CHARLES J. HASTINGS (PLAINTIFF)..... APPELLANT;

AND

LE ROI No. 2, LIMITED, (DEFENDANTS)..... RESPONDENTS.

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*Oct. 26, 27.
*Nov. 30.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

*Negligence—Mining operations—Contract for special works—Engagement by contractor—Control and direction of mine owner—Defective machinery—Notice—Failure to remedy defect—Liability for injury sustained by miner.*

The sinking of a winze in a mine belonging to the defendants was let to contractors who used the hoisting apparatus which the defendants maintained, and operated by their servants, in the excavation, raising and dumping of materials, in working the mine under the direction of their foreman. The winze was to be sunk according to directions from defendants' engineer and the contractors' employees were subject to the approval and direction of the defendants' superintendent, who also fixed the employees' wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions and was paid by them through the defendants. While at his work in the winze the plaintiff was injured by the fall of a hoisting bucket which happened in consequence of a defect in the hoisting gear, which had been reported to the defendants' master-mechanic and had not been remedied.

*Held*, affirming the judgment appealed from, (10 B. C. Rep. 9), Taschereau C. J. dissenting, that the plaintiff was in common employ with the defendants' servants engaged in the operation of the mine and that even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment.

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PRESENT :—Sir Elzéar Taschereau C.J, and Sedgewick, Davies, Nesbitt and Killam JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia *en banc* (1), reversing the trial court judgment and dismissing the plaintiff's action with costs.

The plaintiff is a miner, and the defendants are the owners of the "Josie" mine at Rossland, B.C. The defendants had entered into a contract with a firm of contractors for sinking a winze on special terms and conditions which are stated in the judgments now reported. While the contractors were at work in the winze the defendants carried on their mining operations in other parts of the mine in the usual manner. The contractors engaged the plaintiff to work in the winze. While at his work in the bottom of the winze he was injured by the fall of the bucket used for hoisting rock from the winze, and for such injuries this action was brought. The plaintiff, on the above facts, claimed that the defendants were negligent in their duty towards him and that they had not complied with certain provisions of the British Columbia Metaliferous Mines Inspection Act. The defendants denied all negligence and pleaded, in the alternative, that the injury was occasioned by the negligence of a fellow-servant engaged in common employment with the plaintiff. Issue was joined on these defences. At the trial, before Irving J. with a jury, a general verdict was found for the plaintiff with $3,400 damages. The trial judge entered judgment for the plaintiff. The defendants appealed to the full court which reversed this judgment on the ground that the plaintiff was in fact in the service of the defendants and in common employment with those of their servants whose negligence caused the injury. From that judgment the plaintiff appeals to this court.

(1) 10 B. C. Rep. 9.

The questions at issue on the present appeal are stated in the judgments now reported.

*Shepley K.C.* for the appellant. The question of common employment is purely one of fact to be decided by the jury. The jury by their general verdict having found this issue with all others against the defendants, and there being evidence on which the jury could have so found, the verdict is final and this court should not interfere. *St. John Gas Light Co.* v. *Hatfield* (1); *Masters* v. *Jones* (2); *Cahalane* v. *North Metropolitan Railway Co.* (3). There is no ground for the defence of common employment as this is not an action on the written contract or between the parties to it and it was open to the plaintiff to shew that this writing was not the real contract and to shew by other evidence what was the relationship between the parties. The judges in the full court looked only at the terms of the written contract to determine whether the plaintiff was in common employment with those whose negligence caused the injury. The appellants submit that the whole of the evidence must be considered. And, on the evidence, the case of *Johnson* v. *Lindsay* (4) applies. The court should look at all the circumstances and the real agreement. *Waldock* v. *Winfield* (5) at page 602.

In cases cited in the judgments below the question of "control" over the injured and injuring party is considered the material question. It is submitted that "direction" in this contract is not the same as "control." If the defendants could "control" the work of the plaintiff then they could put him to work in any part of their mine or could make him work fast or slowly as they pleased, and that without any refer-

(1) 23 Can. S. C. R. 164.
(2) 10 Times L. R. 403.
(3) 12 Times L. R. 611.
(4) [1891] A. C. 371.
(5) [1901] 2 K. B. 596.

