1904

*Nov. 14.

*Dec. 14.

THE CANADA WOOLLEN MILLS, LIMITED, (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS H. TRAPLIN (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Master and servant—Dangerous works—Knowledge of master—Employers' liability.

T., an employee in a mill, entered the elevator on the second floor to go down to the ground floor, and while in it the elevator fell to the bottom of the shaft and T. was injured. On the trial of an action for damages it was proved that the elevator was over twenty years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key again to fall out occasioning the accident. On appeal from the judgment of the Court of Appeal maintaining a verdict for the plaintiff:

Held, Nesbitt J. dissenting, that the company was negligent in not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of its employees and was, therefore, liable at common law.

Held, per Nesbitt J. that as the company had employed a competent person to attend to the working of the elevator it was not liable at common law for his negligence although it was liable under the Employers' Liability Act.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiff.

The facts of the case which are sufficiently summarized in the above head-note are fully set out in the judgments published in this report.

---

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

Shepley K.C. for the appellants. The defendants had procured the best style of elevator known when it was made and had always kept it in repair. That was their sole duty at common law. See *Hastings* v. *LeRoi No.* 2, *Limited* (1).

The evidence did not show that the falling of the key was due to any want of care and attention on defendants' part.

Riddell K.C. and *Guthrie K.C.* for the respondent. As to the duty of defendants in regard to the elevator, see Am. & Eng. Ency (2 ed.) vol. 10 pp. 945, 953, 957.

The duty of defendants was to keep the elevator in a safe condition so as to protect the employees using it. *Smith* v. *Baker* (2); *Moore* v. *The J. D. Moore Co.* (3); *Grant* v. *Acadia Coal Co.* (4); *Williams* v. *Birmingham Battery and Metal Co.* (5).

THE CHIEF JUSTICE.—This is a frivolous appeal, and the learned judges of the court *a quo* rightly treated the appellant's contentions as they deserved by unanimously dismissing them without giving written opinions therefor. The case for the jury was one of inference of fact from the fact clearly proved of the dilapidated condition of this elevator. And their finding that the falling of the key was caused by the vibration and general dilapidation of the running gear is far from being unreasonable. That being so, for us to disturb their verdict would be to usurp their functions.

I refer to *McArthur* v. *The Dominion Cartridge Co.* (6), in the Privy Council, and to what Baron Pollock said in *Bridges* v *The North London Railway Co.* (7), and Lord Penzance in *Parfitt* v. *Lawless* (8), in the passages I cited, 31 Can. S. C. R. 404.

(1) 34 Can. S. C. R. 177.
(2) [1891] A. C. 325.
(3) 4 Ont. L. R. 167.
(4) 32 Can. S. C. R. 427.
(5) [1899] 2 Q. B. 338.
(6) 21 Times L. R. 47.
(7) L. R. 7 H. L. 213.
(8) L. R. 2 P. & D. 462.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J.

The appeal is dismissed with costs.

SEDGEWICK J. concurred in the dismissal of the appeal.

DAVIES J.—This was an action brought by the plaintiff, one of the workmen employed in one of the defendants' (appellants') mills, for injuries received by him while being carried on an elevator of the mill from one story to another in the discharge of his duty.

It is necessary, in order to understand the questions put to the jury and the answers to those questions, as well as the contentions of counsel on the argument, that a short outline should be given of the facts.

The elevator was one used by the workmen in carrying the material or products on which they were engaged from one part of the mill to another, and in enabling men like the plaintiff to get speedily from one to another department.

The elevator had been placed in the mill some twenty years before and had been in use all that time.

The chief witness called as to its condition at the time of the accident was one Baker, a machinist in the defendants' employ. He was not the foreman of machinists, simply an ordinary machinist working with others under the foreman machinist. From Baker's testimony it is quite evident that the elevator machinery either from age and use or other causes had lived its life. He says he was called upon to make repairs to it ten or twelve times during the year immediately preceding the accident, and that the impression made upon his mind by the examinations he necessarily made was that "this thing (meaning the elevator and its gear) was in a bad shape of repair and should be renewed at once;" that "they ought to have a new elevator there as soon as possible because I thought

this was very unsafe for anybody to travel on." Baker made during the twelve months two separate reports to the managers, Morrison and Berry, who succeeded each other during that period, repeating his opinion as above and specially mentioning the pinion gear and the driving gear. The day the accident occurred the elevator fell three times. It was on the third fall the plaintiff was injured. The witness Baker testifies that he was sent to fix the cable or see about it, and that he found the first fall of the elevator due to the cable attached to it having come off the drum and wound around the shaft. This had happened several times previously. The next fall of the elevator which took place a few hours afterwards was found by him to be caused by the dropping out of the key or pin which fastened and held the wheel and the shaft together. The falling out of the pin left the wheel free, and the elevator, as a consequence, simply fell to the bottom of the elevator shaft. Baker replaced the pin driving it home to its place. There was a good deal of dispute as to whether or not in doing this he had been guilty of negligence for which the defendants could be held liable under the Workmens' Compensation Act but there is no finding of the jury upon the point. A couple of hours after this last repair the pin again came out and unfortunately at the time the plaintiff was in the elevator. The elevator was precipitated to the bottom of the shaft, its gear greatly damaged, and the plaintiff seriously injured.

