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*Nov. 3, 4,
*Nov. 17.

LAWRENCE W McKELVEY (PLAINTIFF) ..... } APPELLANT;

AND

LE ROI MINING COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—New points on appeal—Jurisdiction—Negligence—Machinery in mine—Defective construction—Proximate cause of injury—Fault of fellow-workman—Defective ways, works and machinery—Verdict—Findings of fact.

Questions of law appearing upon the record but not raised in the courts below may be relied upon for the first time on an appeal to the Supreme Court of Canada where no evidence in rebuttal could have been brought to affect them had they been taken at the trial. *Gray* v. *Richford* (2 Can. S. C. R. 431); and *Scott* v. *Phœnix Assurance Company* (Stu. K. B. 354), followed.

An objection that a judge of the court below had no jurisdiction to render a judgment from which an appeal is asserted is not proper ground on which to question the jurisdiction of the appellate court to entertain the appeal.

An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable which ran over a sheave wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft and the cage was fitted with automatic dogs or safety clutches intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty feet below the sheave wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave wheel with such force that the cable broke and the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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foot level and injured the plaintiff who was engaged at the work for which he was employed by the defendants about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the immediate cause of the injury was "the non-continuance of the guide-rails" which, in their opinion, "caused the safety-clutches to fail in their action, and, therefore, allowed the cage to fall."

Held, reversing the judgment appealed from (9 B. C. Rep. 62), that the verdict rendered in favour of the plaintiff ought not to have been disregarded, as there was sufficient evidence to support the finding of fact by the jury.

APPEAL from the judgment of the Supreme Court of British Columbia (1) affirming the judgment of the trial court dismissing the plaintiff's action with costs.

The action was to recover damages for personal injuries sustained by the plaintiff while working in the defendants' mine at Rossland, B.C., known as the Le Roi Mine. The case is stated in the headnote and judgments now reported.

At the trial the following questions were left to the jury: (1) "What was the immediate cause of the injury?" (2) "If the plaintiff is entitled in law to damages, at what amount do you assess the same?"

The jury returned the following answers: (1) "That the approximate cause of the injury was the non-continuance of the guide-rails which, in the opinion of the jury, caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall:" (2) "Three thousand dollars."

Chief Justice McColl, who presided at the trial, did not direct any judgment to be entered, but ordered that the parties should have leave to move before the full court as they might be advised, and a motion and cross-motion were accordingly made by the plaintiff and defendants, respectively.

(1) 9 B. C. Rep. 62.

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After hearing the motions the full court gave judgment (1), declaring that it had no jurisdiction to hear the motions and giving the parties liberty to move before the Chief Justice as they might be advised. Subsequently, on a motion to enter judgment made by the plaintiff, the Chief Justice ordered judgment to be entered dismissing the action with costs. This judgment was affirmed by the decision of the full court now under appeal.

On the appeal being called for hearing,

Daly K.C., for the respondents, moved to quash the appeal on the ground that McColl C. J. had no jurisdiction to hear the case a second time, and also objected that questions of law not raised in the courts below could not now be relied upon for the first time before the Supreme Court of Canada, as apparently intended by the appellants, and taken in their factum. *Ex parte Firth, In re Cowburn* (2) was cited.

The ruling of the court on these objections was announced as follows by

TASCHEREAU J. (oral).- That the Chief Justice of British Columbia had no jurisdiction to hear the case is, upon the face of it, not an objection to our jurisdiction. If the Chief Justice had no jurisdiction, that would be a reason to set aside his judgment in favour of the respondents, but it is not an objection to our jurisdiction to entertain the appeal.

The established practice of this court on the second point is stated by our present Chief Justice in *Gray* v. *Richford* (3), at page 456, and this is also the practice followed in the Privy Council. See also, in the Privy Council, the case of *Scott* v. *The Phœnix Assurance Company* (4). We therefore, on an appeal, cannot

(1) 8 B. C. Rep. 268
(2) 19 Ch. D. 419.
(3) 2 Can. S. C R. 431.
(4) Stu. K. B. 354.

refuse to entertain questions of law appearing upon the record although they may not have been raised in the court below and are relied upon for the first time here, where no evidence could have been brought to affect them had they been taken at the trial.

