[HIGH COURT OF AUSTRALIA.]

THE TASMANIA GOLD MINING CO. LTD. APPELLANTS; DEFENDANTS,

AND

ALICE MAUD CAIRNS . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 17, 18, 19, 21.

Griffith C.J., Barton and Isaacs JJ

Negligence—Evidence—Absence of direct evidence—Nonsuit—Mining shaft—Breach of regulations—Mining Act 1905 (*Tas.*), (5 *Edw. VII. No.* 23), *sec.* 182; *First Schedule, Rules* 17, 20.

In an action under sec. 182 of the *Mining Act* 1905 (Tas.), by the personal representative of a miner, who died from injuries sustained while working in the shaft of a mine in which he was employed by the mine owners, claiming damages for negligence against the mine owners, at the close of the plaintiff's case an application was made for a nonsuit which was refused, and, evidence having been called for the defendants, the jury found a verdict for the plaintiff. There was no direct evidence of the cause of the injuries, but a doctor said that, in his opinion, they were caused by a descending cage. There was other circumstantial evidence. Consistent with this view there was also evidence that the cage could only have descended in consequence of a signal given by the deceased, which would have been suicidal on his part, or in consequence of the breach of the Rules under the *Mining Act* 1905 to which the deceased was a party, or in consequence of negligence of the engine driver who was in charge of the winding engine at the time of the accident, but who, although an available witness, was not called by either party.

Held, that the case was properly left to the jury.

Judgment of the Supreme Court affirmed.

APPEAL from the Supreme Court of Tasmania.

An action was brought in the Supreme Court of Tasmania by Alice Maud Cairns, the personal representative of William James Cairns, deceased, against the Tasmania Gold Mining Co. Ltd., to recover £2,000 damages. By the declaration it was alleged that Cairns, the deceased, was employed by the defendant company in or about a certain mine of the defendant company, and that, in the course of his duty, he was lawfully and properly in a certain shaft in such mine in which a certain cage travelled upwards and downwards. The first count alleged that the defendant company by their servants negligently and wrongfully lowered the cage, or negligently caused it to be lowered, in consequence whereof the deceased was struck by the cage and sustained severe injuries, and was killed. The second count alleged that it was the duty of the defendant company to provide safe and proper appliances and machinery for the safety of their servants lawfully in the shaft, and that they altogether neglected to provide safe and proper appliances and machinery for that purpose, and in consequence thereof the deceased, whilst lawfully in the shaft, was struck by the cage, whereby he sustained severe injuries, and was killed. The third count alleged that the defendant company negligently and wrongfully omitted and failed to observe the provisions contained in certain Rules of the First Schedule to the *Mining Act* 1905, and in consequence thereof the deceased, whilst lawfully in the shaft, was struck by the cage and sustained severe injuries, and was killed.

After a first trial, at which the jury found a verdict for the plaintiff with £500 damages, which was set aside, the action was tried before *Clark* J. and a jury. At the close of the plaintiff's case counsel for the defendants applied for a nonsuit on the ground that there was no evidence to go to the jury.

The learned Judge refused the application, but reserved leave to the defendants to move the Full Court for a nonsuit. The defendants then called evidence, and the jury found a verdict for the plaintiff for £1,000. Subsequently a motion was made to the Full Court by the defendants to set aside the verdict and to enter a nonsuit or judgment for the defendants. That motion having been dismissed and judgment entered for the plaintiff for £1,000 with costs, the defendants now appealed to the High Court.

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The evidence is sufficiently set out in the judgments hereunder.

Waterhouse and *Bryant*, for the appellants. The onus of proof was on the plaintiff of proving that Cairns received his injuries in consequence of the negligence of the defendant company. There was no direct evidence of, nor do the facts proved afford any reasonable inference as to, the cause of the injuries to Cairns. All that was proved is that he was injured in the mine at the 400ft. level. Everything else was left to conjecture. In these circumstances, even if there were evidence of negligence on the part of the defendant company, the case should not have been left to the jury: *Wakelin* v. *London and South Western Railway Co.* (1); *Avery* v. *Bowden* (2).

