THE WESTERN CANADA POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES S. BERGKLINT (PLAINTIFF) ..... } RESPONDENT.

1916
*Oct. 25
*Dec. 30

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Employer's liability—Competent superintendence—Common employment—Contributory negligence.

B. was employed by the company as a labourer in preparing a site for a power house, and was working on a narrow ledge on a hillside preparing a place on which to erect a drilling machine. Stones or earth falling from above struck him and he fell off the ledge to the bottom of the excavation sustaining severe injuries. In an action against the company for damages under the common law it was contended that failure to protect the workmen by a barrier above the ledge was negligence for which defendants were responsible.

Held, per Davies and Anglin JJ., that such negligence was that of the company's superintendent, a fellow servant of B., and the company was not responsible.

Per Duff and Anglin JJ., following *Wilson* v. *Merry* (L.R. 1 H.L. Sc. 326), that, as it was proved that the company had appointed a competent engineer to take charge of the work, invested him with the requisite authority and responsibility for protecting the workmen and supplied him with the materials necessary for the purpose, they had discharged their duty towards their employees and were not responsible for the injury to B.

Judgment of the Court of Appeal (22 B.C. Rep. 241) reversed, Idington and Brodeur JJ. dissenting.

APPEAL from a decision of the Court of Appeal for British Columbia(1), affirming the judgment at the trial in favour of the plaintiff.

The material facts are stated in the headnote.

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 22 B.C. Rep. 241.

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Sir Charles-Hibbert Tupper K.C. for the appellants. The preparation of the hill from time to time was not a "system" defects in which would entail liability: *Allen* v. *New Gas Co.*(1).

The appellants are within the doctrine in *Wilson* v. *Merry*(2). See also *Canada Woollen Mills* v. *Traplin*(3), per Nesbit J.; *Hedley* v. *Pinkney & Sons S.S. Co.*(4), at page 226; *Wood* v. *Canadian Pacific Railway Co.*(5); *Canadian Asbestos Co.* v. *Girard*(6).

The employer is not bound to take unusual or extraordinary precautions: *Weems* v. *Mathieson*(7).

S. S. Taylor K.C. for the respondent. The jury's verdict should not be disturbed on appeal: *Canadian Woollen Mills Co.* v. *Traplin*(3); *Creveling* v. *Canadian Bridge Co.*(8).

The company must provide a safe system and a safe place to work: *Grant* v. *Acadia Coal Co.*(9); *Ainslie Mining and Railway Co.* v. *McDougall*(10); *Brooks, Scanlon O'Brien Co* v. *Fakkema*(11).

DAVIES J.—This is an action brought to recover damages for injuries sustained by the plaintiff while he was engaged with two other workmen on a narrow ledge (3 or 4 feet broad) of an almost precipitous cliff or rock bluff some 85 feet in vertical height, 35 to 45 feet above him and 40 feet or more below him. The work these men were doing was the preparing of a level place on which to stand a power drill in order to blast off a column or jutting of rock on the face of the rock

(1) 1 Ex. D. 251.
(2) L.R. 1 H.L. Sc. 326.
(3) 35 Can. S.C.R. 424.
(4) [1894] A.C. 222.
(5) 6 B.C. Rep. 561; 30 Can. S.C.R. 110.
(6) 36 Can. S.C.R. 13.
(7) 4 Macq. 215, at p. 226.
(8) 51 Can. S.C.R. 216.
(9) 32 Can. S.C.R. 427.
(10) 42 Can. S.C.R. 420.
(11) 44 Can. S.C.R. 412.

cliff against which it was proposed to build the side of the defendants' power house. The defendants were as a fact at the time of the accident preparing a site for an extensive power plant. The top of this edge on which plaintiff was working was some 35 or 40 feet above the floor or bottom of the rock excavation which had been made at the base of the cliff for the power house and the companies' operations had been carried on for a period extending over six or seven months, employing 300 to 400 men.

No drilling had been made immediately above the ledge on which plaintiff was working but blasting was necessary to blow out the column of rock which if left would interfere with the building up of the power house wall.

