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*Oct. 21.
*Dec. 13.

AINSLIE MINING AND RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

MURDOCK McDOUGALL (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Employer and employee—Duty of employer—Proper system—Common employment.

An employer is under an obligation to provide safe and proper places in which his employees can do their work and cannot relieve himself of such obligation by delegating the duty to another. It follows that if an employee is injured through failure of his employer to fulfil such obligation the latter cannot in an action against him for damages, invoke the doctrine of common employment.

APPEAL from the judgment of the Supreme Court of Nova Scotia maintaining by an equal division of opinion, the verdict for the plaintiff at the trial.

The appellants own and operate a barytes mine in the County of Inverness, N.S., and Duncan R. McDougall, son of the respondent, was, with other workmen, employed to deepen the cut along the vein which was already some thirty feet below the surface. The cut was not perpendicular, but ran to the surface at an angle of about 30 degrees. To protect the workmen from stones and earth falling on them there was a scaffolding about half way down made of timbers placed across at intervals and covered with small poles lying close together, and these again covered with earth. A mass of rock having broken away near the surface it crashed through the scaffolding and fell

*PRESENT:—Girouard, Davis, Idington, Duff and Anglin JJ.

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to the bottom whereby the said Duncan R. McDougall was killed. In an action by his father for damages on behalf of himself and his wife a verdict for the plaintiff for $1,000 was set aside by the Supreme Court of Nova Scotia and a new trial ordered (1). An appeal from this decision to the Supreme Court of Canada was quashed for want of jurisdiction (2). On the second trial the jury found the company guilty of negligence in not having the overhanging wall protected and a safe place for the workmen to do their work and assessed the damages at $1,200. A verdict for the plaintiff for this amount was sustained by the full court being equally divided in opinion.

Newcombe K.C. for the appellants. The company had employed proper and competent persons to oversee the work in the mine and look after the safety of the workmen. That was a performance of their full duty to the men. *Paterson* v. *Wallace & Co.* (3); McDonald on Master and Servant (2 ed.), p. 298; Beven on Negligence (3 ed.), p. 612.

The manager was the only one guilty of negligence if any one was and he was a fellow servant of the deceased. *Hall* v. *Johnson* (4).

Daniel McNeil K.C. for the respondent. The company were themselves negligent in not providing a safe and proper place for the men to work in so that the doctrine of common employment cannot be invoked. *Grant* v. *Acadia Coal Co.* (5); *Smith* v. *Baker & Sons* (6).

(1) 42 N.S. Rep. 226.
(2) 40 Can. S.C.R. 270.
(3) 1 Macq. 748.
(4) 3 H. & C. 589.
(5) 32 Can. S.C.R. 427.
(6) [1891] A.C. 325.

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The findings of the jury were warranted by the evidence and will not be disturbed on appeal. *McKelvey* v. *Le Roi Mining Co.*(1).

GIROUARD J.—I concur in the opinion of Mr. Justice Davies.

DAVIES J.—This was an action under the "Fatal Injuries Act" of Nova Scotia, brought by the plaintiff on behalf of himself and his wife to recover damages for the death of their son, a young man who was killed in the defendants' mine while working as one of the defendants' employees.

The jury awarded as damages $1,200 and divided it, giving to father and mother $600 each.

The death of the employee was caused by a stone or rock of several tons' weight falling out of the hanging wall of the mine upon the deceased workman, just after work had been resumed in the mine after it had remained unworked for some 18 months.

The jury found that the negligence of the defendants, which caused the death of their workman, consisted in

not having the overhanging wall cased and protected from falling; timbering overhead in trench not sufficiently strong to hold a fall of stone liable to fall from overhanging wall;

that

the working place was not safe (and that) if the walls had been properly examined the stone which fell would have been noticed as dangerous;

and lastly,

that the unsafe condition of the working was discoverable by a reasonably careful inspection.

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

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I agree with the opinion of Chief Justice Townshend and Meagher J., that on these findings plaintiff was entitled to judgment.

Mr. Newcombe on this appeal invoked the doctrine of common employment as a complete answer by the defendant company; he contended that the mine which had laid unworked for some eighteen months had been properly examined before work had been resumed by the superintendent of the mine, Kenty, and the managing director, that the inspection was careful and complete, but that whether it was negligent or not the company having employed competent men were not liable and the evidence did not justify the findings.

