CHARLES S. BERGKLINT (PLAINTIFF) ..... } APPELLANT;

AND

THE WESTERN CANADA POWER COMPANY (DEFENDANTS) ..... } RESPONDENTS.

1914

*Feb. 4, 5.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Dangerous works—Defective system—Careless management—Fault of fellow servant—Efficient superintendence—Employer's duty—Evidence—Action—Liability at common law—"B.C. Employers' Liability Act"—Pleading—Practice—Charge to jury—New trial.

To afford protection to workmen about to be employed on a ledge below, several of them, including the plaintiff, were directed by the defendants' foreman to clear loose rocks from the hillside and form a berm above the place where the work was to be done. The clearing was imperfectly performed, although the foreman was informed by some of the men that "it was all right." While plaintiff was at work on the lower ledge he was struck by rocks, which rolled down the hillside, fell over the cliff and sustained injuries for which he brought action to recover damages under the British Columbia "Employers' Liability Act" and at common law. It appeared from the evidence that it was customary to clear off such inclines or to erect pentices or barriers for the protection of the workmen on lower ledges, but not to do both, and there was evidence that on this hillside barriers were unnecessary and might be dangerous. At the trial the jury found that the defendants had been negligent "in not sufficiently clearing the face of the incline and placing barriers to prevent rolling stones and other debris from causing injury to the employees," and judgment was entered for the plaintiff. By the judgment appealed from (17 B.C. Rep. 443) the Court of Appeal dismissed the action, holding that the cause of the injury was the failure to clear the hillside sufficiently, which was due to the fault of the plaintiff and his fellow workmen.

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

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Held, that, having regard to the character of the work in which the plaintiff was engaged when injured, the employers' duty to provide reasonable protection for him could properly be delegated to a competent superintendent or foreman (furnished with adequate materials and resources), whose negligence would not render the employer liable at common law. *Wilson* v. *Merry* (L.R. 1 H.L. (Sc.) 326), applied. *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420), and *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (44 Can. S.C.R. 412), distinguished.

Per Fitzpatrick C.J. and Anglin J.—On the evidence, failure to clear the face of the incline sufficiently was due either (and most probably) to the negligence of the plaintiff and the workmen engaged with him or to that of the foreman and, consequently, a judgment against the defendants at common law was not justified. The finding that the omission to place barriers above the men working on the lower ledge was negligence is not supported by the evidence; if it were, such negligence would be that of the superintendent. The trial proceeded on the assumption that the works were in charge of a competent superintendent and foreman, having discretion and means to furnish all reasonable safeguards, and an admission to that effect was made at bar on the hearing of the appeal — consequently, the appeal should be dismissed.

Per Idington and Brodeur JJ.—The findings of the jury were sufficiently supported by evidence and warranted a judgment at common law.

Per Idington J.—The defendants were bound to allege and prove that they had delegated to a competent person the duty of providing proper safeguards and had furnished him with the means of doing so.

Per Duff J.—There was evidence upon which the jury might have found that the duty of providing proper safeguards had been entrusted to a competent person provided with the necessary means of doing so, but this was not admitted and the failure of the trial judge to leave this question to the jury caused a mistrial.

In the result a new trial was ordered, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment entered on the verdict of the jury at the trial, by Cle-

(1) 17 B.C. Rep. 443.

ment J., and dismissing the plaintiff's action with costs.

The circumstances of the case are stated in the head-note and the questions at issue on the present appeal are set out in the judgments now reported.

S. S. Taylor K.C. for the appellant.

Sir Charles-Hibbert Tupper K.C. for the respondents.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J. (dissenting).—I think we must accept the finding of facts by the jury which is as follows:—

> The Foreman: Owing to the dangerous nature of the work, we, the jury, consider the defendant company guilty of negligence in not sufficiently clearing the face of the incline and putting in place barriers to prevent rolling stones and other debris from causing injury to the employees.
>
> And we further consider that the plaintiff is entitled to $5,500 damages or compensation.

The decision in *Priestly* v. *Fowler*(1) did not abrogate the common law obligation resting upon the master in regard to the protection of his servant.

The result of that case as developed in the case of *Wilson* v. *Merry*(2), and at page 332, as stated by Lord Cairns, is to put the limitation upon that obligation, which appears as follows:—

> 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

(1) 3 M. & W. 1. (2) L.R. 1 H.L. (Sc.) 326.

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this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow workmen.

There is in the above verdict a finding which possibly relates to what may have been the negligence of a fellow servant. The appellant seems to have been subject to the direction of different people as occasion might arise. One of these was the foreman, Fraser, with whom on one occasion he was engaged in clearing the part of the bluff which all seem agreed needed looking after from time to time.

Now if it had been demonstrated beyond peradventure that the work done under Fraser or omitted to be done by his directions had been the cause of the accident it might well be argued that the negligence in question was that of a fellow servant.

But as I understand the jury they do not necessarily find so and do find that even if the fellow servant was negligent the damages therefrom would have been averted if there had been barriers to prevent even rolling stones and other debris from causing injury. We must bear in mind the evidence and charge of the learned trial judge in reading this verdict.

I cannot understand how, if that obligation to erect such barriers rested upon respondent and had not been observed, it can be absolved from the consequences of neglect thereof. The utmost that can be said in such case is that the respondent and its foreman were joint tort-feasors.

The respondent has neither pleaded nor proved that it fell within the limitation of its liability as defined by Lord Cairns.

The statement of defence in paragraph 16 sets up the defence that the injuries in question were caused by the negligence of

> fellow servants of the plaintiff engaged in common employment, to wit: The servants mentioned in the statement of claim, together with the plaintiff, neglected to properly clear off a certain hill above the place where the plaintiff was working at the time of the accident.