The operation was one incidental to the main work the parties were engaged in of preparing a site for and erecting a power house As a matter of fact it took about 9 or 10 hours only to complete and was a mere incident or detail in the general operations or work of construction of the company. That the work in which plaintiff was engaged at the time he fell off this ledge or rock was dangerous work is unquestionable.

That the entire work or operations of the company had been entrusted to a skilled, competent general manager and engineer, Mr. Haywood, was proved beyond any possible doubt, as also that he had been furnished with ample powers and with all appliances, material and workmen necessary to carry out the work successfully or the credit, if required, to procure them.

The case had already been tried once and was retried by order of this court.

A number of pertinent questions had been prepared by counsel for submission to the jury; but the latter

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were told by the trial judge that it was not imperative for them to answer these questions and that they could find a general verdict.

They did, unfortunately, ignore the questions and found a general verdict "for the plaintiff with $10,000 damages at common law."

We must assume that all questions of fact necessary to sustain that verdict were found in plaintiff's favour and amongst these that the defendants were guilty of negligence which proximately caused the accident and that the plaintiff was not guilty of contributory negligence. What the defendants' negligence consisted in the jury did not find, but I assume we must hold that it was in not having placed a barrage of logs along the top of the cliff, as contended by plaintiff should have been done. No other negligence is suggested or given in evidence. As a matter of fact, the general manager and engineer gave it as his opinion that such a barrage would increase rather than lessen the plaintiff's danger. In this he was supported by Colonel McDonell and other witnesses, but I do not think it is possible to say that the jury would not on the whole evidence be warranted in finding that the barrage was a reasonable and necessary precaution for the safety of the plaintiff and his co-workers.

The Court of Appeal for British Columbia sustained the judgment which the trial judge entered on the verdict for the plaintiff and from that judgment this appeal is taken.

The facts were that this vertical rock 100 feet high on a ledge of which about half way down plaintiff went with two others to do the blasting was capped by a sloping hillside which plaintiff had been ordered before going on with the blasting below to clear from rocks and loose stone and material and make what

was known as a "berm" just above the top of the cliff for his own protection and that of his fellow-workmen when they descended to do the blasting on the ledge below.

His own evidence was to the effect that they had done this work all right and made the necessary "berm" but that nevertheless when he went on the ledge below and was about or in the act of drilling the necessary holes in the ledge for blasting something fell from the cliff above either stone, sand or clay, he did not know which, and knocked him off the ledge. The general verdict for the plaintiff rebuts the proof of contributory negligence and therefore it must be assumed that plaintiff and his co-workers had done their duty and efficiently carried out their orders to clear the hill-side from all stones and had made a proper "berm" at the edge of the cliff.

The question immediately arose whether reasonable precautions had under the facts as proved been taken to prevent the falling of this stone, sand or clay, and, if they had not, whether their absence was due to the negligence or error of judgment of the superintendent manager for which the company was liable.

The rival contentions were, first, on the part of the plaintiff, that the work being an admittedly dangerous one more than ordinary precautions should have been taken and that, in addition to the "berm" being made at the top of the cliff, there should have been a barrier of logs or plank on or slightly above the brink of the rock cliff to prevent rolling stone and other debris from injuring employees working below; that the absence of such a precaution made the place below an "unsafe" one for men to work in and brought the company within the rule which made them liable in case of injury to their workmen, whether such was

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caused by the neglect on their superintendent engineer's part to provide the safety barrage or not.

On the other hand, appellant contends that the plaintiff must fail in maintaining his claim for three reasons; first, contributory negligence; secondly, voluntary assumption of the risk; and thirdly, that negligence, if there was any with respect to the barrage of logs, or error of judgment in not providing such barrage, was that of their superintendent, a fellow-servant of the plaintiff, for which the company was not responsible.

It may be that, looking at the jury's finding in connection with the charge of the trial judge, the first two contentions of appellant should not be sustained.

I am of opinion that his last contention must be given effect to and the appeal allowed.

The general proposition is not challenged that it is the duty of the employer and one which he cannot delegate to another so as to relieve himself of liability to provide his workmen, at any rate in the first instance, with a reasonably safe place to work in and reasonably suitable and necessary materials and appliances to work with. The question immediately arises whether the facts of this case bring it within the rule.