It was common ground on the argument at bar and at the trial also that the primary cause of the accident was the dropping out of the pin or key and the question was: To what cause was this attributable? I think the findings of the jury on this crucial point fully justified by the evidence. In their opinion it resulted from the "vibration and general dilapidation

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J

of the running gear." They also found the defendants guilty of negligence which brought about the accident in not having a competent man appointed to look after the operating of the elevator daily and in not having a set screw placed in front of the pin which fell out.

There was no evidence given showing that it was the duty of any person specially to inspect these elevators and to see from time to time that they were reasonably fit for their work. Murdock, the head machinist, testified that when he went to the mill many years previously he changed somewhat the construction of the elevator, putting a chain in instead of a wire cable, and cutting out the grooves in the sheaves which he found too shallow, but that was all he did. Baker, one of the machinists, used to go and repair the elevator machinery when it was reported to him to be out of order, but he does not appear to have reported to his foreman machinist as to the condition of the elevator and its running gear, though on two occasions he did so to the manager of the mill. No evidence of any kind was given as to the system on which the mill was operated. It appeared incidentally that there was a manager, and also that there was a general manager of the company for all their mills, but as to their powers or duties and as to the resources placed at their disposal, if any, to supply or provide new machinery when required, we are left entirely in the dark. From all that appears in evidence all of these powers and duties may have been purposely retained in their own hands by the directors.

No question was raised on the argument as to the amount of the damages in case the defendants were held to be liable. Mr. Shepley, on the question of common law liability, contended that in the first place there was no evidence of negligence in respect of the

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J.

matter which caused the accident, and that the case was governed by the decision of this court in *Hastings* v. *LeRoi No. 2, Limited* (1), and that the defendants were entitled to the benefit of the doctrine of common employment.

On all these questions I have reached the conclusion that the contentions cannot be maintained.

In the case of *Hastings* v. *LeRoi No. 2, Limited* (1) the main question argued and on which the decision was based was whether Burns, the foreman, through whose negligence in failing to supply a proper hook for the hoisting gear after the defect in the one being used was discovered and reported to him, was a workman of the defendants in common employment with the injured man. The decision turned largely upon the proper construction of the agreement between the defendant company and a firm of contractors for the sinking of a winze in their mine. This court held, affirming the judgment of the Court of British Columbia, that the negligent workman and the injured workman were in the common employ of the defendants, and that under the circumstances of that case the doctrine of common employment could properly be invoked by the company to relieve them of liability. In that case there was a specific act of negligence on the part of a fellow workman which caused an injury to another in the common employment of the defendant company and, on that ground, as I understand it, the case was decided. But in the case at bar, under the findings of the jury and the evidence given, there is not, in my opinion, any room for the invocation by the defendants of the doctrine of common employment as an excuse from a liability which would otherwise attach. The negligence found as responsible for the injury is not that of a fellow labourer of the deceased in the com-

(1) 34 Can S. C. R. 177.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J.

mon employment of the defendants but is the negligence of the defendant company itself. It had failed to discharge that plain duty of an employer so clearly and persistently declared by the House of Lords for many years back of "seeing that his works are suitable for the operations he carried on at them being carried on with reasonable safety."

The distinction between the employer's liability to his servant for injuries occasioned by the carelessness of a fellow workman and that arising out of a breach of the employer's duty to his workman to provide and maintain suitable and proper machinery and appliances for carrying on his operations with reasonable safety is well pointed out by Lord Cranworth in his celebrated judgment in *Bartonshill Coal Co.* v. *Reid* (1). In reviewing the cases on the subject the noble Lord there said at page 288:

> This case [*Brydon* v. *Stewart* (2)] it will be observed, like that which preceded it, turned, not on the question whether the employers were responsible for injuries occasioned by the carelessness of a fellow workman but on a principle established by many preceding cases, namely, that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against any unnecessary risks.

The latter principle is reaffirmed by both Lord Herschell and Lord Watson in *Smith* v. *Baker* (3). The latter learned Lord 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.

(1) 3 Macq. H. L. 266. (2) Macq. H. L. 30.
(3) [1891] A. C. 325.

He then goes on to quote authorities for the proposition that long before the passing of the Employers' Liability Act a

master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.

After pointing out that many of the enactments of the Employers' Liability Act were simply declarations of "the acknowledged principles of the common law" he goes on, at page 356, to say:

At common law his (the employer's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect.

I assume the noble Lord meant by the term "ignorance," as used by him, ignorance of something which he ought to have known. And at page 362 Lord Herschell 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 undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered.

There is then a broad distinction between the liability of the master for his personal negligence or for the condition of his premises or machinery, and that arising out of the negligence in the management or operation of that machinery by the servants to whom he has entrusted it. I venture to think that failure to appreciate this distinction has given rise to many of the difficulties which surround this branch of the law, and that a clear appreciation of it will serve to reconcile many apparently conflicting cases. With respect to the liability of an employer for injuries caused to one of his employee's by the negligence of a

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J

fellow servant, the statement of it laid down by Lord Cairns in *Wilson* v. *Merry* (1), seems alike concise, complete and generally accepted. His Lordship said, at page 332:

> What the master is, in my opinion, bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do.

