SARAH GRANT, ADMINISTRATRIX OF THE ESTATE OF DOUGALD GRANT (PLAINTIFF) ..... } APPELLANT;

1902

*May 7, 9.

*May 27.

AND

THE ACADIA COAL COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Working of mines—Statutory mining regulations—R. S. N. S. (5 ser.) c. 8—Fault of fellow-workmen.

The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected and an explosion of gas occurred from the effects of which he died. In an action for damages by his widow,

Held, reversing the judgment appealed from, Taschereau and Sedgewick JJ. dissenting, that as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc*, affirming the judgment at the trial by which the plaintiff's action was dismissed with costs.

The facts of the case are stated in the judgments reported.

Mellish for the appellant.

Newcombe K.C. and *Drysdale K.C.* for the respondents.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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TASCHEREAU J. (dissenting.)—The appellant is the widow of one Dougald Grant and this action was brought by her, as administratrix, on her own behalf as well as on behalf of her daughter, to recover compensation for injuries which caused the death of the said Dougald Grant, under chapter 116, Revised Statutes of Nova Scotia, fifth series, which is substantially a copy of "Lord Campbell's Act."

Dougald Grant was an employee of the defendant company, being a labourer at the defendant company's mine at Thorburn, in the County of Pictou. On the 13th of November, 1899, the said Dougald Grant was set to work in a portion of the said coal mine known as "No. 4 Balance," and, whilst at work in the said balance, an explosion occurred from gas. As a result of the said explosion, he was severely injured and, ultimately died from the burns then received.

In this action, the defendant company is charged with negligence in connection with the accumulation of gas in the said balance. Paragraphs four and five of the statement of claim charge the defendant company's officers with sending the said Grant into No. 4 balance without first examining the balance and assuring themselves that it was free from gas. Paragraph six sets out a regulation of the "Mines Act," whereby it is provided that a place in a mine not in actual course of working and extension shall be fenced off, and then charges the defendant company with neglect to fence off the said No. 4 balance, alleging that the same was not in actual course of extension, and alleges that the same was not in actual course of extension, and alleges an assumption of inspection both by the deceased and defendant company's officers, and charges that the neglect to fence off the said balance was negligence which caused the injuries. Paragraph

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seven charges the defendant company with negligence in having an incompetent manager.

The defendant company denied all the allegations contained in the statement of claim, and pleaded that the negligence, if any, which caused the death of the said Grant, was that of a fellow-servant or fellow-servants in the common employ of the defendant company with the said Grant and, at the time, working with the said Grant.

The action came on for trial at Pictou before Chief Justice McDonald, with a jury, on the fifteenth of June, 1900, and, at the close of the plaintiff's case, the learned Chief Justice withdrew the case from the jury and directed judgment to be entered for the defendant company, on the ground that it appeared, to the satisfaction of the court, that the company operating the mine had appointed competent and careful men to act for them in connection with the management, and that the accident, or circumstances under which it took place, was attributable to the carelessness or inattention of fellow-workmen or servants.

From this judgment the plaintiff, appellant, appealed to the Supreme Court of Nova Scotia, but her appeal was dismissed.

The appellant has failed to convince me that there is error in the judgment of the Supreme Court of Nova Scotia she now appeals from.

The cause of the accident was clearly want of inspection of the place where the deceased was sent on the occasion in question. Such inspection was required by rule three, of the Nova Scotia Regulations of Mines, which reads as follows:

> In every mine worked for coal or any stratified deposit, in which inflammable gas has not been found within the preceding twelve months, then, once in every twenty-four hours, a competent person or persons, who shall be appointed for the purpose, shall, within five hours before time for commencing work in any part of the mine,

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inspect that part of the mine and the roadways leading thereto, and shall make a true report of the condition thereof so far as ventilation is concerned; and a workman shall not go to work in such part until the same and the roadways leading thereto are stated to be safe.