The work the company was engaged in was the construction and installation of a large power house. Some 300 men or more had been engaged for many months preparing the tail race and the foundations for this house. It was intended to build one side of the power house up against the vertical cliff spoken of. The special work plaintiff was engaged in when injured was a mere detail of that general work. As a fact, the blasting off of this ledge of rock to enable the wall to be erected only took a few hours, 9 to 10. It was work of a kind which obviously had to be carried on

under the judgment and control of a skilled manager. The directors of such a company are not as a rule men competent for such a task. It must be delegated. It was work undertaken for the very purpose of carrying out the duty which the law casts upon them of providing a safe place for their men to work in.

If their duty is enlarged further and to the extent contended for and if it extends to the work antecedently necessary to create a "safe place" and done for that very purpose, however necessarily changing from day to day and however incidental to the main work of preparing a "safe place," then it seems to me the doctrine of common employment, as laid down by the House of Lords in *Wilson* v. *Merry*(1), and applied by the courts ever since, would be greatly restricted. I can find no authority for so enlarging the rule as to the absolute liability of the master to provide a safe place for his workmen to work in. The place this plaintiff was working in was admittedly a dangerous one and known to the workmen to be so. The duty of the master was to provide a competent and skilled manager to superintend it who, in his turn, having been supplied with everything necessary, would determine what reasonable precautions were necessary to be taken. I cannot accede to the argument that for an error of judgment on his part in that regard the master would be liable. The work was a mere detail in the preparations for constructing a safe power house.

Mr. Taylor sought to meet the point that the work in question was a mere detail or incident of the work being carried on by contending that it was the company's duty to have had that barrage of logs during all the months the workmen were engaged in preparing the foundations of the power house at the cliff's base.

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

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But the necessity for such a protection is disproved by the fact that not a single man was injured of the hundreds employed during these months, when 300 to 400 men were employed, by anything which fell from the cliff above. We are, however, dealing now with the facts of this case, the blasting off of a column or shoulder of stone from the cliff's side, a single detail of a vast work; and after considering all the authorities cited I am of the opinion that the facts do not bring the plaintiff's case within the rule, excluding the doctrine of common employment.

I do not think the decisions of this court at variance with that I have reached in this appeal. They affirm the main proposition of the absolute duty which cannot be delegated by the master, of providing a safe place for his workmen to work in. They do not go the length of saying that if a master in the attempted discharge of his duty so to provide a safe place for his workmen employs a skilled and competent man as his superintendent, furnishes him with everything necessary to do his work effectively and provides the "safe place" the law contemplates and does not personally actively interfere with the work, the master is liable to his workmen for damages caused to them from the negligence or error in judgment of such competent manager in carrying out every detail of that work.

In the case in this court chiefly relied upon of *Ainslie Mining and Railway Co.* v. *McDougall*(1), a majority of this court held that under the facts there proved it was not open to the employer to invoke the doctrine of common employment. The facts at the time of the accident complained of were as regards the mine-owners' duties to their employees, that the mine owners were there for the first time placing their men at work

(1) 42 Can. S.C.R. 420.

in a mine which was held not to be at the time a safe place for the workmen to work in.

In the later case of *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(1), the court seems to have held that the damages awarded the injured workman were the result either of a defect in the *original installation* of the engine which caused the damage or in a defective system.

I do not think the principle upon which either of these cases was decided applicable in the present case, where the doctrine of the absolute responsibility of the master is invoked. The work of constructing such a power house was necessarily changing from day to day, the particular work on which plaintiff was engaged was a mere incident or detail in the general work, the control and carrying out of which had been necessarily delegated to a competent engineer and the general work was one undertaken to discharge the master's absolute duty of providing a safe place for the workmen to be employed in his power-house.

I at one time thought the late case decided by the Judicial Committee, *Toronto Power Co.* v. *Paskwan*(2), might be applicable, where it was held, as the headnote of the report states:—

> The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

In that case, the jury found *inter alia* that the accident was due to the company's negligence through their master mechanic in failing to install proper safety appliances and to employ a competent signalman

(1) 44 Can. S.C.R. 412. (2) [1915] A.C. 734.