[ISAACS J. referred to *Pomfret* v. *Lancashire and Yorkshire Railway Co.* (3).]

The only state of facts which will support the plaintiff's case is that Cairns was struck by a descending cage, but there are other equally probable ways in which his injuries could have been caused, and, if he was injured in any one of those ways, it was primarily due to his own negligence. Even if there were evidence that Cairns was struck by a descending cage, there is no evidence of any negligence on the part of the defendant company. Assuming that the cage was lowered in accordance with the signals arranged between Bealey and the men working in the shaft—of which there is no evidence—that, under the circumstances, would not be a breach of Rule 20 of the Rules under the *Mining Act* 1905, so as to be evidence of negligence on the part of the defendant company; besides, it has never been suggested on the part of the plaintiff that such an arrangement would be in breach of the Rule. No conclusion adverse to the defendant company can be drawn from the fact that Bealey was not called as a witness. There was no evidence of negligence on his part, so that there was nothing for him to answer: *M'Kewen* v. *Cotching* (4).

[ISAACS J. referred to *Stephen's Digest of the Law of Evidence*,

(1) 12 App. Cas., 41; (1896) 1 Q.B., 189 (*n*).
(2) 6 El. & Bl., 953, at p. 972.
(3) (1903) 2 K.B., 718.
(4) 27 L.J. Ex., 41.

5th ed., art. 96, p. 111; *Angus* v. *London, Tilbury and Southend Railway Co.* (1).]

Under sec. 182 of the *Mining Act* 1905, contributory negligence is an answer in an action for ordinary negligence, although it is not an answer to an action for negligence based on a breach of the Rules. The evidence of Dr. Graham is not evidence as to how the accident happened, but is merely an expression of his opinion that the injuries were such as could have been inflicted by a descending cage.

[Counsel also referred to *Cowie* v. *Berry Consols Extended Gold Mining Co.* (2); *Laurenson* v. *Count Bismarck Gold Mining Co.* (3); *Neville* v. *Lord Nelson Gold Mining Co. No Liability* (4).]

Lodge and *Crisp*, for the respondent. There was evidence to go to the jury both as to how the accident happened and as to negligence of the defendants. It was assumed throughout the whole conduct of the case in the State Court that, immediately before the happening of the accident, the cage was raised clear above the 400ft. level. There was evidence to support that assumption. That being so, there was evidence from which the jury might reasonably conclude that Cairns was injured by the descending cage, and Dr. Graham's evidence supports that conclusion. The question then is, was there evidence of negligence on the part of the defendant company? The facts proved by the plaintiff were such that, without evidence being given by the defendant company to explain them, the jury could find that the accident was due to the negligence of the defendant company: *Byrne* v. *Boadle* (5).

[GRIFFITH C.J. referred to *Brown* v. *Great Western Railway Co.* (6).]

The defendant company having called evidence, the fact that they did not call Bealey, who alone could give evidence as to how the cage came to descend, affects the quantum of evidence necessary to allow the case to go to the jury. There were such breaches of the Rules, and they were so intimately connected with the accident, that the jury might reasonably infer negligence.

(1) 22 T.L.R., 222.
(2) 24 V.L.R., 319; 20 A.L.T., 124.
(3) 4 V.L.R. (L.), 83.
(4) (1905) V.L.R., 242; 26 A.L.T., 160.
(5) 2 H. & C., 722; 33 L.J. Ex., 13.
(6) 1 T.L.R., 406.

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[Counsel also referred to *O'Halloran* v. *Great Boulder Proprietary Mining Co.* (1).]

Bryant in reply referred to *Simson* v. *London General Omnibus Co.* (2); *Fenna* v. *Clare & Co.* (3); *East Indian Railway Co.* v. *Kalidas Mukerjee* (4).]