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ence to the contractors. Anything short of that would not be control at all, and it can hardly be suggested that the defendants possessed such rights. If the men employed by the contractors were really the servants of the defendants, then the contractors had no servants at all, and as the contract was purely to perform manual labour by themselves or their servants, it really meant nothing; there was in effect no contract at all. The case of the defendants must go this length; that the contractors would not have been liable but that the defendants would have been liable to any person injured by the negligence of one of the contractors' men. *Cameron* v. *Nystrom* (1); *Abraham* v. *Reynolds* (2). So far as the power to dismiss, assuming it to exist in this case, is concerned, it is of no effect. *Reedie* v. *London & North Western Railway Co.* (3). The payment of wages, that must surely mean payment under a legal liability to pay. The plaintiff could only look to the contractors for his wages. Payments charged to the contractors would not be payments by the defendants. *Laugher* v. *Pointer* (4), at page 558; *Quarman* v. *Burnett* (5); *Union Steamship Co.* v. *Clardge* (6); *Jones* v. *Corporation of Liverpool* (7); *Warburton* v. *Great Western Railway Co.* (8).

Assuming that the plaintiff was in fact the servant of the defendants they are still liable in this action under the pleadings, evidence and finding of the jury. *Smith* v. *Baker* (9), at page 362, per Herschell L. J.; *Grant* v. *Acadia Coal Co.* (10); *Murphy* v. *Philips* (11); *Clarke* v. *Holmes* (12), per Cockburn C. J.; *Williams* v.

(1) [1893] A. C. 308.
(2) 5 H. & N. 143.
(3) 4 Ex. 244.
(4) 5 B. & C. 547.
(5) 6 M. & W. 499.
(6) [1894] A. C. 185.
(7) 14 Q. B. D. 890.
(8) L. R 2. Ex. 30.
(9) [1891] A. C. 325.
(10) 32 Can. S. C. R. 427.
(11) 35 L. T. N. S. 477.
(12) 7 H. & N. 937.

*Birmingham Battery and Metal Co.* (1); *Sault St. Marie Pulp and Paper Co.* v. *Myers* (2); *Paterson* v. *Wallace & Co.* (3); *McKelvey* v. *Le Roi Mining Co.* (4).

The defendants are also liable by virtue of the Metalliferous Mines Inspection Act (5). The direction to report and record the report applies to the daily as well as to the weekly examination. *Scott* v. *Bould* (6). The provisions of this law were not complied with. If such an inspection had been made the defect in the hook would have been detected. The hoist would at once have been stopped, and all danger avoided. For the breach of this statutory duty imposed on the defendants, and the injury resulting to the plaintiff therefrom, *primâ facie*, the plaintiff has a good cause of action. *Groves* v. *Lord Wimbourne* (7), at p. 407; *Baddeley* v. *Earl Granville* (8); *Kelly* v. *Glebe Sugar Refining Co.* (9); *Blamires* v. *Lancashire & Yorkshire Railway Co.* (10). The defence of common employment does not apply to an action arising out of a breach of a statutory duty.

*Davis K.C.* for the respondents. The sole question in issue is whether or not the defence of common employment is open to the defendants. If the plaintiff was a servant of the defendants, so far as the circumstances connected with and surrounding the accident are concerned, then the defendants are not liable. Whether or not one man is the servant of another is a question of fact to be decided either by the jury upon disputed facts, or by the judge upon facts which are admitted. Here the facts in that connection are all admitted. The wages of plaintiff and

(1) [1899] 2 Q. B. 338.
(2) 33 Can. S. C. R. 23.
(3) 1 Macq. 748.
(4) 32 Can. S. C. R. 664.
(5) R. S. B. C. c. 134, s. 25, Rule 11.
(6) [1895] 1 Q. B. 9.
(7) [1898] 2 Q. B. 402.
(8) 19 Q. B. D. 423.
(9) 20 Rettie 833.
(10) L. R. 8 Ex. 283.