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which the Judicial Committee said was not an unreasonable finding under the evidence and they dismissed an appeal from a judgment holding the master liable.

In the case before us, I hold, however, that the master's duty was not, under the circumstances, an absolute one and that it was open to him to invoke the doctrine of common employment. His attention had

> not been called by any previous occurrence to the danger

which the absence of the suggested barrage of logs might cause and nothing had occurred to induce him to actively interfere with the management and control he had wisely and necessarily delegated to his competent engineer foreman.

I would, therefore, allow the appeal and dismiss the action

IDINGTON J. (dissenting) —This case has been tried twice as a result of our disposition of the appeal as reported(1). The pleadings were amended before the second trial and the evidence adduced thereon has tended to clear up some matters relative to the relation of the directorate of appellant to the work in question and their knowledge of how that was being carried on.

I need not re-state my view of the law which should govern such cases.

The evidence applicable thereto adduced on the last trial furnishes ample ground for the jury to find the verdict they have and to maintain the judgment entered for respondent.

The work was carried on under the eyes and direction of a local branch of the directorate and thus the case brought well within the decision of this court in the

(1) 50 Can. S.C.R. 39.

case of *Ainslie Mining and Railway Co.* v. *McDougall* (1), and numerous other cases upon the liability of companies who so install their works as to render them unsafe for their workmen employed therein.

The latest case cited of *Toronto Power Co.* v. *Paskwan*(2), seems to leave no question upon that part of the matters involved in that branch of the case.

Moreover, the evidence on the second trial brings out more clearly than its presentation on the first trial that it was the original installation of the work that was at fault.

The nature of the work that was being done by the workmen had changed from month to month as the work progressed but the same source of danger existed throughout and needed the same sort of protection, which respondent has urged throughout, in order to render the place a reasonably safe one to work in.

On the main ground of the appellant's contention it, therefore, fails.

Some minor matters were urged as to misdirection which appellant claimed entitled it to a new trial. I have considered these but can find nothing which would justify ordering a new trial.

Indeed, the appellant seems to me to have very little ground, if any, to complain of the charge of the learned trial judge.

Anything its counsel objected to on the trial with any semblance of reason was corrected. And the alleged misdirection relative to evidence rejected, or improperly admitted, even if tenable at all which I doubt, cannot be said to have produced any miscarriage.

I think the appeal should be dismissed with costs.

(1) 42 Can. S.C.R. 420. (2) [1915] A.C. 734.

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DUFF J.—This is the second appeal to this court arising out of the same action each having been brought after a trial before a jury in which the verdict and judgment were given in favour of the plaintiff (respondent) See *Bergklint* v. *Western Canada Power Co.*(1). The respondent was injured when working as a drill-helper on the side of an excavation which the appellant company was making to provide a site for its power house at Stave Falls in B.C. While engaged in clearing the narrow ledge on which he was standing in order to place the drill he was helping to work he was struck by something coming from the edge of the cliff, some 35 feet above, and losing his ba'ance in consequence fell to the bottom of the ravine, a distance of some 50 feet, and was very severely injured. The respondent's complaint upon which the action was based was that the appellant company negligently failed to provide sufficient protection against injury by rock or soil falling from the top of the cliff. The respondent was unable to say precisely what it was that struck him, but it must be taken for the purposes of the appeal that he was struck by rock or gravel or earth with sufficient momentum to throw him off his balance. The excavation was a large one, 400 feet in length by 100 in width, and the work was in progress many months. The respondent's case was that the appellant company should have provided a barrier at the edge of the cliff to protect the workmen from the danger of falling material. The course actually adopted by the engineer in charge of the work, who was entrusted with full responsibility with respect to such precautions, was from time to time at places where men were about to work on the cliff side to have a gang of men clear away

(1) 50 Can. S.C.R 39.