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The motion to quash was dismissed with costs.

The appeal was then heard upon the merits. The questions then at issue are stated in the judgments reported.

Aylesworth K.C. and *A. H. MacNeill K.C.* for the appellant.

Daly K.C. for the respondents.

TASCHEREAU J.—I concur in the judgment allowing the appeal with costs and granting the appellant's motion for judgment with costs for the reasons stated by His Lordship Mr. Justice Davies. The courts of British Columbia were wrong in disregarding the verdict of the jury.

SEDGEWICK J. concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice Davies.

GIROUARD J.—I am inclined to allow the appeal. I think there is some evidence in support of the verdict of the jury that the

approximate cause of the injury was the non-continuance of the guide-rails which, in their opinion, caused the safety-clutches to fail in their action, and thereby allowed the cage to fall.

The witness Hughes, one of the miners working on the railway, says:

A. The safeties are arranged that when the rope breaks loose they are supposed to turn to and catch the guide-rails.

Q. When the cage is attached the safeties are open?

A. Yes, and when it breaks loose they close and catch.

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Q. They turn automatically and catch on the guide-rails?

A. Yes.

Q. So that, when there is no guide-rail at the point at which the rope breaks, what becomes of the safeties?

A. They are useless.

Q. This cage was fitted with safeties?

A. Yes, sir.

Q. But having fallen from a place where there were no guide-rails the safeties would not act?

A. No, sir.

* * *

Q. You say that you think the safeties would probably have acted if the guide-rails had been there?

A. Yes, they would have had more of a chance.

Even the trial judge found that there was no dispute as to the evidence in respect to the guide-rails. I do not feel, therefore, inclined to disturb that verdict, and there being evidence of negligence at common law the company should be held liable and condemned to pay the sum of three thousand dollars, being the amount of the damages assessed by the jury, the whole with interest and costs.

DAVIES J.—This action was brought to recover damages for injuries sustained by the appellant, a workman, while engaged in the defendants' mine. The injuries sustained were serious and the jury assessed the damages at three thousand dollars.

The plaintiff was working in company with other miners at the bottom of a large shaft, referred to as a five compartment or combination shaft, and was engaged in sinking this shaft so that a depth of nine hundred feet should be reached. At the time of the accident the shaft was about forty to forty-six feet below the eight hundred foot level. The mine was operated down to the eight hundred foot level by means of two cages which were in the two westerly compartments of the shaft. There were no cages in the three other

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compartments. Drifts had been opened out from the shaft at the three hundred and fifty, five hundred, six hundred and seven hundred foot levels, both east and west, and from the east at the eight hundred foot level, and ore was being "stoped" and general mining carried on from all these levels. A platform had been placed in the westerly compartment of the shaft over the eight hundred foot level and the place where the plaintiff and others were working was underneath this platform, some forty or fifty feet. The plaintiff was injured by the fall of the iron cage operated in the westerly compartment, from the sheave wheel at the top of the shaft down to the eight hundred foot level where it struck and smashed through the platform constructed there and fell down upon the plaintiff.

At the time of the accident the cage which fell was being used for bringing timber to the six hundred foot level and hoisting waste rock therefrom.

It is not contended that the platform was built or intended as a protection against the fall of so heavy an article as the iron cage. It was only intended to protect the workmen from any ordinary material, such as pieces of rock or ore, falling down the shaft from the sides or from the several tunnels and, in the event of the cage falling from the breaking of the rope which was attached to it and by which it was raised and lowered, unless its fall was prevented by the dogs or safeties with which it was provided seizing and holding the guide-rails, there was no protection of any kind for these workmen at the bottom of the shaft.