The 17th paragraph of the defence proceeds in a more elaborate manner to set forth the steps taken by Fraser, the foreman, and his men, including plaintiff, to clear the face of the hill above the spot where plaintiff and others were at the time of the accident engaged in drilling and the duty to render same safe thereby and then alleges that if, which is denied, the accident was caused by any substance, rock, gravel, stones or earth falling upon the plaintiff it was wholly due to the

> neglect of plaintiff and his fellow workmen engaged in a common employment in omitting to take the necessary precautions so that the face of the hill above the ledge aforesaid where the plaintiff was working at the time of the said accident, was clear of all the above material and not otherwise.

How can this be said in any sense to answer the neglect to place the proper barriers protecting against such falling material reaching the plaintiff and others, which the statement of claim had alleged as neglect.

It is quite obvious that the neglect of the superintendent or manager or of respondent was nowhere pointed at either by express language or implication in these paragraphs.

There is nothing anywhere pleaded to answer the charge of neglect to erect a proper barrier save by the general denial of neglect which still left the onus of exoneration from *primâ facie* liability on respondent.

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Particulars of the neglect involved in paragraphs 16 and 17 were demanded and answered by delivery of so-called particulars alleging that they were as stated in paragraph 17 of the defence.

Such being the pleading what is there in evidence to exonerate the respondent by the limitations laid down by Lord Cairns as above ?

There is absolutely nothing save such inference as may be drawn from an engineer describing himself as manager. There is not a word to explain what was the extent of the authority given him by respondent. Where and what were "the adequate material and resources" placed at his command ? How could the jury say he was so furnished ? How can we say so in the absence of all evidence on that score ?

In one way of looking at such a matter the word "manager" and the control of men which he explains might justify the inference of authority to incur a trifling expense such as involved in some of the suggestions made by counsel, but the manager himself and others say these minor expedients in the way of a barrier would be worse than useless. That does not help the respondent in making out a defence.

There is evidence to the contrary also. But there is clear evidence that to effect an efficient protection by building the necessary barrier would involve an expense beyond the ordinary expenditure such as may necessarily be implied in the authority of a manager.

And there is evidence that only by such an erection could the adequate protection, found by the jury to be necessary, have been effectively provided.

I cannot close my review in this aspect of the case without quoting the evidence of Mr. McDonald, a con-

tractor of wide experience, called for respondent in rebuttal. He says as follows:—

Q.—And you say, if water is coming down it would be too expensive to remove all this earth and stones, and I understood you to say to Mr. Griffin that some extra precaution in the way of barriers could be erected ?

A.—No, I did not say that.

Q.—Do you say it cannot ?

A.—I said, if material was liable to be started rolling through natural causes up above that there might be something done in the way of extra precautions.

Q.—Yes, exactly. And you, of course, as a railroad contractor yourself, you have to provide against accidents ?

A.—We do all we can.

Q.—And always, of course, with your eyes to expenses ?

A.—With an eye primarily to the safety of the men.

Q.—But I say, also with an eye to the expenses ?

A.—Exactly, that is a factor.

Q.—And you, as a large railway contractor, such as you are, have a good many damage actions to contend with ?

A.—We do not have actions, we settle them all.

There is evidence of water coming down at times and of other causes of disturbance from which it may be inferred even if clearing done as well as Fraser says might well account for the accident and the need of a barrier. The reasons or excuses, given for none, were for the jury to consider.

I am not concerned with determining the question one way or another. I only desire to point out what a wide field of evidence there was before the jury bearing upon the subject and how it was quite competent for them to have reached the conclusion they did.

Primâ facie in a dangerous work there is an obligation resting upon the master to take due care for the protection and safety of his workmen and until that is discharged either by taking the due care needed or in the manner already pointed out by furnishing adequate material and resources as well as a competent manager, he must be held liable for negligence.

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It does not appear to me that in this case the obligation has been discharged in either way by respondent.

I need not dwell upon the decisions in this court. I do not think it is necessary for the purposes of this peculiar case to go as far as some of these decisions have apparently gone. Nor do I deem it necessary to define what may and what may not fall within the term system. Whatever may properly fall within that term must, I think, be found within the dictum of Lord Cairns, who did not find it necessary to go further in the exposition thereof, but left a wide field to be dealt with later, as it has been dealt with in many cases since. And within that lie such cases as this if the jury's view of very conflicting evidence be correct. There existed no barrier and no evidence was given to shew any one had the power to supply it.

It was properly the purpose of the respondent to pursue the policy indicated in Mr. McDonald's evidence above quoted of finding it cheaper to pay for accidents than furnish the material for adequate protection.

Our latest case thereon was that of *Waugh-Milburn Construction Co.* v. *Slater*(1), decided last November.

There is no room for applying the *volens* doctrine here unless we discard the case of *Smith* v. *Baker & Sons*(2), and the case of *The Canada Foundry Co.* v. *Mitchell*(3), or perhaps substitute our own judgment of fact for that of a jury.

I think the appeal should be allowed with costs.

(1) 48 Can. S.C.R. 609. (2) [1891] A.C. 325.
(3) 35 Can. S.C.R. 452.

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DUFF J.—The appellant was injured in these circumstances: The respondent company was engaged in making a large excavation (roughly, 300 ft. by 100 ft.) for the site of their dam at the outlet of Stave Lake, B.C. In carrying on this work the appellant, with some others, was clearing a narrow ledge on the face of the steep hillside, preparatory to settling a steam drill, when he was struck by a shower of gravel and rock that fell from the edge of the cliff and was thrown to the foot of the hill below and seriously injured.

The charge of negligence which was the principal subject of controversy was that of insufficient protection against the danger of falling rock and earth.

The usual practice was when the workmen were employed in drilling on the face of the hill for the foreman to send a party of workmen to make a "berm" above the place where they were about to be engaged; a "berm" being a cleared space (from which rocks and other material that might be a source of danger had been removed) extending back from the edge of the cliff a sufficient distance to secure such comparative immunity as could be obtained by this method.

On the part of the appellant it was alleged this method was in many places ineffectual and that complete immunity from this particular danger might be secured by placing a barrier or shield of logs in such a position as to intercept falling material.

At the trial the principal points of controversy were whether there was negligence in failing to adopt some such expedient as that just referred to, whether the plaintiff ought not to fail on the grounds of contributory negligence and assumption of risk; and, whether, assuming all these questions determined in

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his favour, the negligence leading to the injury was the negligence of a fellow servant for which the company would not be responsible.

