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*Feb. 19

*May 6.

GEORGE BULL BURLAND (DEFENDANT)..... } APPELLANT,

AND

ANDREW M. LEE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Master and servant—Negligence—Accident, cause of—Contributory negligence—Evidence.

In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed, but it was proved that the speed had been increased to such extent at the instance of the employee himself, who was a skilled workman.

Held, reversing the judgment sf the Court of Queen's Bench, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Supreme Court, District of Montreal in favour of the plaintiff for $3,000 damages and costs.

The plaintiff brought his action for $6,000 damages for injuries sustained whilst employed by the defendants in operating an embossing and stamping press, which, he alleged, worked irregularly, and at too great speed and was not in good order, and that upon being urged to hurry his work his right hand was crushed in the press and had to be amputated. The defence was in effect that no fault was to be attributed to the

PRESENT.—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

defendants, but that the accident was due to the carelessness of the plaintiff himself in thrusting his hand too far into a dangerous machine in a manner quite unusual, unnecessary and improper.

The trial judge, Mr. Justice Archibald, found the defendant guilty of negligence, because it appeared that up to about two months previous to the accident the machine was geared to run at about 18 revolutions per minute; that the speed was increased so that it ran at the rate of about 29 revolutions per minute, and that after the accident the machine was restored to its previous speed; that the operation of the machine was irregular, probably owing to the variable resistance offered by one or more large machines which were attached to the same shaft in defendant's premises; and that the lever provided to throw the press out of gear when necessary was uncertain in its action. The learned judge concluded that the speed at the time of the accident was excessive and dangerous, more especially when combined with the irregularity of the operation of the machine, and that the defendant, through his agent, was aware of the unsatisfactory condition and running of the machine previous to the accident in question, and should be held responsible in damages. The Court of Queen's Bench on the appeal affirmed the decision of the trial judge for practically the same reasons.

G. Stuart Q.C. and *Francis McLennan* for the appellant. The plaintiff was a skilled workman and had himself asked to have the speed of the machine increased. No fault attributable to the defendant is shewn to have caused the accident, but it was rather the result of plaintiff's own imprudence. The defendants cannot be held liable for injuries unless they were actually the result of negligence clearly chargeable against them. See remarks of Lord Chief Justice

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Coleridge in *Smith* v. *Baker* (1) at page 519, and by Mr. Justice Girouard in *The Montreal Rolling Mills Co.* v. *Corcoran* (2) at pages 599 and 600.

Saint-Pierre Q.C. for the respondent cited 2 Sourdat, Responsabilité, Nos. 912, 913, 913 *ter*; 20 Laurent, Nos. 474 and 475; Arts. 1053, 1055 C. C. and *Lefebvre* v. *The Thomas McDonald Co.* (1).

The judgment of the court was delivered by

GWYNNE J.—The cause of action stated in the plaintiff's statement of claim in this case is: that the plaintiff was in the employment of the defendant in the working of an embossing and stamping press which is alleged to have worked irregularly and at too great speed, and was not in good order; that while engaged in this occupation his hand was crushed by the press; that in consequence his right hand had to be amputated, "and that the accident was caused by the fault and negligence of the defendant *who had urged the plaintiff to hurry his work*."

Now, as to this hurry, which thus appears to be made the gist of the action, all that appeared was that the plaintiff was given 5,000 cards to emboss, and was told that the defendants wished to have them done that day, and the evidence showed that the press was capable of embossing ten thousand cards in nine hours. As to the speed at which the press was being worked it appears that the plaintiff, being a good workman, had himself some months previously procured the speed to be increased to that at which it was being worked when the accident occurred. As to the alleged irregularity in the working of the press all that appeared was that there was on the premises

(1) [1891] A. C. 325. (2) 26 Can. S. C. R. 595
(1) Q. R. 6 S. C. 321.

a large machine called a plating calendar which when worked was propelled by the same belting as that which propelled the embossing press at which the plaintiff worked, and when this plating calendar was set at work the effect which it had on the embossing press was to make it go a little slower and gradually to recover in a short time its regular speed; the irregularity thus caused was in the language of a witness: "just a slight variation in the speed, but nothing noticeable, and it did not make the press dangerous." However the evidence showed that this plating calendar was not in operation at all on the day upon which the accident happened, so that all idea of the accident having been due to the alleged irregularity in the speed of the embossing press was dispelled.

Robert Massie, one of the plaintiff's witnesses, alone gave intelligent evidence as to the actual cause of the accident. He saw the plaintiff immediately after its occurrence, he cleaned the press after the accident and had an opportunity of observing how it worked on that day and he said that it worked with perfect regularity. He said that he saw how the accident happened by finding on the floor a card having stamped on it the whole of the plaintiff's hand, which showed, as indeed the hand itself did, that it had been for its whole length under the press when in operation, and the evidence showed that for the performance of the work in which the plaintiff was engaged, this was unusual, unnecessary and improper; that the hand need not be and should not be ever inserted further than the second knuckle either for the purpose of inserting or of withdrawing a card. It thus appears, we think, very clearly, that the plaintiff's misfortune occurred by the merest accident, due not to any negligence of the defendants but solely to the heedlessness, thoughtlessness and misadventure of the unfortunate

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young man himself. We are of opinion therefore that the appeal must be allowed with costs and the action dismissed out of the court below with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Hatton & McLennan.*

Solicitors for the respondent: *Saint Pierre, Pélissier & Wilson.*