serious negligence in any case when he is not under this obligation.

The neglect of the master to exercise proper care in the choice of servants competent to perform the duties assigned to them is, therefore, a source or cause of liability in the case of an accident properly assignable to that neglect. In other words, to make my meaning clear, I quite agree that no case of principle can be found in English law subjecting an individual to liability at common law for an act done without fault on his part; but it is equally certain that the master owes

(1) [1891] A.C. 371.

his servant the duty of reasonable care in the choice of his fellow servants, that the

duty differs in degree with the nature of the employment and with the experience of the servant,

and for a breach of that duty there is liability. The degree of care required from the employer by the common law of negligence adopted as the basis of treatment of accidents of industry when the mule and the spinning jenny were unknown, the canal boat and the stage coach the only means of communication and men dug and delved by the exclusive aid of pick and shovel, must be determined by a different standard in this age of flying machines, motor cars and dynamite.

Legal principles remain unchanged, but their application is to be changed with the changing circumstances of the times.

It occurs to me that there is another aspect in which the principle of legal liability involved in this case may be considered. The master must use all reasonable and proper precautions to safeguard his servant from dangerous conditions of his property, machinery and tools; and it is certainly well established by the authorities that the law takes notice that there are things which, in their nature, are so highly dangerous that, unless they are managed with great care, they are likely to injure people with whom they come into contact; and, while there is no disability on the master to utilize those dangerous substances for his profit and advantage in the prosecution of his work, there is a clear duty upon him to adopt every reasonable precaution which science and experience provide to reduce the risk of accident to the workmen who are obliged to handle them; and there can be no doubt that, on the evidence here, the respondents failed in that duty. *Citizens Light and Power Co.* v.

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*Lepitre* (1). No advantage results from the use of unnecessarily harsh language, but the evidence of the foreman has left with me a most disagreeable impression. I deem it my duty to say this much: One can hardly conceive it to be possible that, in our day and in this country, so little regard is had for human life on the works of construction that are being carried forward in so many places, not only in mines, railroads and factories, but in all the trades. The employment of such men as road-master Campbell in the general superintendence of work which involved at times the use of dynamite, a dangerous agency of which he was totally ignorant, gives us an explanation of the enormous toll of life and limb levied on their employees by railway companies. The risks of modern industry necessarily incidental to the complicated conditions under which reasonable regard for efficiency and economy oblige men and women to labour should not be increased by the employment of negligent or incompetent foremen. I trust this word of warning may serve to create a greater sense of responsibility on the part of corporations and other great employers of labour.

I was much troubled by the objection raised by the appellants as to the effect of section 306 of the "Railway Act" based on the Statute of Limitations; but, on the whole, I agree with the conclusion reached by Mr. Justice Duff. If this short statutory prescription is applicable to a case of common law liability, a point which I consider it quite unnecessary to decide now, at least it must be made abundantly clear that the facts bring the case clearly within the statute. On the evidence, it appears that the respondent was engaged

(1) 29 Can. S.C.R. 1.

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in a pit at a place called Bird's Hill, distant from the main line of railway, digging sand which was used for various purposes other than the construction of the railway. In this country where the activities of railway companies are multifarious, should we hold this section applicable, for instance, to a workman in a stone quarry from which stone is being extracted to build a hotel intended to be used for the purposes of the railway? That is an extreme case, but it is by such cases that the applicability of a principle may be most effectively tested.

I would dismiss the main appeal and allow the cross-appeal with costs.

DAVIES J.—This appeal raises several important questions of law upon which I confess I have had difficulty in reaching a satisfactory conclusion.

The plaintiff sued for damages sustained by him while blasting hard-pan with dynamite for the defendants in their quarry. He had been employed by one Campbell, a road-master in defendants' employ, and the jury found, in reply to questions put to them, that the injuries he sustained were caused by the negligence of the defendant company in

not employing competent men and not furnishing proper appliances and storage for explosives.

They further found against contributory negligence on plaintiff's part, and that plaintiff's injuries

were caused by his ignorance of the material he was using.

Now, the material was frozen dynamite which required to be thawed before being used to blast the hard-pan. The thawing of dynamite so as to use it for blasting purposes unless carried out in what seems to

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be recognized as the proper way is most dangerous work.