These oft quoted words when applied to the branch of the law of master and servant, to which the learned Lord was addressing himself, and which he had before him in the case he was deciding, seem to cover the whole ground. It is equally clear to me that they were not intended to cover cases arising out of the master's liability for injuries caused by defects either in the system or in the condition of his premises or machinery which he either knew or ought to have known about, and of which the injured servant was ignorant. *Johnson* v. *Lindsay & Co.* (2), at page 379, where Lord Herschell says:

> I think it clearly means that he (Lord Cairns), did not intend to state the law differently from Lord Cranworth whose opinions in *The Bartonshill Coal Co.* v. *Reid* (3) he quotes with approval,

and Lord Watson at pp. 385-7.

As Mr. Beven states the liability at page 738 of his work on Negligence (2 ed.):

> The master is not liable for the negligence of his superintendent; nevertheless, he is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety. If the master leaves the supervision of his works to his superintendent, the master cannot by doing so escape liability, for the duty is one of which he cannot divest himself. If the superintendent is negligent the master is not answerable, yet, if the appliances with which the men have to work are not reasonably suitable, the neglect is the master's.

(1) L. R. 1 H. L. Sc. 326. (2) [1891] A. C. 371.
(3) 3 Macq. H. L. 266.

The employer cannot escape from liability to a third person for injuries caused by defective premises or machinery on the ground that he had not personally interfered in the construction or management of his works; nor can he do so in the case of his employee, unless these risks are held to be risks incident to the servant's employment which, by the decided cases, they are certainly not; as Lord Herschell tersely puts it, such an assumption would be equivalent to relieving by implication an employer of his negligence. The effect of the workman's knowledge of the defects when he enters upon or continues in his master's employ is an entirely different question, and depends upon the facts of each case as proved and the proper inference to be drawn from them. It is clear that while, on the one hand, the employer is liable to his servants for his own personal negligence in the actual performance of work or for failure to provide appliances for the proper carrying on of the work, or for default in the appointment of competent servants, he is not, on the other hand, liable either for the negligence of the servant injured or that of his fellow servant. While bound to use reasonable precaution and care in providing his employees with reasonably suitable premises and machinery on which and with which to work, he does not insure the absolute safety of the machinery provided by him. If he fails in this duty of precaution and care he is responsible for injuries which may happen to his employees through defects which were or ought to have been known to him and were unknown to the employees. When the necessity of executing repairs springs from the daily or ordinary use of appliances the master is of course bound to provide the means of executing the necessary repairs, and when he has done so it remains for the servants to secure themselves in those matters which can easily

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J.

be remedied and do not involve the permanent operations of skilled mechanics; and if the employer seeks to escape from liability on the ground that the servant entered upon or continued in the employment with knowledge of the facts the onus lies upon him of proving that the servant took upon himself the risk without the precautions which might or would have avoided it. *Williams* v. *Birmingham Battery and Metal Co.* (1).

I fail to find anything in the evidence relieving the defendants from their common law liability arising out of the injuries caused by the defective elevator. The defect was not one arising out of its daily or ordinary use and which could be met by ordinary repair. It was, on the contrary, one arising from the elevator's general worn out condition, and from the fact that it "had lived its life." While it was perhaps impossible to put one's finger on any specific defect in the gear it was not only possible but reasonable and proper to conclude that it was worn out and dangerous and unfit for further use. The knowledge of these facts is a knowledge which must be imputed to the employer. To refuse so to impute it would be in effect to declare that he could by the simple expedient of employing a foreman relieve himself from his common law liabilities. The worn out condition of the running gear of the elevator having been shewn (of which the workman did not have and could not under the circumstances be assumed to have knowledge) coupled with the injuries to the workman caused by it completed the case for the plaintiff, and no evidence was given of any kind which, in my opinion, justified or excused the defendant company from the results of what I hold to have been its proved negligence.

(1) [1899] 2 Q. B. 338.

In cases coming within the doctrine of common employment the onus is upon the injured workman of proving negligence on the part of his employer, and in such cases it may well be that the plaintiff must prove either that the workmen by or through whose negligence the injury was caused were incompetent or that adequate materials or resources were not furnished because they are all parts of one whole proposition going to make up the negligence. But I cannot see that such a rule applies to cases lying outside of that doctrine. In such cases the defendant's negligence is proved when evidence is given shewing damages arising from a failure to provide or maintain that which the law says it is his duty to provide alike in premises, machinery or appliances. Failure to do either one or the other constitutes the negligence and when followed by consequent damages creates the liability. If the employer claims that for some reason he ought to be excused the onus rests upon him to shew it. The case of *Allen* v. *New Gas Company* (1) cited in support of a contrary doctrine is not, I venture to say, authority for that doctrine. That case was argued and decided, as appears from the report, exclusively upon the ground of the duty of employers to employ a competent person to take charge of their premises and without reference to their duty to see to the condition of the machinery. The basis of that decision is to be found in the following extract from the judgment of the court at page 254:

> We think that the mischief in this case arose from the conduct of the plaintiff's fellow workmen as such and not from the defendants' default nor from the default of any manager or vice-proprietor, and that therefore the defendants are not liable.

