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*Oct. 27, 28.

*Dec. 9.

ELIZABETH JANE HOSKING AND OTHERS, (PLAINTIFFS) ..... } APPELLANTS;

AND

LE ROI No. 2, LIMITED, (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining plans and surveys—Negligence of higher officials—Duty of absent owners—Operation of metalliferous mines—Common law liability—Employers liability Act—R. S. B. C. ch. 69, s. 3.

The provisions of the third section of the "Inspection of Metalliferous Mines Act, 1897," of British Columbia, do not impose upon an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mine are accurate and sufficient and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys.

The defendant company acquired a mine which had been previously worked by another company and provided a proper system of surveys and operation and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans according to surveys made up to date, the inaccurate plans misleading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted platting the information on the plans had left the employ of the company prior to the engagement of the deceased who was killed in the accident.

Held, Taschereau C.J. contra, that the employers not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could

*PRESENT:—Sir Elzéar Taschereau, C. J. and Sedgewick, Davies, Nesbitt and Killam JJ.

not be held responsible for the consequences of failure to provide complete and accurate plans of the mine.

Held, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia "Employers' Liability Act" (R. S. B. C. ch. 69, sec. 3), for negligence on the part of the superintendent.

Judgment appealed from reversed and a new trial ordered, Taschereau C.J. being of opinion that a judgment should be entered in favour of the plaintiffs.

Per Taschereau C.J. An employee who has left the service of the common master cannot be regarded as a fellow workman of servants engaged subsequently.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco*, affirming the judgment of the trial court which, upon the findings of the jury, directed judgment to be entered for the defendant and dismissed the plaintiffs' action with costs.

The questions at issue on this appeal are stated in the judgments now reported.

J. Travers Lewis for the appellants. We cite the statutes of British Columbia, in point, and the decisions in *Wilson* v. *Merry* (1); *Johnson* v. *Lindsay* (2); *Bartonshill Coal Co.* v. *Reid* (3); *Swainson* v. *North Eastern Railway Co.* (4); *Charles* v. *Taylor* (5); *Wood* v. *Canadian Pacific Railway Co.* (6); *Smith* v. *Baker & Sons* (7); *Choate* v. *Ontario Rolling Mill Co.* (8). The plaintiffs submit that the manager and mine superintendent were negligent as to the surveys and in failing to get accurate information before placing men to work in a dangerous situation. A case at common law has been made or, alternatively, under the Employers' Liability Act and there is evidence to justify a judg-

(1) L. R 1 H. L. Sc. 326.
(2) [1891] A. C. 371.
(3) 3 Macq. 266.
(4) 3 Ex. D. 341.
(5) 3 C. P. D. 492.
(6) 30 Can. S. C. R. 110.
(7) [1891] A. C. 325.
(8) 27 Ont. App. R. 155.

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ment for plaintiffs on the verdict. Again, if a judgment cannot be entered for plaintiffs, a new trial should be ordered for misdirection by the trial judge and mistrial.

Davis K.C. for the respondents. There is no liability for the default of the mine officials in respect to the plans. The accident was due to the negligence of the defendants' engineer and to that alone. The British Columbia Employers' Liability Act only applies to cases where personal injury is caused to a workman:—(1) By reason of defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer by reason of any defect in the construction of any stages, scaffolds, or other erections erected by or for the employer, or in the materials used in the construction thereof; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer or by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive, engine, machine or train upon a railway, tramway or street railway.

Of these, the second case is the only one that could possibly be suggested but it does not apply, inasmuch as the superintendence referred to, as is shewn

by the English and Canadian authorities, and also by the interpretation clause of the Act itself (sec. 2, subsec. 1), is a superintendence over workmen, and the engineers were not persons exercising superintendence of that kind, nor indeed of any kind for that matter, and, moreover, neither of them is charged in the statement of claim with negligence in the exercise of any superintendence.

At common law, it is impossible for the plaintiff to recover inasmuch as the accident happened by reason of the negligence of a fellow-servant. The only duties cast upon an employer who does not personally superintend the work are to supply at the outset fit and proper premises, fit and proper appliances and machinery, a proper system and competent agents and officers. These things having been done the liability of the employer ceased. *Wilson* v. *Merry* (1). *Rajotte* v. *Canadian Pacific Railway Co.* (2); *Wood* v. *Canadian Pacific Railway Co.* (3); *Rudd* v. *Bell* (4); *Matthews* v. *Hamilton Powder Co.* (5); *Howells* v. *Landore Steel Co.* (6); *Hedley* v. *Pinkney & Sons S. S. Co.* (7).

The argument that the doctrine of common employment does not apply, because the so-called fellow-servants whose negligence caused the accident (that is, the engineers) were not in the defendants' employ at the time when the accident happened, or indeed while the person injured was working for the defendants, is of no force. That point is dealt with, though merely *obiter*, by Lord Cairns in *Wilson* v. *Merry* (1) at page 332.