I have come to the conclusion that there ought to be a new trial and I shall refer to the evidence no more than is absolutely necessary to elucidate my view of the law applicable to the case.

There can be no doubt that the work was of a dangerous character.

Mr. Haywood, the respondent's engineer, says:—

Q.—You mean to say you never had any timbers or logs or planks or anything of that sort at any time up there, up to the present day to protect the workmen from rocks rolling down on the workmen in that excavation ?

A.—I do not believe we did; we did have a kind of protection for the pipes against blasting.

Q.—I mean protection for the workmen ?

A.—I don't think so.

Q.—You could have protected them under the timbers, you could have had planks or logs placed so as to protect the workmen from the falling rocks ?

A.—*It was not practicable.*

Q.—But you did have planks over at the dump to prevent rocks from the skip falling down on the workmen ?

A.—I think you must be referring to the place where the skip was being hauled out over the top of the flume; we had a protection there but there was no reason for any timbers to protect the workmen.

Q.—Had you not at the top some protection ?

A.—We had a kind of shack.

Q.—I mean simply as a protection ?

A.—I do not remember what the protection was; it was not for the men working there, it was not necessary; it was protection for the plant. The men were not there when the blasts were going off.

Q.—You have seen stones or rock rolling down when the men were at work ?

A.—Very much so.

Q.—You knew it was a dangerous thing ?

A.—*The whole work was hazardous.*

Q.—You knew that vicinity was dangerous ?

A.—Yes, it was dangerous.

Q.—And you know it can be protected against ?

A.—*It cannot entirely be protected against.*

Q.—It can to a certain extent be protected against ?
A.—*I cannot say as it could.*

It was clearly the duty of the company, therefore, to take all reasonable precautions for the protection of the workmen engaged in this hazardous employment.

There was, moreover, evidence (see especially the evidence of Fraser, the foreman) entitling the jury to find that the provision of a shield such as that suggested in places where such protection might be required would not be an unreasonably extravagant measure.

In these circumstances the position of the respondents appear to have been this: They were not in my view (for reasons I shall presently give) under an absolute duty to see that reasonable care was taken to provide proper safeguards. The duty of the company (and of those exercising the general powers of the company, directors, executive committee, managing director as the case might be) would, I think, be discharged if they engaged some competent person whose duty it was to provide such safeguards and entrusted such agent with the necessary materials and invested him with the necessary authority to enable him to do so effectually. The duty of the agent to take such precautions might be expressly imposed upon him or it might arise impliedly from the terms or character of his employment, but if the company is to escape responsibility (assuming the work in these respects was not in fact superintended by the directors or others exercising the general powers of the company) it must appear that the provision of such safeguards was in fact the duty of some delegate expressly

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stipulated for or implied in the terms or nature of his engagement and that this delegate had been furnished with the necessary authority and resources to enable him to perform it. That is, in my opinion, the result of the decision of the Court of Appeal in *Young* v. *Hoffmann Manufacturing Co.*(1). In effect also it was the view expressed in *Canadian Northern Railway Co.* v. *Anderson*(2), in a judgment delivered by my brother Anglin and myself jointly.

I think it was a question of fact for the jury whether the duty of superintendence was in fact in this case retained by the directors or others having authority to exercise the general powers or whether, on the contrary, Mr. Haywood had such authority and resources at his command and was under a duty express or implied to use them in furnishing the suggested safeguards if such safeguards were reasonably necessary. And I think the learned trial judge in effect refused to leave this question of fact to the jury. For that reason there should be a new trial.

I cannot, however, leave the case without some reference to the grounds on which the appellant contends the judgment of the trial judge should be restored and the respondents contend that the judgment of the Court of Appeal should stand. On the question of *volens* and contributory negligence I do not think I ought to say more than this. While the evidence is far from satisfactory, I do not think it is a case for the exercise of the power of the court to enter judgment for the defendant. I think there was evidence to support the verdict and I am not sure that in considering the appellant's conduct the admission of the

(1) [1907] 2 K.B. 646. (2) 45 Can. S.C.R. 355.

foreman that the appellant "had practically no understanding of English" has been sufficiently attended to. His want of English should also be considered in appreciating the effect of his answers given on examination for discovery. He asserts that he understood few of the questions. As to the form of the verdict, its purport seems clearer when it is read in the light of Mr. Haywood's evidence quoted above, and of the judge's charge; so read, it would appear in both branches of it to impute negligence to the company itself rather than to the appellant's fellow workmen. All these matters, however, present difficulties and suggest additional reasons pointing to the desirability of a new trial.

Coming to the contention of the appellant that the respondent company's duty was an absolute duty to see that reasonable care was taken for the protection of its employees in this dangerous work.

My view of the case is that the fault — if there was fault — was a fault of management or superintendence of the operations in the prosecution of which Bergklint was engaged (the making of the excavation) and that the case falls within the actual decision of the House of Lords in *Wilson* v. *Merry* (1).

In that case the trial judge had instructed the jury that negligence in the construction of a scaffold under the supervision of the mine superintendent in such a way as to obstruct ventilation and thereby cause an explosion of fire-damp was negligence for which the owner was in law responsible, the erection of the scaffold being required in the ordinary course of the working of the mine; there being no question of the suffi-

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

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ciency of the system of ventilation as originally installed and no suggestion that the superintendent was incompetent. The House of Lords held that the instruction in question was erroneous.

In *Wilson* v. *Merry*(1), as well as in previous and subsequent cases a distinction is signalized between the duty of the master in relation to the safety not only of structures, but of arrangements that are relatively permanent such, for example, as the system of ventilation in a mine or the disposition of the parts of a plant occupying for a considerable period a fixed position and his duty as regards measures which are required from time to time to secure safety in the operations in which the workman is engaged and which must of necessity vary with the progress of work and changing times and places. This latter is treated as a duty of management or superintendence which the master may discharge by employing competent persons whose duty it is to perform it and supplying them with the necessary resources to enable them to do so. The following passages from the judgment in *Wilson* v. *Merry*(1) will illustrate my meaning.

