THE MONTREAL ROLLING MILLS COMPANY (DEFENDANT)..... } APPELLANT;

AND

MARY ANN CORCORAN (PLAINTIFF)...RESPONDENT.

1896

*Oct. 14.

*Dec. 9.

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

Master and servant—Negligence—"Quebec Factories Act"—R. S. Q. arts. 3019-3053—Art. 1053 C. C.—Civil responsibility—Accident, cause of—Conjecture—Evidence—Onus of proof—Statutable duty, breach of—Police regulations.

The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture to be inferred from the circumstances proved.

Held, that in order to maintain the action it was necessary to prove by direct evidence, or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.

The provisions of the "Quebec Factories Act," (R. S. Q. arts. 3019 to 3053 inclusively) are intended to operate only as police regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, affirming the decision of the Superior Court for the District of Montreal, which awarded damages in the sum of $3,000 in favour of the plaintiff on account of the death of her husband, an engineer in the employ of the defendants, which occurred accidentally whilst he was employed at his work about the machinery of the engine room.

The plaintiff alleged that the engine room was dark and contained a dangerous belt and a large fly-wheel neither of which was protected as required by law; that while the deceased was working as engineer he was caught either by the one or the other and instantly killed; and that the want of covering on the belt and fly-wheel constituted gross negligence and imprudence on the part of the defendant. The pleas set out that there was a sufficient protection around the machinery and that the accident was entirely due to the negligence, imprudence and carelessness of the deceased, and by a subsequent plea that the accident was caused by fortuitous circumstances and the act of God for which the defendants were not responsible.

The evidence shewed that the engine room was lighted as well as such rooms usually are; that the engine and apparatus were in good order doing its work in a proper manner; and that a railing three and a half feet in height, consisting of two rows of iron pipe, surrounded the fly-wheel and belt-pulley. The deceased was alone in the engine room when the accident occurred and when the witnesses arrived after the alarm they discovered the body of the deceased scattered about the room as described in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

McGibbon Q.C. and *Riddell* for the appellant. The employer cannot be treated as an insurer of the employee;

his liability is limited by the civil code. *Mercier* v. *Morin* (1); *Smith* v. *Baker* (2). There is no direct or sufficient evidence as to how the accident occurred, it is a mere matter of conjecture to be inferred from certain facts proved. Beven on Negligence, p. 133, and cases there cited. The onus of proof was on the plaintiff to shew that defendant's fault actually caused the accident; C. C. arts. 1053, 1054; *Morgan* v. *Sim* (3); *Badgerow* v. *Grand Trunk Railway Co.* (4); *Wakelin* v. *London and South-Western Railway Co.* (5).

The "Factories Act" is restricted by its last article, (3053), and the civil laws as to the civil responsibility of employers remain unaffected. The Act is penal only in its operation, and the proprietor is relieved from infractions committed without his knowledge. It is *quasi* criminal and provides no additional civil responsibility. (R. S. Q. arts. 3040, 3041, 3042, 3044, 3046, 3053;) *Atkinson* v. *Newcastle Waterworks Co.* (6); *Wilson* v. *Merry* (7), per Lord Chelmsford at p. 341; *Hildige* v. *O'Farrell* (8), per Deasy L. J. at p. 497; *Cowley* v. *Newmarket Local Board* (9). Even if the statute can have any application it has been satisfied. The machinery was guarded as far as practicable (10), and no reasonable person would take other precautions; *Nichols* v. *Hall* (11); *Cooper* v. *Woolley* (12). Usual and ordinary precautions are sufficient; *Ross* v. *Hill* (13). The statute calls for nothing unreasonable or unusual. Deceased understood the risks of his employment; *volenti non fit injuria*. *Brousseau* v. *Boulanger* (14); *Montrambert* v. *Sapanel* (15); *Blot* v.

(1) Q. R. 1 Q. B. 86.
(2) [1891] A. C. 325.
(3) 11 Moo. P. C. 307.
(4) 19 Ont. R. 191.
(5) 12 App. Cas. 41.
(6) 2 Ex. Div. 441.
(7) L. R. 1 H. L. Sc. 326.
(8) L. R. Ir. 6 C. L., 493.
(9) [1892] A. C. 345.
(10) R. S. Q. art. 3024.
(11) L. R. 8 C. P. 322.
(12) L. R. 2 Ex. 88.
(13) 2 C. B. 877.
(14) Q. R. 6 S. C. 75.
(15) S. V. 74, 2, 316.

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Société des mines de Layon (1). If, as suggested, the accident was due to experiments deceased was making with the machinery, or to any imprudence, however slight, on his part, there is no recourse in damages, Dalloz vo. "Ouvrier" no. 104; *Sarault* v. *Viau* (2); *Archambault* v. *Dominion Barb Wire Co.* (3); *Currie* v. *Couture* (4). The test is whether there was such negligence that ordinary care could not have prevented the accident; *Radley* v. *London and North-Western Railway Co.* (5). The directions to deceased were that the machinery should be stopped when its parts required attention or repairs, and we must attribute the accident to his disobedience or imprudence in the engine room; *The Globe Woollen Mills* v. *Poitras* (6); *Roberts* v. *Dorion* (7). A person in his own wrong cannot recover; *Headford* v. *McClary Manufacturing Co.* (8).

Guerin for the respondent. The court below was entitled to draw necessary inferences from the facts proved and thus establish the presumptions against the defendant, (C. C. art. 1238). The "Quebec Factories Act" provides cumulative penal liabilities and saves the civil responsibility for infraction of its provisions, in addition to the penalty by art. 3053. The case of *Wakelin* v. *London and South-Western Railway Co.* (9), must be distinguished as it was governed by the special statutes relating to railways; and in a similar manner we must distinguish the other railway cases cited on behalf of the appellant. We rely upon the findings, in the courts below, that the appellants were liable for neglect in not adequately protecting their machinery.