The trial judge directed judgment to be entered on the findings of the jury, for the damages found at common law. On appeal, the Court of Appeal, Chief Justice Howell dissenting, set aside that judgment and entered judgment for the smaller damages found under the "Workmen's Compensation Act." The defendant company appealed from that judgment on the ground that there was no evidence of negligence of the company or its employees which would justify the findings of the jury and for which the company was responsible, and that in any event the claim was barred by the 306th section of the "Railway Act."

The plaintiff cross-appealed to have the judgment of the trial judge for common law damages restored.

The substantive questions before us, therefore, are these two. Does the 306th section of the "Railway Act" apply to this case and bar plaintiff's claim, and, if not, is there evidence to sustain the findings of the jury, and if so is the plaintiff entitled to recover the common law damages found, or is he limited to those awarded under the "Workmen's Compensation Act"?

As to the proper meaning and application of this 306th section of the "Railway Act" I have entertained grave doubts. In the case of the *Canadian Northern Railway Co.* v. *Robinson*(1), I held the view that the acts there complained of, namely, the wrongful removal, in 1904, of the siding-track facilities which the complainant, Robinson, enjoyed and the continued operation of the railway without these facilities until September, 1906, when they were restored by the order of the Board of Railway Commissioners,

(1) 43 Can. S.C.R. 387.

were within this section and that damages resulting from the operation of the railway denying the complainant those rights were prescribed at the expiration of a year from the wrongful act of the railway company.

On appeal to the Privy Council, however, Their Lordships held(1), at page 745, that the "operation of the railway" referred to in the section seemed to signify the process of working the railway as constructed.

The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act in the course of operating the railway itself.

It would appear, therefore, that, in Their Lordships' opinion, these special provisions limiting the time of bringing actions of certain classes to a period of a year from the origin of the cause of action do not apply to a case of refusing or discontinuing facilities on a siding such as were those in question and that the acts covered by the section were only such as were done in the course of operating the railway itself. Applying the principle underlying that decision it seems to me that operations carried on in a "borrowing pit" by the railway's servants in obtaining sand for the ballasting of a railway are not within the terms "construction of the railway" as used in the section. To come within that section the act or omission complained of must be directly connected with the actual construction of the road and not indirectly or incidentally so connected.

It is manifest that some limitation must be placed upon the words of the section. "The construction of the road" can hardly be held applicable to work carried on by the company such as the manufacture of

(1) [1911] A.C. 739.

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rails for the road or the procuring of ties for it from the woods nor can I extend the construction of the section to the case before us, namely, the operations of blasting hard-pan in a pit, some distance, it matters not what, from the actual railway for the purpose of obtaining sand for ballasting the road. I admit the difficulties surrounding the construction of the section, but following what I understand to be the view of Their Lordships of the Privy Council in the case of *The Canadian Northern Railway Co.* v. *Robinson*(1), I conclude that it must be confined to what would be deemed the actual construction of the road itself and not extended to incidental or indirect or outside work or operations of the company in the obtaining or manufacture or procuring of material or plant to be used in such construction.

Having reached this conclusion, I pass to the next question, whether there is evidence to sustain the findings of the jury, and especially that one which says that the plaintiff's injuries were caused by the negligence of the company

by not employing competent men and by not furnishing proper appliances and storage for explosives.

I have carefully gone through the evidence, especially that of Campbell, the foreman, and the plaintiff, and am of the opinion that there was ample evidence to justify that finding. Campbell, according to his own evidence, knew little or nothing of the proper way to prepare frozen dynamite so that it might be used with safety as an explosive for the purposes required. He gave no instructions to the plaintiff apparently because he felt himself not competent to

(1) [1911] A.C. 739; 43 Can. S.C.R. 387.

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give them. He may have been fully competent as a road-master pure and simple, but the duties he had to discharge involved the use of dynamite, sometimes frozen, in blasting operations, and he frankly confesses his own ignorance in the matter of thawing frozen dynamite, and his consequent failure or inability to instruct the plaintiff as to what he should do and what he should avoid doing in thawing out the dynamite. The plaintiff himself was found by the jury on ample evidence to have been "ignorant of the material he was using," that is, frozen dynamite, and the crude and ineffective efforts made by him first to improvise or construct a method of thawing the dynamite, and on these efforts failing in placing the sticks of dynamite under or alongside of a hot stove, is evidence, I think, not of recklessness but simply of ignorance.

It was contended that, in any event, it was Campbell's negligence, in not applying to the company for proper materials to thaw the dynamite and in not fully instructing Anderson with regard to it, that caused the accident, and that, they being fellow-workmen, the doctrine of common employment covers the case and relieves the company of responsibility for damages caused by such negligence.