Lord Chelmsford, at p. 336:—

> Although the learned judge in the course of his summing up, distinguished between "keeping clear and in good working order the ventilation arrangement or system, when completed, and defect or fault in the arrangement or system itself," yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from "that system of ventilation and putting the mine into a safe and proper condition for working," which according to the opin-

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

ion of the Lord Justice Clerk, in *Dixon* v. *Rankin*(1), "it was the duty of the master for whose benefit the work is being carried on to provide." In the course of working the Houghhead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and, therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Neish and the deceased were fellow workmen, it would have been one of the risks incident to the employment in which the deceased was engaged.

Lord Colonsay, at pages 344, 345, 346, says:—

I think that there are duties incumbent on masters with reference to the safety of labourers in mines and factories, on the fulfilment of which the labourers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself; or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty; or failure to provide or supply the means of providing proper machinery or materials—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails he may be responsible. But on the other hand, there are risks incident to occupations more or less hazardous, and of which the labourer who engages in any such occupation, takes his chance.

* * * * * * *

It is not alleged that the general system of ventilation of the pit, as it had existed anterior to the erection of the scaffold, was not good, or that Neish was not a fit man to be placed in the position he occupied.

* * * * * * *

First: It deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of a pit, for which in certain views the defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defenders for the fault of Neish; but the distinction does not appear to have been adverted to.

(1) 14 Ct. of Sess. Cas., 2 Ser., 420.

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The same distinction is adverted to in the judgment of Lord Cramworth in the *Bartonshill Coal Co.* v. *McGuire*(1).

The general principle is broadly stated by Lord Cairns in *Wilson* v. *Merry*(2), at page 332, in the following passage:—

> 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 he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master.

But this passage was construed in *Allen* v. *The New Gas Company*(3) (by the Court of Exchequer, Bramwell, Amphlett and Huddleston, BB., at p. 256), as laying down the rule that the owner must provide all that is necessary

> to carry on the business including premises reasonably safe for that purpose as, for instance, in case of a mine of a proper system of ventilation as pointed out by Lord Colonsay, in *Wilson* v. *Merry*(2).

In that case the injury had been the result of certain gates on the defendant's premises being in a dangerous state of disrepair. But a distinction between the master's duty in relation to the safety of structures in the first instance and his duty in relation to maintenance as a part of the duty of superintendence is suggested at page 256.

> There was no evidence to shew *that the premises of the defendants were dangerous, that the gates were defective in their original construction, or that they had not been perfectly safe when first put up.* If they had fallen into a state of decay, and had been per-

(1) 3 Macq. 300.

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

(3) 1 Ex. D. 251.

mitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed.

The same distinction is also adverted to by Lord Herschell in his judgment in *Gordon* v. *Pyper*(1), at page 26. The rule which makes the master responsible for reasonable care in providing a safe place to work, sufficient machinery and appliances and a safe arrangement, was applied by this court in *Ainslie Mining and Railway Co.* v. *McDougall*(2), and *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(3). In these cases the breach of duty charged was the failure to make proper provision in the *first instance.* But the question whether maintenance of structures and of plant and machinery (as distinguished from the duty to make safe provision in *the first instance*) is to be regarded as a duty of management or superintendence that the master may discharge by employment of competent delegates is a question on which there has been a good deal of difference of opinion and which does not necessarily arise in this case.

That distinction apart I do not think the principle of absolute responsibility illustrated by the decisions just mentioned, can properly be applied to the circumstances of this case. The work undertaken by the respondents necessarily subjected their workmen to hazards of various kinds, among those being the danger to which workmen engaged in drilling on the hillside might be exposed from falling material. As the work progresses the conditions of it must necessarily change. Expedients which at one time or in one place

(1) 20 Ct. of Sess. Cas., 4 ser., 23.

(2) 42 Can. S.C.R. 420.

(3) 44 Can. S.C.R. 412.

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would be effective safeguards might in other places be only a source of additional peril; where the work is of such a character, and the nature of the precautions to be observed, or the safeguards to be provided, changes or may reasonably be supposed to change with the progress of the work, I think we are outside of the principle of the cases referred to and within the doctrine applied in *Wilson* v. *Merry*(1), as expounded in the passage quoted above from the speech of Lord Chelmsford.

There are two further points to be mentioned.

First.—It has been contended that by failing specifically to plead that the engineer was invested with authority and supplied with means to provide the necessary safeguards, the respondents have disentitled themselves from raising that defence. I think there was evidence to go to the jury on the question whether or not the duty to make the suggested provision for the safety of the workmen was one of the duties of his employment. I think the learned trial judge would have allowed an amendment if one had been asked for, had he not felt that he was bound by the authority of the *Fakkema Case*(2) to hold that the defendants could not divest themselves of responsibility for the exercise of due care by the engineer. On the other hand, considering the state of the pleadings, the respondents having alleged that the failure to clear the incline was due to the negligence of the appellant's fellow-servants and having omitted to set up the same answer to the allegation of negligent failure to provide a barrier, it would be a little extravagant to treat anything which occurred at the trial as amounting to an admission by

(1) L.R. 1 H.L. (Sc.) 326. (2) 44 Can. S.C.R. 412.

the appellant that the duty of making provision of the last mentioned kind was one of the duties cast upon the engineer. I was under the impression at one stage of the argument in this court that Mr. Taylor had admitted that duty was cast upon him in fact; but the intention to make any such admission of fact was afterwards disavowed and I have no doubt that my impression must have been due to a misconstruction of some concession made for the purposes of discussion.

The circumstances of the case are very special and on the whole I think justice will be best served by reserving all costs to abide the event of the new trial.