Any further observations made in the case must be read with reference to this ground work of the deci-

(1) 1 Ex. D. 251.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Davies J.

sion. The case should be read along with the cases I have already cited and also of those of *Vaughan* v. *Cork & Youghal Ry. Co.* (1); *Webb* v. *Rennie* (2); the judgments of Ch. J. Cockburn and Byles J., in *Clarke* v. *Holmes* (3); and *Murphy* v. *Phillips* (4); with which might be compared *Spicer* v. *South Boston Iron Company* (5). I adopt the language of Mr. Beven, at page 763 of his book, where he says:

> The master is liable in all cases where there has been neglect in providing proper machinery and competent servants. He is not liable when the injury results from the management of proper machinery by servants not incompetent.

This rule is strictly in accord with the jurisprudence of this court as laid down in *Grant* v. *Acadia Coal Co.* (6), and *McKelvey* v. *LeRoi Mining Co.* (7); the latter decision being entitled to greater weight from the fact that an application for leave to appeal to the Privy Council was refused.

In my opinion the appeal should be dismissed with costs.

NESBITT J.—In this case the plaintiff, an employee of the defendants, sued for injury caused to him by the fall of an elevator used in the premises of the employers and which, on the evidence, we must assume the plaintiff was properly using.

The plaintiff claims both at common law and under the Workmen's Compensation Act, and the jury have assessed the damages under each branch of the claim.

It is to be regretted that the Court of Appeal has not seen fit to give reasons for the affirmance of the judgment of the trial judge, holding the defendants liable at common law.

(1) 12 Ir. C. L. R. 297.
(2) 4 F. & F. 608.
(3) 7 H. & N. 937.
(4) 35 L. T. 477.
(5) 138 Mass. 426.
(6) 32 Can. S. C. R. 427.
(7) 32 Can. S. C. R. 664.

This and other cases of late have been argued at length on the supposition that the case of *Smith* v. *Baker* (1), which I shall hereafter refer to, has introduced a modification of the common law rule which had theretofore been assumed to be well settled, and I think it is advisable to re-state that rule and see how far it *has* been modified and explained, and then to apply the rules to the facts proved in this case complied with the findings of the jury.

For his own personal negligence a master was always liable and still is liable at common law. See per Bowen L. J. in *Thomas* v. *Quartermaine* (2). And before the Workmen's Compensation Act he was not otherwise liable by reason of the doctrine of common employment, first enunciated by a decision of the Court of Exchequer in the year 1837, in the much discussed case of *Priestley* v. *Fowler* (3), and finally established in the year 1858, in the case of *Bartonshill Coal Co.* v. *Reid* (4), in which it is to be noted that all the Scotch cases referred to in *Smith* v. *Baker* (1) were discussed, and in which, after two years consideration, Lord Cranworth finally settled the doctrine of common employment, the effect of which was, as stated by Mr. Ruegg in the sixth edition of his Employers' Liability Act, at page 27:

> Before the Act was passed a workman could only recover, if injured in his employment, when he could prove that the employer had *personally* been guilty of the negligence which led to his injury, and which in the case of large employers was almost, *and in the case of corporations quite, impossible.* Now a workman is *primâ facie* entitled to recover where the employer—be he private employer or corporation—has delegated his duties or powers of superintendence to other persons, and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them, but the doctrine of common employment, save in so far as it is thus abrogated, remains.

(1) [1891] A. C. 325.
(2) 18 Q. B. D. 685.
(3) 3 M. & W. 1.
(4) 3 Macq. H. L. 266.

1904

CANADA WOOLLEN MILLS v. TRAFLIN.

Nesbitt J.

I adopt this statement of the law and propose to cite some of the legal authorities which, to my mind, clearly establishes it.

In 1868 the case of *Wilson* v. *Merry* (1), came before the House of Lords composed of Lord Cairns L. C., Lord Cranworth (who had delivered the judgment in *Bartonshill Coal Co.* v. *Reid* (2), and *Bartonshill Coal Co* v. *McGuire* (3), Lord Chelmsford and Lord Colonsay. Lord Cairns points out that, in the *Bartonshill Coal Co.* v. *Reid*, (2) Lord Cranworth explained with great clearness the difference between the liability of a master to one of the general public and his liability to a servant of his own for an injury occasioned, not by the personal neglect of the master himself, but by the negligence of some person employed for him, and then summarises the law relating to the duty of the master towards his servant as follows:

> What the master is, in my opinion, bound to his servant to do, in the event of his not *personally* superintending and directing the work, is to select competent and proper persons to do so, and to furnish them with adequate material and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence that is not the negligence of the master.

