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*Mar. 20, 21.

*May 6.

THE HAMILTON BRIDGE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH O'CONNOR (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Use of dangerous machinery—Orders of superior—Reasonable care.

O. was employed in a factory for the purpose of heating rivets and one morning, with another workman, he was engaged in oiling the gearing, &c., of the machinery which worked the drill in which the rivets were made. Having oiled a part the other workman went away for a time, during which O. saw that the oil was running off the horizontal shaft of the drill and called the attention of the foreman of the machine shop to it and to the fact that the shaft was full of ice. The foreman said to him, "Run her up and down a few times and it will thaw her off." The shaft was seven feet from the floor and on it was what is called a buggy which could be moved along it on wheels. Depending from the buggy was a straight iron rod into the hollow end of which was inserted the drill secured by a screw, and attached to the buggy was a lever over six feet long. O. when so directed by the foreman tried to move the buggy by means of the lever but found he could not. He then went round to the back of the spindle and not being able then to move the buggy came round to the front, put his two hands upon a jacket around the spindle and put the weight of his body against it; it then moved and he stepped forward to recover his balance, when the screw securing the drill caught him about the middle of the body and he was seriously injured. In an action against his employers for damages it was shown that O. had no experience in the mode of moving the buggy and that the screw should have been guarded.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that the jury were warranted in finding that there was negligence in not having the screw guarded; that as the foreman knew that O. had no experience as to the ordinary mode of doing

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

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what he was told he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court (2) in favour of the plaintiff.

The material facts of the case sufficiently appear from the above head-note and the judgments of the court.

Bruce Q.C. for the appellants. There was no defect either in the construction of this drill or neglect in using it which would make the employers liable for negligence. *Walsh* v. *Whiteley* (3); *Wild* v. *Waygood* (4).

The fact that the screw was not guarded would not be ground for an action. *Finlay* v. *Miscampbell* (5).

This case is distinguishable from *Grand Trunk Railway Co.* v. *Weegar* (6), in that here the employee was told to do a particular thing which could only properly be done in one way.

Staunton for the respondent. This case is directly within the principle of *Grand Trunk Railway Co.* v. *Weegar* (6), and *Barber* v. *Burt* (7).

As it was reasonably practicable to have the screw guarded it was the duty of the respondents to do it. *Smith* v. *Baker* (8); *Webster* v. *Foley* (9).

The judgment of the majority of the court was delivered by:

KING J.—The fair result of the evidence is that the set screw projecting from a swiftly revolving spindle was a contrivance that subjected persons brought into proximity to it to unnecessary danger. That it was

(1) 21 Ont. App. R. 596.
(2) 25 O. R. 12.
(3) 21 Q. B. D. 371.
(4) [1892] 1 Q. B. 783.
(5) 20 O. R. 29.
(6) 23 Can. S. C. R. 422.
(7) 10 Times L. R. 383.
(8) [1891] A. C. 325.
(9) 21 Can. S. C. R. 580.

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dangerous any one would know; whether it was unnecessarily so would depend upon circumstances. The machine had been in the workshop but a short time and was manufactured by a firm of high standing, and this afforded a fair presumption of fitness. On the other hand a witness for plaintiff, who had been mechanical foreman in the Grand Trunk Railway shops for thirty years, stated that the projecting screw had long before been discarded in England and the screw set flush with the spindle adopted as being safer because not liable like the other to catch in the clothing. He gives as the reason for the use of the projecting screw its cheapness and the ease of getting at it. He further said that it might readily be guarded by a collar put on at the time of manufacture or afterwards. At the same time, however, he said, partly as a statement of a fact and partly as a matter of opinion, that the projecting screw was an ordinary reasonable device in this country. The defendants did not produce any witnesses at all to explain the mechanical reasons that led to the adoption of the contrivance used by them. In view of their manifest avoidance of attempted justification of the construction and use of this part of their machinery, and of the obvious danger of it, I cannot say that the several courts who have dealt with it are wrong in concluding that the jury were warranted in their conclusion that there was negligence in not having the screw guarded. They probably thought that any one reasonably acquainted with machinery would not need the occurrence of an accident to see the probability of some harm coming from the projecting screw if not properly guarded. This, considering the way the matter was left by the learned Chief Justice of the Queen's Bench, meant that the defendants had not taken reasonable care to provide proper appliances, and so to carry on their operations

as to subject those employed by them to no unnecessary risk.

