1919

RAYMOND SHILSON AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS; *Nov. 20, 21. *Dec. 22.

AND

NORTHERN ONTARIO LIGHT AND POWER COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence—Power Co.—Use of power—Pipe across ravine on trestle—Wire four feet above pipe—Boy crossing on trestle—Injury from wire.

A pipe conducting compressed air was carried across a ravine on trestles and an electric wire crossed at right angles four feet above it at the centre. Barriers were erected across this pipe-line on both sides of the wire and on each barrier was posted a warning of danger. S., a boy twelve years old, attempted to cross the ravine by the pipe-line and having climbed around a barrier came into contact with the wire and was badly injured. In an action against the power company for damages the jury found that children were not in the habit of going on the pipe-line at the place where the accident occurred.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 449), that owing to this finding of the jury, and the fact that the company could have no reason to suppose that any person would get into a position of danger from the wire the action must fail.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial which dismissed the plaintiff's action.

The facts are sufficiently stated in the above headnote.

Aug. Lemieux for the appellant. There should be perfect protection against danger from such an agent

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*PRESENT:—Sir Louis Davis C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 449, 48 D.L.R. 627.

1919
SHILSON
v.
NORTHERN ONTARIO LIGHT AND POWER CO.

as electricity. See *Royal Electric Co.* v. *Hévé*(1) at pages 466-7 and 470-1; *Gloster* v. *Toronto Electric Light Co.*(2) at pages 33 and 39.

The defendant company was bound to anticipate contact with the wires and should have had them insulated; *Thomas* v. *Wheeling Electrical Co.*(3).

R. S. Robertson for the respondents referred to *Groves* v. *Wimborne*(4); *Woods* v. *Winskill*(5), at page 309.

THE CHIEF JUSTICE.—I agree with Mr. Justice Anglin.

IDINGTON J.—The appellants in support of very numerous complaints of error on the part of the learned trial judge in directing, or failing to direct, the jury, are unable to point to any objection by counsel at the trial in regard to any of these alleged misdirections or non-directions which are now for the first time as to the greater part of them brought forward as grounds for relief.

Needless to say such grounds are too late and must be discarded. They are, moreover, in substance, so far as I have heard in argument, quite untenable.

There seems no ground upon which relief can be given for the reason that the judgment appealed from is right.

The rather startling proposition that there were regulations expressly applicable which had been overlooked by solicitors in bringing the action, and counsel in conducting it, and the learned judge in trying it, held our attention for a time, but it seems to turn out to be quite unfounded in fact.

The appeal should be dismissed with costs.

(1) 32 Can. S.C.R. 462.
(2) 38 Can. S.C.R. 27.
(3) 54 W. Va. 395.
(4) [1898] 2 Q.B. 402.
(5) [1913] 2 Ch. 303.

DUFF J.—I concur in the view of the Chief Justice of the Appellate Division that an insuperable obstacle to the appellant's success lies in the finding of the jury that boys were not in the habit of frequenting the place where the unfortunate appellant was injured.

Mr. Lemieux contends that the admitted facts give rise to liability under sec. 37 of the "Power Commission Act" of Ontario as amended by ch. 19, sec. 37 of the Ontario statute of 1916. His contention is that the wires from contact with which the appellant received the injuries from which he suffers, were not insulated as required by the regulations under this statute and that the respondents are answerable for the consequences in damages.

I do not find it necessary to consider the construction of sec. 37 with a view to ascertain whether a right of action is given in respect of the harm caused in consequence of the default of companies or individuals in observing any duty arising out of regulations brought into existence under the authority of the enactment. The regulations produced are

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are stated in the preface to

have reference only to inside work in ordinary buildings

and moreover, it is explicitly declared that electric work involving potentials exceeding 5,000 volts are not taken into consideration; and further the notes attached to the rules (A) and (B) upon which Mr. Lemieux desires to base his claim, make it quite clear that these rules apply only to conditions obtaining in some place which in ordinary language would be described as a building.

It is quite clear that we should not be justified in granting a new trial to enable Mr. Lemieux's client to put forward a claim based upon these regulations.

1919
SHILSON
v.
NORTHERN ONTARIO LIGHT AND POWER CO.
Anglin J.

ANGLIN J.—A perusal of the evidence has satisfied me that the learned trial judge was right in holding that it discloses no duty owing to the plaintiff by the defendant which it failed to perform and therefore dismissing this action. I agree that there was no evidence proper to be submitted to the jury in support of the plaintiff's charge of negligence.

In view of the improbability of even a venturesome and mischievous boy seeking to walk across a ravine 17-19 feet deep and 300 feet wide on a 12 inch pipe carried on trestles, and of the precautions which the defendant had taken by posting conspicuous "danger" notices near the place where the plaintiff's son was injured, which he saw and understood to be such, and making it still more difficult of access by the placing of barricades which any person travelling along the pipe would be obliged either to climb over or to swing around, there was no reason to apprehend that children might find an opportunity of making the company's high voltage wire crossing nearly four feet above its pipe line a source of danger to themselves or others such as led this court to find negligence and consequent liability in the recent cases of *Salter and Geall* v. *The Dominion Creosoting Co.*(1). The principle of the decision in *McDowall* v. *Great Western Rly. Co.*(2), there distinguished, I think governs this case. As put by the learned Chief Justice of Ontario:

> It seems to me that what the respondent company did was just the same as if it had a patrolman who said "don't go over into that enclosure. It is dangerous to go there." And it shocks my common sense to think that a boy or a person who had been warned in that way and does go there and is injured by something he did not anticipate to find, should be entitled to recover.