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other workmen under the contractors were, by arrangement, paid by the defendants and charged to the contractors. The principal test, however, as to whether or not one man is the servant of another, is whether or not the former is controlled by the latter. One of the results which in law follows the relationship of master and servant is that the master is responsible for the acts of the servant, and it would clearly be unreasonable that a man should be responsible for acts which he himself cannot control, and on the other hand it is clearly most reasonable that a man should be responsible for those acts of others which he does control. Here, the terms of the contract, taken with the evidence, shew clearly that the actions of the plaintiff were subject to the control of the defendants, and, therefore, he was their servant, and a fellow-servant with whichever one of the defendants' servants was responsible for the accident. If the plaintiff, himself, had been guilty of negligence in connection with his proper work, which resulted in injury to another workman in the mine, or to a stranger, the defendants could not have escaped liability on the ground that he was not their servant, and, therefore, that they were not responsible for his negligence.

The following authorities are refered to: *Wigget* v. *Fox* (1); *Abraham* v. *Reynolds* (2), at pp. 149, 150; *Johnson* v. *Lindsay* (3), at pp. 379, 381, 382: *Donovan* v. *Laing W. & D. Syndicate* (4); *Jones* v. *Scullard* (5); *Masters* v. *Jones* (6); *Cahalane* v. *North Metropolitan Railway Co.* (7); *Griffiths* v. *Gidlow* (8); *Dynen* v. *Leach* (9); *Murphy* v. *Phillips* (10); *Clarke* v. *Holmes*

(1) 25 L. J. Ex. 188.
(2) 5 H. & N. 143.
(3) [1891] A. C. 371.
(4) [1893] 1 Q. B. 629.
(5) [1898] 2 Q. B. 565.
(6) 10 Times L. R. 403.
(7) 12 Times L. R. 611.
(8) 3 H. & N. 648.
(9) 26 L. J. Ex. 221.
(10) 35 L. T. N. S. 477.

(1), at page 943; *Bartonshill Coal Co.* v. *Reed* (2); *Wilson* v. *Merry* (3).

THE CHIEF JUSTICE (dissenting).—I would allow this appeal.

I am of opinion that the trial judge was right in ruling that the appellant was not a servant of the company, respondent.

He was clearly engaged by Hand & Moriarity, the contractors. They alone were his masters. Against them alone was his recourse for his wages: he was paid by them through the company, acting for them and in their name for that purpose. There was nothing in their contract with the company of a nature to bind the appellant that prevents them from making any agreement with him about increasing or decreasing his wages: they alone could dismiss him: the very fact that by the contract with Hand & Moriarity the company could request his dismissal shows that he was not the company's servant, since they could not themselves dismiss him.

The learned judges of the full court seem to have been under the impression that the appellant was under the control of the company and its officers. But that is not so as I view the evidence. He received no orders directly from the officers of the company, for the good reason that the contractors, not the company, were his masters. It is not because the engineers and superintendent of the company had as between themselves by their contract with Hand & Moriarity the direction of the works to be done that the appellant was himself under the control of the company. He is not proved to ever have known of the terms of that contract, nor that there was such a contract in writing at all. He

(1) 7 H. & N. 937.
(2) 3 Macq. 266.
(3) L. R. 1 H. L. Sc. 326; 19 L. T. N. S. 30.

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never knew that any one could ever pretend that he was not under the exclusive control of his masters, the contractors; he never received orders but from them; he never submitted himself to the control of any one else. They, not the company, directly controlled him. "He was working for the contractors and not for the company" says Kenty, the company's own foreman.

Assuming, however, that there was a common master and a common employment as regards the appellant and the company's foreman or other employee whose fault might be said to have been the cause of the accident, that would not put an end to the appellant's claim.

The accident in question was caused by a defect in one of the permanent appliances for the working of this mine. A clevis had originally been provided by the company for the purpose of raising the bucket at the point in question; that was a safe appliance, but later on, eight or ten days before this accident, the contractor, Hand, replaced this clevis with a hook, having a safety spring, supplied at his request by the company, thereby substituting an unsafe appliance for a safe one. Now it is incontrovertible law that the master is bound to provide for his employee proper and reasonably safe appliances and to keep them in a reasonably safe condition, so that the work be carried on without subjecting the employee to unnecessary risks. And if the master instead of discharging this duty himself, as a corporation must do, imposes it upon one of his employees, the negligence of this employee is, in that respect, the negligence of the master. The master's breach of such duty towards his servant cannot be absolved by the negligence of any one else. The doctrine of non-liability of the master on the ground of common employment has therefore no application in this case.