At the trial the plaintiff contended, amongst other reasons, that the defendants were liable because they had failed to comply with the provisions of "The Inspection of Metalliferious Mines Act" (1), as

(1) R. S. B. C. ch. 134.

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amended by "The Inspection of Metalliferous Mines Act Amendment Act, 1899" (1).

Section twenty-five of the principal Act, ch. 134, is as follows:

The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies.

(20) Each shaft, incline, stope, tunnel, level or drift and any working-place in the mine to which this Act applies shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material.

By the Act of 1899, ch. 49, sec. 12, it was enacted as follows;

Sub-section 20 of said section 25 is hereby amended by adding thereto the following;

No stope or drift shall be carried on in any shaft which shall have attained a depth of two hundred feet unless suitable provision shall have been made for the protection of workmen engaged therein by the construction of a bulkhead of sufficient strength or by leaving at least fifteen feet of solid ground between said stope or drift and the workmen engaged in the bottom of the shaft.

It was conceded that fifteen feet of solid ground had not been left in the body of the shaft in the nature of a pentice. And also that the bulkhead or platform which had been put in at the eight hundred foot level was insufficient to protect against a falling cage. And also that, had the fifteen feet of solid ground (the pentice), been left, the accident would have been prevented; that the shaft was more than two hundred feet in depth, viz., eight hundred and forty-six feet, and that stoping or drifting was carried on in the shaft.

The learned Chief Justice was of opinion that these statutes did not govern or apply to this case, that the cage of the hoist could not be regarded as "falling material" within the sense of these words as used in section twenty-five above quoted, and that the amend-

(1) 62 Vict. ch. 49.

ment of 1899, though somewhat indefinite in its language, did not mean that fifteen feet of solid ground or a sufficient bulkhead in lieu thereof should be left or constructed within the shaft itself as a protection to the workmen, but that the proper construction of this section is that, in the event of the owner of a mine wishing to drift or stope ore on any *side of the shaft* that he shall leave for the protection of the workmen in the shaft a solid pillar of rock at least fifteen feet deep, so as to constitute a wall of the shaft, lying between the shaft and the stope or drift, or, in the event of such pillar of rock being ore of a very high grade and his desiring to make use of the same and to recover the precious metal therefrom, that he is then at liberty to replace the same by bulkheads of timber which would form a solid wall for the shaft sufficient to withstand the vibrations caused by the work and blasting necessary for the drifting and stoping; and that the evidence showed compliance on the defendants' part with the section as so construed.

At the close of the plaintiff's case, and again when the evidence was all in, the defendants moved for a nonsuit on the grounds that there was no evidence to go to the jury of any defect in the ways, works or machinery for which they were liable at common law or under the statutes regulating their operations, and that the evidence showed the accident to have been caused by the negligence of a fellow-workman of the plaintiff, the engineer who had the control of the working of the cage, and for which they were not liable.

The learned Chief Justice who tried the case refused to non-suit, holding that the only point open was whether there was negligence on defendants' part in not continuing the guide-rails up to the wheel sheave. He submitted the following question to the jury:—

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What was the immediate cause of the injury?

To which the jury returned answer:

The approximate cause of the injury was the non-continuance of the guide-rails, which, in the opinion of the jury, caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall.

The learned Chief Justice declined to order any judgment to be entered on this verdict and on application being made to the Supreme Court to enter a verdict on the jury's findings for one party or the other, that court decided that it had no jurisdiction to do so and remitted the cause back to the Chief Justice, who, thereupon, directed judgment to be entered dismissing the plaintiff's action. From this judgment an appeal was again taken to the Supreme Court of British Columbia, which affirmed the Chief Justice's judgment, and, from this latter judgment an appeal was taken to this court.