ANGLIN J.—The plaintiff was an employee of the defendants who were preparing a site for an extensive power plant at the outlet of Stave Lake, B.C. When injured he was engaged with two other workmen on a narrow ledge on a hillside in making ready a level place on which to stand a power drill. Some dirt and stones fell from above. One of the falling stones apparently hit the plaintiff, and, losing his balance, he fell to the bottom of the excavation, some 35 or 40 feet, sustaining serious injuries. He and his two fellow workmen had been instructed by the foreman, Fraser, to clear off all the loose rock and other material from the hillside above and to make the customary "berm" before commencing to work on the ledge, and they had been engaged from three to five hours in doing so. Before they began to work on the ledge one of these men, in the plaintiff's hearing, assured the foreman that the work above had been properly done. The accident happened after the men had been working on the ledge about twenty minutes.

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The negligence charged against the defendants was

(1) Failing to provide a guard or shield of planks to prevent rocks and other material falling on the men while at work on the ledge;

(2) Failing to provide a watchman to warn the men of falling material;

(3) Improper construction and operation of cable-lines carrying aerial trams causing loose rock and material to fall;

(4) Failing to clear away loose dirt and rock above and adjoining the excavation.

Most of the evidence was directed to the third item of alleged negligence; but it was ignored by the jury, who found that

> Owing to the dangerous nature of the work, we, the jury, consider the defendants guilty of negligence in not sufficiently clearing the face of the incline and putting in place barriers to prevent rolling stones and other debris from causing injury to the employees.

They awarded the plaintiff $5,500 damages.

On appeal this verdict was set aside on the ground that the evidence did not sustain it and the action was dismissed.

Upon the admitted facts "the failure to clear the face of the incline" would appear to have been ascribable to the plaintiff and his fellow workmen, although the finding of the jury would seem to be to the contrary and probably precludes the dismissal of the action on the ground of contributory negligence. If the jury was of the opinion that the foreman should have personally inspected the work above in order to see that it had been properly done before allowing the men to begin operations on the ledge, and that he was negligent in not having made such an inspection, that would be negligence of a fellow employee and would

not support a judgment against the defendants at common law. Moreover, lack of efficient superintendence or inspection is not amongst the grounds of negligence charged against the defendants.

On this branch of the jury's verdict we have the following evidence: Fraser, the foreman, asked the men if the work of clearing had been properly done ("Boys, are you sure that it is all right above ?") and was assured that it had been before the work on the ledge began. This is not questioned. One of the men, McKinnon, gives this evidence:—

Q.—In your opinion was everything made safe before you came down ?

A.—I was pretty well satisfied myself with the work we did.

Q.—With the work you did ?

A.—Yes.

Q.—Did you think it was safe for yourself, that is the point ?

A.—I never thought of any danger before the accident.

But on cross-examination, he says:—

Q.—When you came down from clearing the top of the hill you did not appreciate any danger after that, you did not think there was any danger ?

A.—No.

Q.—And you did not think — it would be fair to say that Bergklint would not think he was in any danger or appreciate any risk, would he ?

A.—No.

Q.—What occurred was something — the picking of stones away was not sufficient to prevent occurring — that is the way you would size it up, would you not ?

A.—Well, we thought we did everything we could do.

Q.—In the shape of picking away the stones ?

A.—Yes.

Q.—Now what loosened that stuff up there, do you think ?

A.—I have no idea.

Q.—The dirt around the brink of the hill, the small gravel and small stones were not actually shovelled away from the brink of the cliff, that is about it, is it not ?

A.—Yes.

Q.—If they had been shovelled away from the brink of the cliff and the bedrock made bare, it would be less dangerous ?

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A.—About two feet at the edge of the cliff.

Q.—If it had been made bare further back, it would have been less dangerous ?

A.—I presume so.

Q.—You presume it would have been less dangerous down there ?

A.—Yes.

McLean, the other workman, did not give evidence. From the plaintiff, who had been engaged in similar work in Sweden, we have this testimony:—

Q.—I call your attention to the notice of injury put in as exhibit 1, I think on the 21st of December, 1910, which was about a month after the accident, you state that this accident was due to loose pieces of rock, allowing loose rock to remain on the edge of the precipice under which you were working — just call his attention to this notice and I will follow it by another question. The statement in this notice that the cause of the accident was allowing loose rocks to remain on the edge of the precipice. Now what do you mean by that — I will put it as though I was speaking to the man — what you mean by that Bergklint is, that they did not sufficiently clear the edge of the hill above the ledge — what you mean by that is that the loose rocks and stuff were not sufficiently cleared from the edge of the hill above you ?

A.—Yes.

Q.—Now is this answer correct ? Reading from his examination for discovery at question 70, "Was it not always your custom in working on that class of work either in Sweden or at the works, to go up above the ledge and clear off the loose stone before you went down on the ledge to work ?

"A.—Yes."

Ask him if that is a correct answer to that question ?

* * * * * * * *

Q.—Ask him that question, you can do it in your language — what is his answer ?

The Interpreter: His answer is, that *when it was not too much work they cleared off the rock, but if it was too much work they put protection.*

* * * * * * *

Q.—Now the next one I wish to call his attention to is question 135 on the same examination: "But in Sweden you did the same sort of work, you cleared away the loose rock too ?

"A.—Sure, all over, 3 or 4 yards."

A.—Yes.

Q.—Now 137: "You put this to him, Mr. Interpreter.

"A.—What I mean is that it was not cleared far enough back."

Q.—138. "Did you think so at the time ?

"A.—Just at this place it was not cleared away so far as it was in other places, on account of so little work to be done at this place."

Q.—139. "That was not my question. My question is did you think at the time when you were clearing it that you had not cleared it sufficiently ?

"A.—I don't think so."

* * * * * * *

Q.—Your idea, Mr. Bergklint, is, in short, that the accident was due to this insufficient clearing at the edge of the hill ?

A.—Yes.

* * * * * * *

Q.—Very well. Whatever the facts may be as to the reason — at any rate you now say, Bergklint, you say that the work on the ledge was to be very short, that you were not acting as helper but merely to assist on the ledge in making a place for the machine drill, that is true, is it not, Bergklint ? You knew you would be a very short time on the ledge when Fraser sent you to that part of the work and your work was simply to assist in preparing a place on the ledge for the machine ?