As to the findings of the jury, I have no difficulty whatever in holding that the evidence was sufficient to sustain them.

The inclination of the hanging wall, as stated by Mr. Harrison, the managing director, was about 30 degrees. The workmen were working immediately below this overhanging wall blasting rock, and when the blasting operations were begun and no doubt caused by them, the huge stones fell out of the top part of this wall, crushing through an artificial roof or covering built across the mine or excavation and killed the unfortunate miner, McDougall. The inspection made as described by the superintendent, Kenty, was superficial and fully justified the jury's finding that it was not a reasonably careful one. Kenty says

> the wall was cracked along in places, ordinary cracks as you would see in any cut, I couldn't see anything to say it was dangerous. It was grassed over to the edge of the cuts; it was impossible to see without cutting away the surface.

No cutting or prying into the surface was done and no testing of the cracks. Mr. Harrison, the managing-director, who accompanied Kenty, gave similar evi-

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dence of the examination which, while it may have satisfied them, was not such an examination as the circumstances called for.

I am not able to accept Mr. Newcombe's contention with respect to the duty owing to the servant by the master in respect of the dangerous condition of the mine when the mine was re-opened and the workmen were put to work on blasting. I have seen no reason to change the opinions I have expressed on this subject in *Grant* v. *Acadia Coal Co.*(1); *McKelvey* v. *Le Roi Mining Co.*(2), and *Canada Woollen Mills* v. *Traplin*(3). In substance they are that while the master is not necessarily liable for the negligence of the superintendent of his works, he is bound to see that these works are suitable for the operations he carries on at them; and he cannot by leaving their supervision to his superintendent, escape liability, for the duty is one of which he cannot divest himself.

In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable cannot be extended to cases arising out of neglect of the masters' primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others.

The case of *Bartonshill Coal Co.* v. *Reid*(4) was cited in support of the general proposition that a master employing competent servants and supplying proper materials to enable them to carry on the work,

(1) 32 Can. S.C.R. 427.
(2) 32 Can. S.C.R. 664.
(3) 35 Can. S.C.R. 424.
(4) 3 Macq. 266.

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was not liable for injuries caused by the negligence of one of his servants to another while they were engaged in their common work.

But in giving his careful and elaborate opinion in that case, an opinion which Lord Chancellor Chelmsford said, in the next following case of the same volume, *Bartonshill Coal Co.* v. *McGuire*(1), had his entire concurrence, Lord Cranworth was at pains to point out the broad distinction between the exemption of the master from liability arising out of the carelessness or negligence of one fellow servant causing injury to another, and the liability of the master for injuries to his servant arising out of his failure to discharge the duty the law throws upon him of providing a fit and proper place in which his workmen are engaged at work. Whether he has or has not discharged his duty in this regard, will be in all cases a question of fact. Mere proof that he had employed competent persons to do his work is not enough.

Lord Cranworth points out that the two previous decisions of the House of Lords, *Paterson* v. *Wallace & Co.*(2), and *Brydon* v. *Stewart*(3).

turned not on the question whether the employers were responsible for injuries occasioned by the carelessness of a fellow workman, but on a principle established by many preceding cases, namely, that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risks.

The question in the former case of *Paterson* v. *Wallace & Co.*(2) he said

was not as to an injury occasioned by the unskilfulness of a fellow workman, but an injury occasioned by the fall of part of the roof;

(1) 3 Macq. 300, at p. 303. (2) 1 Macq. 748.
(3) 2 Macq. 30.

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and in the other case of *Brydon* v. *Stewart*(1), the jury had found that

> the death arose from the pit not being in a safe and sufficient state;

and Lord Cranworth said, p. 288:

> Your Lordships came to the conclusion that the men had a right to leave their work if they thought fit and that their employers were bound to take all reasonable measures for the purpose of having the shaft in a proper condition so that the men might be brought up safely,

and so a verdict was directed to be entered for the pursuer.

Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work, are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ. That exception as defined by Lord Cairns in his celebrated dictum in *Wilson* v. *Merry*(2), does not cover the duties owing by the employer to the employed in these respects, but does cover all risks which the workmen assume when they enter into their master's employment against the wrongful acts or negligences of their fellow servants.

As Lord Herschell says at p. 362 of *Smith* v. *Baker & Sons*(3):

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk. *Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence* and the creation or enhancement of danger thereby engendered.