I agree that the parties stood towards each other in the position of fellow-workmen and that at common law the company would not be liable to any of the workmen standing in that relation for injuries caused to them by such negligence of Campbell, assuming his competency for the discharge of the dangerous duties intrusted to him to have carried out. But, as I find ample evidence to justify the finding by the jury of his incompetence to instruct those under him as to the

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proper way and method of thawing dynamite and as to the danger of attempting to thaw it in the fatal manner Anderson in his ignorance followed, I cannot accept the conclusion that the company are absolved from liability.

I find the evidence of Campbell's incompetence with respect to this special class of dangerous work which Anderson, uninstructed, was ordered to carry out, in Campbell's own confession of ignorance with regard to the handling and thawing of frozen dynamite.

The majority of the Court of Appeal for Manitoba based their judgment upon the absence of any such evidence.

The question then is, for me, reduced to one of the onus of proof as to the discharge by the company of its duty. That duty is, as laid down by the Court of Appeal in two late cases of *Cribb* v. *Kynock, Limited* (1), and *Young* v. *Hoffman Manufacturing Co.* (2), to give the necessary and proper instructions to young or inexperienced or ignorant workmen employed by them in dangerous work to guard against preventable dangers or accident, but such duty is one which the company or employer may delegate to a competent foreman and the negligence of the foreman is a risk which the fellow servant takes upon himself.

The foreman, however, or person to whom such duty is delegated must be a person competent to rightly discharge the duty. If that competency is proven then the employer's duty is discharged even where the delegate fails through neglect in the discharge of the delegated duty.

(1) [1907] 2 K.B. 548. (2) [1907] 2 K.B. 646.

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But, in the case of delegation to an incompetent foreman (by intermediate superior officers of the company who were, themselves, not shewn to be incompetent), as in the case now under consideration—does the onus lie upon the workman injured and suing for damages of disproving their competency also; or has he discharged all the law requires of him, *primâ facie,* when he proves incompetency on the part of the official whose negligence caused the injuries for which compensation is claimed? In my opinion, on every ground of reason and, I venture to think, of authority also, the latter is and should be the law. If it is not so, then mere appointment will imply competency and an onus will be cast upon injured workmen which in most cases it will be quite impossible for them to discharge. The law casts the duty upon the employer, whether a person or a company, of taking due and proper care in the appointment of his or its officers. That is all. The appointee may turn out to be quite incompetent, but that result throws no liability upon the company if it is shewn that due and proper care in his appointment was taken.

When the workman proves incompetency, on the part of a subordinate foreman, resulting in the injuries he complains of he makes, in my humble opinion, a *primâ facie* case and throws the onus on the company of proving affirmatively that it has discharged the duty the law casts upon it, but which it has elected to delegate. That duty, when delegated, is only discharged by delegation to competent persons, and it is not an absolute duty warranting competency on the part of the appointee, but is satisfied by shewing due and proper care in its exercise. The appointment, however, of an incompetent officer gives rise to

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the presumption that due and proper care was not exercised in his appointment. I gather that to be the opinion alike of the Master of the Rolls, at page 657, and of Kennedy L.J., at page 659, of the report of the case of *Young* v. *Hoffman Manufacturing Co.*(1). The same opinion is expressed with convincing reasoning by Palles C.B. in *Skerritt* v. *Scallan*(2), at page 401, and is called the "better opinion" by Mr. Beven in his book on Negligence (Can. ed., 1908), at page 648.

In the present case we have the necessary findings; incompetence of Campbell who employed the plaintiff, absence of proper instruction in the thawing of the dynamite, and absence of contributory negligence by plaintiff. These findings cast upon the defendant company the onus of proving the exercise of due and proper care in Campbell's appointment. That onus was not discharged simply by proof that Campbell was appointed by an intermediate officer. There still remained upon the company the duty of proving either that due and proper care had been exercised in the appointment of such officer, or that he was a man fully competent to discharge the duties delegated to him.

My opinion, therefore, is to dismiss the main appeal, allow the cross-appeal, vacate the judgment of the Court of Appeal, and restore that of the trial judge, with costs to the plaintiff in all the courts.

IDINGTON J.—The limitation of action contained in section 306 of the "Railway Act" certainly does not seem to have much to do with an action of neg-

(1) [1907] 2 K.B. 646.

(2) (1877) Ir. R. 11 C.L. 389.