from the top of the cliff such materials as appeared to be possible sources of danger. It has been found by the jury, and I shall of course assume it as the basis of this judgment, that the engineer in pursuing this course, in failing, that is to say, to provide something in the nature of a physical barrier at the place where Bergklint was injured, was negligent and that, if the appellant company is answerable for his negligence, the respondent is entitled to succeed and the appeal should be dismissed. The appellant company's defence, in so far as it is material in the view I take of the case, was that Mr. Hayward, the engineer in charge of the works, was entrusted by the company with authority and with the responsibility of taking whatever precautions for the protection of the workmen might be required by a proper regard for their safety and that he was supplied with sufficient means to enable him to provide any protection that in his judgment might be expedient and that Mr. Hayward's competence not being really questioned the appellant company had thereby discharged its duty to its employees. In answer to that (it may be mentioned) it was contended that there was sufficient evidence to shew such actual intervention by Mr. McNeil, the vice-president of the company, as to justify the jury in finding that the company was directly responsible through Mr. McNeil. I may say at once, and I dismiss the point with this observation, that I think there is no such evidence.

The question is: Could the company discharge its duty to its workmen, in respect of such precautions, by the employment of Mr. Hayward, a competent engineer, and by giving him the authority and the resources which were given to him? On the present appeal the fact that the necessary authority and resources were given to Mr. Hayward cannot be disputed.

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The question upon which it is now our duty to pass is in substance the question decided by the majority of the court adversely to the respondent on the previous appeal. On that occasion the view expressed was that the circumstances of the respondent's employment and of the work in which the appellant company was engaged were such as to take this case out of that class of cases in which the rule is that the owner is responsible not only for taking due care to see that the employee has a safe place to work in but is bound to see that due care is taken by those to whom he commits the performance of the duty; in other words, is responsible for failure on their part to exercise due care to that end. The opnion was expressed, that having regard to the conditions—the character of the work and the physical surroundings—the duty of providing protection for the workingmen from time to time as the work progressed was a duty in the nature of a duty of superintendence requiring the judgment of the man on the spot for its efficient performance and was therefore not one of the duties in respect of which it is said that the master cannot divest himself of the responsibility by delegating it to an employee. The case seemed to fall within the actual decision in *Wilson* v. *Merry*(1), where the owner was held by the appointment of a competent superintendent with adequate means and resources to have discharged or divested himself of his responsibility regarding so grave a matter as providing "local ventilation" in a shaft where workmen were engaged in opening a drift into an unworked seam of coal—an explosion of fire damp having been the consequence of neglect. That, as was pointed out on the previous occasion, was regarded by several

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

of their Lordships as being in the nature of a duty of superintendence and therefore naturally devolving upon the superintendent of the mine.

It may indeed be a question, in view of the judgment delivered in the last appeal on this point, whether the respondent is not estopped from raising the question now. The evidence now before us in so far as it differs from the evidence on the previous trial, as stated in the judgments previously delivered, is not in its bearing on this point more favourable than that evidence was to the respondent. On the last trial the respondent strongly pressed the contention that the escape from the top of the cliff of the material that struck him was probably due to the existence of exceptional conditions at the place where it occurred—that the material had been loosened by the action of water, there being as he alleged a trickling of water near by. It is true that the judgment directed a new trial only but this order was made on the ground that the trial judge had not left to the jury the question whether or not the duty of taking precautions and resources sufficient to enable him to take them effectively had been entrusted to Hayward. There is some authority indicating that where a court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin*(1), at p. 623, and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*(2), (see especially p. 41 as to the effect of determinations

(1) [1909] A.C. 615. (2) 11 Ind. App. 37.

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in interlocutory judgments upon the rights of parties in the suits in which the judgments are given). It seems quite clear that for this purpose we are not confined to the formal judgment; *Kali Krishna Tagore* v. *Secretary of State for India*(1), and *Petherpermal Chetty* v. *Mumandi Servai*(2), at p. 108.

It is true, however, that the record of the previous trial and appeal are not formally before us and moreover that the point was not taken and has not been argued by counsel. As I think the appeal should be allowed on other grounds, I say nothing more about it.