Mr. Newcombe relied upon the case of *Hall* v. *Johnson*(4) as supporting his proposition that an

(1) 2 Macq. 30.
(2) L.R. 1 H.L.Sc. 326.
(3) [1891] A.C. 325.
(4) 3 H. & C. 589.

underlooker, whose duty it was to examine the roof and prop it up if dangerous, is a fellow labourer with a workman in the mine and the latter cannot maintain an action against the owner of the mine for injury occasioned by the neglect of the underlooker to prop up the roof, if the owner has not personally interfered or had any knowledge of the dangerous state of the mine.

It cannot, I think, be questioned, that an "underlooker," with such duties as those mentioned, would be held to be a fellow workman with the ordinary workmen in the mine. In that case it appeared that the mine had been worked in the ordinary course for the previous six years, and the Court of Exchequer Chamber held that under these circumstances, the workmen

> undertook to run all the ordinary risks of the service including negligence on the part of a fellow servant,

and that the case before them was within that undertaking.

That case does not involve any question as to the primary duty of the master to provide in the first instance places in and materials with which workmen may safely work or systems under which they may so work, or whether with respect to cases where such duty is not fulfilled, and an accident happens to a workman in consequence, the master can invoke the doctrine of common employment and escape liability by shewing merely that a fellow workman's negligence was the cause of his duty being unfulfilled. My holding is that in such cases he cannot and that he is bound to shew that reasonable and proper skill and diligence were not wanting on his part or on the part of those

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to whom he delegated the performance of his duty in those regards.

In view of the disuse of the mine for a period of 18 months, I deem the position on the resumption of work, as regards the mine-owners' duties to their employees, to be the same as if they were then for the first time placing their men at work in the mine. Their duty to their workmen in this situation was to provide them with a reasonably safe place in which to work. When that duty has been delegated, any negligence of an employee to whom it has been confided must be imputed to the employer whether an individual or a body corporate.

Under these circumstances, and holdings, without discussing the other branch of the case as to whether the general manager and director of the company was or was not a fellow workman with the deceased, or was the *alter ego* of the company for whose negligence they would be liable, I think the appeal should be dismissed with costs.

IDINGTON J.—The whole point of this case as appellant's counsel put the matter without abandoning other and minor things, is whether the doctrine of common employment is applicable or not and whether the jury should have been better directed in that regard than they were.

I do not think appellant can now complain of non-direction after its counsel at the trial prudently and deliberately refrained from taking objection to the charge or submitting a proper question for adoption by the learned trial judge or otherwise insisting on the point in question being finally and definitely brought to his attention with a view to having the jury pass upon it.

Moreover, on the facts that bear on the exact point raised there is no dispute.

There is most conflicting evidence as to whether or not what the jury has found to have been negligence was so. But there is no dispute that the condition of things pronounced negligent and dangerous was seen and passed upon by three officers of the company of whom one was manager and director, and another general mine superintendent, for the express purpose of either determining or reporting to the Board of Directors (it does not appear which), so that it could decide as to re-opening the mining operations which had ceased for eighteen months.

The condition of the place in and about which the workmen had to work, the nature of that work and the risks created thereby and to be suffered must be taken I think as adopted by the company on their re-opening of the mine—as a place and things all known to it to be just what it was—and what was that? Was it not a dangerous place wherein the men were to work and was not the employment of a dangerous character?

No proper system was adopted to protect the company's workmen, in life or limb, against these dangers. No adequate protection was supplied by the company and put at the service of those it placed in charge of the work.

Nor was the obvious need either to case the wall or remove the overhanging or other material liable to fall provided for by the company.

Nor, if that might have made a difference, was there assigned to any one (competent or not) the duty of supplying the necessary protection.

This is not the case of a work opened by a competent superintendent appointed for that purpose and

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its work continuously operated and developed by him within his authority both as to the creation of its dangerous qualities and insufficient protection, but is distinct therefrom as if something new.

Whatever doubt or difficulty might exist in a case such as I have just stated, I fail to see how any can exist here if we have regard to the very cases cited by appellant without going further.

I think the appeal should be dismissed with costs.

DUFF and ANGLIN JJ. concurred in the opinion of Mr. Justice Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*
Solictor for the respondent: *Daniel McNeill.*