

by Walker, also an employee of the company. The company were not negligent in employing Walker, as he was, undoubtedly competent.

A. G. Slaght, for the plaintiff.

J. W. Mahon, for the defendant.

HON. MR. JUSTICE MIDDLETON:—At common law, the plaintiff cannot recover, because the negligence occasioning his injury was the negligence of a fellow servant; and I do not think that the Workmen's Compensation Act in any way improves his position, because the common law still prevails unless the fellow servant is one who has superintendence intrusted to him and the accident occurs while he is in the exercise of such superintendence.

The statute defines "superintendence" as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman whether the person exercising superintendence is or is not ordinarily engaged in manual labour.

There is no dispute of fact concerning the position occupied by Walker. He was a teamster employed by the defendant company, and was engaged in and about the same undertaking as that upon which the plaintiff worked. He was employed to draw material to the work, and upon two trips during the day he carried the men to and from the work. Upon those uncontradicted facts I think it is clear that it cannot be said that he had superintendence within the statutory meaning.

As a matter of precaution I explained the law to the jury, reading to them the statutory provisions found in the Workmen's Act, and asked them to determine as a question of fact whether Walker had superintendence intrusted to him within the meaning of the statute. The jury first returned the answer: "We do not know"; but after my further explaining the matter to them they brought in the answer "Yes."

The plaintiff's counsel was not satisfied with the way in which I presented the question to the jury, and thought that the question asked was not entirely apt. At his instance I submitted a further question, framed in accordance with his views: "Had Walker superintendence over the wagon and workmen while riding in the wagon?" To this the jury first answered, "Yes, over the team and wagon;