What I have said touching the ground of judgment given by the majority of the court on the previous appeal would be conclusive and I should leave the matter there were it not for an argument based upon the decision of the Privy Council in *Toronto Power Co.* v. *Paskwan*(3), pronounced since the judgment in the last appeal was given. The judgment of their Lordships was delivered by Sir Arthur Channell and in the course of that judgment, at pp. 737 and 738, he says:—

> The contention of the defendants is that they performed their duty by leaving the selection and care of the plant to a competent man, and they rely mainly on a well-known passage in the judgment of Lord Cairns in *Wilson* v. *Merry*(4). Reliance was also placed on *Cribb* v. *Kynoch*(5), and *Young* v. *Hoffman Mfg. Co.*(6). It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is, necessary, however, in each to consider the duty omitted, and the providing proper plant as distinguished from its subsequent care, is especially within the province of the master rather than of his servants.
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> In *Cribb* v. *Kynoch*(5) and *Young* v. *Hoffman Mfg. Co.*(6) the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper plant stands on rather a different footing.

(1) 15 Ind. App. 186, at p. 192.
(2) 35 Ind. App. 102.
(3) [1915] A.C. 98.
(4) L.R. 1 H.L. Sc. 326, at p. 332.
(5) [1907] 2 K.B. 548.
(6) [1907] 2 K.B. 646.

I cannot infer from His Lordship's observations that their Lordships in any way questioned the actual decision in *Wilson* v. *Merry*(1), and I think there is nothing in their Lordships' judgment or in the decision affecting the considerations upon which the opinion expressed on the previous appeal was based.

One point not previously mentioned calls for a word. The appellant company incorporated by letters patent and governed by the Dominion Companies Act passed certain by-laws which authorized the appointment of executive committees selected from the members of the board of directors and the investing of such committees with such powers as the directors should deem advisable. An executive committee was appointed for Vancouver which consisted of three members of the board of directors and the by-law appointing them at the same time provided that Mr. Hayward, who was not a director, should be authorized to attend the meetings and to take part in all its deliberations and be "*ex officio* a member of the committee." There was also a power of attorney executed by the company conferring large powers upon these four persons to be exercised by any two or three of them. It is argued that Mr. Hayward by reason of being a joint donee of the powers under the power of attorney stood in the same relation to the company for the purposes of this action as the board of directors themselves. The answer to that is that Mr. Hayward was general manager and engineer in charge and as such exercised only such powers as were vested in him by virtue of his appointment to those offices, or otherwise entrusted to him as general manager or engineer in charge; and it was as general manager and engineer in

(1) L.R. 1 H.L. Sc. 326, at p. 332.

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charge that he was entrusted with the duty to provide protection for the workmen.

It was not in the exercise of powers vested in him under the power of attorney jointly with the members of the executive committee proper that he is chargeable with negligence.

The company could not moreover be chargeable with notice through Hayward of the negligence found against him. There is not the slightest evidence of want of good faith on Hayward's part and if notice of the facts known to Hayward be imputed to the company notice also must be imputed of Hayward's opinion that the precautions taken by him were sufficient. In these circumstances and in view of Hayward's admitted qualifications, assuming the company is not responsible for Hayward's omissions it cannot be charged with wrongful neglect in failing to direct that some additional precaution should be provided.

ANGLIN J.—The facts of this case and its surrounding circumstances are fully set out in the judgments delivered on the former appeal to this court; *Bergklint* v. *Western Canada Power Co.*(1); and in assigning reasons for the conclusion which I have reached, that the present appeal should be allowed and the action dismissed, I find it necessary to add little to what I then said.

The only material variation in the evidence at the new trial is that the plaintiff has now emphasized water conditions on the hillside as a definite and all-important element of danger—a development which I should regard with grave suspicion.

The second trial (in the order for which I reluctantly concurred) has resulted in a general verdict for the

(1) 50 Can. S.C.R. 39.

plaintiff, his recovery being increased, however, from $5,500 to $10,000.

The sole ground of negligence on the part of the defendants now relied upon is the failure to have provided an overhead barrier or shield of logs for the protection of the plaintiff and the workmen engaged with him—and that is the fault on which it is claimed for him that the jury based their verdict in his favour.

