HENRY HEADFORD (PLAINTIFF).....APPELLANT; 1894

*Oct. 24, 25.

AND

1895

THE McCLARY MANUFACTURING COMPANY (DEFENDANTS)... } RESPONDENTS. *Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Negligence—Workman in factory—Evidence—Questions of fact—Interference with on appeal.*

W., a workman in a factory, to get to the room where he worked had to pass through a narrow passage and at a certain point to turn to the left while the passage was continued in a straight line to an elevator. In going to his work at an early hour one morning he inadvertently walked straight along the passage and fell into the well of the elevator which was undergoing repairs. Workmen engaged in making such repairs were present at the time with one of whom W. collided at the opening but a bar usually placed across the opening was down at the time. In an action against his employers in consequence of such accident :

*Held*, affirming the decision of the Court of Appeal, Strong C.J. *hesitante*, Taschereau J. dissenting, that there was no evidence of negligence of the defendants to which the accident could be attributed and W. was properly non-suited at the trial.

*Held*, per Strong C.J., that though the case might properly have been left to the jury, as the judgment of non-suit was affirmed by two courts it should not be interfered with.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which sustained the non-suit at the trial.

The facts material to the appeal are sufficiently stated in the above head-note and in the judgments published herein.

*Gibbons Q. C.* for appellant. There was some evidence of negligence and the case should not have been with-

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

(1) 21 Ont. App. R. 164. (2) 23 O.R. 335.

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drawn from the jury. *Denny* v. *Montreal Telegraph Co.* (1).

The want of a guard on the shaft was of itself negligence for which defendants would be liable. *Hollinger* v. *Canadian Pacific Railway Co.* (2). And see *Smith* v. *Baker* (3).

*Nesbitt* and *Grier* for the respondents referred to *Callender* v. *Carlton Iron Co.* (4); *Quebec Central Railway Co.* v. *Lortie* (5); *Black* v. *Ontario Wheel Co.* (6).

THE CHIEF JUSTICE.—The only question open on this appeal is that as to the non-suit. In deciding this we must, of course, entirely disregard the findings of the jury which the appellant is not entitled to invoke in his support as he has done in his factum. The judge at the trial had to decide two preliminary questions. First, was there any evidence of negligence of sufficient substance to be submitted to the consideration of the jury? Secondly, if there was such evidence, did it appear from the undisputed facts that the plaintiff's own negligence had contributed to the accident?

Had I been dealing with the case as judge of first instance, or even in the Divisional Court, I might have thought that the evidence did disclose a sufficient case for the consideration of the jury tending to show that the respondents' premises were at the time of the accident in a defective state, and that they were therefore guilty of a breach of duty towards the appellant who was rightfully passing through them when he fell through the shaft of the hoist. The space left between the shaft and the shelving on the left side of the room for the passage of workmen going to the carpenter's shop, appears to me to have been so narrow that I might have considered there was some proof of

(1) 42 U.C.Q.B. 577.
(2) 21 O.R. 705.
(3) [1891] A.C. 325.
(4) 10 Times L.R. 366.
(5) 22 Can. S.C.R. 326.
(6) 19 O.R. 578.

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a maintenance of the premises in a defective condition and, therefore, proof of negligence on the part of the defendants in omitting to provide some barrier or at least some warning to persons rightfully using the passage.

This preliminary question, however, being substantially one of fact, no matter of law being involved, and it having been held in three successive courts, composed in the aggregate of seven judges, that the facts found did not constitute a sufficient case for the consideration of the jury, I do not think I ought now to act on my own somewhat doubtful view of the effect of the evidence so far as to reverse the unanimous judgments of the Court of Appeal and of the Divisional Court (1). I therefore, though somewhat doubtfully I admit, agree that the appeal must be dismissed.

TASCHEREAU J.—I would allow the appeal.

GWYNNE J.—The evidence in this case fails, in my opinion, to show any negligence of the defendants to which the accident from which the plaintiff sustained the injury he complains of can be attributed. Being engaged as a workman in a room in a factory to which he could have proceeded without any danger or risk of danger whatever, and whither a fellow workman had without any difficulty just proceeded but a few steps ahead of him, he went out of his course and walked into an elevator the door of which was open it is true, but necessarily open because of some mechanics being then employed doing some necessary work to it, one of whom was so employed at the very opening through which the plaintiff fell and which he had approached without apparently taking any notice of where he was going. The case does not present a

(1) *Allen* v. *Quebec Warehouse Company* 12 App. Cas. 101.

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question of contributory negligence at all; the only conclusion which is warranted by the evidence is that the accident happened by and the injury consequent thereon is attributable wholly to the carelessness of the unfortunate sufferer himself and for which the defendants are in no way responsible The appeal must in my opinion be dismissed.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed for the reasons stated by Mr. Justice Burton in the Court of Appeal

The accident which happened to the plaintiff was occasioned by his own carelessness and not through any negligence on the part of the company. The repairing of the elevator was a necessary act on their part. It is true that the guard protecting the elevator was not up at the time of the accident and that if it had been up the accident would not have occurred, but at the time the defendants' workmen were engaged in repairing the elevator, workmen were about it and around it engaged in that duty, and the accident happened in consequence of the defendant, instead of looking about him, looking up towards the roof of a room in which he was walking to a man engaged in the repairs and actually collided with a workman at the opening also engaged in the repairs. One can hardly conceive of a case stronger than the present where it can be said that the man himself was wholly to blame for what happened to him. I am of opinion that the appeal should be dismissed with costs.

KING J. concurred

*Appeal dismissed with costs.*

Solicitors for appellant: *Gibbons, McNeil & Mulkern.*

Solicitors for respondents: *Beatty, Blackstock, Nesbitt & Chadwick.*