

The defendant McCormick, besides denying the allegations in the statement of claim, pleads that he was employed by the defendant company as a hiring and purchasing agent for the work, the work itself being performed by and under the directions of the defendant company and its engineers.

The defendant company deny liability and allege that the defendant McCormick was an independent contractor and that the plaintiff was not in their employ, but was employed by McCormick and working under his foreman, and that the Canadian Pacific Railway Company are in no way liable for any injuries suffered by the plaintiff. . . .

It is perfectly clear from the evidence—indeed it was not contended otherwise—that the injuries were occasioned by negligence.

I also think it perfectly clear that McCormick is responsible for this negligence. The more difficult question is whether the Canadian Pacific Railway Company are also responsible.

The learned Chief Justice finds that the plaintiff was not careless or negligent in any way, and that the injuries were caused by the negligence of both defendants. He also finds “that the defendant McCormick, personally, and the Canadian Pacific Railway Company, by their engineers and servants, had abundant notice of the danger that existed in carrying on the work in the manner in which it was being carried on, and that the cause of the accident was the negligence of the defendants in either not guarding against the falling of the rocks which caused the accident, or first removing them before doing the work.”

He also finds that McFadden and Houghton, two of the company’s witnesses, are mistaken in thinking that scaling was done before the accident. Except as to the question of the liability of the Canadian Pacific Railway Company, which I shall consider later, I think the evidence fully supports the findings of the learned Chief Justice.

The result of the undisputed evidence is that the engineer in charge had actual notice of the danger to the men employed on the work, from rock falling from the face of the hill through which the tunnel was to be made, and, recognising this danger, sent his assistant to report. Upon the report, the face of the hill was directed to be scaled; that is, cleared of the débris. This work was commenced and about 1,000 yards of this stone and débris removed; but, as the learned Chief Justice finds, the scaling was not done before the accident, and the men were allowed