But, it is said that the plaintiff had no reason to be where he was. This depends on whether the mode he took to move the buggy was one that he might reasonably suppose to be necessary in order to carry out his orders. He was told to run the buggy up and down a few times, but was not told how he was to do this. It is said that this amounted to a direction to do it in the ordinary way, and that he was not warranted in doing it in any other way. But the foreman who gave the order knew that the plaintiff had no experience of any ordinary way, for he had only a few minutes before called him from his usual work of heating rivets in another part of the building to act as a helper in the operating of this machine. For the plaintiff, therefore, any reasonable way was an ordinary way. But further, I fail to see upon the evidence that the ordinary way of moving the buggy backwards and forwards on its track was by means of the lever. This had a distinct use, viz., by its vertical action to raise or lower the drill. Force applied at the end of a long arm and at a considerable angle to the line of motion, is poorly adapted for the pushing or the pulling of a heavy body. The evidence shows that when Gearing, the principal workman, started the buggy a foot or two along its track that morning in the presence of plaintiff, he used a crowbar. Archibald, the witness already referred to as having been for many years mechanical foreman in the Grand Trunk Railway shops, was asked by the learned judge how he would move the buggy backwards and forwards, and replied that he would take it by the centre and pull it. What the plaintiff did, after trying to move it by the lever, without success, was to take the machine by the centre and push it. And indeed there would seem to be less danger in pushing a heavy

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body that is apt to yield suddenly than in pulling it towards you. I would only add as further showing that the foreman's direction could not be carried out by the plaintiff merely by his using the lever, that the foreman, in denying that he gave any orders at all to run the buggy backwards and forwards says :—

> I would not tell him to do that, it takes two men to do it and I would not tell a boy to do it.

It manifestly appears, therefore, that if the plaintiff was told to run the buggy backwards and forwards a few times (as is found by the jury) he was clearly acting within his instructions in resorting to the only efficient means he could use. There would of course still remain the obligation to take reasonable care, but although he knew that the spindle was revolving he did not know of the projecting screw. Here is his account :—

> I said to Kempster (the foreman) that the shaft was all ice and the oil was running off as fast as he put it on, that is the horizontal shaft : he says to me, "Run her up and down a few times and it will thaw it off," he walked away and I started to pull her up and down. The buggy was about in the middle of the shaft, I caught the lever and pulled her up about a foot or two towards the end of the shaft but could not get it any freer ; I went around back and tried to shift it again, and I came around to the front and put my two hands upon the jacket around the spindle ; I put my weight against it and it started ; I stepped forward to catch myself, when the set screw caught me about the middle * * * ..... I did not expect there was anything in it, and no one told me there was a set screw.

The jury have negatived want of due care on plaintiff's part, and whatever doubts I might myself have had upon the point of defendants' negligence in not taking reasonable care in providing proper appliances, a doubt, however, which does not exist respecting the failure to acquaint the plaintiff of the dangerous character of the work he was directed to do and which was out of the usual course of his employment, I have

not the slightest doubt whatever, either as to the way in which the plaintiff sought to carry out his instructions, or as to his use of ordinary care in doing so.

For these reasons I think the appeal should be dismissed.

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GWYNNE J.—The action in this case was brought under the Workman's Compensation for Injuries Act for injuries sustained by the plaintiff as alleged from the following causes: 1st. By reason of defect in certain machinery used by the defendants in their business as bridge and ship builders. 2nd. By reason of the negligence of a person in the service of the defendants to whose orders the plaintiff was bound to conform and did conform; and, 3rd. By reason of the defendants having negligently set plaintiff to work at a drill without instructing him in the management of the drill, of which to the knowledge of the defendants the plaintiff was ignorant. The plaintiff's own statement of the manner in which he received the injury, as alleged in his statement of claim and in his evidence, is that at the time when the accident occurred which occasioned the injury he was employed as a labourer by the defendants for the purpose merely of heating rivets used in their business; that upon the morning of the 22nd December, 1892, the plaintiff together with one Gearing (whose business was to work a drill in the defendants' factory for drilling rivet holes in large iron plates) was engaged in oiling the gearing, shaft, &c., of the machinery which worked the drill. The plaintiff and Gearing having oiled the arms of the shaft and a track along which a part of the machinery called a buggy moved, Gearing went to the machine shop, taking with him the oil cans with which they had been oiling the machinery. While Gearing was thus away the plaintiff observed that the

