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SMITH V. THE ST. LOUIS, KANSAS CITY, AND N. R. COMPANY.

[U.S. Rep.]

ployés in using implements and machinery furnished them by the employer.

If the employer furnish defective machinery to an employé ignorant of a defect which was, or might have been, known to the employer by the use of proper care and vigilance, he is liable to the employé for any injury the latter may sustain in operating the machine with proper care on his part. This is all that was decided in *Porter v. The Hannibal & St. Jo. R. R. Co.*, 60 Mo. 162. As was said by Bacon, J., in *Warren v. Erie R. R. Co.*, 39 N. Y. 471: "We are not now dealing with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects, which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognise in the case of an employé, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments. *Lewis Admr. v. St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 530, is not in conflict with the foregoing views of the New York court in the decision of the question before the court. The plaintiff's intestate was a brakeman, and, in coupling cars, stepped along as they moved, partly forward and partly out toward the rail, until he reached the rail, when, taking a step sideways, to get clear of the rail, his right foot went into a hole, which caused him to fall, and in falling his left foot was caught by the wheel of the car, which ran over and crushed it. The hole had been dug by steamboat men for a purpose of their own, and had, to the knowledge of other brakemen, been there several days, and the attention of the section-foreman, had been called to it. The evidence tended to show that plaintiff's intestate was ignorant of its existence. The principal question in the case was whether the instruction for plaintiff was correct, which declared that defendant was responsible if the risk of injury to the plaintiff was increased by the hole being there, and it was allowed to remain after defendant knew of its existence, or might, by the exercise of reasonable diligence and care, have known thereof, and that the injury was received in consequence of the hole remaining after defendant knew or might have known of its existence. Upon the hypothetical case thus put to the jury, no doubt could be entertained of defendant's liability. The instruction was proper, and the court so held, but the principle controlling that case is

wholly inapplicable to this. In discussing the questions involved in that instruction, Wagner, J., who delivered the opinion, remarks: "The rule has long been established, and is founded in reason and justice, that it is the duty of railroad companies to keep their roads and works, and all portions of their track, in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passenger, or servants, or others. They are bound to furnish a safe road and sufficient and safe machinery or cars. The legal implication is that the roads will have and keep a safe track, and adopt all suitable instruments and means with which to carry on their business." This paragraph of the opinion is relied on by respondent, and, if it is to be taken literally, without qualification, it furnishes some support to the doctrine announced in plaintiff's first instruction. What is meant by a safe track is not very clear. An absolutely safe track is one on which no accident could occur attributable to the track. On the best roads in construction and management accidents do occur, and a strictly safe track is nowhere to be found. The remarks we have quoted, taken literally, without qualification, are disapproved.

The plaintiff who avers must prove negligence. Is the fact that there is another kind of rail, of which a guard-rail might be constructed which would be safer for employés, and would equally answer its purpose, sufficient to render the company liable to an employé for injury received by him in consequence of the failure of the company to use that other kind of rail? Is proof of that fact proof, or any evidence, of negligence on the part of the company? Plaintiff's first instruction declares that it is. Wharton, in his *Law of Negligence*, section 213, says: "An employer is not required to change his machinery in order to apply every new invention, or supposed improvement in appliance, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than another in use, without being liable to his servants for the non-adoption of the improvements; provided the servant be not deceived as to the degree of danger that he incurs." Again, in section 244: "When an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. Hence, to turn specifically to the consideration of the employer's liability, an employé who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of