In *Howells* v. *Landore Siemens Steel Company* (4), Lord Blackburn points out that a company or corporation must be treated in the same way as an individual on this point, and it is to be noted in this last case that the *manager* was one appointed pursuant to an Act of Parliament, and yet the company were held not liable for his negligence. And in the same case Lord Blackburn further observes:

> When a master *personally* interferes he is liable for his personal negligence just as the individual servant would be.

And the discussion by counsel makes it perfectly plain

(1) L. R. 1 H. L. Sc. 326.
(2) 3 Macq. H. L. 266.
(3) 3 Macq. H. L. 300.
(4) L. R. 10 Q. B. 62.

that the court, composed of Chief Justice Cockburn and Blackburn, Quain and Archibald JJ., assumed that after the decision in *Wilson* v. *Merry* (1) the subject was no longer open to discussion, and apparently, as a corporation can only act through managers, it can only be held liable in the very nature of things for failure to select proper and competent persons to superintend and direct the workings and failure to furnish them with adequate material and resources for the work.

In 1876 two other cases came before the courts, the first being *Allen* v. *The New Gas Company* (2), and the judgment of the court composed of Bramwell, Amphlett and Huddleston BB., was read by Huddleston B., and he points out at page 254 what is necessary to be proved in order to make out a master liable to common law; he says:

> To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The onus is upon him, and failing to do so he fails to establish negligence.

In the same year *Murphy* v. *Philips* (3), was decided in the Exchequer Division in a court composed of Kelly C. B., and Cleasby and Pollock BB. It was an action by a servant against his master for negligence in failing to *examine machinery* and therefore most apposite to the case at bar. It appeared that the chain had become so much worn by long and constant service that it was at the time in question in need of being repaired, and was in fact in such a condition that if unrepaired it was dangerous and unfit to be used and serious injury was not unlikely to be the result of its being used in its then condition. It was,

(1) L. R. 1 H. L. Sc. 326. (2) 1 Ex. D. 251.
(3) 32 L. T. 477.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Nesbitt J.

therefore, a question of whether it *was* or *was not* the duty of the defendant as the master and employer of the plaintiff to see and examine from time to time the state and condition of the chains and other machinery employed on his premises in his business, and it was clearly held that it was his duty. And Cleasby B. says:

> Now here I think that the defendant was under an obligation to ascertain that this chain was fit for use in the work in which it was about to be employed, and that it was not in a dangerous condition. This might have been accomplished by the defendant in *two* ways; *he might have appointed a fit and competent person expressly to superintend and see to the examining and testing of the chain, and had he done so he would, of course, have been himself exempt from all liability, or, he might have examined the state of the chain himself.*

And Pollock B. says:

> It is hardly possible to lay down any one general rule with reference to the duty of a master to examine into the state and condition of the machinery that is used in his business, and the question is obviously one of degree; but it is to be noted in the present case that the defendant *was aware of the age of this chain.*

Prior to this, in 1865, in a case of *Webb* v. *Rennie* (1), Cockburn C. J. directed the jury in reference to the duty cast upon the master respecting the maintenance of machinery as follows:

> It was his business to know if by *reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not.* It was not enough, therefore, that the master did not know of the danger if, by *reasonable* care, he might have known, and if, reasonably, he *ought* to have known, and to have taken the proper means of knowing. It followed that, although he would not be liable merely on account of the negligence of his servants, yet it was his duty either *himself* to take the proper means of knowing of the danger, or to employ some competent person to do so. There were many things which a man could not himself *know of.* Thus, in the case of a manufacturer employing machinery which might be attended with danger to the person employed about it, a danger which might be greatly aggravated by the machinery not being in a proper condition—as, for

(1) 4 F. & F. 608.

instance, in the case of a boiler of a steam engine bursting as it would be more likely to do if in an improper condition—the master manufacturer might have no means of personally knowing the condition himself, and the question being whether he had used reasonable care and diligence to ascertain it, *all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it.* The master must either ascertain the state of the machinery or apparatus himself or employ some competent person to do so ; and if he did employ such a person, and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence.

On the question of onus of proof see also *Hanson* v. *Lancashire and Yorkshire Railway Co.*, (1872), (1), where the court was composed of Byles, Brett, Grove and Willes JJ. See also *Griffiths* v. *London and St. Katharine Docks Company* (2), where the cases are fully collected as establishing that at common law it was necessary for a servant to establish, not only his own want of knowledge, but also knowledge on the part of the master; both must be alleged and proved, otherwise the plaintiff must fail. It is argued that Mr. Beven, in his second edition of his work on Negligence, beginning at page 736, lays down the rule that the master does not fulfil his duty by the appointment of a fit and proper person to superintend but that he must himself see that the works are suitable for the operations he carries on at them and that they are being carried on with reasonable safety. I propose showing later that the cases cited by Mr. Beven for this in no sense established any such proposition, but that an examination of the authorities themselves will in every case show either personal superintendence or that the defect or negligence was known to the defendant who, with that knowledge, permitted or possibly allowed the work to proceed, in which case I could understand holding him liable. It is on this ground *Webster* v. *Foley* (3),

(1) 20 W. R. 297. (2) 13 Q. B. D. 259.
(3) 21 Can. S. C. R. 580.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Nesbitt J.