It is, moreover, in evidence that before the accident the defect in question had been brought to the knowledge of the officers of the company. The evidence is contradictory as to this, but the jury have given credit to the appellant's witnesses. It is in evidence that immediately after the accident, Kenty, the company's foreman, said to Hand, the contractor, "I told you that the hook was dangerous; you had no business to have it on there." Then, Miller, the hoisting engineer, had told, two weeks before and since, to the master mechanic and to the foreman, that the hook was defective. The trial judge was clearly justified under the circumstances in telling the jury that if they believed the evidence they had to find for the appellant.

It is also clear that no prior knowledge of this defect in the hook in question can be imputed to the appellant.

At the close of the trial, the learned judge presiding charged the jury that:

> If you find that the company took reasonable precautions for the protection of the men working in there, then you find for the company, and if you find that they did not, then you find for the plaintiff and assess the damages.

The jury returned their verdict as follows:

> We, the undersigned jurors, impannelled on the case of *Hastings* v. *Le Roi No.* 2, in which it is attempted to show that the said defendant company did not take the proper precautions to safe-guard the lives of the workmen engaged in sinking the winze on the seven hundred foot level of said company's property, hereby find that the plaintiff is entitled to damages to the extent of $3,400.

That is clearly a finding that the company had not taken the proper precautions to safe-guard the lives of the men working in that mine at the time of this accident. And upon what grounds that verdict could be disregarded I entirely fail to see. The case of

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*McKelvey* v. *Le Roi Mining Co.* (1) is precisely in point. There the company's contention was that they were not liable on the ground of common employment, the accident, as they argued, being due to the carelessness of the engineer, a co-worker of the plaintiff. But the court held that as the master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the servant's safety, the finding against the company could not be interfered with, though the carelessness of the engineer had undoubtedly contributed to the accident.

I cannot distinguish this case from the present. Indeed, the evidence against the company in this case is stronger than in that one.

Apart from these considerations I would think that the appellant is entitled to succeed upon clauses 14 and 15 of his statement of claim which read as follows:

14. It was the duty of the defendants to the plaintiff and those working in said winze to have inspected once at least in every twenty-four hours, the state of the head gear, working places, levels, inclines, ropes and other works of the said mine which were in actual use, including the said winze and its ropes, head-gear and appliances; and once, at least, in every week to have inspected the state of the shaft and inclines by which persons ascend or descend, and the guides, timbers and ladder-ways therein, and to make a true report of the result of such examination and have such report recorded in a book to be kept at the mine for that purpose and to have such report signed by the person who made the same, and to remedy any defects found on such examination which were liable to be dangerous to those working in the said winze; but the defendants neglected to observe and perform their said duty as above set forth.

15. If the defendants had made or caused to be made the examinations and inspections in the preceding paragraph hereof and had caused the result of such examination to be recorded as aforesaid, the defective condition of said hook and appliances would have been discovered and remedied, and the injury to the plaintiff would have been prevented.

(1) 32 Can. S. C. R. 664.

Now section 25 of the Metalliferous Mines Inspection Act, R. S. B. C. ch. 134, enacts as follows:

11. A competent person or persons who shall be appointed for the purpose shall, once at least, every twenty-four hours examine the state of the external parts of the machinery, and the state of the head-gear, working places, levels, inclines, ropes and other works of the mine which are in actual use, and once at least in every week shall examine the state of the shafts or inclines by which persons ascend or descend, and the guides, timbers and ladder-ways therein, shall make a true report of the result of such examination, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the person who made the same.

It appears that these provisions of the statute were not complied with. And, if they had been, the defect in question would bave been detected and the accident averted. Now, under the law laid down by this court in *Sault St. Marie Pulp and Paper Co.* v. *Myers* (1), the doctrine of common employment cannot, under these circumstances, be invoked successfully by the respondents. They cannot shift their responsibi ity for the non-performance of any of their statutory duties on the shoulders of any of their employees.

I would allow the appeal with costs and restore the judgment of the trial judge.

The judgment of the majority of the court was delevered by

NESBITT J.—I am of opinion that the judgment of the full Court of British Columbia should be affirmed. My opinion, after the very able argument of Mr. Shepley, was that the appeal should be allowed, but after examination of the evidence and all the authorities quoted, in addition to some others, I think that the Chief Justice in the court below has correctly stated the decisive test of whether or not the relation of fellow servant exists, namely, "who has the control and

(1) 33 Can. S. C. R. 23.