Cur. adv. vult.

The following judgments were read:—

Feb. 21.

GRIFFITH C.J. This was an action by the respondent, as personal representative of W. J. Cairns deceased, claiming damages for injuries which were sustained by him while in the employment of the appellants as a miner, and which resulted in his death. The first count of the declaration as finally amended was for negligence in lowering a cage in consequence of which Cairns was struck by it. The second count was for negligence in failing to provide proper appliances in the shaft, and the third for negligence in failing to observe the Rules contained in the *Mining Act* 1905. The action was twice tried. At the first trial the jury found a general verdict for the plaintiff with £500 damages. This verdict having been set aside, a new trial resulted in a verdict for £1,000. A rule *nisi* for a new trial or to enter a nonsuit was granted and discharged, and this appeal was brought from that decision.

The substantial ground of appeal is that upon the evidence it is quite uncertain whether the injuries which caused Cairns' death were due to some negligence for which the defendants were responsible, or to the negligence of Cairns himself, or were the result of pure accident, and it is contended that, there being nothing to incline the balance of probability either way, the defendants are entitled to judgment.

The accident—using that term in a neutral sense—occurred at the 400ft. level of the defendants' mine, where Cairns was employed alone. In compliance with a signal given by him, he was drawn up to the surface, when he was found to be suffering from the effects of a severe blow on the right lower jaw which

(1) 3 W.A. L.R., 41.
(2) L.R. 8 C.P., 390, at p. 392.
(3) (1895) 1 Q.B., 199.
(4) (1901) A.C., 396, at p. 401.

had inflicted two incised wounds, apparently caused by a sharp-edged body, and had detached a portion of the jaw-bone containing four teeth. He was unable to speak, but muttered the word "cage," pointing to his mouth. On another occasion, in answer to an inquiry as to the cause of his injuries, he passed his hand over his head with a circular movement of his arm. He died two or three days afterwards. There was no other direct evidence as to the circumstances of the accident. But there was a good deal of circumstantial evidence, which was sufficient, if believed, to establish beyond reasonable doubt the actual circumstances.

A medical witness called by the defendants said that in his opinion Cairns received his injuries from a descent of the cage upon him while he was in a kneeling position and looking upwards. We are informed by counsel that this view was accepted by both sides at the trial. From the nature of the injuries themselves, and fortified by this opinion, the jury might reasonably conclude that they were so caused. It follows that immediately before the accident the cage must have been suspended above the 400ft. level. From this fact, with other facts to which I will call attention, several others may be inferred with such a high degree of probability as to amount almost to certainty.

At the time of the accident Cairns was, as already stated, employed alone at the 400ft. level. Two other men were employed at the 900ft. level in filling and loading trucks with material to be used in making concrete at the upper level. These they sent up to Cairns, whose duty it was to wheel the truck containing the material out of the cage, empty it, return it to the cage, and send it down to the lower level. One of the compartments of the shaft was exclusively used for this cage. The average time that elapsed between the successive despatches of the truck from the lower level to Cairns was about a quarter of an hour. In order to provide a resting place for the cage at the 400ft. level, so that the truck might be wheeled out of it, temporary appliances had been constructed in the shaft consisting of two pieces of railway iron described as bearers, resting and sliding upon fixed bars parallel to the sides of the compartment,

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and attached to a mechanism moved by a lever, by which the bearers could be brought out towards each other from the ends of the compartment towards the middle so as to form a support for a descending cage, or could be pushed apart and under the edges of the plats at either end, so as to leave a clear opening for the cage to pass, whether ascending or descending.

Unless they were in this position the cage could neither ascend nor descend past the level. The actual mode of working was as follows :—When the men at the 900ft. level had placed a full truck in the cage they gave the signal to hoist—one knock—which, by arrangement between them, Cairns and the engine driver, was to be taken to mean that the cage should be hoisted to a little above the 400ft. level, then stopped for a short time so as to enable Cairns to get the bearers in position, and then (after this short and indefinite time) lowered upon the bearers, which, as was assumed, would be in their proper places. During this short time Cairns would by a simple movement of the lever put them there. I pause to observe that this arrangement as to signalling was a plain violation of the statutory Rules.