Now, it seems to me clear, that it is simply because he was carelessly sent into a balance by one of the officials of the company, without an inspection having previously taken place, that Dougald Grant was injured. And, that being so, the negligence he suffered from was the negligence of a fellow-servant upon which this appellant has no action. The contention that there was a breach of the mining regulations, in that the defendant company's officers neglected to fence off balances that were not in actual course of working and extension, and that the fact of such neglect was proof of a defective system in operating the defendant company's mine, is well answered by the fact that the breach of the regulations as to fencing the balances not in course of actual extension did not cause or contribute to the accident, and cannot be said to be the proximate cause of the accident, nor can the accident be said to be the proximate, necessary or natural result of non-fencing. The fact of not fencing was not sufficient to bring about the result, and the fencing would not have been sufficient to hinder it.

It may well be contended that it was not the official who sent the deceased into the mine, but the inspector or examiner, or perhaps the underground manager, whose negligence caused the accident But whichever of them it was due to is immaterial, as they were all fellow-servants of deceased. They were, upon the evidence, competent men, and no negligence against the company itself is proved.

A verdict for the appellant could not have been sustained. I would dismiss the appeal with costs.

SEDGEWICK J. (dissenting).—The plaintiff is the administratix of one Dougald Grant and brings this action to recover damages by reason of the death of her husband who was killed by a gas explosion in the defendant's mine at Thorburn, Pictou County, N.S. Upon the trial before the Chief Justice of Nova Scotia, the case was withdrawn from the jury upon the ground that the plaintiff had failed to establish a case of negligence against the company, as distinguished from negligence by its servants, and gave judgment accordingly.

Upon appeal, this judgment was affirmed by Weatherbe, Ritchie, Townshend and Meagher JJ., Graham J. dissenting.

Coal mines in Nova Scotia are governed and worked under "The Mines Regulations Chapter" (Revised Statutes, 5th ser., cap. 8) and by section 25, sub-sec. 4, the following provision or rule is made:

> All entrances to any place in a mine * * * not in actual course of working and extension, shall be properly fenced across the whole width of such entrance so as to prevent persons inadvertently entering the same.

And by sub-sec. 31, it is provided that

> in the event of any contravention or non-compliance with any of the said general rules in the case of any mine by any person whomsoever being proved, the owner, agent and manager shall each be guilty of an offence against this chapter, unless he prove that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

The explosion which occasioned the accident occurred in a place in the mine called a "balance," which balance was not in actual course of working or extension at the time and had not been worked for six months before, during which time it had not been fenced. As the place was not in actual course of working, the examiner, one of the company's em-

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ployees and an official with specified statutory duties, did not inspect it on the morning of the accident, as it was his duty to do and as he did in the case of the "working places" in the mine, to see that it was free from gas. Consequently, the deceased was sent to work in the place without any inspection having been made, the overman who gave the order assuming that the place had been inspected for the reason that it was unfenced. There was gas in the balance. Upon his entering, his lighted lamp ignited the gas and the fatal explosion occurred.

The mine, as I have said, was worked under the provisions of the Mines Act. So far as the directorate of the company was concerned, everything was done that they could do. They employed competent officers duly certified by the statutory authority as to their fitness and knowledge. These officers had been supplied with the regulations and were aware of their contents and purported to work the mine under them.

So far as I can see, the only negligence proved was that of the underground officials in not fencing the balance and its consequent non-inspection. This was undoubtedly negligence, but the negligence of a fellow-servant of the deceased not that of the company. Except upon the ground about to be alluded to, there was no actual personal negligence of the master, and that must be established in order to place a liability upon him.

The judgment, in my view, must be affirmed for two reasons.

There is no evidence that the accident was occasioned by reason of the negligent act of non-fencing. The evidence shewed that, even if the place in question had been fenced, the deceased would have entered, obeying the order of the overman, and the accident would still have happened. Whether or not the gate

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was opened or closed, it is manifest that that had nothing to do with what occurred; the immediate direct cause of the accident—its only cause—was his burning lamp and the presence of gas.

