1894
*Feb. 21.
*May 1.

THE SAINT JOHN GAS LIGHT COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JAMES P. HATFIELD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW-BRUNSWICK.

Master and servant—Common employment—Negligence—Questions of fact—Finding of jury on.

A gas company, engaged in laying a main in a public street, procured from a plumber the services of H., one of his workmen, for such work and while engaged thereon H. was injured by the negligence of the servants of the company. In an action for damages for such injury:

Held, affirming the decision of the Supreme Court of New Brunswick, that by the evidence at the trial negligence against the company was sufficiently proved.

Held further, that whether or not there was a common employment between H. and the servant of the company was a question of fact and it having been negatived by the finding of the jury, and the evidence warranting such finding, an appellate court would not interfere.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the verdict at the trial for the plaintiff.

The facts of the case were as follows—

In 1890 the defendant company was engaged in laying down a new main in Dock Street, in St. John, and connecting the service pipes to the houses and shops along the streets. Finding that its own men were unable to make the connections as fast as was desired, Davenport, the defendants' manager who was in charge of the work, applied to one Freeman Wisdom, in whose employ the plaintiff was, for a man to assist the com-

*PRESENT:—Fournier, Taschereau, Gwynne and Sedgewick JJ.

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

pany's own men in making these connections, and Wisdom sent the plaintiff for the purpose. He worked one whole day, and in the early part of the second day some gas which had been allowed to escape through the main became ignited from fire from a salamander being used in carrying on the work; an explosion took place and the plaintiff was injured. The valve by which the gas was shut off from the main was some six or eight hundred feet from the point where the men were working when the accident took place. When work was discontinued each evening the end of the new main was closed so that the gas could be turned on for the use of those whose houses or shops had already been connected. It was turned off again in the morning before the work was resumed, and as the service pipes were connected by the plaintiff and others engaged in doing that part of the work, the connections would be tested for leakage by the gas being turned on the main and a light applied at the connection to see if there was any escape. It would then be shut off again. It seems that the man whose duty it was to shut off the main did not, on the morning of the accident, altogether close the valve, which allowed some pressure and caused an escape of gas through the main and led, as is alleged, to the explosion which took place, and by which the plaintiff was injured. On the trial certain questions were submitted to the jury which, with their answers thereto, were as follows:—

1. Was the plaintiff injured by the negligent act or omission of defendants or their servants? A. Yes.

2. If so, could the plaintiff by the exercise of ordinary care have avoided the consequence of such negligence? A. No.

3. Was the plaintiff at the time of the accident acting as a servant of the defendants, and under their

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

direction and control? A. He, the plaintiff, was acting under the direction of the defendants as a servant of F. W. Wisdom, and under his, Wisdom's, control.

4. Was the plaintiff at the time of the accident acting as the servant of defendants? A. No.

5. Was the plaintiff at the time of the accident acting under the control of defendants? A. No.

6. Did the plaintiff impliedly undertake to become the servant of defendants? No.

7. Was the plaintiff at the time of the accident acting under independent employment or was he acting for the defendants and as their servant and under their control in and about their work? A. He was acting under independent employment.

The Court—You mean by that, Mr. Wisdom, of course? Foreman—Yes.

8. If the injury was caused by the negligence of the defendants' servants was the plaintiff a fellow servant of the company with such servant, and engaged with him in a common employment? A. No.

On these findings the judge ordered a verdict to be entered for the plaintiff, the defendants having leave to move to enter it for them. A motion for that purpose having been made a rule was refused. The defendants then appealed to this court.

Hazen for the appellants. There is no evidence of a contract between the company and Wisdom by which the latter was to be paid for the plaintiff's services. Therefore plaintiff was not Wisdom's servant when he was working for the company. See *Donovan* v. *Laing, &c., Construction Syndicate* (1), judgment of Bowen L. J.

The plaintiff and the person whose act caused the injury complained of were working for the same master and were in a common employment for the company.

(1) [1893] 1 Q. B. 629.

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

Rourke v. *White Moss Colliery Co.* (1); *Johnson* v. *Lindsay* (2)

Currey for the respondent referred to *Swainson* v. *North Eastern Railway Co.* (3); *Warburton* v. *The Great Western Railway Co.* (4); *Vose* v. *The Lancashire and Yorkshire Railway Co.* (5)

FOURNIER J—I am of the opinion that this appeal should be dismissed.

TASCHEREAU J.—I would dismiss this appeal. I think Mr. Justice King's reasoning in the court below unanswerable, and the answer of the jury to question 8, for which there is evidence, concludes the case.

GWYNNE J.—This action was brought for injuries alleged to have been caused by the negligence of the defendants to the plaintiff when employed as the servant of one Wisdom, a steamfitter, in connecting a main gas pipe of the defendants laid by them in a street called Dock Street in the city of St. John, in New Brunswick, with certain small pipes leading into the houses and to the lamps on said street, for the purpose of lighting the said houses and street lamps with gas. The defence pleaded is, that at the time of the plaintiff's suffering the injury complained of he was a servant of the defendants, and acting as such together with other servants of the defendant, in one common employment, and doing one common work for the defendants, and that the said servants so employed were reasonably fit and competent to be so employed in such work, and that the grievance of which the plaintiff complains was occasioned by the carelessness, negli-

(1) 2 C. P. D. 205.
(2) [1891] A. C. 371.
(3) 3 Ex. D. 341.
(4) L. R. 2 Ex. 30.
(5) 2 H. & N. 728.