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ligence in operating, long after construction of the railway, works in a sand-pit. The only change made in amending the old "Railway Act" was to make the amended section conform to the usual interpretation the courts had put on that section.

I do not think the long struggle over that should now be given a new starting point to run it over again. I see no ground in this or any other point taken for allowing the appeal.

As to the cross-appeal I think it ought to be allowed.

The law, as laid down by Lord Cairns, in *Wilson* v. *Merry*(1), seems strangely forgotten in many places.

I have no doubt there exists a very wide if not an entire disregard of the terms upon which masters are there held to be absolved from a personal discharge of the duties they owe to their servants.

Lord Cairns, at page 332, of the report of that case stated as follows:—

> The master has not contracted or undertaken to execute in person the work in connection with his business. * * * But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do, and if the persons so selected are guilty of negligence this is not the negligence of the master.

The master's duty in the premises existent herein was to instruct, to warn, and to protect when setting his men at a dangerous employment.

The appellant company chose to substitute for itself, to discharge these duties, a man about as ignorant

(1) L.R. 1 H.L. Sc. 326.

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of dynamite, its dangers and the proper means for avoiding and averting them, as any man could be in these later times when the destruction it has wrought, largely through incompetent foremen, has awakened the dullest of men.

The company knew all these things so well that they properly paid an extra wage for the higher degree of skill needed at this work than the ordinary workman possesses.

The foreman selected does not seem to have so realized even what that meant as to be put on inquiry or get such men.

The jury has found herein and, to my mind, would have failed to discharge their duty if they had not found herein that the man in charge superintending and directing the work in question was incompetent.

He never should have been for an hour permitted to hold his position when the conditions of operating had become such that the work to be done involved a superintending for which he had never been fitted. He had by reason of changed conditions become, if ever fit, then unfit.

I think it unnecessary to pursue the subject further. The evidence quoted by Chief Justice Howell makes it clear that the jury had ample ground to find as they did and the reasons he assigned need not be repeated here. I agree therein.

I think the appeal should be dismissed with costs.

I think the cross-appeal should be allowed, with costs throughout, and that the judgment of the learned trial judge be restored.

DUFF J.—In this case I am to deliver the judgment of Mr. Justice Anglin and myself.

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The defendants appeal from the judgment of the Court of Appeal for Manitoba holding them liable to the plaintiff in the sum of $1,200, assessed by a jury as damages under the "Workmen's Compensation Act." At the trial the jury made findings which, in the opinion of the trial judge, entitled the plaintiff to recover at common law and he accordingly entered judgment for the sum of $7,000, the damages assessed by the jury on the basis of common law liability. This judgment the plaintiff by a cross-appeal seeks to have restored.

The findings of the jury, in so far as they establish liability of the defendants under the "Workmen's Compensation Act," on the ground that the plaintiff's injuries are properly attributable to the negligence of road-master Campbell, and not to his own blameworthy departure from such instructions as Campbell gave him, cannot be disturbed. They are supported by evidence upon which a jury might properly act.

The defendants also seek to escape liability under the limitation provision of section 306 of the "Railway Act," the action having been brought more than a year after the plaintiff was injured. Although, in one sense, the injury complained of was sustained by the plaintiff "by reason of the construction" of the defendants' railway, it was not so, in our opinion, within the meaning of those words as used in section 306 of the "Railway Act." The plaintiff was engaged in the work of procuring or preparing materials for the construction of the railway rather than in the work of construction itself. If the section of the "Railway Act" relied upon should be held applicable to such a case as this, it is difficult to perceive what limits should be placed upon its application when the rail-

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way company itself undertakes the procuring or manufacturing of materials of whatever kind requisite for the construction of its works. Having regard to the recent decision of the Judicial Committee, affirming the judgment of this Court in *Canadian Northern Railway Co.* v. *Robinson* (1), we think it is reasonably clear that an injury sustained under circumstances such as those of the present case is not within the purview of section 306.

We have not overlooked the argument of counsel for the plaintiff, although it was based on evidence somewhat meagre, that because gravel taken from the pit in question by the defendants was sold or given to contractors to be used for purposes not connected with the railway, or the works which it includes under the statute, the pit itself cannot be deemed to have been part of the railway, and that it is not established that the material, for the taking out of which the plaintiff was preparing when he was injured, was intended to be used upon or in connection with the railway. But, in the view we have taken of the purview of section 306, it is unnecessary to determine these questions and because of the unsatisfactory character of the evidence it seems undesirable to do so if it can be avoided.