must be assumed to have been decided; see Labatt Master and Servant, p. 1983 & 677, note 3. The doctrine so contended for, I admit, is applicable where the duty is one imposed by statute; that involves very different conditions. In the care of a corporation, which is an abstract personality, or of a person who, without any knowledge of the business, brings into existence an undertaking or industry of which he is entirely ignorant, the cases show that all that can be required is to employ competent persons, to supply adequate materials and means and resources suitable to accomplish the work. Negligence is defined as the omission to do something which a reasonable man, guided by those considerations which originally regulate the conduct of human affairs, would do, or the doing of something which a prudent or reasonable man would not do. Per Alderson B. in *Blyth* v. *The Company of Proprietors of the Birmingham Water Works* (1), at page 784. And, again, in the words of Brett M. R. the neglect of the use of ordinary care or skill towards a person to whom defendant owes the duty of ordinary care or skill; *Heaven* v. *Pender* (2). How, therefore, a corporation, an abstract personality, can do anything but appoint a competent person, etc., I am unable to understand. See *Kettlewell* v. *Paterson & Co.* (1886) (3). How a person entirely ignorant of the undertaking can do otherwise than employ competent contractors for the work and competent persons to supervise it, whose duty it is to see that the machinery, etc., is kept in proper order, I am at a loss to understand. The very attempt on his part to supervise or regulate the operations might be the most disastrous thing possible for the servants, and as put by Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (4), the servant, before he goes

(1) 11 Ex. 781.
(2) 11 Q. B. D. 503.
(3) 24 Sc. L. R. 95.
(4) 3 Macq. H. L. 266.

into the employment, knows whether he is entering into the employment of one who does pretend to know or of one who leaves the whole matter to managers.

I come now to see whether *Smith* v. *Baker* (1), did purport to break in upon the rule I have indicated or to establish any modification of these doctrines. In the first place, it is to be observed that in *Smith* v. *Baker* (1) the only point which was decided by the court did not involve this question at all. In the report of the case at page 335, Halsbury L. C. says :

> The objection raised, and the only objection raised, to the plaintiff's right to recover, was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the county court itself, had jurisdiction to deal with.

Again on page 354 Lord Watson says :—

> The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this, whether, upon the evidence, the jury were warranted in finding as they did, that the plaintiff did not "voluntarily undertake a risky employment with a knowledge of the risks."

I have mentioned this because the expressions relied upon in argument as being used by the judges in giving judgment were not used in reference to the point decided, nor when examined did they in fact, with one exception which I shall mention, suggest any modification of the common law I have above stated. The first expression occurs at page 339, where Lord Halsbury says :

> I think the cases cited at your Lordship's Bar of *Sword* v. *Cameron* (2), and the *Bartonshill Coal Company* v. *McGuire* (3), establish 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 provisions of the Employers' Liability Act.

(1) [1891] A. C. 325. (2) 1 Sc. Sess. Cas. (2 ser.) 493.
(3) 3 Macq. H. L. 300.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Nesbitt J.

In *Bartonshill Coal Co.* v. *Reid* (1) Lord Cranworth who, it is to be remembered, took part in the judgment of *Wilson* v. *Merry* (2), after discussing the facts found in *Sword* v. *Cameron* (3) says as to that case:

> It is to be inferred from the facts stated that the notices and signals given were those which had been *sanctioned by the employer.*

This comes clearly within the rule of *Wilson* v. *Merry* (2), personal superintendence or personal knowledge. *Bartonshill Coal Co.* v. *McGuire* (4), was an action arising out of the same accident as *Bartonshill Coal Company* v. *Reid* (1). The Lord Chancellor expressly laid down the rule at page 276 in his judgment in the *Reid Case* (1), which was made part of the judgment in the *McGuire Case* (4), that the master is not responsible if he has taken proper precautions to have proper machinery and proper persons employed. How he takes proper precautions is employed, as I have indicated above, by Cleasby B. in *Murphy* v. *Philips* (5), in cases where he had not the knowledge himself. In that case the accident was caused by the neglect of the engineman, Shearer, as it caused the accident in the *Reid Case* (1). And on page 311 of the *McGuire Case* (4) Lord Chelmsford, then Lord Chancellor, states with approval the observations of the Lord Justice Clerk in *Dixon* v. *Rankin* (6):

> The recklessness of danger on the part of the men is a result of the trade in which the master employs them, and he is bound in all such cases to hire superintendence which will exclude such risks, etc.

Shewing that at common law, even if the master did not personally superintend, if he was aware of and sanctioned the use of improper machinery or inadequate means he was liable. The same question is again

(1) 3 Macq. H. L. 266.
(2) L. R. 1 H. L. Sc 326.
(3) 1 Sc. Sess. Cas. (2 ser.) 493.
(4) 3 Macq. H. L. 300.
(5) 35 L. T. 477.
(6) 14 Sc. Sess. Cas. (2 Ser.) 353, 420.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Nesbitt J.

referred to at page 353, in the judgment of Lord Watson, where the learned judge cites *Sword* v. *Cameron* (1), *Bartonshill Coal Company* v. *Reid* (2), and *Weems* v. *Mathieson* (3). I have already dealt with *Sword* v. *Cameron* (1) and *Bartonshill Coal Co.* v. *Reid* (2), and an examination of *Weems* v. *Mathieson* (3) will shew that in that case the employer was held responsible for injury caused by the falling of a cylinder insufficiently sustained

> the manner of the suspension having been suggested by the defendant himself;

and that this was clearly in the mind of the learned judge at that moment is seen by the very next sentence at the foot of page 354, where he says the main, although not the sole, object of the Act of 1880, was to place masters who do not upon the same footing of responsibility as those who do personally superintend the works of their workmen. The only sentence I do not understand in the judgment of Lord Watson is at page 358 where he says:

> 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.