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

Gwynne J.

gence and improper conduct of said servants of the defendants, so engaged in one common employment with the plaintiff, doing the common work of the defendants and not from any personal negligence, carelessness or improper conduct of the defendants. The issue joined upon this defence involved mere questions of fact, and the jury who tried the issue found as matters of fact, in answer to certain questions put to them by the learned judge, before whom such issue was tried.

1st. That the plaintiff was injured by the negligent act or omission of the defendants or their servants.

2nd. That the plaintiff could not, by the exercise of ordinary care, have avoided the consequence of such negligence.

3rd. That the plaintiff, at the time of the injury happening, was acting under the directions of the defendants, as a servant of F. W. Wisdom and under his, Wisdom's, control.

4th. That the plaintiff was not acting as the servant of the defendants.

5th. Nor under the control of the defendants.

6th. Nor had the plaintiff impliedly undertaken to be the servant of the defendants.

7th. But was acting under independent employment, namely, the employment of Wisdom.

And they rendered a verdict in favour of the plaintiff for $1,250.

Upon a motion to set aside a judgment for the plaintiff and enter judgment for the defendants pursuant to leave reserved, or for a new trial, the Supreme Court of New Brunswick after argument refused a rule, and maintained the verdict. From that judgment this appeal is taken. If the findings of the jury, upon the matters of fact so found by them, are well found, there can be no question that the plaintiff is entitled to maintain

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

Gwynne J.

the verdict so rendered in his favour; and the well established rule of this court is, that upon such pure matters of fact the court cannot interfere unless it be conclusively established that the findings of the jury are so entirely wrong, and so unwarranted by the evidence, as to justify the conclusion, either that the jury did not appreciate their duty or acted wilfully in violation of it. In the present case the findings of the jury are open to no such imputation ; indeed they are, in my judgment, in perfect accord with the evidence. The plaintiff was a servant of Wisdom, employed by him in his business of a steamfitter at $7 per week. The defendants were desirous of employing a competent mechanic to make connections between the new main pipe they were laying in the street with the pipes from the houses and the lamps upon the street in which the main pipe was being laid by the defendants, and for this purpose they applied to Wisdom who undertook to make the connections, and sent his servant for that purpose. For the services rendered by the plaintiff Wisdom charged the defendants what he considered a reasonable price as upon a *quantum meruit*, and was paid his demand by the defendants. The plaintiff in doing the work which he did acted as the servant of Wisdom, and was paid by him as his hired servant at $7.00 per week. The defendants not only never hired plaintiff, or agreed to pay him for his services, but he was in no sense under the control of the defendants, nor under their directions, save in so far that they pointed out the places where the connections were to be made.

All the cases relating to the principle of a defendant's exemption from liability for injuries occasioned to one servant from the negligence of another servant, or other servants, of the defendant, employed together with the plaintiff in one common employment, and

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

Gwynne J.

in one common work for the same master, have been most thoroughly and exhaustively discussed in the court below, and not one of them countenances the conclusion that this plaintiff, under the circumstances in evidence, must be held to be a fellow worker with the other servants of the defendants whose negligence caused the injury which the plaintiff suffered. There is no countenance for the contention that the plaintiff was lent by Wisdom to the defendants so as to have become the servant of the defendants, and under their control, and so as to make applicable the principle which exempts a master from liability for an injury sustained by one of his servants from the negligence of another, when both are engaged in one common employment for their master. The persons who caused the injury to plaintiff were at least two, namely, the man whose duty it was nightly to turn on the power into the main in Dock Street, so as to light the houses and lamps in the street, and to turn it off in the morning, and who neglected to do so sufficiently on the morning that the plaintiff received his injury, and the person who left the salamander, or stoker, as it has been indifferently called, at the place where it was, quite close to the place where the plaintiff was working at an open hole in the main pipe, where he was making connection with a pipe from a neighbouring house. The man who neglected to turn off the power effectually spoke of his duty in that particular as being his ordinary duty for many years, namely, to turn on the power every evening and to turn it off every morning ; and he gave the only evidence that was given as to how the fire in the salamander or stoker came to be placed where it was, close to the hole in the main at which the plaintiff was working, where it was not at the time at all required. He says that it was removed from a place where he himself

had placed it not long before, and where, if it had been suffered to remain, the plaintiff could not have received the injury; that the accident which injured him could not have happened, and that it was removed from that place and placed where it was by the order of the defendants' manager. If this be so, and this was the only evidence upon this point, then the defendants themselves, through their manager, were a party to the injury which the plaintiff suffered.

1894

THE SAINT JOHN GAS LIGHT COMPANY v. HATFIELD.

Gwynne J.

But it is quite unnecessary to dwell upon this. It is sufficient to say that the question whether the plaintiff was the defendants' servant, and under their control, and a co-labourer employed in one common employment with the persons who, being servants of the defendants, negligently caused the plaintiff the injury of which he complains, was a mere question of fact, which it was the office of the jury to determine, and that their findings cannot be said to be so manimanifestly erroneous as to justify a court to set aside their findings, and either to assume their function, or to order a new trial.

SEDGEWICK, J.—I concur, but with the greatest hesitation, in the dismissal of this appeal.

*Appeal dismissed with costs.**

Solicitors for the appellants: *Barker & Belyea.*

Solicitor for the respondent: *C. N. Skinner.*

---

* As to a servant being at the same time in the employ of two masters see *Union S.S. Co.* v. *Claridge* [1894] A.C. 185, the report of which was published after this case was decided.