On the day of the accident Cairns went down the mine at about 3.30 p.m. The miner who worked at the 400ft. level in the preceding shift said that, when he left, the mechanism was in good working order. After Cairns went down a truck was sent up to him from the 900ft. level, emptied, and returned. As this operation occupied about the usual time, it may be inferred that the lever apparatus was still in working order, but it is not, I think, material whether it was or not. A second truck was then filled and sent up, but it did not come back.

In fact it was not taken out of the cage by Cairns, and he was found lying upon it when taken to the surface as already stated, which was about an hour afterwards. But, since the ascending cage passed the 400ft. level and ultimately reached the surface, it follows that, when it went up, the shaft was free from obstructions at that level. There was, indeed, no reason why Cairns should have done anything to obstruct it, since, when he withdrew the bearers, as he must have done after the first load had been taken out, he expected another truck to come up in a few minutes. We thus arrive with certainty at another important

fact, viz., that the cage had been hoisted from the 900ft. level to some (unknown) distance above the 400ft. level, whence it descended and struck Cairns. What, then, was he doing when it struck him? This question is also answered by circumstantial evidence. Shortly after Cairns had been brought to the surface, a party went down in the same cage (which still contained the truck load of material) to the 400ft. level, where they found that the mechanism already referred to had been partially dismantled. They also found that a strip of wrought iron, which had formed what was called the quadrant lever, and which worked on a central pin, being connected by bolts at its upper and lower ends to iron straps extending to the bearers at the eastern side of the shaft, had been forcibly bent upwards from below. The bolt at the top had been taken out, the straps had been disconnected from the lever but left attached to the bearers, and the bolt replaced. Similar straps on the western side had been also disconnected from the lever, but left attached to the bearers. This work must have been done by Cairns, and must have occupied some minutes of time. From the condition in which he arrived at the surface, it is a reasonable inference that he could not have done the work after receiving the blow.

It follows that the jury might find, as a fact, that he did the work after the cage had ascended past the level either on its first or second ascent.

Some argument was addressed to us as to the cause of the derangement of the mechanism, and it was contended that it must have occurred at the second ascent of the cage, and was probably caused by some part of the ascending body catching the lower end of the quadrant lever. It seems to me, however, to be immaterial whether the derangement was caused at the first or second ascent of the cage, and equally immaterial to determine how it was caused. The physical facts observed show that the mechanism had been disarranged, that this disarrangement was not such as to prevent the upward passage of the cage, and that Cairns endeavoured to disconnect the mechanism. His object was, apparently, to enable him to put the bearers in place without the aid of the lever mechanism, which would not work. This could be done with some little difficulty by hand, as was in

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fact done later in the day by the party who went down after the accident.

I have mentioned that the straps were not disconnected from the bearers. The free ends were placed so as to rest upon the centre pieces of the shaft, and by pulling upon them the bearers might be brought out from beneath the plats. In fact one end of one of them had been brought out for a short distance. If, then, the disarrangement occurred at the first ascent of the cage, it is probable that Cairns would have made the disconnection immediately after the cage went down, and in preparation for the next ascent. The cage having then ascended, and having stopped above the level in obedience to what was called the conventional signal, he would try to pull the bearers into position by means of the straps, and had in fact begun to pull one of them, when—again in obedience to the conventional signal—the cage without any further warning was lowered upon him.

If, on the other hand, the disarrangement occurred at the time of the second ascent, the cage must have been suspended above him for a sufficient time to enable him to make the disconnection described.