If the learned judge is there speaking of the obligation of the master to either himself, or by others competent to do so, inspect and see that machinery is kept in a proper state of maintenance, I agree, but if he means to say that a competent person has been employed whose duty it was to inspect and see that the machinery was kept in a proper state of maintenance, and that that person's neglect the master is responsible for, it seems to me to be against any authority to be found in

(1) 1 Sc. Sess. Cas. (2 Ser.) 493. (2) 3 Macq. H. L. 266.
(3) 4 Macq. H. L. 215.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Nesbitt J.

the books subsequent to the case of *Wilson* v. *Merry* (1). I think, therefore, that the judges in *Smith* v. *Baker* (2), in discussing the Scotch case, did not intend in any sense to qualify the doctrine of *Wilson* v. *Merry* (1), which case was itself decided some ten years after the last of the Scotch cases referred to, and in which case Lord Cranworth took part and in no way suggested any modification of the language used by Lord Cairns in defining the duty of the master to the servant at common law. I think, therefore, that when a defective system is spoken of which renders the master liable it is a system which he has either personally taken part in or has subsequently sanctioned or had knowledge of, and that the full extent of his duty is as defined in *Wilson* v. *Merry* (1). I do not see in many cases at the present day how it would be possible for the employer to have any knowledge whatever as to whether a system was perfect or defective; much of such knowledge is technical and all that he can do is to use ordinary care to see that he gets competent contractors to supply his machinery and competent persons to see that the machinery is properly run and properly maintained, and that such persons are supplied with adequate means and materials to so run and maintain the machinery in a reasonably safe condition, and that if any failure to keep the machinery up to date is due to the neglect of such superintendent, in the absence of knowledge upon the part of the employer, he is not liable at common law. Any other rule would, it seems to me, entirely lose sight of the numerous undertakings requiring special scientific knowledge both as to the machinery required and as to the method of running, and as to when it was out of repair, and as a rule such knowledge is not possessed by the people having the

(1) L. R. 1 H. L Sc. 326. (2) [1891] A. C. 325.

necessary capital to create the undertaking and employ labour, but the employer has necessarily to depend upon the skilled knowledge of others.

I am fortified in the view that *Smith* v. *Baker* (1) did not attempt to decide anything more than that "*sciens* was not *volens*" by the judgment in *Williams* v. *Birmingham Battery and Metal Co.* (2), where, although the defendants were held liable for non-maintenance, it appeared that the defendants were aware of the absence of any ladder or proper means of ascending to or descending from the tramway, and A. L. Smith L.J., at page 342, quotes from Lord Herschell as follows:

> 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, etc., (and then continues in his own language) This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man.

And again:

> This is not the case where a master has provided proper appliances and done his best to maintain them in a state of efficiency, in which case the man has no action against his master, if the appliances became unsafe whereby the man has been injured unless he avers and proves that *the master knew of their having become unsafe and that the man was ignorant of it.*

The case is similar to that of *Mellors* v. *Shaw* (3). When you turn to *Mellors* v. *Shaw* (3) it is again found to be a case decided upon the ground of the master's personal negligence.

I have dealt at perhaps too great length with the English authorities, but my only excuse is that nearly every case at the present day is launched and fought out both at common law and under the Employer's Liability Act, and we are continually pressed with

(1) [1891] A. C. 325. (2) [1899] 2 Q. B. 338.
(3) 1 B. & S. 437.

1904

CANADA WOOLLEN MILLS v. TRAPLIN.

Nesbitt J.

the argument that the law is not as it was always supposed to be, namely, the law as enunciated by Lord Cairns in *Wilson* v. *Merry* (1).

The Ontario cases are well summed up in the judgment in *Rajotte* v. *Canadian Pacific Railway Co.* (2); and *Matthews* v. *Hamilton Powder Co.* (3); and the British Columbia authorities are collected in *Wood* v. *Canadian Pacific Railway Co.* (4), affirmed on other grounds by this court. Much discussion has taken place also in the case of *Sim* v. *Dominion Fish Co.* (5), in 1901 at page 69. That case is not entirely satisfactory but I take it that it was established that the boxes supplied were unfit, as will be seen by a reference to the evidence at page 72, and the Chief Justice, at page 75, points out that the uncontradicted evidence showed that the boxes were not fit for the purpose for which they were provided, and then says that from that evidence the inference arose that the defendants had not exercised due care in providing boxes and gave no evidence whatever in excuse for their so doing. I assume that had the defendants proved that they employed competent men with instructions to obtain adequate materials, and that the neglect to provide such adequate materials was that of the persons so employed, that the learned Chief Justice would have held no liability existed at common law, but in the view of the expression of opinion of Huddleston B. in *Allen* v. *The New Gas Co.* (6), above cited, to which the attention of the learned judge had not been drawn, I should have doubted whether the plaintiff satisfied the full onus cast upon him.