It follows that the defendants' appeal should be dismissed with costs.

The cross-appeal raises quite another question.

The respondent was injured by an explosion of dynamite, at Bird's Hill, Manitoba, when in the employment of the appellant company. In the course of removing sand from a sand-pit with a steam shovel,

(1) [1911] A.C. 739; 43 Can. S.C.R. 387.

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in September, 1907, a party of the employees of the company encountered a bed of hard-pan, which proved intractable to ordinary methods and had to be broken up by means of dynamite. The party was subject to the orders of one Campbell, a road-master of the company, who, having procured some dynamite from some persons engaged in taking sand and gravel from an adjacent gravel pit, directed the respondent (according to his evidence) to take charge of the operation of blasting. To this the respondent (accepting his own account) objected, protesting his ignorance of dynamite and inexperience in the manipulation of it. The road-master (still following the respondent's story) then peremptorily ordered him to proceed with the blasting (telling him that he would be dismissed if he did not) and advising him, at the same time, to consult one of the workmen engaged in the neighbouring pit as to the proper method of handling it. The respondent says the person to whom he was thus referred was unable to give him any instructions except to shew him how to connect the fuse with the explosive; but that, being face-to-face with the alternative of obeying orders on the one hand and dismissal on the other, he chose the former and proceeded as well as he could with the work he had been directed to do. In mid-October the respondent left the employ of the company but, in the last few days of that month, was again engaged to work in the company's yard at Winnipeg by Campbell who, a day or two afterwards, directed him to proceed to Bird's Hill to resume the work of blasting, telling him at the same time that he must thaw the dynamite—which would be frozen. This the respondent (who according to his own story had no experience and no knowledge of the proper or

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usual method of thawing dynamite) first attempted by a process (it is unnecessary to describe it) which according to his evidence proved to be altogether too dilatory, and afterwards by placing the sticks of dynamite (on end) around a stove in a box car which the party was using. An explosion resulted killing one person and destroying the respondent's sight. The action was brought to recover damages on the ground that this explosion was due to negligence for which the company is responsible. The jury acquitted the respondent of the charge of contributory negligence and found negligence against the company in two respects.

By not employing competent men and by not furnishing proper appliances and storage for explosives;

they also found as follows:—

(5) If the injury was so caused by the negligence or improper conduct of any person having superintendence over the plaintiff, did the defendants use reasonable and proper care and caution in the selection of such person for the position he occupied ?

A. No.

The question on the cross-appeal is whether there is or is not evidence which, in law, is sufficient to support these findings.

"It does not appear to me to admit of dispute that at common law," said Lord Watson in *Smith* v. *Baker & Sons*(1), at page 353,

a master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the workman's safety.

In the same case Lord Herschell said, at page 362:—

It is quite clear that the contract between the employer and the employed involves on the part of the former the duty * * * so to carry on his operations as not to subject those employed by him to unnecessary risk.

(1) [1891] A.C. 325.

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It is a corollary from these principles that where warning and instruction are necessary to enable persons employed in circumstances involving danger to appreciate and protect themselves against the perils incident to the duties in which they are engaged it is the duty of the employer to take reasonable care to see that such warning and such instruction are given.

On the evidence adduced in this case the jury were clearly entitled to find that the respondent was without experience or knowledge of the process of thawing dynamite and that, a workman thus ignorant and inexperienced having had the work of thawing dynamite assigned to him, it would be a precaution obviously necessary for the protection of the workman himself as well as of his fellow employees to see that, before undertaking the operation, he was properly informed as to the risks attending it and instructed as to the best methods of avoiding or diminishing those risks. The jury were, moreover, entitled to say that the obligation to take reasonable care to see that such information and instructions should be given involved the duty (if no other adequate steps to that end were taken) to see that the official who was charged with the responsibility of selecting persons to be entrusted with work such as that assigned to the respondent should be a person competent to discharge the obligation. There was ample evidence to shew that Campbell, the road-master, was not qualified in this respect and that no steps had been taken by the superintendent who appointed him or otherwise to ascertain whether he did or did not possess such qualification. In these circumstances the real question for determination appears to be this: On the evidence in this case, can the company properly be held responsible

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for the lack of instructions found by the jury to be due to the failure to take proper care in respect of the appointment of the official charged with selecting persons to be entrusted with the duty of thawing dynamite ?