A.—Yes.

Q.—And notwithstanding his previous answer, the truth is, that he, McLean and McKinnon cleared off all the loose stuff or dangerous material that they could see — ask him that — if, as a matter of fact, that however wrong they were and no matter what he has hitherto said, the fact remains that the three of them cleared off the face of the hill of all the loose stuff they could see ?

A.—No, it was only the stones that were lying closest to the edge.

* * * * * * *

Q.—I understand the witness to say that is an incorrect answer to 55 — "As far as you could see you cleared off all loose rock ?

"A.—Yes."

Ask him if he swears to-day that he did not clear off all the loose rock that he saw ?

A.—At the edge we cleared off as many stones as we saw, but there were stones higher up the mountain.

Q.—There were stones higher up the mountain, and did you tell any one or suggest to any one there was any danger higher up the mountain ?

A.—No.

Q.—How long was he doing that clearing ?

The Interpreter: You mean, just on the ledge ?

Q.—In the whole clearing, how long was he clearing the hill above the ledge or any clearing that day ?

A.—Altogether I was about 5 hours.

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Q.—In clearing ?

A.—In clearing.

* * * * * * *

Q.—But passing that over, did you tell me on the 7th of March, this month, the following that you thought there was some danger of rock falling — that is question 149.

Q.—149. "You thought there was some danger of rock falling ?

"A.—I say — that at that time I didn't think a great deal about it — that there might be danger, but I took a chance and went down because I did not think it would take long."—This is just after you started, at the same time that McLean told you, you would have to go there.

Q.—147. "McLean said, that he thought it was allright and I ask you, if at that time you didn't think it was allright too ?

"A.—I didn't think so."

Q. 148. "But you said nothing ?

"A.—No."

Q.—149. "You thought there was some danger of rock falling ?

"A.—I say — that at that time I didn't think a great deal about it — that there might be danger, but I took a chance and went down because I did not think it would take long."

Q.—150. "I see. You didn't think that you would be there long enough for any trouble to happen ?

"A.—Yes, sir."

Did he give those answers ? What does he say so far ?

A.—I cannot recognize all this.

Q.—Will he deny on his oath he used that language which I read to him, on the 7th of March, this year, will he deny on his oath those questions were put to him and those answers were given — what does he say ?

A.—No, I cannot do it, I don't remember.

Q.—Now, whatever he said, the fact is, is it not, that he did not thing the clearing was sufficient when he went down, is that not the fact ?

The Interpreter: What was that ?

Q.—He did not think it had been sufficiently cleared away, all these stones and stuff when he went down on to the ledge, is that not a fact ?

A.—I saw all of them, that it was risky to work there.

* * * * * * *

Q.—Fraser sent him to assist in making a safe place to put the machine to be worked by McKinnon and McLean, and told him to assist McLean in clearing the hill and to bar down the rock so as to make a safe place for the machine ?

A.—Yes, they were going to make a safe place for the machine.

These extracts are somewhat lengthy. Yet it seems to be scarcely possible to state the plaintiff's position fairly without giving them. Some of them apply as well to the other branch of the jury's finding.

Upon all this evidence it is, I think, abundantly clear that on the first branch of the jury's verdict the judgment at common law cannot be maintained. Indeed, a verdict finding contributory negligence, if not *volens,* could not have been held to be at all unreasonable. But the jury have negatived these defences and their verdict upon them is probably conclusive.

It remains to consider the failure to

> place barriers to prevent rolling stones and other debris from causing injury to the employees,

found by the jury to amount to actionable negligence. It is doubtful whether the jury meant to impute negligence to the defendants in this respect independently of the earlier part of their verdict. The finding rather reads as if they deemed the defendants chargeable with negligence for not having placed the guard or barriers above the men only because the hillside had not been sufficiently cleared, and on the assumption that for that the defendants were to blame, or at least that they knew or should be deemed to have known of it. But if the latter part of the verdict should be deemed a distinct and independent finding of negligence, on the evidence the practicability of providing such a guard or shield is more than questionable. The testimony of Haywood, the superintendent, and Fraser, the foreman, as well as that of J. A. McDonald, an expert contractor, is that it was impracticable, and that

> in a place like this it would probably cause more accidents and would be more dangerous to erect a thing like that than it would be to go up

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and take the cause of the trouble out of the way altogether. The first precaution in all work of this kind is to send the men up and give them *carte blanche* to bar down any rock that was at all dangerous, and if you take that precaution and remove the cause of danger I do not see any necessity for this overhead contrivance.

All these witnesses agree that the proper method to pursue in such a situation as the hillside in question presented is thoroughly to clear away all loose stuff and debris above the place where the work is to be done and that it is only where that is not feasible or would be too expensive that the shield protection should be resorted to as a substitute. The plaintiff himself distinctly corroborates this evidence when he says that, in Sweden, (and it is on the practice in that country that he relies to establish that it was negligent not to have had a shield of planks in the present case,)

when it was not too much work they cleared off the rock, but if it was too much work they put protection.

There is not a scintilla of evidence that here the work of clearing was "too much" or that it entailed too great an expense or that for any other reason it was not practicable to have it thoroughly done. The uncontradicted evidence is that the men were given *carte blanche* to clear away all dangerous material and that it was only when assured by them that this had been done that the foreman allowed them to proceed with the work on the ledge. Under such circumstances and upon such evidence I agree with the learned judges who formed the majority in the Court of Appeal that the finding that the defendants were negligent in not placing barriers cannot be sustained. The evidence does not support it.

But if such a shield should have been placed above

the men when at work on this particular ledge and if it was negligence not to have had it so placed, and the verdict in this respect should stand, those facts would not, under the circumstances of this case, in my opinion, warrant a recovery at common law.