Nor was there any defect of system here. The law is that a negligent system may make the employer liable, as stated by Lord Halsbury in *Smith* v. *Baker & Sons* (1), at page 339, but the alleged default on the part of the company's underground servants in the matter of fencing, even if that had been the cause of the accident, was not a defect in system, but the negligent carrying on, in a matter of detail, of a proper system. It is not necessary here to discuss what knowledge or conduct on the part of the company itself, in a matter of this kind, would make it liable. It is enough to say that no such knowledge or conduct has been proved or can be imputed here.

I have cited the clause making a breach of any of the statutory regulations an offence merely for the purpose of suggesting that an act or omission, lawful at common law, is not necessarily evidence of negligence in a civil action, even although prohibited by statute and made subject to penal consequences.

See *The Montreal Rolling Mills Co.* v. *Corcoran* (2), in this court, so far as the Province of Quebec is concerned, and the judgment of Lord Chelmsford in the House of Lords (3), as to the general law.

The appeal should be dismissed with costs.

GIROUARD J.—I entirely concur in the judgment of my brother Davies.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia (Mr. Justice Graham, dissenting), confirming the ruling of the learned Chief

(1) [1891] A. C. 325.
(2) 26 Can. S. C. R. 595.
(3) *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326 at p. 335.

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Justice, who tried the cause, withdrawing it from the jury at the conclusion of the plaintiff's evidence on the ground that it was proved to his satisfaction that the defendants had employed competent men to act for them in the management and that the accident was attributable to the negligence of the deceased's fellow-servants.

The facts of the case may be stated very shortly. The deceased workman was employed as an ordinary labourer in defendants' mine and, on the morning of the accident, the 13th day of November, 1899, was ordered by the defendants' "overman" to go to work in No. 4, balance. He did so and was almost immediately after killed by an explosion of gas which had accumulated there.

The officials of the mine, so far as its general working was concerned, consisted of the general manager, the underground manager, the overman and the inspector. The mine was subject to the Nova Scotia statute for the Regulation of Mines, ch. 8, Rev. Stats. N.S. (5th Ser.), and the general system prescribed by the statute for the working of the mines was contained in the "general rules" enacted by section 25 and which were directed "to be observed so far as is reasonably practicable in every mine."

The first rule provided generally for ventilation as follows:

(1) An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that *the working places* of the shafts, levels, stables, winzes, sumps and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

This, I take it, was nothing more than a statutory declaration of the common law duty of the mine-owner. He is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety.

The second and third rules prescribe generally the times and manner in which the mines should be inspected and the fourth rule relates to the precautions with regard to places not in actual course of working. It reads:

(4) All entrances to any place in a mine worked for coal or any stratified deposit not in actual course of working and extension shall be properly fenced across the whole width of such entrance, so as to prevent persons inadvertently entering the same.

The place where Grant was killed was admittedly one of those required by the rule to be fenced and was not fenced. Neither had it been inspected to ascertain whether it contained noxious gases and I cannot doubt that it came within rule one and should have had an adequate amount of ventilation produced in it so as to render harmless noxious gases and to be in a fit state for working in. As the result shewed, no such adequate ventilation was provided for.

The system adopted by the defendant company can only be gathered from the evidence of their two officers, who were examined on the part of the plaintiff, but this evidence, in the absence of any explanation or denial, we are bound to accept. The inspector, McKay, says he worked under the Act and the instructions he had received from the general manager on his appointment, twelve years previously. These instructions had not been altered by the present or the intervening managers. McKay says:

He (Turnbull) gave me *the regulations to go by as far as the working places were concerned and, when I had time, I was to go to places that were idle, when I got a chance, and have an eye on the places that were idle and see that no roof fell on the stock or on the roadway.*

He further goes on to state that, for some months, he had not inspected the place or cutting where the accident occurred for gas because he did not

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regard it as a working place within his instructions and the Mines Regulations Act. In his examination he states explicitly that he does not report to the shaftmen or the labourers, "that he has nothing to do with them," but simply reports to and inspects for the pickmen and coal-cutters, and gives as his reasons for not inspecting No. 4 balance,

> I did not consider it to be a working place and, besides, I had instructions from the first manager that I worked under.

