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*Oct. 18, 19.

*Dec. 13.

J. A. WEBSTER & H. V. EDMONDS (DEFENDANTS)..... } APPELLANTS;

AND

JOHN A. FOLEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Master and servant—Use of dangerous machinery—Defective system of usage —Liability of master for—Notice to master of defect.

A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself.

At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery or a defective system of using the same by reason of his failure to give notice to the employer of such defect.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment for the plaintiff at the trial.

The plaintiff was in the employment of the defendants as a "chainer" or "log roller" in their saw-mill at the city of Vancouver, and the action was brought in consequence of injuries received by the plaintiff in the course of such employment.

The grounds of the action, as set out in the statement of claim, were that the plaintiff, in the course of his employment, had to work on a rolling tier or rollway for logs which by the negligence of defendants was in an unsafe condition and unfit for the purpose of rolling logs; that defendants knew of the unsafe condition of the rollway but plaintiff did not; that it

* PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 2 B.C. Rep. 137.

was the duty of plaintiff, by the use of machinery provided for the purpose, to move saw-logs across the rollway and place them on a carriage on the opposite side; that to do so it was necessary for plaintiff to be provided with proper rolling blocks to check the motion of the logs; that plaintiff had frequently informed defendants that the rolling blocks furnished him were worn out and unfit for the purpose and that he would refuse to work longer unless proper blocks were supplied, defendants promising on each occasion to furnish same and requesting plaintiff to continue working; that defendants neglected to furnish the same and in consequence plaintiff was injured by a log falling upon him.

By their statement of defence the defendants denied that plaintiff was employed as alleged and that the rollway was unsafe or if it was they claimed to be ignorant of it; they alleged the same thing as to the rolling blocks and denied that they were ever notified by plaintiff as alleged; and they claimed that if plaintiff was injured as alleged it was through his own negligence and that they were not responsible therefor.

The action was tried before a special jury to whom certain questions were put which, with the answers thereto, were as follows:—

1. Were machinery and build of mill good as regards safety of workmen? No.

2. Were chock blocks sufficient? No.

3. (a) Was slant of rollway dangerous, (b) or did it require sufficient blocks to render it safe? Yes to both.

4. What was the inducing cause or causes of accident, having regard to slant, chock blocks, and alleged negligence? Slant of rollway and defective chock blocks were inducing causes.

5. Could the plaintiff by the exercise of such care and skill as he was bound to exercise have avoided the

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injury, having regard to the proper discharge of his duties as chainman ? No.

6. Did plaintiff complain of the chock blocks to the person or persons who appeared to be the authorized person or persons to whom he should complain ? Yes.

7. Did plaintiff know of slant ? No.

8. Did Burns promise to make chock blocks good ? Yes.

9. What was Burns's position and authority in the mill ? Millwright in charge of machinery.

10. (a) Apart from machinery, were discipline and management of mill good, (b) and was want (if any) of such an inducing cause of accident ? (a.) No. (b.) Yes.

11. Was plaintiff aware of the state of the chock blocks ? Yes.

12 Were defendants, or either of them, cognizant of defect in chock block ? No.

13. If they were not cognizant ought they, or either of them, to have been so ? Yes ; as manager and foreman the defendant, Mr. Webster, should have taken cognizance of this matter.

14. Did they exercise due care as to rollway and blocks being in a safe and proper condition ? In his capacity of manager and foreman, the defendant, Mr. Webster, appears not to have exercised due care as to rollway and blocks.

15. If the rollway and blocks were defective, was it by reason of the personal negligence of the defendants, or either of them, or did they, or either of them know it ? The defective conditions of the rollway and blocks appears to have been due to personal negligence on the part of one of the defendants, Mr. Webster, in his capacity of manager and foreman.

Judgment was reserved by the trial judge and the plaintiff afterwards moved for judgment in accordance

with the findings and the defendant moved for a nonsuit and for the findings as to the amount of damages and negligence to be set aside. Plaintiff's motion was granted and judgment entered for him with $5,000— damages as found by the jury. The full court affirmed this judgment and the defendants appealed to this court.

Cassidy for the appellants. There was no evidence of negligence for the jury; if there was it was not negligence of the defendants but that of fellow-workmen of the plaintiff.

Up to 1868 the law governing the liability of a master to his servants was that with regard to defects, &c., in machinery and materials the master was bound to use personal diligence and could not protect himself by any delegation of authority. See *Priestley* v. *Fowler* (1) and subsequent cases. In 1868 the law was altered by the decision of the House of Lords in *Wilson* v. *Merry* (2) which necessitated the passing of The Employers' Liability Act.

The use by an employer of dangerous machinery is not in itself wrongful. *Dynen* v. *Leach* (3).

The following cases in Ontario on this subject were decided before the passing of The Employers' Liability Act. *Jarvis* v. *May* (4); *Plant* v. *The Grand Trunk Railway Co.* (5); *Rudd* v. *Bell* (6); *Miller* v *Reid* (7).

In *Hamilton* v. *Groesbeck* (8) the decision was in favour of the employer even under the act.

The following cases also were referred to on the general question of liability: *Matthews* v. *Hamilton Powder Co.* (9); *Ross* v. *Cross* (10); *Canada Southern Railway Co.* v. *Jackson* (11).