It was pointed out by the learned Judge who presided at the second trial (*Clark* J., whose lamented death has since deprived the State of the benefit of his learning and ability) that if the cage was lowered upon Cairns (as the jury might reasonably believe) it must have been lowered either

(1) in response to a signal from Cairns, or

(2) without a signal from him, or

(3) by being negligently allowed to drop by what was called a "creep" of the engine.

Evidence was adduced on both sides on the question whether, having regard to the construction of the engine in use, the cage, if suspended in the shaft, could have dropped without the active intervention of the engine driver, and upon this evidence the jury might reasonably infer that it was very likely to do so unless special care was taken.

The first hypothesis, that the cage was lowered in response to a signal from Cairns while he was engaged on a task which

required him to be on his knees on the plat exposed to the risk of being struck, is highly improbable.

The only person who could give direct evidence on this point was the man in charge of the winding-engine. He was not called for the defendants, although he was available as a witness. Considering, then, that a signal by Cairns to lower the cage when he was either engaged in disconnecting the mechanism or in trying to pull out the bearers would have been almost suicidal, I think that the jury were justified, in the absence of any evidence to support this hypothesis—which evidence, if the hypothesis was true, was available—in rejecting it. If it is rejected, it is immaterial whether the second or third hypothesis is accepted. For, if the engine driver lowered the cage without a fresh signal, he was acting in clear violation of the Rules, which require that there shall be a definite code of signals posted up in the mine, and that any departure from them shall be an offence against the Act (Rule 20). Lowering the cage in obedience to what was called the conventional signal was not in accordance with the code, and was therefore (as already said) a non-observance of the Rules.

Sec. 182 of the Act provides that:—"If any person employed in or about any mine or works suffers injury in person or is killed— I. Owing to the negligence of the owner of such mine or works, or his agents or servants: or, II. Owing to the non-observance in any such mine or works of any of the provisions of this Act, such non-observance not being solely due to the negligence of the person so injured or killed, the person injured, or his personal representatives or the personal representatives of the person so killed, may, in any Court of competent jurisdiction, recover from the owner of such mine or works, as the case may be, compensation by way of damages, as for a tort committed by such owner: Provided that in estimating the damages due regard shall be had to the extent (if any) to which the person injured or killed contributed by any negligence on his own part to the injury or death."

If, therefore, the accident occurred from a non-observance of the Rules, the defendants have no defence to the action. No

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point was made as to any such negligence on the part of Cairns as should be taken into consideration in reduction of damages.

If the third hypothesis is accepted, the accident occurred through the negligence of the engine driver, for which it is not disputed that the defendants are liable.

It was suggested to us that it is probable that, after the cage had passed the 400ft. level on the second ascent, Cairns gave signals to hoist the cage and keep it hoisted, so as to give him time to prepare the bearers to receive it at the level, since, if the conventional signal had been observed, it would have probably caused a descent of the cage before he had time to finish his task. If he did not give such signals, the accident obviously arose from obedience to the conventional signal, which was a non-observance of the Rules for which the defendants are responsible. If he did give them, and the cage was hoisted, then its descent, whether without a further signal or by means of the carelessness of the driver, would, as already shown, be negligence for which the defendants are equally responsible. The only person who could give evidence on this point was not called by the defendants.

It follows, in my opinion, that, if Cairns was struck by the descending cage, there was evidence from which reasonable men might infer that that descent was due either to the negligence of the defendants' servants or to a non-observance of the Rules.

There is a further point deserving of mention. The winding gear in use had no indicator as required by the Rules to show to the engine driver the position of the cage in the shaft. He had, in fact, nothing to guide him but a piece of spunyarn (one of 20 pieces) on the rope to indicate that the cage was at the 400ft. level, so that he might very easily have misjudged the extent to which he lowered the cage. If this was the cause of the accident the defendants were clearly responsible.