Whatever might have been the duties of the inspector, if he had simply been appointed to carry out the regulations, it seems clear that, under his instructions, his duties, so far as inspecting for gas was concerned, were limited to the inspection of such places as were in actual working. This place where Grant was killed was not, therefore, either fenced off, as provided for by the regulations, or inspected, as, it seems to me, they also provide for. The system under which, for twelve years, the mine had been carried on did not provide for these reasonable precautions for safety. Mr. Justice Weatherbe intimated in his judgment, (p. 34), that the evidence showed there were "other inspectors besides McKay for *unused* places," and that they may all have had their instructions as McKay had and that he was not in a position to say there was a defect in the inspection system from the evidence of the directions of the general manager Turnbull to only one of his servants. And, if the facts were as the learned judge assumed and stated, I should be inclined to agree with him. But I have searched in vain for any evidence whatever of other inspectors than McKay and I certainly gathered from the argument at bar that there were none.

The overman, McDonald, who was the only other official examined, says that he ordered Grant to go to

work in this balance or cutting, after asking the manager whether the place would be all right, who replied "that there would be nothing in there." He further says that he, himself, thought the place had been treated as a working place and examined by McKay right along, and he explained why he thought so.

> Because it contained stock and was not fenced, and I understood from the manager that it was safe ;

and he further says, that

> if the place had been fenced, he would have had it examined to see that it was safe

before commencing work. This witness went on to say that, immediately after the death of Grant, this No. 4 balance had been fenced, but that another explosion of gas subsequently took place in it and that, in his opinion, the cause was

> that the brattice across the main level had been knocked down and that caused the collection of gas in No. 4.

And he explains that he came to that conclusion because when the brattice was replaced it at once cleared the "balance." As the balance had not been examined or inspected for days before the accident, it was, of course, impossible to say whether or not the same cause, the brattice being down, had produced the result. But it is a reasonable inference which might fairly be drawn by the jury from the evidence.

As to the law on this subject, I agree with the judgment of Mr. Justice Graham who dissented from the majority. I cannot doubt that, while the master is not liable for the negligence of his officers, he is

> bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety,

and this is a duty that no officer's negligence can relieve him of.

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The observations of the learned law lords who decided the case of *Smith* v. *Baker & Sons* (1) are directly in point. The Lord Chancellor, on page 339, says:

> I think the cases cited at your Lordship's bar of *Sword* v. *Cameron* (2), and *Bartonshill Coal Co.* v. *McGuire* (3), established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery, may make the employer liable, quite apart from any of the provisions of the "Employers' Liability Act." In *Sword* v. *Cameron* (2), it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk, but, nevertheless, he was held entitled to recover, notwithstanding that knowledge.

And Lord Watson, at page 353, 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 (4), 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* (2), the first Division of the Court of Sessions 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 safety 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 Co.* v. *Reid* (5), 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 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 explosions."

The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Co.* v. *McGuire* (3). The judgment of Lord Wensleydale in *Weems* v. *Mathieson*, (6) clearly shows that the noble and learned Lord

(1) L. R. [1891] A. C. 325.
(2) 1 Ct. Sess. Cas. (2 ser.) 493.
(3) 3 Macq. 300.
(4) 43 & 44 Vict. ch. 42 (Imp.)
(5) 3 Macq. 266.
(6) 4 Macq. 215.

was also of opinion that the 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 Lord Herschell, page 362, says:

It is quite clear that the contract between employer and employed involves, on the part of the former, the duty of taking reasonable care to *provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.* Whatever the dangers of the employment which the employed takes, amongst them is certainly not to be numbered the risk of the employer's negligence and the creation or enhancement of danger thereby engendered. If then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his services it is true to say that he is willing his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim "*volenti non fit injuria*" becomes applicable.