THE CHIEF JUSTICE:—In this case the jury have found that the Company, acting without reasonable

(1) L. R. 1 H. L. Sc. 326.
(2) 5 Man. L. R 365.
(3) 6 B. C. Rep. 561; 30 Can. S. C. R. 110.
(4) 13 O. R. 47.
(5) 14 Ont. App. R. 261.
(6) L. R. 10 Q. B. 62.
(7) [1894] A. C. 222

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care and skill, have been the cause of the accident complained of by their failure to provide proper and accurate working plans of the shaft wherein the accident occured.

That there is ample evidence to support that verdict, which is conceded to be a finding of negligence at common law, is not denied by the court whose judgment in favour of the respondent, notwithstanding that verdict, is appealed from.

The ground upon which the court reached their conclusion against the action is that these plans were made either by one Stewart or one Turnbull who were competent employees and must be considered as fellow-workmen of the appellant, as the court holds, though they had ceased to be in the service of the company before the appellant entered their service, and had not been employed since.

In my opinion that view of the law on the subject, taken by the judgment appealed from, is erroneous.

A fellow-servant in the common employment of a common master must be a co-worker, a collaborateur, and a collaborateur is one with whom a work is carried on, though it need not be in the same branch or department. An employee who has left the service of a company cannot be said to be a co-worker or a collaborateur of all its future employees. Yet, that is what the judgment appealed from necessarily imports. He has ceased to be a worker at all; therefore, he cannot be a co-worker.

In entering its service, an employee impliedly covenants to take upon himself the risks of the negligence of those working with him, with whose habits, conduct and competence he may, in the course of his employment, become acquainted or hear of, and against whose carelessness, listlessness, bad habits or incompetency he has an opportunity to protect him-

self as he may deem best. But he does not assume the consequences of all past negligent acts of his predecessors.

Then under the finding of the jury and the evidence, the respondents have committed a breach of the common law obligation that they impliedly contracted towards the appellant when he entered their service, of providing the adequate materials and a reasonably safe place in which he was to work and a reasonably safe system for the carrying on of the works in which they agreed to employ him. I would not think the operating of a mine of this kind, without a plan, or with a defective and deceiving plan, which is worse, a reasonably safe system of carrying on the operations.

And it is no defence to his claim for injuries received in the course of his employment, in consequence of their failure to fulfil such a positive duty, that the accident was the result of the negligence of some one else upon whom they relied for the performance of such duties that the law imposes upon them personally, whether they act, or have to act, in the matter through other persons or not.

I would allow the appeal with costs and grant the appellants' motion for judgment on the verdict of the jury with costs.

SEDGEWICK and DAVIES JJ. concurred in the judgment allowing the appeal and ordering a new trial for the reasons stated by Nesbitt J.

NESBITT J.—This action is brought under the Employers Liability Act, chapter 59 of the Revised Statutes of British Columbia (1897), and in the alternative at common law.

It is an action for damages resulting from the death of Charles Hosking which occurred on the 23rd day of

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August, in the metalliferous mine called the 'Josie,' at Rossland, B.C., owned and operated by the respondent company, it having acquired this property in July, 1901.

The deceased, with three others, was working in the bottom of the Josie shaft sinking it deeper, and was 565 feet directly below the point in the Josie shaft where the 300 foot level runs into the Josie shaft; in the roof of this 300 foot level and directly under the Annie shaft (then not sunk down to the 300 foot level) were men working raising from the 300 foot level to the bottom of the Annie shaft.

The Annie shaft had been sunk by the respondents' predecessors in title and, as I read in the evidence, a certain amount of work had been done by the respondents; but, however this is, it is quite plain that at the date of the accident the foot of the Annie shaft was about 14½ feet from the top of the level. I extract from the evidence of William Thompson, the general superintendent and general manager of the mine:

Q. Now what was the distance between (producing exhibit 1) the foot of the Annie shaft and the top of the level marked on plan No. 1 as the 300 foot level?

A. Approximately about 14½ feet.

Q. How many feet—what would be the rock necessary to go through in making the upraise to connect with the Annie shaft?

A. About 12 feet.

Thompson, the general superintendent, gave Kenty, the mine superintendent, instructions to have the pumps repaired and put in this Annie shaft in order to pump water out which was in it while the work was proceeding in the up-raise from *the* 300 *foot level;* and apparently Kenty gave these instructions to the machinist who was getting the pumps ready preparatory to pumping in a proper manner. Thompson and Kenty thought that the bottom of the Annie shaft to which they were raising was about 75 feet above

the roof of the 300 foot level and consequently supposed they would have plenty of time to pump the water out while the work in the upraise was being proceeded with. That the upraise was made to the extent of about 12 feet when the next blast allowed the water from the Annie shaft to escape into the 300 foot level along which it rushed and descended upon the deceased with great force, who was working at the bottom of the Josie shaft, killing him. The questions given to the jury and their answers read as follows:

1. Q. Have the defendants or their servants done anything which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done?

