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*Nov. 21.

*Dec. 14.

THE CANADA FOUNDRY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JOHANNA MITCHELL AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Employer and workman—Volenti non fit injuria—Finding of jury.

In an action claiming compensation for personal injuries caused by negligence the defendant who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk unless it so plainly appears by the plaintiff's evidence as to justify the trial judge in withdrawing it from the jury and dismissing the action. Sedgewick and Nesbitt JJ. dissenting.

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

The action was brought by the widow and infant children of Charles Mitchell who was killed while working at the construction of the iron work on the exhibition buildings in Toronto as an employee of the defendant company. The particular work on which he was engaged at the time was hoisting purlins up to the roof and bolting them to the rafters, being a gang foreman in charge of the men doing such work. There were several modes of hoisting such purlins, and the one used by deceased and his men was, as plaintiffs alleged and the jury found, an improper method, as it would not raise the purlins high enough and they had to be pushed up into place by the men.

* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

The defendants claimed that a better method was supplied and the gang used the one they did for their own convenience, but the jury found that it was by direction of the defendants' foreman.

The plaintiffs obtained a verdict at the trial, the jury finding that deceased had not voluntarily incurred the risk and the verdict was maintained by the Court of Appeal.

Duvernet for the appellants.

John M. Godfrey for the respondents.

SEDGEWICK J. (dissenting) concurred in the opinion of Mr. Justice Nesbitt.

GIROUARD J. concurred in the dismissal of the appeal.

DAVIES J.—The one doubt I have had in my mind as to the soundness of the judgment of the Court of Appeal in this case was whether the deceased workman had not, by continuing at his work with full knowledge and appreciation of the risks he ran in doing the work with the appliances which were used, necessarily accepted those risks and so relieved the defendants from liability. The jury found that he did know and fully appreciate the risks and they also found that he did not voluntarily incur them. The question is one of great nicety and it is very difficult at times to reach a satisfactory conclusion as to the application of a proper rule. The general law on the point may be accepted as that laid down by Lord Justice Bowen in the case of *Thomas* v. *Quartermaine* (1), as explained and modified by the decision of the House of Lords in *Smith* v. *Baker* (2), and by the Appellate Court in the still later case of *Williams* v. *Birmingham*

(1) 18 Q. B. D. 685. (2) [1891] A. C. 325.

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Battery and Metal Co. (1). Lord Justice Bowen had said that:

> Where the danger is visible and the risk is appreciated, and where the injured person knowing and appreciating both risk and danger voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier (the employer) at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete.

In the subsequent case of *Yarmouth* v. *France* (2), approved of by Lord Herschell in *Smith* v. *Baker* (3), Lord Esher and Lindley, L.J., sitting with Lopes L.J. as a divisional court and accepting as such the exposition of the law given by the Appeal Court in *Thomas* v. *Quartermaine* (4) engrafted this distinction or qualification upon it; that the question whether a workman was "volens" or not was a question of fact depending upon evidence adduced in each case.

The decision in *Smith* v. *Baker* (3) really turned upon the right inference to be drawn from the continuance of a workman in an employment the risks of which he knew and appreciated. What that case really decided is well summarised by Mr. Ruegg in his work on Employer's Liability, page 170, (5 ed.) as follows:

> There is no inference to be implied by law even where a workman knows of and appreciates a danger from the fact of his continuance in the employment; the question is one of fact and is for the jury; the consent to run the risk must be proved by the defendant who wishes to rely on the maxim the reason being that a workman does not impliedly take the risk of his employers' negligence.

The latest decision on the question is that of the Court of Appeal in *Williams* v. *Birmingham Battery and Metal Co.* (1), where it was held that to enable an employer to successfully invoke the doctrine of

(1) [1899] 2 Q. B. 338.
(2) 19 Q. B. D. 647.
(3) [1891] A. C. 325.
(4) 18 Q. B. D. 685.

volenti non fit injuria he must obtain a finding of the jury upon it in his favour. I adopt as correct the propositions of law which Romer L.J. formulated as established by the decided cases:

> If the employment is of a dangerous nature a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury the employer is *primâ facie* liable; and it is no sufficient answer to the *primâ facie* liability for the employer to shew merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into, or continued in, his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him.

In the case at bar not only was there no finding that the deceased voluntarily had incurred the risk, but an express finding that he had not. If it is essential to the judgment being entered for the defendant on this single point that he should have obtained a finding in his favour from the jury, then, how can we, in the presence of a contrary finding, declare that deceased did agree to undertake the risk of the defendant's negligence. Fear of dismissal rather than voluntary action on the workman's part might have been inferred by the jury in reaching their finding.

The evidence of Hall and of the foreman, Bullock, agree that the gin poles which were the safest and best appliances to have used in the raising of the purlins were discarded by the express orders of the engineer, Law, who had as said, "sent up the monkeys or davits to be used in place of the gin poles," and that, as the foreman said, "they must be used." The orders to use the monkeys or davits and not the gin

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poles were peremptory and could not be disobeyed. There is really no substantial distinction between the appliance substituted for the davit and the latter itself. The substitution was rendered necessary by the condition of the particular part of the roof where the men were working. Both were alike defective in compelling the men to descend from the top chord to the lower one so as to raise the purlin out of its place by their personal force and strength, and it was this action of descending to the lower chord which created the extra danger.