This case is, I think, clearly distinguishable from *Ainslie Mining and Railway Co.* v. *McDougall*(1), and similar authorities relied on for the appellant. The nature and extent of the protection for workmen which was required in the course of the works that the defendants were carrying on must have varied in the different spots in which they were from time to time called on to discharge their duties, according to the relative situation of such spots and the character of the surrounding land. In some clearing of the berm and incline would have sufficed; in others the shield or guard of planks might be necessary; again, in others neither precaution might be requisite. It was not a case of defective installation of a permanent structure for protection, as in *Ainslie Mining and Railway Co.* v. *McDougall* (1), where the roof in a mine was defective, or of negligence in maintaining a permanent appliance as in *Canada Woollen Mills* v. *Traplin*(2), where the elevator in a mill or factory was worn out. The protection alleged to have been lacking in this instance was not for a place where men would be required to work in the same spot and under the same conditions for any considerable time.

It was admitted at bar in this court and the case appears to have proceeded at the trial on the assump-

(1) 42 Can. S.C.R. 420. (2) 35 Can. S.C.R. 424.

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tion that the defendants' works were put in charge of a competent superintendent and foreman, that they were furnished with the means to provide proper protection and were given authority to incur any expense necessary for that purpose. What kind and extent of safeguard would be necessary and best suited for each spot in which workmen were from time to time engaged was necessarily left to the determination of the superintendent or foreman. That was the only system of protection for their workmen which the company could adopt under the circumstances. In providing it they discharged the common law duty of the

> master who employs his servant in a work of a dangerous character * * * to take all reasonable precaution for the workmen's safety; *per* Lord Watson, in *Smith* v. *Baker & Sons*(1), at page 353.

The principle of the decisions in *Ainslie Mining and Railway Co.* v. *McDougall*(2) and such cases, in my opinion, is not applicable to the circumstances of the present case. *Zeigler* v. *Day*(3); *Batty* v. *Niagara Falls Hydraulic Power and Manufacturing Co.*(4), and *Perry* v. *Rogers*(5), at page 258, cited by the learned counsel for the respondent, are, I think, much more closely in point.

In the *Fakkema Case,* (6) much relied on by the appellant, in so far as the decision does not depend on the form of the verdict, which was a principal subject of discussion in this court, and on the failure to raise in the courts below the question of the knowledge or means of knowledge of the defendant company of the existence of the defect complained of, the court pro-

(1) [1891] A.C. 325.
(2) 42 Can. S.C.R. 420.
(3) 123 Mass. 152.
(4) 79 N.Y. App. 466.
(5) 157 N.Y. 251.
(6) 44 Can. S.C.R. 412.

ceeded on the assumption that it was dealing with a permanent or quasi-permanent instalment of an engine in a place where the men who were engaged about it would be required to work for a considerable period of time. What will amount to such permanency as will impose on the employer the absolute duty of providing his servants with a place in which to work as safe as is reasonably consistent with the character of the work in which they are engaged and will not permit of his delegating to a superintendent, however competent, the selection and determination of the means of protection best adapted to the situation so that the employer may be himself exempt at common law from liability for mistakes or negligence of such superintendent in regard to selecting and utilizing such means of protection, must frequently be a question of degree which can be determined only upon careful consideration of all the circumstances of each case as it arises. Where men are engaged in extensive outdoor works of such a character that their location changes each hour or each day and that protection which may be the most suitable, or even absolutely necessary, in one place in which they are required to work may be unsuitable or unnecessary in another, the master who selects proper and competent persons and entrusts to them the superintendence of such works and furnishes them with adequate materials and resources for providing reasonable protection for the workmen (all of which it is conceded was done by the defendants) does all that he is bound to do and if the persons so entrusted are guilty of negligence it

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is not imputable at common law to the master. *Wilson* v. *Merry* (1), at pages 332, 344.

The fact that the protection alleged to be defective or lacking is required for a temporary purpose is a material element in determining the liability of the defendants for any fault of their superintendent or foreman in regard to it. *Ibid.*, at pages 342 and 346: *Hicks* v. *Smith's Falls Electric Power Co.* (2).

It is alleged that for the defendants' works there was no system of protection by overhead shields or guards arranged for and that they are, therefore, liable at common law if the absence of such protection was the cause of the plaintiff's injuries. But assuming that this failure to place a shield of planks above the men was the cause of the plaintiff's injuries, and that there was such a lack of system, that lack of system was not the cause of the accident. Had such a system been expressly arranged for, on the evidence in the record an overhead shield would not have been used at the place where the plaintiff was injured. The defendants' witnesses say that its use would have been fraught with greater danger to the workmen. It was probably impracticable. Had the clearing above been done as it should have been, and as the foreman thought and had reason to believe it had been, the shield protection would, upon all the evidence, have been unnecessary. But the testimony does not establish a lack of system such as is now alleged and the verdict does not involve such a finding. If the injuries sustained by the plaintiff in the present case are properly ascribable to the absence of the guard or shield of planks, the fault (if any) in failing to provide that

(1) L.R. 1 H.L. (Sc.) 326. (2) 5 Ont. W.N. 301.

guard or shield was that of the superintendent or foreman and is not attributable to the defendant company so as to subject them to common law liability. If the failure to provide a guard was due to mere error of judgment on the part of the foreman or superintendent no negligence whatever has been established.

On the evidence I rather incline to agree with the learned Chief Justice of the Court of Appeal when he says that the cause of the plaintiff's injuries was the failure of himself and his fellow workmen to clear the hillside or incline properly, as it was their duty to have done. It is not shewn that it was not practicable so to clear the hillside that no overhead guard or shield would be required. The plaintiff himself says that the accident was due to the "insufficient clearing at the edge of the hill," and for that he and his fellow workmen, McLean and McKinnon, would seem to have been to blame. No negligence of the foreman, Fraser, or of the superintendent, Haywood, is either alleged or proved in respect of that part of the work. Upon this view of the facts, which appears to be warranted by the evidence, the plaintiff could not succeed either at common law or under the "Employers' Liability Act." But, for the disposition of the plaintiff's appeal to have the judgment in his favour restored, it suffices that a cause of action at common law has not been established.

