1911

*March 6, 7.
*April 3.

BROOKS, SCANLON, O'BRIEN COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

RHINE FAKKEMA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence — Employer and employee — Dangerous works — Defective system—Liability of incorporated company—Fault of employee.

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. *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420) followed. Judgment appealed from (15 B.C. Rep. 461) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Murphy J., at the trial, by which the plaintiff's action was maintained with costs.

The plaintiff was employed by the company to operate an engine used for breaking jams in a logging slide constructed on the side of a mountain. The engine was placed at the foot of the chute, near the water where the logs were to be boomed; its position was changed from time to time, upon the orders of an ex-

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

(1) 15 B.C. Rep. 461.

perienced foreman, and at the time of the accident by which the plaintiff received his injuries it was near the foot of the slide down which logs were coming with considerable speed. A log jumped the side of the chute and rolled down the mountain side breaking the plaintiff's leg and causing him other injuries while he was standing near his engine. The jury, without being asked to answer questions, found that the engine had been placed too near the chute and gave a verdict for the plaintiff, assessing damages at $4,500, for which judgment was entered at the trial. This judgment was affirmed by the judgment appealed from.

The questions raised on the appeal are stated in the judgments now reported.

Ewart K.C. for the appellants.

J. Travers Lewis K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. were of opinion that the appeal should be dismissed with costs.

IDINGTON J.—This case is founded on the common law liability of an employer, for negligence in failing to take due care of his servant engaged in a highly dangerous occupation.

The jury under the direction of the learned trial judge, in a charge to which no objection was taken by appellant's counsel, found a verdict for plaintiff (respondent here) of $4,500 for which judgment was entered.

The Court of Appeal for British Columbia upon appeal taken there unanimously dismissed the appeal.

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Idington J.

The jury, without being asked questions, assigned as reason for their verdict

that the engine was placed too near the chute by the defendant company.

But, is there evidence that the company placed the engine thus needlessly and hence negligently ?

The appellant is an incorporated company and the business in question was left entirely to the superintendent and a foreman.

The placing of the engine, which the respondent was in charge of as engineer, was *their* work. It was the result of experiments in the course of working at that chute, placed where complained of.

The company's business was that of loggers. In course of such business this chute, some fifteen hundred feet long, was used for sliding logs down to the water's edge.

The placing of this engine (needed for occasional service in connection therewith) one day at one point and next day at another, would hardly seem to constitute, as a matter of course, a part of a system adopted by the company. It may have, in the language of Lord Cairns in *Wilson* v. *Merry*(1), provided "adequate material and resources" for the protection of the workmen under such circumstances as to render the mistake of the competent superintendent only the act of a fellow employee, and not in this regard of the company.

An examination of the authorities when we had to dispose of the *Ainslie Mining and Railway Co.* v. *McDougall*(2), relied upon by the Court of Appeal, did not satisfy me that the accidental mistake of a com-

(1) L.R. 1 H.L. Sc. 326. (2) 42 Can. S.C.R. 420.

petent superintendent or foreman if so supplied with adequate material and resources enabling him to do better, but failing through his negligence, could be attributed as a matter of course to the company.

It so happened in that case that there was evidence from which it might be inferred that the company did know and direct, or acquiesce in, what was done. It was not necessary to decide the point of the company's responsibility for negligence of a competent superintendent, supplied as suggested.

Is a company without knowing, or having the means of knowing, responsible in such a case for the negligence of the superintendent ?

In the case at bar the failure to raise directly, at any stage, the point in question, when coupled with the general verdict given, seems to preclude, even if it had been taken here, as it was not, the consideration and passing opinion upon such a point.

I agree in the dismissal of the appeal.

I only refer to this question to guard myself from being taken, by tacit consent, as agreeing in the suggestion that the case cited conclusively decides the law as in the way apparently assumed in the judgment of my brother judges in that case.

A decision is binding only so far *as necessary to the decision* of the case.

With every respect for my brother judges, I do not think the decision carries the law further than it had previously gone in modifying the law laid down in *Wilson* v. *Merry*(1).

Yet it has been relied upon here and elsewhere as having done so.

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DUFF J.—The finding of the jury whether treated as a general verdict or as a special verdict is in effect a finding that the arrangement of the works taken as a whole was faulty by reason of the fact that the engine was placed too near the chute. I agree with the learned judges of the Court of Appeal that there was evidence to sustain this view. The questions arising are, — first; whether, in law, that is sufficient to cast a liability on the company, and — secondly; whether, on the undisputed facts, the proper conclusion is not that the proximate cause of the injury to the plaintiff was his own act in unnecessarily remaining in a place of danger.

This last contention was pressed upon us by Mr. Ewart with his usual ingenuity, but there appears to be evidence which, if believed by the jury, might properly lead to the inference that the plaintiff himself believed, on grounds not unreasonable, that it was his duty to be where he was. The plaintiff himself expressly states that it was his duty to be at the engine; and it was stated by another witness that he had been discharged from a similar position for not remaining at his post. In face of this evidence it cannot be successfully maintained, in the absence of a finding of the jury to that effect, that the plaintiff is disqualified from recovering by reason of contributory negligence. There is evidence again shewing that the plaintiff called attention to the danger and asked for protection. This happened the day before the accident occurred. In these circumstances it cannot be said, as a matter of law, that the plaintiff voluntarily assumed the risk of injury arising from the position in which he was placed. In my view, therefore, this contention fails.

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As to the first point, the employer is responsible according to the view of the majority of the judges in *Ainslie Mining and Railway Co.* v. *McDougall*(1), for the installation of a system of work which needlessly exposes his workmen to risk of injury.

I do not propose to re-state the grounds on which that opinion rests; they are sufficiently explained in the judgment of Mr. Justice Davies. In this case as I have said, the jury have, I think, in effect found all that is necessary to establish the proposition that the system inaugurated infringed this rule.

ANGLIN J.—The verdict returned in this case was, in my opinion, a general verdict. But whether it should be so regarded or should be deemed special findings, there was evidence to sustain it and it supports a judgment for the plaintiff at common law. The negligence found by the jury, if it should be regarded as based solely upon the placing of the engine, which it was the plaintiff's duty to attend, in a position unnecessarily dangerous, was a defect in original installation. If the verdict should be treated as resting upon the view that adequate protection was not provided for the safety of the plaintiff, while he was rightly and in the course of his employment in this dangerous place, it is a finding of a defective system. In either case the defendants are, in my opinion, liable at common law for the injuries sustained by their employee, the duty, of a breach of which the jury have found them to have been guilty, being a duty which they could not delegate so as to substitute liability under the "Employers' Liability Act"

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

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for liability at common law in the event of injury resulting to an employee from failure to discharge it. *Ainslie Mining and Railway Co.* v. *McDougall*(1). The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bowser, Reid & Wallbridge.*

Solicitor for the respondent: *C. M. Woodworth.*

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