The judgment of the court was delivered by :

(1) S. V. 78, 1, 148.
(2) 11 R. L. 217.
(3) 18 R. L. 57.
(4) 19 R. L. 443.
(5) 1 App. Cas. 754.
(6) Q. R. 4 Q. B. 116.
(7) Q. R. 4 Q. B. 117.
(8) 24 Can. S. C. R. 291.
(9) 12 App. Cas. 41.

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GIROUARD J.—On the 11th December, 1893, about 11 o'clock in the morning, Wilson, an experienced engineer in the service of the appellants for a couple of years, was in charge of the engine and machinery of the mills belonging to the appellant in the city of Montreal. Suddenly a strange noise was heard throughout part of the large building. A rush was made to the engine room where the engine and machinery were found running in perfect order, but poor Wilson was dead, his body being scattered around the room, frightfully mutilated. How did the accident happen? No one can tell. Wilson was alone as usual. Several hypotheses, theories and suppositions were made, but it is not upon conjectures that the civil responsibility of the master towards his employees or their heirs can rest. Art. 1053 of the civil code declares, not that every person is responsible for the damage which he may possibly have caused, but that every person "is responsible for the damage *caused by his fault* to another, whether by positive act, imprudence, neglect or want of skill."

Volumes have been written upon the interpretation and application of this simple principle of justice, recognized by the laws of every civilized nation, and the decisions are almost innumerable. For the purposes of this case, it is sufficient to refer to two recent *arrêts* of the Cour de Cassation of France. In the first case (1), decided in 1884, the court held:

Une action en responsabilité ne peut être utilement exercée, qu'autant qu'une relation nécessaire et directe rattache le préjudice allégué par le demandeur à la faute qu'il impute au défendeur.

See also the reporter's note.

In the last case (2), decided in 1890, the court held:

Attendu qu'il n'y a lieu à l'application générale de l'article 1382 C. Civ., qu'autant qu'une faute a été commise par un tiers et que cette faute a causé un préjudice à celui qui réclame des dommages-intérêts.

(1) *Roncin* v. *Garnier* Dal. 84, 1 367.

(2) *Léguillon* v. *Panthion* Pand. Fr. 90, 1, 495.

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The reporter adds in a note:

L'action en responsabilité n'est recevable qu'en autant qu'il existe une relation directe et nécessaire entre le préjudice allégué par le demandeur et la faute qu'il impute à son adversaire.

All cases of this kind, therefore, involve the determination of certain facts, which must be proved by direct evidence or by presumptions weighty, precise and consistent. It is this proof that is entirely wanting in this case.

The same rule of law prevails under the English jurisprudence. In *Wakelin* v. *London and South-Western Railway Co.* (1), the House of Lords held:

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual headlight, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on the line. An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff. This verdict having been set aside by the court, an appeal was taken to the House of Lords, where it was held, affirming the decision of the court, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was, therefore, no case to go to the jury, and that the railway company were not liable.

Lord Chief Justice Coleridge said, in *Smith* v. *Baker* (2):

If there were 500 acts of negligence and none of them caused the injury to the plaintiff, such acts of negligence would not give a cause of action. Here it was left wholly in doubt as to how the plaintiff was injured. It was the plaintiff's duty to make that clear.

This decision was reversed by the House of Lords, but on another point.

See also *Farmer* v. *Grand Trunk Railway Co.* (3).

The judgment of the Superior Court, and the majority of the Court of Appeals, for Chief Justice Lacoste and

(1) 12 App. Cas. 41. (2) 5 Times L. R. 519.
(3) 21 O. R. 299.

Mr. Justice Hall were dissenting, is based entirely on the fact that the fly-wheel and machinery were not securely guarded or fenced, contrary to the provisions of the "Quebec Factories Act" (1). But these provisions are mere police regulations which subject the employers and even, in certain cases, the employees, to fine and imprisonment, but they do not affect, in any manner whatever, the civil responsibility of the employer. Art. 3053 of the same statute has so declared in express words:

> The provisions of the civil laws of this province concerning the responsibility of the employer towards his employees, are in no manner considered as being modified or changed by the provisions of this section.

In England, Scotland, Ontario, and other colonies where the Factories Act and other similar statutes have been adopted, which however do not contain any such enactment as article 3053 of the Quebec Act, it is a question remaining yet unsettled whether the breach of a public statutory duty, such as the duty to fence round machinery, gives a right of action to the person damnified by the breach. See *Couch* v. *Steel* (2); *Wilson* v. *Merry* (3); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4); *Finlay* v. *Miscampbell* (5); Addison on Torts (6); Austin, The Law relating to Factories (7).

Lord Chelmsford, in *Wilson* v. *Merry* (3), said:

> The statutable duty is, no doubt, created absolutely for the purposes of the Act; but it is a duty which, if unperformed, can only be enforced by the penalty; and this for the protection of the public is be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable.

(1) R. S. Q. art. 3024.
(2) 3 E. & B. 402.
(3) L. R. 1 H. L. Sc. 340.
(4) 2 Ex. D. 441.
(5) 20 O. R. 29.
(6) 6 ed. p. 75.
(7) Ed. 1895 p. 18.

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It is not necessary to dwell any longer upon this branch of the case, as it is not even pretended that the want of guard or fence was the cause of the accident.

Subject to these explanations, and without expressing any opinion as to whether the "Quebec Factories Act" is intended to protect employees in charge, we entirely concur in the elaborate opinion of Mr. Justice Hall, and are of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *McGibbon, Davidson & Hogle.*

Solicitors for the respondent: *Madore & Guerin.*