It appears, as already stated, to have been assumed at the trial that the blow was struck by the descending cage. In the argument before us, however, some other possible causes of the accident were suggested. It was said that the blow might have been given by the top of the ascending cage while Cairns was stooping over the shaft. In this view the disarrangement of the mechanism must have occurred before the second ascent. But the

hypothesis is rendered improbable by the nature of the wounds, since the part of the ascending cage which would have struck him would have been the rounded bonnet or cover of the cage which would be ascending slowly in anticipation of being stopped. It was also suggested that the ascending cage might have caught and lifted up one of the bearers, which might have fallen back and struck Cairns. In this event the bearer must have fallen upon the plat. It was, however, found in its proper place under the plat, where, in this view, it must have been replaced by Cairns after the blow, which is highly improbable, both from the weight of the bearer itself and from his condition.

In my opinion there was abundant evidence from which reasonable men might find that the injuries were caused by negligence or non-observance of Rules for which the defendants were responsible.

The appeal must therefore be dismissed.

BARTON J. The real question in this case is whether the facts, as stated by the Chief Justice, furnish evidence on which a jury might reasonably affirm the issue to be proved.

I agree with His Honor in the conclusion at which he has arrived. In saying so I apply to the argument most strongly pressed for the appellants the words of *Kay* L.J. in the case of *Smith* v. *South Eastern Railway Co.* (1) :—"It was said that the facts were equally consistent with the accident having been due to want of care on the part of the deceased man himself as with its having been caused by the defendant's negligence, and, where that is so, the law is that the Judge ought to hold that there is no question for the jury to decide. I venture to say, with all respect for those who hold a different opinion, that as long as we have trial by jury and juries are judges of the facts, it should be a very exceptional case in which the Judge could so weigh the facts and say that their weight on the one side and the other was exactly equal. There may be such cases, and the House of Lords seems to have considered that there might be. I can only say that I think they must be very rare, and I certainly do not think that the present case is one of them."

(1) (1896) 1 Q.B., 178, at 188.

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I am of opinion that there was sufficient evidence to go to the jury, and sufficient evidence to support their verdict of negligence on the part of the appellant company causing the accident, whether on the 1st or the 3rd count of the declaration, although the negligence is to be inferred largely from circumstantial evidence. In saying this I do not forget the rule stated by *Willes* J. in the case of *Daniel* v. *Metropolitan Railway Co.* (1) approved of in the House of Lords (2), namely:—"It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to: and I go further, and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." It has, I think, been shown in the judgment just delivered that the case proved warrants the inference that the blow which caused the death of Cairns was caused by the descent of the cage upon him, that descent at the particular time being caused by the negligence of the company, that is, by the cage having been either lowered or allowed to drop by the engine driver without any signal from Cairns. As *Clark* J. has said, the appellant company "is in either of these cases responsible for any consequence to Cairns which was not immediately produced by his own negligence." I do not find any evidence that the injuries were caused by any contributory negligence of Cairns, disentitling the plaintiff to succeed. There were, indeed, hypotheses to that effect, but the jury were entitled to disregard them, and they could within reason so connect the company's negligence with the accident as to say that the one was, on the whole, the cause of the other. Personally, I think the case is one of some difficulty, but I cannot say that it was not a proper case to leave to the jury, nor, if called on to decide whether the verdict was one which they could reasonably have found, can I say that it was not such a verdict. I am, therefore, of opinion that the appeal must be dismissed.

ISAACS J. This is a case really involving no question of law, but merely the application of a well established principle that,

(1) L.R. 3 C.P., 216, at p. 222. (2) L.R. 5. H.L., 45.

before a plaintiff can succeed in maintaining a verdict for negligence, he must prove that the defendant was negligent and thereby caused him damage. He may do that by direct evidence which, if believed, at once completes his case; or he may do it by proving collateral facts which, being believed, lead to a reasonable inference of the ultimate fact sought to be established. The facts of different cases naturally vary, and whether in any particular case the collateral facts deposed to are sufficient for the purpose must depend upon a consideration of the whole circumstances. *Wakelin* v. *London and South Western Railway Co.* (1), which has been relied on here for the defendants, may be at once put aside, because it was bare of any evidence throwing light on the manner in which the deceased met his death, except that he was run over by a train which did not whistle when it should have whistled. As to whether he saw the train coming —and he could have seen it at a distance of at least nearly half a mile away—or whether he took his chances of getting across in time, nothing appeared, and the case was just as consistent with his death being unconnected with the defendant's absence of care as it was with being the result of the defendant's negligence.