Failing to secure a restoration of the judgment at common law, the plaintiff asks that a new trial should be granted to enable him to present a case under the "Employers' Liability Act," which he set up in his pleadings but failed to press at the former trial. The trial judge in charging the jury said:—

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I wish to say at once that this is a case, in my opinion, that does not come under the "Employers' Liability Act" at all; I feel that if he recovers at all it must be at common law.

No exception was taken to this part of the charge. The learned judge was not asked to leave the case to the jury under the statute as well as at common law. The Court of Appeal, exercising its discretion, refused to accede to this request. Under these circumstances and having regard to the evidence to which I have referred, I think that in the exercise of our discretion we should not direct a new trial to enable the plaintiff to place before another jury his claim to recover under the "Employers' Liability Act."

I would dismiss the appeal with costs.

But there is not a majority of the court in favour of dismissal. My brothers Idington and Brodeur would restore the verdict for the plaintiff, while my brother Duff is of the opinion that there should be a new trial. Under the circumstances, I very much deprecate the necessity for a new trial and I accept that result only in order that there may be a majority of the court supporting a disposition of the appeal that will not involve the restoration of a verdict which I deem unjustifiable.

Under ordinary circumstances since where a new trial is ordered it is, no doubt, desirable that there should be as little discussion as possible of the merits of the action, I should withhold the opinion I had prepared giving the reasons why I think the plaintiff's action should be dismissed and should merely state the considerations which lead me to concur in the order for a new trial. But as some difficulty would seem to have been occasioned at the former trial by the views

taken as to the effect of the judgments of this court in *Ainslie Mining and Railway Co.* v. *McDougall*(1), and the *Fakkema Case*(2), it is not desirable — indeed, I think, it would scarcely be proper — to send this action back for another trial without expressing an opinion as to the scope of those decisions and stating my view of the law bearing upon the questions touched by them which this case presents. That I endeavoured to do in the opinion I had prepared, and for that reason I file it with this appended memorandum.

BRODEUR J. (dissenting).—This is an action in damages against the respondents for an accident which, according to the verdict of the jury, was due to their negligence.

The respondents were making an excavation for their power-house and the appellant was working to clear a ledge on which a steam-drill was to operate and, in doing that work, stone or debris came down from above and injured him.

The jury found as follows:—

> Owing to the dangerous nature of the work, we, the jury, consider the defendant company guilty of negligence in not sufficiently clearing the face of the incline, and getting in place barriers to prevent rolling stone and other debris from causing injury to the employees.

There is evidence to support that verdict.

The incline in question was not evidently sufficiently cleared. Some work had been done on that incline and the appellant had worked under the instructions of a foreman to the clearing of that incline. But the debris that struck the appellant when he was

(1) 42 Can. S.C.R. 420. (2) 44 Can. S.C.R. 412.

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working on the ledge could come just as well from that incline where he had been previously working as from another part of the hill about which he had not been ordered to do any work. Some strong evidence has been adduced for the purpose of proving that this debris had not been falling from the place where clearing had been carried out by Bergklint's foreman and himself.

As to the barriers, the system has been in use and proved effective. On those two grounds the verdict of the jury could be sustained. Appellant should succeed in his action.

An employer is bound to regulate his business in such a manner as not to cause injuries to his employees.

If he occasions injury to his workmen by the fact that he does not get his undertakings superintended and controlled with due care and caution he is liable.

It follows that he is responsible for injury caused to his workmen by the negligent system on which his business is carried on. *Bartonshill Coal Co.* v. *McGuire*(1); *Sword* v. *Cameron*(2).

Lord Herschell, in *Smith* v. *Baker & Sons*(3), enunciated those principles in the following words:—

> It is quite clear that the contract between the employer and employed involves on the part of the former the duty of taking reasonable care to provide 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.

We must bear in mind that under the English law the common law duty above mentioned is a personal one, but at the same time when the employer delegates

(1) 3 Macq. 300. (2) 1 Ct. of Sess. Cas., 2 ser., 493.
(3) [1891] A.C. 325.

his duty to some other person that responsibility passed from him, contrary to the well-known maxim *"qui facit per alium facit per se."*

The doctrine of common employment comes then in existence.

That doctrine is to the effect that if a person occasioning and the person suffering the personal injury are fellow workmen engaged in a common employment and under a common master, such master is not responsible for the results of the injury.

That bare statement of the law was somewhat qualified, however, by the opinion several times expressed in important decisions in England to the effect that the master was bound in delegating his powers: 1, to employ competent persons; and 2, to provide a proper and suitable plant. Had the company respondent properly discharged its obligation in this case ?

Was there a proper plant; or proper system and control of the work ?

In the case of *Grant* v. *The Acadia Coal Co.*(1), at page 434, decided by this court, it was stated by my brother Davies that the employer

> is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety,

and, at page 437, he added,

> this is a duty that no officer's negligence can relieve him of.

In the case of *McKelvey* v. *LeRoi Mining Co.*(2) it was also decided that a master who employs a servant in a work of a dangerous character, such as in mining at the foot of a shaft 800 feet deep, is bound

(1) 32 Can. S.C.R. 427. (2) 32 Can. S.C.R. 664.

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to take all reasonable precautions for the workmen's safety.

I may quote also the case of *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(1), where an incorporated company carrying on dangerous operations is liable at common law for damages sustained by an employee in consequence of injuries occasioned by the use of a system which failed to provide a safe and proper place in which the employee could do his work; it is not relieved from this responsibility by the fact that the operations were superintended by a competent foreman.

I will refer also to Halsbury, Laws of England, *vo.* "Master and Servant," No. 280, to shew that the ledge was part of the work carried on by the company respondent and it was, as I have said before, its duty to see that it should be safe for its servants to work thereon.

For those reasons, the plaintiff's action should be maintained and the judgment of the Court of Appeal that dismissed it should be reversed with costs of this court and of the Court of Appeal.

Appeal allowed, new trial ordered, costs to abide result.

Solicitors for the appellant: *Taylor, Harvey, Baird, Grant & Stockton.*

Solicitors for the respondents: *McPhillips & Wood.*

(1) 44 Can. S.C.R. 412.