(1) 3 M. & W. 1.
(2) 19 L. T. N. S. 30.
(3) 26 L. J. Ex. 221.
(4) 26 U. C. C. P. 523.
(5) 27 U. C. Q. B. 78.
(6) 13 O. R. 47.
(7) 10 O. R. 419.
(8) 19 O. R. 76.
(9) 14 Ont. App. R. 261.
(10) 17 Ont. App. R. 29.
(11) 17 Can. S. C. R. 316.

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In *Rajotte* v. *Canadian Pacific Railway Co.* (1) which was a common law action similar to the present, the authorities are all collected.

The jury found that the defendants did not know that rollers were unsafe but that they ought to have known it. That was an improper finding in the present state of the law. *Wilson* v. *Merry* (2). The employer is only bound to have competent persons to exercise his authority and if there is such a person his competency will be presumed and the onus is on plaintiff to disprove it. See *Rajotte* v. *Canadian Pacific Railway Co.* (1) and cases there collected, and the late case of *Hedley* v. *The Pinkney S.S. Co.* (3).

The court improperly held that they had no jurisdiction to grant a new trial. Even if this was so this court could grant it. Supreme Court Act sec. 61.

Ewart Q.C. for the respondent. This appeal is against the findings of the jury as well as the judgment. As to the former the defendants are precluded by the statute which requires notice to be given within eight days which was not done. R.S.B.C. ch. 31 secs. 60, 61 and 67. *Davies* v. *Felix* (4).

The master was bound to exercise due care to have his machinery in proper condition. *Smith* v. *Baker* (5).

The jury found that defendant Webster knew of the defective condition of the roadway and his negligence is binding on his partners. *Dublin and Wicklow Railway Co.* v. *Slattery* (6).

The learned counsel also referred to *Weems* v. *Mathieson* (7); *Black* v. *Ontario Wheel Co.* (8); Smith on Master and Servant (9).

(1) 5 Man. L. R. 365.
(2) 19 L. T. N. S. 30.
(3) 8 Times L. R. 61.
(4) 4 Ex. D. 32.
(5) [1891] A. C. 325.
(6) 3 App. Cas. 1155.
(7) 4 Macq. H. L. Cas. 215.
(8) 19 O. R. 582.
(9) P. 212.

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STRONG J.—I am of opinion that this appeal may be disposed of on a very short ground.

There was ample evidence for the consideration of the jury that the " rolling and chock blocks " were in a dangerous condition. There is, therefore, no ground for displacing the finding of the jury in favour of the plaintiff on this head. There being no evidence of contributory negligence the only question was, it seems to me, one of law, that which was principally insisted upon by the appellant's counsel, namely, whether or not it was incumbent on the plaintiff to prove that the appellants had notice of the dangerous nature of the " rolling and chock blocks " at which he had to work.

This question may be answered in the negative on the very high authority of Lord Watson in the late case of *Smith* v. *Baker & Sons* (1). The whole law applicable to the present case is covered by two paragraphs in this opinion of Lord Watson. His Lordship says:—

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this house by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this house, long before the passing of the Employers' Liability Act (2), that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. In *Sword* v. *Cameron* (3) the First Division of the Court of Session found a master liable in damages to a quarryman in his employment who was injured by the firing of a blast before he had time to reach a place of shelter, although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Company* v. *Reid* (4) in support of the proposition that the doctrine of collaborateur was unknown to the law of Scotland; but Lord Cranworth pointed out that the decision

(1) [1891] A. C. 348.
(2) 43 & 44 Vic. c. 42.
(3) 1 Sc. Sess. Cas. 2 Ser. 493.
(4) 3 Macq. H. L. Cas. 273.

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did not turn upon the negligence of the fellow-workman who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosion." The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Company* v. *McGuire* (1). The judgment of Lord Wensleydale in *Weems* v. *Mathieson* (2) clearly shews that the noble and learned Lord was also of the opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

And at page 355 Lord Watson pointed out that at common law notice to the employer of the unsafe state or the unsafe working of appliances or apparatus was not required, and that he was bound at his peril to make proper provision in these respects, but that the Employers' Liability Act had, in this respect, altered the law in favour of the employer by requiring that the workman should give information of the dangerous or defective state of the appliances.

The language of Lord Watson as to this point is as follows :—

It is material to notice that the Employers' Liability Act, under which the present action was brought, by sec. 2 subsec. 3, provides that a workman shall have no right to compensation for injuries caused by reason of any defect or negligence which is specified in sec. 1 in any case where he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but, as was pointed out by Lord Esher in *Thomas* v. *Quartermaine* (3) in cases where the employer and his deputies were personally ignorant

(1) 3 Macq. H. L. Cas. 310. (2) 4 Macq. H. L. Cas. 226.
(3) 18 Q. B. D. 685.

of the defect it is made a condition precedent of the workman's right to recover that he should have given them information of it before he was injured.

This is conclusive upon the point made by the appellant's counsel that the appellants had no notice or knowledge of the dangerous character of the rolling and chock blocks, and of the risk of injury incurred in working them, and this was the only material point argued before us.

There was, therefore, no ground for a new trial, and the appeal must be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—I should have preferred to send this case down for a new trial for the elucidation of some facts which do not appear to me to have been sufficiently brought out at the former trial, but as my learned brothers are unanimous in a contrary opinion I do not dissent from their judgment.

PATTERSON J. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor for appellants : *A. S. Black.*

Solicitor for respondents : *Adolphus Williams.*