But here there are a number of circumstances sworn to on one side or the other which, in my opinion, give a start to the plaintiff's case, that is to say, they are such as a jury of men of the world may fairly look at and draw from them a reasonable conclusion as to how Cairns met with the injuries that caused his death.

Now, the evidence of Dr. Graham, obviously based on the nature and position of the injuries, is very clear and distinct, and if believed, would lead the jury to a definite and certain commencing point.

He is called to refute Dr. Ramsay's theory as to the creep, and is supported by Dr. Clemons. He says:—"I believe that he received his injuries from a descent of the cage while he was in a kneeling position and looking upwards—his head was free—the mark of a bruise might be visible on the back of his neck on the next day to the extent of four or five inches but it would not represent a serious injury. I think that the injury was the

(1) 12 App. Cas., 41; (1896) 1 Q.B., 189 (*n*).

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result of direct violence and that the object that caused it came quickly in contract with him ; the injuries he had received to his jaw would be sufficient to produce pain all round his neck; the blow of the cage may have rolled him into the chamber behind him; his mental condition was a slight indication that he had received his injuries by a quick blow and not from a slow pressure."

Now that evidence involves:—

(1) That the injury arose from impact with the cage.

(2) That Cairns was in a kneeling position looking upwards when the injuries were received.

(3) That the cage was then descending quickly, that is, in contra-distinction to the slow and comparatively speaking imperceptible movement of a creeping cage, which would not directly wound but would crush.

There is nothing in the evidence inconsistent with this opinion, and having been advanced as material testimony by the defendants' counsel, it cannot be regarded as unimportant.

Various theories have been urged by learned counsel as to the mode in which the accident happened. Objections of more or less weight present themselves to all these theories. But if it be once supposed that, after the descent of the cage on the first journey, Cairns saw that something was wrong with the catches, occasioned possibly on the first upward journey, and then while the cage was below, on the second journey, set to work to take the catches to pieces, believing he could effect the necessary changes in time to place the bearers in position to receive the cage on its next trip—a not improbable supposition—the whole difficulty disappears. Even the bending of the quadrant lever may be thus explained ; but in any case this is only more or less a matter of speculation under any one of the suggested theories, and the ascertainment of its precise cause is not essential to the real question at issue. If, then, in the second journey the cage was raised and lowered in accordance with the concerted arrangement, Cairns may have thought that by kneeling down he could do sufficient to get the bearers into the requisite places to hold the cage for that trip, and either complete the re-arrangement of the catches before the third truck load came up or, if

necessary, report the matter. The cage, however, on this assumption descended while he was still engaged at the work, and perhaps while he was turning his face upwards either to see if he still had time, or when surprised by the descent of the cage, and so was struck.

The theory of the creep has two great obstacles in the way of its acceptance; it supposes a departure from the concerted plan, and a consequent signalling by Cairns to lower, and of this there is no evidence; and, next, it does not seem a probable way of accounting for the injuries that Cairns received. It is, of course, in opposition to Dr. Graham's evidence, already referred to, and to that of Dr. Clemons, though favored by Dr. Ramsay.

The defendants have made the suggestion that Bealey the driver may have had a signal from Cairns to lower. Now Bealey was essentially in the defendants' camp both before and during the trial. In these circumstances I can see no ground for assuming the probability of a signal from Cairns which, if given, Bealey alone could prove, and did not. The non-calling of Bealey certainly weakens any suggestion of the defendants in support of their case, or as an answer to the plaintiff's case, which is put forward as a possible fact, the truth being known to Bealey, or to him and the defendants to whom he may be supposed to have communicated it.