We think the decision of the Court of Appeal in *Young* v. *Hoffman Manufacturing Co.*(1) is authority for the proposition that, once it is shewn that an employee has had assigned to him work of a character such that a duty arises on the part of the employer to take reasonable care before permitting him to undertake it, to see that he has the necessary knowledge and experience to protect himself from injury in the course of it, and it further appears that the employee (being incompetent in that respect) has been permitted to enter upon his duties without any steps having been taken, in fact, to ascertain his competency — those conditions being satisfied, it lies upon the employer to establish to the satisfaction of the jury that he has committed the duty referred to to some competent delegate or has made some other adequate provision for fulfilling it. In the case just mentioned the material facts are stated at page 646 of the report as follows:—

> The plaintiff, a boy of fifteen, was injured through his arm being caught by a circular saw while working in the defendants' engineering works. The jury found that there was negligence on the part of the defendants in not sufficiently instructing the plaintiff in the working of the machine. They found that the foreman, to whom the duty of instructing the plaintiff was delegated by the defendants, had not fully instructed or cautioned the plaintiff. The defendants at the trial desired to raise the defence that they were not liable to the plaintiff for the negligence of their foreman, which was not their negligence. Ridley J. declined to allow this point to be taken, on the ground that it was not pleaded, and gave judgment for the plaintiff. The defendants appealed.

(1) [1907] 2 K.B. 646.

The principles applied in that case are stated, at page 659, by Kennedy L.J., in these words:—

If it be the duty of the employer, in order that he may discharge his obligation to use reasonable care in order to prevent injury to his servant in handling the machinery upon which the servant is employed, to instruct him as to the safe and proper method of working, may that duty be discharged by delegating the business of instruction to a competent person — call him foreman or overlooker or what you will — so that, if an injury happens to the servant from the failure of the delegate to give any instruction, or adequate and proper instruction, the negligence causing the injury is, in point of law, the negligence, not of the master, but of the foreman or overlooker, who is a fellow servant with the injured person?

I agree with the Master of the Rolls that the contractual duty of the master to instruct may be discharged in this manner, and, further, that such delegation may be either an express delegation or implied as a part of the known and recognized duties of the delegate — whether styled foreman or overlooker or anything else — in the course of his service. Whether in the particular case such delegation, either express or implied, existed; whether the directions of the employer, if expressly given to the delegate were sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty — all these, just as in the case where the employer gives instruction personally or by written or printed notice the adequacy of such personal direction or of the notice, are matters proper for the consideration of the tribunal which, whether judge or jury, has to decide the issue of fact upon which depends the question of the fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery, and consequently the question of his liability or non-liability for the injury to the servant.

At the conclusion of his judgment at page 651, the Master of the Rolls says this:—

In my opinion the case must go down for a new trial. If it is established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction. Unless this is established, the defendants will be liable, assuming that, as in the first trial, contributory negligence on the part of the boy is negatived.

In effect the decision of the court is that the duty referred to may be delegated; but, it having appeared

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that the thing which it was somebody's duty to do for the protection of the workman has not been done, then the employer, in order to discharge himself, must shew that the default is not his default.

Here the plaintiff has carried his case one step further forward and has proved (as the jury have found) that the lack of instructions to him was due to absence of care in respect of the appointment of his superior. On the principle above mentioned the burden of shewing that for this absence of care the company is not responsible is cast upon it. We have not overlooked the fact that, in the course of the plaintiff's case, Campbell was shewn to have been appointed by Wilcox, the Divisional Superintendent. The passage quoted from Kennedy L.J. makes it quite clear that in such circumstances the employer must satisfy the jury that he has done all that can reasonably be asked of him and that the neglect of duty leading to the injury complained of was that of an employee for whose negligence he is not responsible. It appeared, indeed, in *Young* v. *Hoffman Manufacturing Co.*(1), as the statement of facts above quoted shews, that the duty of giving instructions had been delegated and, nevertheless, it was held to be a necessary part of the employer's defence to shew that the delegate was competent.

The cross-appeal should be allowed with costs.

BRODEUR J.—I agree with the views expressed by the Chief Justice.

(1) [1907] 2 K.B. 646.

The main appeal should be dismissed and the cross-appeal maintained with costs.

*Appeal dismissed with costs; cross-appeal allowed with costs.*

Solicitors for the appellants: *Clark & Sweatman.*

Solicitor for the respondent: *George A. Elliott.*