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direction of the negligent and injured persons." The evidence in this case shews that in order to work the mine as a non-union mine, the form was gone through of letting a contract for work in this case to two men called Hand and Moriarity, the contract in question being for sinking a winze, Hand and Moriarity, with the men they purported to employ doing the excavating, the defendants owning the hoisting apparatus and operating same through their acknowledged servants, the whole of the men engaged in the operation of excavating and raising and dumping of material being under the directions of one Kenty. A contract in writing existed, the important parts of which are follows :—

(1) The parties of the second part agree to sink a winze, as aforesaid, to be at least ten feet long by six feet wide in the clear, direction and dip to be as given by engineers of the party of the first part.

(3) The parties of the second part agree to work continuously in eight-hour shifts, and change shifts at the same hour as the men employed by the company : *it is also agreed that all men employed in carrying out this contract shall be subject to the approval and direction of the superintendent of the party of the first part*, and any men employed *without the consent and approval of, or unsatisfactory to the superintendent, shall be dismissed on request.*

(4) The parties of the second part agree to bind themselves under this contract to pay the regulation wages of the mine to all the men under their employ and to work only the regulation and lawful number of hours for underground miners, and where any deviation therefrom is considered absolutely necessary, the consent of the superintendent of the mine shall be first obtained before any *increase or decrease in the scale of pay or hours of employment shall be made.*

It was argued that the word "direction" in the third paragraph was not to be given the meaning that the men were under the orders of the superintendent, but I think the reference in clause one shows that the word "direction" as used in that clause indicates that full effect is to be given to the word "direction" in the third clause, and the evidence seems to me to make it very plain that the excavating, raising and

dumping of material was all looked upon as the one work. The plaintiff says :—

Q. You say you were employed by Hand. Did you see Kenty in the mine often ?—A. Every day I see him.

Q. He directed the way the work was to go on, didn't he ?—A. Yes sir.

Q. Hand and yourself followed the directions he gave ?—A. He gave direction to Hand, and Hand directed us. He never told me. I don't remember speaking to him, only as I was going out of the mine.

Q. Hand was in charge of the mine ?—A. Yes sir.

Q. And in your presence Kenty would come down and direct how the work was to go on ?

A.—Yes, every day.

This, taken with the admitted facts that the man got his pay in an envelope from the company (although the form was gone through of the amount paid him being charged to Hand and Moriarity) with the written contract showing precisely the relations between the superintendent of the mine and all the men, namely, that no man could be employed except by the superintendent's consent; that the rate of wages was fixed by the company; that a man could be discharged at any moment by the superintendent by going through the form of instructing Hand or Moriarity to discharge the man ; that he had complete control and direction of the men, could tell them in what part of the work for which they were employed they should work; gave orders to Hand just as any superintendent would give directions to a foreman in a factory which orders were by Hand communicated to the men. It is well known in all works of this character some one is foreman of the gang to whom directions are given, and such foreman transmits the orders to the men. I think that it is perfectly clear that the answer to the inquiry as to the control and direction of the negligent and injured persons must be that the company had such control. All the

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authorities establish clearly the proposition that A. may employ B. and pay him, and still B. being under the control of C. has a common employment with others engaged in the same work who are under the control of C. and who are directly hired by C. The discussions which have arisen in the cases have always been upon the facts as to the control of the workmen. I think that here the men engaged by Hand and Moriarity in this particular work knew that there was one common controlling mind in those engaged in the work of excavating and raising the material excavated to the surface, and I think clearly, on this evidence, that if a stranger had been injured by some negligent act done by the plaintiff while engaged in his work, that the company would have been liable, and I think that the appellant continuing in the employment runs the risks of the organization so controlled by Kenty.

It was also argued that under the statute there was a liability because of the failure to make a daily report of the condition of the machinery. I do not think anything turns upon this for the simple reason that the accident was not in any sense due to the failure to make such examination. The want of a proper hook, according to the evidence, was known to and reported to Burns who should have stayed the hoisting until the defect was remedied, so that the object for which the statute was passed, namely, discovery of the defect, was obtained, and the act of negligence from which the accident arose was Burn's failure to remedy the defect when it was discovered and reported to him.

Appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitor for the appellant; *A. H. MacNeil.*

Solicitor for the respondents; *J. S. Clute, jr.*