We have not had the advantage of having the reasons for the judgment delivered by the Chief Justice, entering the judgment for the defendants, and those of the full court are very meagre. They turned almost, if not entirely, upon the true construction to be given to the twenty-fifth section of the "Inspection of Metalliferous Mines Act" and the amendment to the twentieth subsection of that section enacted in 1899 Mr. Justice Irving, expressing himself as "not feeling any great degree of confidence in the correctness of the construction placed upon that section by the Chief Justice," but, on the other hand, being "unable to say that he was wrong," and Mr. Justice Martin adhering to the decision that he had given when the case came first before the full court, that neither the twenty-fifth section of the Act above referred to nor its amendment in 1899 applied to the facts of the case.

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In the view I take, however, of the whole case it is unnecessary to express any opinion as to what is the true construction of that section or its amendment.

The jury have found that the proximate cause of the injury to the plaintiff was the defective construction and condition of the guide-rails along which the cage ran, in their non-continuance to the sheave-wheel, "which caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall."

If there was any evidence which could properly sustain this finding then it is clear that the defendants are liable at common law, and quite irrespective of the statutes, for the injury sustained by the plaintiff. The substance and meaning of the finding of the jury are that the accident was due to the neglect of the defendants to take proper precautions for the protection of their employees from the possible consequences of a failure to provide machinery and appliances fit and proper for the working of the cage. Such neglect would clearly render them liable at common law for injuries sustained by any of their workmen and of which it was the proximate cause. The exact nature of this neglect is found by the jury to be the non-continuance of the guide-rails up to the sheave-wheel fixed in the timbers set in the shaft about sixty feet above the three-hundred-and-fifty-foot level or tunnel from which the cage was operated and around or through which sheave-wheel the rope attached to and guiding the cage ran. The necessity for such a continuance of the guide-rails was a pure question of fact and especially one proper for the jury to find.

It was admitted, on both sides, that the guide-rails did not run up to the sheave-wheel but stopped about twelve or twenty feet below it. This cage was operated from what was called the three-hundred-and-fifty-foot tunnel or level. The shaft was an inclined

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one, about seventy-four degrees from the horizontal, and the cage ran on rails resting on wall or shaft timbers. In addition to the rails there were what were called guides to assist the rails and, in case of necessity, for the cage-safeties to work upon. These safeties were appliances attached to the cage for the purpose of stopping it in case the rope, which held and guided the cage, and which passed around the sheave-wheel, broke. This sheave-wheel was fastened to timbers in the shaft about sixty or sixty-five feet above the three-hundred-and-fifty-foot tunnel, called by the witnesses the Black Bear Tunnel. These guide-rails ran up above the tunnel and towards the sheave-wheel, a distance variously estimated at from thirty-seven to fifty feet. There remained, therefore, between the place where the guide-rails ended and the sheave-wheel, a space without guide-rails variously estimated at from ten to twenty feet; and if the cage ran up to the sheave-wheel, and the rope broke, there would be nothing for some distance on which the so-called safeties could operate and the cage must necessarily fall. at any rate till it struck the guide-rails.

It was contended on behalf of the plaintiff, that this was just what happened at the time of the accident, and that, owing to the absence of guide-rails, the falling cage, weighing over a ton, obtained such an impetus before it reached the place where the guide-rails began, that the dogs or safeties on the cage were unable to act and were reversed and broken and so the cage fell to the bottom.

The superintendent of the defendants' mine, Mr. Long, in his examination, explaining the methods of operating the cage and the uses of the guide-rails, and dogs or safeties, stated that the guide-rails were continued up within ten or twelve feet of the sheave-wheel, and that they are used for steadying the cage

and for the cage-dogs or safeties to work upon, but that he did not think, if these rails had been continued up to the timbers on which the sheave-wheel was set, it would have prevented the cage or skip from falling.

Other witnesses called for the defence expressed the same opinion and placed the blame for the accident upon the engineer running the cage. Munro, on the other hand, who was one of the stationary engineers of the mine, stated that it was customary to run guide-rails as far up as the skip or cage could run, and that, if it was not done, he did not know of any other appliance in use which could prevent accident in case the rope broke. He stated that, in his opinion, it was necessary they should run to the top in order to be a safeguard. Other witnesses gave similar testimony, stating, what is in fact almost self-evident, that without these guide-rails at any particular point the safeties are useless.