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oil was all running off the horizontal shaft; when oiling it he had observed that the shaft was full of ice; while Gearing was absent with the oil cans one Kempster, who was foreman in the machine shop, happened to be walking around picking up drills that were lying about and the plaintiff mentioned to him that the oil was all running off the shaft and that it was full of ice, and Kempster replied, "Run her up and down a few times and it will thaw her off," that thereupon the plaintiff went and took hold of the lever used for moving the buggy backwards and forwards along the shaft. The buggy at this time was in the middle of the shaft, whither it had been drawn by the united force of the plaintiff and Gearing applied at the lever, before they had commenced to oil the machinery. When, then, the plaintiff alone went to the lever for the purpose of running the buggy backward and forward on the shaft, as Kempster had suggested, he found he could not move it more than a foot; he then upon his own suggestion, thinking that he could move it by taking hold of the spindle, went round to the back of the spindle and took hold of it, and, as he says, tried to shift it, then came round to the front, put his two hands upon the jacket around the spindle, put the weight of his body against it and it moved, he stepped forward to catch himself when the set screw caught him about the middle of his body; what caught him was the square head of a screw by which the drill was kept tight within the spindle and which projected a little on the outside of the spindle; the machine having been put in motion by Gearing when they commenced oiling it the plaintiff was caught by the machinery in motion and received, no doubt, very serious injuries before he was released.

Now upon this evidence it is, I think, apparent that the lever which the plaintiff took hold of to move the

buggy was the proper means designed to be used for that purpose and that no one directed the plaintiff to take hold of the spindle, thereby to move the buggy, as it appears that he did. The evidence, however, is that any person who understood the business could have moved the buggy by taking hold of the spindle without incurring any danger of being caught in the machinery. The plaintiff unfortunately knew nothing of the machinery, and he through ignorance and without any directions to take hold of the spindle at all took hold of it as he did upon his own suggestion and thereby occasioned the injury which he suffered. He was not employed by the defendants for any purpose save as a labourer to heat rivets. He knew nothing of the working of the machinery further than that he knew that the lever which he took hold of to move the buggy was designed and used for that purpose, for Gearing and he had together that morning so used it. His taking hold of the spindle in the manner in which he did cannot be attributed to any direction given by the defendants or by any person in their service whose orders or direction the plaintiff was bound to obey and was obeying. The plaintiff therefore cannot recover upon the ground, alleged in the statement of claim, that the injury was occasioned by reason of his obeying any such order. Neither do I think the action can be maintained upon the ground of defect in any part of the machinery used by the defendants in their business. The case of *Walsh* v. *Whiteley* (1) is, I think, conclusive that the projection of the head of the screw in the spindle, which was not intended to be taken hold of at all in the manner in which the plaintiff took hold of it, and which could, without any danger whatever of damage, have been taken hold of in a different manner by any person who understood the business

(1) 21 Q. B. D. 371.

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for which the machine was used, cannot be held to be any defect in the machinery for which, under the Act, negligence can be imputed to the employer, at least by a person who had no business whatever to lay hold of the spindle as the plaintiff did. In fine, the evidence clearly, as I think, establishes that the injury which the plaintiff sustained was occasioned wholly by his attempting to deal with the machinery in a manner never contemplated by the defendants, and in his undertaking upon his own mere motion to exercise his discretion in a matter which he did not understand and in his attempting to handle machinery which he was never employed by the defendants to handle at all, and in a manner not directed by any person in the service of the defendants to whose orders or directions he was by reason of his employment bound to conform. Kempster's suggestion as to moving the buggy backwards and forwards in order to thaw the ice on the shaft, even if it could be regarded as such an order, cannot be extended beyond a direction to effect the purpose by the use of the lever which was used for that purpose.

I am, for these reasons, of opinion that, however much to be lamented are the very serious injuries which the plaintiff has sustained, the defendants cannot reasonably or legally he held to be responsible therefor. The appeal therefore must, I think, be allowed and the action in the court below dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Bruce, Burton & Bruce.*

Solicitors for the respondent: *Staunton & O'Heir.*