The case then stands, so far, that it was quite open to the jury to find, as apparently they have found, that by means of a cage, which ought not to have been, but which was in fact, lowered without a signal, Cairns was injured and so died.

If so, the cage descended, either slowly by means of a creep, or more quickly in pursuance of the customary arrangement. In the result, it is immaterial which of these alternatives was the fact, because, in the first alternative, the jury had ample material to find the defendants negligent, and there was no trace of contributory negligence on the part of Cairns; and in the second, the complicity of Cairns in the non-observance of the signalling Rules does not absolve the defendants from liability at least to some extent, and no question is raised as to the quantum of damages.

The creep, if it occurred, arose through the neglect of Bealey to

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keep the valve on the capstan engine in good order or to hold it securely, thus lowering the steam pressure, and permitting the cage to fall, as according to the evidence it would then do. In view of the testimony of Pope as to his practice to hold up the cage with steam and to keep his hand on the valve when he used steam, and that he showed Bealey how to work the engines, I think it was perfectly competent to the jury, seeing the cage did in fact come down, and no denial of the ordinary practice was deposed to, to infer that the usual course was followed on this occasion, and that a creep did take place, unless—and this is the other horn of the defendants' dilemma—the cage was deliberately lowered in accordance with the accustomed plan without a signal. The defendants are practically driven to one or other of these alternatives. If the second course was adopted, then, notwithstanding the arrangement made between Cairns, Collins, Cowie, and Bealey, it was an arrangement prohibited by the Act, and in violation of the signalling Rules. The capstan cage in that shaft, used as it was, ought not to have been lowered without a proper signal to lower, and I have no doubt that the evidence as to the arrangement taken in conjunction with the fact, which by this time must be assumed, of the descent of the cage, is ample to justify the conclusion that the lowering was in itself a distinct operation. The evidence as to the arrangement was thus deposed to by Collins:—"The signal of one knock was arranged by Cairns, Cowie and myself with the engine driver. It meant that the cage was to be hoisted to the 400ft. level and to be stopped there. The cage would be hoisted a short distance above the level and then lowered after the man working there had had time to arrange the catches."

Apparently it was a double operation that was to be performed upon receiving the one signal. The cage was to be hoisted to some distance above the 400ft. level, an indefinite distance to be roughly judged of by the driver, who had no indicator and therefore no means of precisely measuring the height of the cage, and he was to hold it there for an indeterminate period, sufficient in his opinion to allow the man working 400 feet below to arrange the catches if all went well. I am not resting my judgment upon the failure of an indicator or of hinged bearers, but the absence

of these aids to safety are circumstances to bear in mind in considering how the arrangement to lower without a further signal would operate in fact. It would leave the miner below in a position of uncertainty unless everything worked smoothly; if, unhappily, the least thing went wrong his life would be in danger, and the lowering of the cage without a signal appropriate to that movement would be likely to do what it actually did in this case upon the jury's finding, inflict fatal injuries.

The legislature has expressly provided against such risks, and has enacted that in such a case a proper signal is essential. The legislative Rules, on the assumption of the second alternative, were disobeyed, and there was consequently a non-observance of one of the most important provisions of the Act. The fact that Cairns shared in the non-observance does not disentitle the plaintiff to succeed, because the non-observance was not solely due to Cairns's negligence.

These considerations are sufficient to show that the case could not possibly have been withdrawn from the jury, as being a mere case of conjecture, or as being a case in which the facts were so exactly balanced as not to be open to the jury as men of experience and common sense to arrive at a reasonable conclusion that the deceased met his death owing to the fault of the defendant company.

The appeal therefore should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *J. B. Walker, Wolfhagen & Walch,* Hobart, for *Ritchie & Parker,* Launceston.

Solicitor, for the respondent, *W. O. Hamilton,* Hobart, for *J. W. C. Hamilton,* Launceston.

B. L.