Now, the learned Chief Justice McDonald, in withdrawing this case from the jury, did so on two grounds which I cannot assent to without qualification; first, that, where a company appoints competent men to act for it and the accident is attributable to the negligence of fellow-workmen, the injured party cannot recover. Such a general proposition is only true when and after it is shewn that the company has provided a proper place for the men to work and carry on its operations so as not to subject the workmen to unnecessary risk. A negligent system or a negligent mode of using perfectly sound machinery might, as the Lord Chancellor says, make the employer liable and I altogether challenge the application of the maxim "*volenti non fit injuria*" to the facts of this case.

One of the learned judges in the court below asks;—What is the question which should have been submitted to the jury? It does not seem difficult to frame such a question. The jury might be asked;—

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Whether or not the system under which the company carried on its operations subjected the deceased workman to unnecessary risks, and, if so, in what respect did it do so? Whether or not the system provided for proper inspections and examinations or fencing off of the balance No. 4, where Grant was put to work, and, whether, as a fact, it had been examined and inspected before the accident? In this case, as I read the evidence, I think there was quite sufficient to justify the jury in finding the injury to Grant to have been the result of a defective system which did not adequately provide for the workman's protection inasmuch as, in direct violation of the statute, it seems to have left this balance or cutting entirely unprovided with a protective fence and failed to have any examination of the balance or cutting made, before allowing men to work there, so as to see whether the current was flowing through, and, lastly, had for many years confined the inspection for dangerous gas to those "working places in actual operation" and to the entire neglect of other places in which men were occasionally put to work, but which were not in actual working operation, as in the "balance" where this accident happened. The company may, of course, be able to explain away completely the evidence already given. I, of course, decide upon the reasonable and fair inference which a jury might draw from the uncontradicted and unexplained evidence given for the plaintiff.

I think the appeal should be allowed with costs and a new trial given.

MILLS J.—I think in this case that the appeal should be allowed with costs and a new trial should be given. It is not enough that the company should have given proper directions to its servants, but it is responsible

for their performance It is its duty to see that those directions are carried out. *Philadelphia and Reading Railroad Co.* v. *Derby* (1).

The master who puts a servant in a place of great responsibility and commits to him the management of his business, or intrusts him with the discharge of important duties in which the lives of other servants are involved, cannot escape from the discharge of those duties which the law imposes upon himself by simply entrusting their performance to another. The law imposes, in this case, certain duties upon the company for the better security of its servants. It requires the performance at its hands and it makes the company responsible if there is neglect. It is in the public interest that this should be so.

In the case of *Warburton* v. *The Great Western Railway Company* (2) where the plaintiff, while engaged in his usual employment, was injured by the negligence of the defendants' engine driver, in shunting a train without signal, the judgment of the court was delivered by Kelly C.B., who says:—

> We are of opinion that inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendant, not in the course of a common employment or of operation under the same master, but by negligence in the discharge of his ordinary duty to the defendant alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption and that therefore, the action is maintainable.

To exempt a company from all responsibility in a case of this kind would tend to defeat the legislation had, to give greater security to life, in carrying on mining operations. It is its duty to see that the provisions of the law are faithfully complied with. It is not a duty in a common employment, but an antecedent duty, the performance of which the law requires

(1) 14 How. (U.S.) 468. (2) L. R. 2 Ex. 30.

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at the hands of the company, which, in this case, was not discharged.

Appeal allowed with costs.

Solicitor for the appellant: *H. Mellish.*

Solicitor for the respondents: *W. H. Fulton.*