(1) L. R. 1 H. L. Sc. 326.
(2) 5 Man. L. R. 297, 365.
(3) 14 Ont. App. R. 261.
(4) 6 B. C. Rep. 561; 30 Can. S. C. R. 110.
(5) 2 Ont. L. R. 69.
(6) 1 Ex. D. 251.

Applying, then, the rules above indicated to the facts of this case, I find that it is proved that there was a head machinist employed who did in fact inspect the elevator from time to time and pointed out the serious defect which he said was remedied, and after that he himself saw another ground of complaint. I find also that Baker, a sub-machinist, did in fact inspect continually and make repairs, and that he pointed out the old and worn condition of the machinery to both the general superintendents of the company, who failed apparently, notwithstanding such inspection and notice to them, to change the pinion gear. I think, therefore, that, as no knowledge was brought home to the company, the case comes clearly within the decision of *Williams* v. *Birmingham Battery and Metal Co.* (1) and *Matthews* v. *Hamilton Powder Co.* (2), and that there is no liability at common law. But I cannot see upon this evidence and the findings of the jury how the defendants can escape under the Employer's Liability Act See *Henderson* v. *The Carron Co.* (3). The statute is comparatively simple, R. S. O., 1897, ch. 160, sect. 3, s.s. 1 and 2, coupled with section 6, s.s. 1. It is quite true that the under-machinist, when he drove in the key, swears that he did it properly, and that he saw nothing wrong with the machinery, and that he was the person entrusted with the duty of seeing to the remedying of that particular defect, but he had, if defendants are to be believed, and the jury did believe them, already pointed out that the vibration and general dilapidation of the machinery was such that it ought to be renewed, and that, therefore, while the patching up by putting in the key made good the falling out of the key for the moment, the defect which he had pointed out, namely,

(1) [1899] 2 Q. B. 338. (2) 14 Ont. App. R. 261.
(3) 16 Sc. Sess. Cas. (4 Ser.) 633.

1904

CANADA WOOLLEN MILLS v. THAPLIN.

Nesbitt J.

the vibration and general dilapidation, and which he said he believed brought about the second falling out of the key, still existed and had not been remedied owing to the negligence of the superintendent who must also be said to be a person entrusted with the duty of seeing to the proper carrying out of the business generally, because it is sworn that the superintendent had the general conduct, and it would be for him to give general directions either to the head machinist or to a subordinate machinist, and certainly to give directions for the renewal of machinery, and I think that under this section of the Act there may be various parties in different degrees of authority to whom the work of seeing to defects may be entrusted. I would, therefore, vary the judgment by directing a judgment to be entered for the amount of damages assessed by the jury under the Workmens' Compensation Act.

KILLAM J.—It is not disputed that the appellant company was liable, under "The Workmen's Compensation for Injuries Act," R. S. O. (1897) c. 160, for the injuries sustained by the plaintiff. The only question is whether or not it was liable at common law.

I agree with my brother Davies in the opinion that the case falls within the class of cases in which an employer has been held liable on the ground that the state of the appliances was such that there could properly be imputed to him knowledge of the defects or neglect of the duty to know them.

The authorities have been very exhaustively and ably discussed by my learned brothers, and it appears unnecessary that I should attempt any further examination of them.

Probably, as my brother Nesbitt thinks, the decision in *Smith* v. *Baker* (1) has been to some extent misconstrued and misapplied, but it seems to me to be clearly established that the duty of an employer is not satisfied by the instalment of a sufficient set of appliances and the adoption of a sufficient system of working, leaving them to managers or superintendents of apparently sufficient skill to manage or operate. Some responsibility remains in the employer. And while the onus was upon the injured workman, at common law, to show negligence in the employer himself, it might be discharged by evidence of circumstances raising an inference either of knowledge of the defects or of neglect of the duty to exercise care to acquire such knowledge and remedy them. *Paterson* v. *Wallace & Co.* (2); *Weems* v. *Mathieson* (3); *Clarke* v. *Holmes* (4); *Murphy* v. *Phillips* (5): *Webb* v. *Rennie* (6); *Webster* v. *Foley* (7).

In the present case I agree with the opinion of my brother Davies that the evidence warranted the findings of the jury and the judgment for the full amount allowed.

Appeal dismissed with costs.

Solicitors for the appellants: *Duvernet, Jones, Ross & Ardagh.*

Solicitors for the respondent: *Guthrie & Guthrie.*

---

(1) [1891] A C. 325.
(2) 1 Macq. H. L. 748.
(3) 4 Macq. H. L. 215.
(4) 7 H. & N. 937.
(5) 35 L. T. 477.
(6) 4 F. & F. 608.
(7) 21 Can. S. C. R. 580.