After careful consideration of it, the evidence now before us seems to me to establish that the overhead protection of a shield or barrier of logs or planks is required only where sufficient clearing of the hillside is not feasible or is too expensive; that it was entirely practicable in the present case to have thoroughly cleared away all debris and loose stuff from above the place where the plaintiff was working when injured; that he and his associate workman had been instructed to so clear it and had assumed to discharge that duty; that there were no conditions present which would render clearing properly done inefficient or inadequate as a protection; and that it was only when assured that the work of clearing had been properly done that the foreman allowed the plaintiff to go upon the ledge in order to proceed with the preparation for drilling at which he was engaged when injured. Apart altogether from any question of contributory negligence or any issue of *volens*, if trying the action I think I should unhesitatingly hold that the facts in evidence would not support a finding that the omission to have a shield of logs placed above the workmen's heads amounted to actionable negligence, and that, if it was a mistake at all, it was the result of a mere error of judgment which should not entail liability.

But assuming that it was open to the jury on any theory suggested to have found that it was negligence,

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it was clearly that of the superintendent Hayward, who was undoubtedly a fellow-employee of the plaintiff.

Counsel for the plaintiff urged that the shield of planks or logs was required as a protection throughout the entire period of the construction of the defendants' works for men working in the valley below and on the hillside, and that its absence should therefore be regarded as a defect in original installation or a failure to make proper provision in the first instance—from liability for which no delegation of duty, however comprehensive, to officials, however competent and well equipped, could relieve the employer. *Toronto Power Co.* v. *Paskwan*(1), affords a recent and a very striking illustration of the absolute character of that duty. The evidence before us, however, does not support this contention. The guard or barrier of logs is not dealt with, even by the expert witnesses called by the plaintiff, as such a permanent or relatively permanent requirement.

An attempt to shew knowledge of conditions and control of, or interference in, the superintendence or management of the works by the directors of the company, or any of them, utterly failed. Everything in the nature of superintendence and management was unqualifiedly entrusted to Mr. Hayward. As the learned trial judge put it in his charge:—

> It does not appear that they (the directors) in any way interfered in the practical physical operation of the work. In other words, they were simply business men who left the practical duties to the superintendent and his staff.

Yet the jury may have based their verdict upon a finding—made, of course, without any evidence to warrant it—that the directors did attempt to manage or supervise the work themselves and were negligent in doing so, since, notwithstanding what he had stated

(1) [1915] A.C. 734.

as to the lack of evidence, the learned judge left it to the jury to say whether they had in fact so interfered.

I find nothing in the record to alter the view taken by other members of the court as well as myself on the former appeal that the provision of suitable protection for employees engaged as the plaintiff was when injured

could properly be delegated to a competent superintendent or foreman (furnished with adequate means and resources) whose negligence would not render the employer liable at common law.

With my Lord the Chief Justice I thought that upon the case then before us it was clear beyond question that this duty had been so delegated and that the furnishing adequate means and resources to the superintendent was conceded.

A new trial was ordered because in the opinion of my brother Duff(1), the trial judge had in effect refused to leave to the jury the question

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. Hayward had such authority and resources at his command and was under a duty expressed or implied to use them in furnishing the suggested safeguards, if such safeguards were reasonably necessary.

Mr. Hayward's competency has never been in question. Whatever may have been the case upon the former record, his duty and authority in the premises and the adequacy of the resources at his command are put beyond controversy by the evidence now before us. Yet the jury may have found otherwise, since the learned trial judge, notwithstanding that he had told them that Hayward was a competent superintendent, that the duties of superintendence had been left to him and that he and Fraser, the foreman,

had at their command, according to the evidence, for the purpose of fulfilling their duties, the necessary facilities, appliances and funds,

nevertheless afterwards explicitly left it to them

(1) 50 Can. S.C.R. at p. 50.

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to determine whether Mr. Hayward, the superintendent, had full authority to superintend the work and whether he had at his command all the necessary appliances and facilities for so carrying on the work,

adding that, if they should so find, the plaintiff could not succeed (at common law) on that branch.

Whether the verdict at common law was based on supposed failure of the directors to charge Hayward with the full duties of superintendence, or to supply him with the necessary means and resources, or upon some personal negligent interference by the directors or some of them, cannot now be known. But upon whatever view the jury may have proceeded the verdict is against the evidence and perverse.