A large mass of testimony pro and con, in support of the rival contentions of the parties, was given and now that the jury have found that the absence of the guide-rails at the top was the proximate cause of the accident, and of the plaintiff's injuries, we are asked to set the finding aside and to sustain the judgment of the court below entering judgment for the defendants.

As I have already remarked, the question as to whether or not the finding of the jury should be set aside does not appear to have been argued in the court below, and no reference is made to this branch of the case in the reasons for their judgment given by the learned judges. The whole case turned upon the application of the sections of the "Inspection of Metalliferous Mines Act" and its amendment to the case, and the court, agreeing with the Chief Justice, held that they were not applicable.

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The more recent authorities on the rule with respect to setting aside the findings of a jury have been considered in a case lately decided in this court and we have determined, in accordance with these authorities, that before doing so the court must be satisfied that the finding is one which the jury, viewing the whole evidence, could not properly find. In such a case only should the finding be interfered with.

I am of opinion, after careful examination of the evidence in this case, and for the reasons hereinbefore stated, that the jury's finding is not one which, under this rule, we ought to interfere with.

That would appear to me to end the case. It is not denied that, as a matter of law, a master who employs a servant in work of a dangerous character, such as in mining at the foot of a shaft eight hundred feet deep, is bound to take all reasonable precautions for the workman's safety. In this case the proximate cause of the accident is found to be the defendants' neglect to do so in an important particular.

The finding standing, the appeal should be allowed with costs in all the courts and judgment entered accordingly,

MILLS J.—In this case the plaintiff was working at the bottom of a mining shaft upwards of 800 feet in depth. The cage which was used for raising the product of the mine and for the ascent and descent of the men employed fell, from the breaking of the cable at the sheave-wheel, upon the timbers in the shaft through which it passed, and seriously injured the plaintiff. There were guide-rails along which it ran which extended to within thirty feet of the sheave-wheel. The engineer in charge had carelessly run up the cage to the sheave-wheel quite above the guide-rails, and this seems to have been done with so much

violence as to break the cable, so that it fell all the way to the bottom of the shaft. It fell several feet before it reached the guide-rails, and had thereby acquired so much momentum that the safeties which were intended to check its downward progress were bent back and no longer served the purpose for which they were intended.

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There are certain provisions of the Act known as the Inspection of Metalliferous Mines Act, which are intended to prevent persons working in the bottom of a shaft from being injured by falling material, and an attempt was made during the argument to show that proper precautions had not been taken in this regard. But it was pointed out by Mr. Daly, the counsel for the company, that the provisions of the Act were in this regard sufficiently complied with. The law requires that the workmen in the shaft shall be protected against falling material; that where mining operations are being carried on away from the shaft there would be danger arising from rock or mineral being blown out and falling down unless there was a protecting wall of solid ground or the construction of a bulkhead above the workmen of sufficient strength to guard against falling material. In this case, from the carelessness of the engineer in running up the cage, which weighed about two tons, much further than was necessary, the cable was broken and the cage precipitated to the bottom of the shaft. The trial judge was of opinion that the accident was wholly due to the carelessness of the engineer, but the jury were of opinion that the company had failed in their duty in not extending the guide-rails as high up as it was possible for the cage to go. There is no doubt that had the guide-rails been so extended the accident might not have happened, and men employed in such dangerous operations as there are in mines are

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entitled to all the protection which can be reasonably given them.

I cannot say that the finding of the jury is not one which the evidence did not warrant and I think, therefore, that the verdict ought not to be disturbed.

Appeal allowed with costs.

Solicitor for the appellant: *W. S. Deacon.*

Solicitor for the respondents: *C. R. Hamilton.*