A. Yes.

2. Q. If yes, what was it?

A. Failure of the defendant company to provide proper and accurate working plans of the Annie shaft, showing the distance between the roof of the 300 foot level and the bottom of the Annie shaft.

3. Q. Have the defendants or their servants by such act of commission or omission caused injury to the plaintiff?

A. Yes.

4. Q. If you find in answering the first question that the company or its servants was or were guilty of any act or omission, who was or were the persons, if any, who did such act or made such omission?

A. The defendant company.

5. Q. Damages, if any?

A. Total $5,000, divided as follows: Elizabeth Jane Hosking (widow), $3,000; William John Hosking (son), $1,150; Stanley Hosking (son), $850.

Upon this the trial judge, Mr. Justice Martin, gave judgment in favour of the defendants on the ground that the answers were answers solely referable to common law negligence, and that the negligence, if any, was the negligence of Turnbull in not properly platting the plan, and that this was negligence of a fellow employee.

This judgment was affirmed by the full Court of British Columbia.

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The system as to plans as it was adopted is described by Thompson as follows:

Q. What method is usually adopted in large mines with respect to keeping track of work done in the mine; that is, to keep track of levels, tunnels, winzes and all that sort of thing?

A. Usually, the employment of a competent engineer who is held responsible for the correctness of the work.

Q. What are the duties of this competent engineer?

A. To make surveys; make his notes and plat the results.

Q. What was done in that regard in the Le Roi No. 2 from the time of the commencement of the work?

A. That was the method followed.

The previous owners had begun the sinking of the Annie shaft, and they had in their employ when they first began operations, a Mr. R. H. Stewart, then stated to be one of the best mine operators in the west, and he was succeeded by Mr. Turnbull (who is described as a competent man, a graduate of McGill University), and both of these gentlemen were subordinate and reported to Mr. Thompson. Their duties were to survey the mine and record the survey notes in books kept in the office for the purpose, and to plat and keep the plan up to date. At the time of the accident Mr. Thompson states that the notes were in existence in the office, and that these notes showed that the distance between the bottom of the Annie shaft and the top of the 300 foot level was 14½ feet. The survey engineers had neglected to plat these notes upon the plan and Mr. Thompson neglected to see that the vertical plan was up to date, and that his orders in that respect were complied with. He knew of the notes and that they were in existence, but he simply made a casual examination of an old report from which he gathered that there was a distance of 75 or more feet between the bottom of the Annie shaft and the 300 foot level, and so gave the negligent order to commence the upraise which I have described.

On appeal to this court it was argued for the first time that there had been a breach of the Metalliferous and Mines Act of British Columbia (1897) ch. 27, s. 23, in this that no accurate plan had been kept in the office of the company. In my opinion an examination of the language in this section shows that this contention is not tenable. The provisions of that section, instead of imposing upon the mine-owner the absolute duty to have accurate and sufficient plans, seem rather to support the view that such is not the absolute duty of the mine-owner himself since he is not liable to the penalty if he can show ignorance of the imperfection or inaccuracy.

The company provided a proper system of surveying and plan making and employed men, apparently efficient, to carry out the system.

Any inaccuracy or want of completeness in the plans would be due to the default of those so employed, of which an employer at a distance could not be expected to be aware. And it seems immaterial that there was a change of surveyor before the deceased came into the company's employ.

But even if there was negligence in the surveyor, the jury might well have found, also, negligence on the part of Thompson in not seeing that the system was properly carried out, as well as in giving the directions for the upraising, in the absence of accurate information respecting the Annie shaft, without having the water pumped out. This, at common law would be negligence of a co-employee for which the employer would not be responsible, but subsection (2) of section 3 of the "Employers' Liability Act" R. S. B. C. c. 69, imposes upon an employer responsibility for the negligence of any person who has any superintendence entrusted to him while in the exercise of such superintendence. And it is quite pos-

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sible to treat the answer of the jury to the 4th question as including the negligence of any person for whose acts or omissions the company is responsible.

While the record of the case appears to justify the view of the court below, that the plaintiffs' case was directed mainly to establishing liability at common law, the learned judge who presided at the trial left it open to the jury to find for the plaintiffs under the Employers' Liability Act; and although the questions put to the jury did not distinctly point to any specific phase of the Act, the jury could have given answers clearly finding facts establishing liability under it. It does not appear that the plaintiffs have ever abandoned the alternative claim.

As there was not sufficient evidence to warrant judgment against the company upon the principles of the common law, and the damages assessed went beyond the limit allowed under the Employers' Liability Act, there could not well have been a judgment for the plaintiffs for any sum. But it appears to us that, as there was evidence warranting a verdict against the company under the statute, and as the findings of the jury do not negative the liability, the judgment should not stand.

The appeal should be allowed, with costs, and a new trial ordered, no costs of the appeal to the full court in British Columbia; costs of the former trial to abide the event.

KILLAM J. concurred in the opinion stated by Mr. Justice Nesbitt.

Appeal allowed with costs.

Solicitors for the appellants: *Taylor and O'Shea.*

Solicitor for the respondents: *J. Stillwell Clute.*