For these reasons (some of them more fully stated in the report of the former appeal at pp. 57-70) I am with respect of the opinion that if there was any fault (I incline to think there was not) on Mr. Hayward's part, it did not entail liability of the company at common law.

In order that the plaintiff should recover under the "Employers' Liability Act" it would be necessary to treat the verdict as a finding that the failure to protect him and his fellow workmen by a shield of logs was negligence in superintendence on the part of Mr. Hayward. At the former trial this aspect of the case raised on the pleadings was practically abandoned. The trial judge then told the jury, without objection, that, if the plaintiff should recover at all, it must be at common law. At the second trial, although evidence was given in support of the claim under the Act and the jury was invited to deal with it, they ignored it and merely found

for the plaintiff for $10,000 under the common law.

In his factum on the present appeal and at bar in this court counsel for the respondent made not the slightest allusion to this branch of his client's claim. More-

over, as I have already pointed out, in view of the manner in which the case went to the jury, it is impossible to say that their verdict, holding the defendants liable at common law, was not based upon a finding that the directors of the company had personally interfered in the management and supervision of the work and had been themselves negligent therein. There is no assurance that the verdict proceeded upon negligence on the part of Hayward, which would be necessary to sustain a judgment under the "Employers' Liability Act" If we were otherwise at liberty to deal with the case upon an aspect of it ignored by the jury and not presented in argument before us, this uncertainty about the meaning and effect of the verdict would appear to present an insuperable obstacle to our now holding the plaintiff entitled to recover under the "Employers' Liability Act."

The appeal should be allowed and the action dismissed. If the defendants ask them, they are entitled to all the costs of the litigation of which we have power to dispose.

BRODEUR J. (dissenting).—This is an accident case which already came before us, *Bergklint* v. *Western Canada Power Co.*(1), and in which the majority of this court was of opinion that a new trial should take place. It was then stated that there was evidence upon which a jury might have found that the duty of providing proper safe-guards had been entrusted to a competent person provided with the necessary means of doing so and that the failure of the trial judge to leave this question to the jury necessitated a new trial.

I was then of opinion that the findings of the jury were sufficiently supported by evidence and warranted judgment in favour of Bergklint.

(1) 50 Can. S.C.R. 39.

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A new trial has taken place and some of the objections raised against the former verdict have disappeared.

It had been found in the first verdict 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.

It was decided by the Court of Appeal of British Columbia that this insufficient clearing having been carried out by Bergklint and his fellow-workmen that there was contributory negligence on his part and that the verdict in his favour should be set aside.

On the new trial this question of clearing was, of course, the subject of evidence and it is shewn very clearly, in my opinion, that the clearing was well done and, in the language of the general manager of the company,

> it was properly cleared of anything that would drop or break down.

That phase of the case was not very strongly pressed upon us; but the main question which was argued was that the verdict of the jury under the doctrine of *Wilson* v. *Merry*(1), could not be supported. In that case of *Wilson* v. *Merry*(1), it was stated by Lord Cairns that what the master is 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 it and to furnish them with adequate materials and resources for the work.

It is contended by the respondent on this appeal that barriers should have been erected on the cliff in order to protect the servants of the company working below against rolling stones or debris which might come from that cliff. Blasting was being done constantly

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

and it was necessary that some protection should be used in order that no debris should reach the men.

That question of giving protection to the men by means of barriers is controverted, it being claimed by the appellant company that those barriers would not give proper protection.

According to my opinion, the company was not bound to use all the latest improvements and appliances. It is a question of fact in each particular case whether there has been negligence in failing to install any appliance: *Toronto Power Co.* v. *Paskwan* (1).

The jury in this case has brought in a general verdict of negligence against the company. They evidently found that those barriers whould have constituted, in the circumstances, a proper protection and that the neglect of the company to install these appliances constituted on its part a case of negligence.

There was certainly evidence on which the jury could find such a verdict and I have come to the conclusion that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Tupper, Kitts & Wightman.*
Solicitors for the respondent: *Taylor, Harvey, Grant, Stockton & Smith.*

(1) [1915] A.C. 734.