I entirely concur in the reasoning and conclusions of the learned Chief Justice of the Court of Appeal on this latter branch of the case. I think the foreman, Bullock, was by his own confession responsible for the use by the men of an unsafe appliance in the raising of the purlins; that, under the statute, the master is liable for his negligence as a person having the superintendence of this very work, and that the evidence did not show that the deceased was a gang foreman or occupied any position of superintendence which gave him control over or made him responsible for the appliances used in the raising of the purlins used in the construction of the building.

On the authority of the cases above quoted, and the findings of the jury, I would dismiss the appeal.

NESBITT J. (dissenting).—This is an action founded upon negligence, and I adopt the definition of negligence of Brett M. R. in *Heaven* v. *Pender* (1).

> The neglect of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill *by which neglect* the plaintiff, without contributory negligence on his part, had suffered injury to his person or property.

It is not disputed in this case that the defendants not only employed competent superintendents and sup-

(1) 11 Q. B. D. 507.

plied all necessary means and appliances, but also that the proper appliances to raise the purlins above the upper chord was not used, but that a device contrived by the gang of men, of whom deceased was the foreman, was substituted for a proper appliance as being easier to be used; and it is also not disputed that the deceased who was, as I say, *foreman of the gang* in question, was a skilled workman and knew and fully appreciated the risk he ran in doing the work with the appliances which were used. It is therefore plain that there was no breach of duty towards the deceased at common law; and the only ground upon which a breach of duty on the part of the defendant is put is that the foreman, Albert E. Bullock, who was immediately above the gang foreman, had seen the men adopt the device in question at various times and had made no objection, and, therefore, while there is no pretence that there is any breach of duty towards the deceased in the actual giving of an order, that there is negligence in superintendence. I doubt if the facts of the case bring it within the subsection "whilst in the exercise of such superintendence" or that Bullock, as respects this particular operation, was in any way *exercising superintendence*, but assuming the subsection applied, I am unable, so far as the deceased is concerned. to appreciate a construction of the statute which would bring the defendants within the above definition as failing to do anything "by which neglect" the deceased suffered. I take it that, if the deceased were an unskilled workman and any person in authority either instituted or sanctioned a dangerous system of carrying on the work, the employer would be liable under this subsection which, as I understand it, was enacted in order to make an employer *not exercising personal superintendence, liable for those to whom he deputed the super-*

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intendence. But I do not understand that there is any breach of duty or want of care towards a man who has been supplied with the proper appliance, knows how to use it, and is fully cognizant of the danger he runs in using another appliance, to actually forbid the use of the other appliance when it is known that the skilled workman is fully conscious of the risk he runs in himself actually adopting the more dangerous of the two methods of doing the work. An employer is bound to take reasonable care that his men are protected against injury, and to warn them against dangers so that they may be aware of them; but I cannot hold that an employer is bound to stop a workman performing work in a certain way where he knows the workman is perfectly well aware that a safe way is provided for him to do the work and for his own convenience chooses to do it in another way and is injured. This is the very highest that this case can be put. I think this is covered in principle by what is said by Lord Watson in *Smith* v. *Baker* (1), at page 357. where he points out that if a servant engages to do work of such a nature *that his personal danger and consequent injury* must be produced by his own act, he could not recover if he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, and this was a case where defective machinery was supplied to the workmen I think that if a workman knows that proper means and appliances are supplied to him and, notwithstanding this, for his own convenience, chooses to adopt some other method, knowing and fully appreciating the risk he ran in doing the work, that he cannot be heard to say that his employer (through a foreman), is liable to him in an action of negligence for a want of care in giving him information of danger (for that must be what the negligence consists in),

(1) [1891] A. C. 325.

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when the foreman already knew that he was perfectly aware of that danger and was taking the course he did to save himself trouble. It is, to my mind, just like the case constantly arising of where the person is entitled to have warning, say of an approaching train, by whistle or by bell. It is clear law that no action of negligence will lie where it is found that the person so entitled to warning knew otherwise of the approaching train and persisted in his course and is run into by the train.

In this case it is from the workman's own particular act that the injury arises, and the jury found that he fully appreciated the risk he ran in performing the act. What good could it have been for the foreman above him to have told him "don't do that with gin-poles as it is dangerous." He knew such to be the case perfectly well.

I distinguish the case from that of a workman continuing to work with defective machinery where the machinery is used by others over whom he has no control. Here he has the right of selection himself and chooses to take a dangerous course where danger can only arise from his own act. I think he is in such a case, the author of his own wrong and the doctrine of *volens* is applicable. See *Callender* v. *Carlton Iron Co.* (1); *Dominion Iron and Steel Co.* v. *Day* (2).

I would upon the answers of the jury and undisputed facts, allow the appeal with costs.

KILLAM J.—Upon the argument of the appeal in this case I was inclined to the view that the plaintiffs were not entitled to recover, on the ground that the deceased was really the author of his own injury.

(1) 9 Times L. R. 646; 10 Times L. R. 366.

(2) 34 Can. S. C. R. 387.

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Further examination of the evidence has, however, convinced me that there was a case to go to the jury and that, upon their finding, the judgment was rightly entered for the plaintiffs.

Whatever criticism may be passed upon the finding that the deceased was working under protest, it still remains that there was no finding that he voluntarily incurred the risk and that the evidence for the plaintiffs did not so far establish this as to enable the court to take that question from the jury.

It is now established that mere knowledge of the risk is not necessarily sufficient to preclude the workman and that the onus is upon the master to show that it was voluntarily incurred.

I agree with the reasoning of the Court of Appeal and that of my brother Davies.

Appeal dismissed with costs.

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

Solicitors for the respondents: *Robinette & Godfrey.*