In this court, however, the plaintiff asks that if he should not be entitled to judgment on the case as

(1) 55 Can. S.C.R. 587; 39 D.L.R. 242. (2) [1903] 2 K.B. 331.

presented at the trial he should be granted a new trial to enable him to bring before a trial court certain rules and regulations of the Hydro-Electric Power Commission made under the authority of sec. 37 of the "Power Commission Act," R.S.O. 1914, ch. 39, as enacted by 6 Geo. V. ch. 19, not adverted to in the courts below, which he maintains either directly impose a duty on the defendant which it failed to fulfil or afford evidence of a standard of due care, omission to observe which would constitute negligence on its part. A copy of these regulations

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has been furnished to us.

In the first place sub-sec. 8 of sec. 37 itself provides that

nothing in this Act shall affect the liability of * * * any company, firm or individual for damages caused to any person or property by reason of any defect in any electric works, plant, machinery, apparatus, appliances, device, material or equipment or in the installation or protection thereof.

Secondly, in the preface to the rules and regulations so published we are informed that they

have reference only to inside work in ordinary buildings, *e.g.*, residences, workhouses, factories, etc., and such work may be attached to the outside of such buildings and to the wiring of electric railways, cars and car houses,

and that all electric work involving potentials exceeding 5,000 volts is not taken into consideration. Finally, in the notes appended to the particular rules (a) and (d) found under the heading "High Potential Work, (650-5,000 volts)," which the appellant seeks to invoke it is again made clear that they relate to high potentials in buildings.

We are here concerned with an outside transmission line far distant from any building and carrying a current of 11,000 volts. In my opinion these rules and regu-

1919

SHILSON
v.
NORTHERN ONTARIO LIGHT AND POWER CO.

lations could not be successfully invoked by the appellant for any purpose in this case.

The appeal fails and should be dismissed with costs.

Brodeur J.

BRODEUR J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Anglin.

MIGNAULT J.—The appellant, a boy of twelve years, was injured by falling from a pipe line of the respondent crossing a ravine and on which he was walking. At about four feet above the pipe line were high voltage wires, and the appellant having touched these wires received a shock which threw him to the ground, causing his injuries.

The appellant's action having come to trial before Mr. Justice Masten and a jury, the latter answered the questions put to them as follows:

Question 1: Was the plaintiff on the pipe line where the accident occurred with the knowledge or permission of the defendants? Ans.: No.

Question 2: Were children and other persons in the habit of walking on the defendants' pipe lines to the knowledge of the defendants? Ans.: Yes. And if so where? Ans.: Principally on the main line.

Question 3: If so, did the defendants object or seek to prevent that practice? Ans.: No.

Question 4: Were children or others in the habit of walking on the defendants' pipe lines at the place where the accident occurred? Ans.: No.

Question 5: If so, were the defendants aware of the practice? Ans.: No.

Question 6: Was the plaintiff aware that the barricade and notice thereon was intended to warn persons not to walk on the pipe line at that place? Ans.: Yes.

Question 7: In the construction or maintenance of their lines, were the defendants guilty of any negligence which occasioned the accident? Ans.: Yes.

Question 8: If so, in what did such negligence consist? Ans.: In the electric wires being too close to the pipes.

Question 9: If you find that the defendants are liable, at what sum do you assess the damages? Ans.:
To the Infant plaintiff..... $2,500
To the Father..... 410

At the close of the plaintiff's case, the respondent had moved for a non-suit. This motion was reserved until the evidence for the defence had been put in and the case had gone to the jury. The motion was then renewed and the learned trial judge, without determining whether the plaintiff was a trespasser or a licensee when walking on the pipe line of the defendant, found that the evidence did not disclose any duty owing to the plaintiff by the defendant which the latter failed to observe and perform. He also found that there was no evidence proper to be submitted to the jury in support of question No. 7 or upon which they could find as they had. The motion for a non-suit was therefore allowed and the action dismissed with costs. This judgment was upheld, on appeal, by the Appellate Division.

Taking the findings of the jury as they are, the answers to questions 7 and 8, in my opinion, impute no negligence to the respondent on which legal liability can be predicated against it. The jury found that children or others were not in the habit of walking on the defendant's pipe line at the place where the accident occurred, and also, in answer to question 1, that the plaintiff was not on the pipe line where the accident occurred with the knowledge or permission of the defendant. Even if the answer to question 2 could by itself be taken as a finding that children and other persons were in the habit of walking on the defendant's pipe lines generally to the latter's knowledge, the reply given to question 4 shews clearly that the answer to question 2 should not be construed as a finding that children or others were in the habit of

1919

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO.

Mignault J.

walking on the branch pipe line where the accident happened. Taking all the answers together, it would seem, although the learned trial judge did not think it necessary to determine the point, that the plaintiff was a trespasser on the pipe line where he was injured, and the jury's answer to question 6 seems to put this beyond any doubt. This would defeat his action under the authority of *Maritime Coal, Railway & Power Co.* v. *Herdman*(1) unless the respondent failed in a duty which it owed him as such trespasser.

I cannot find that the respondent failed in any such duty. At the argument, the appellant's counsel referred to the rules and regulations issued by the Hydro-Electric Power Commission of Ontario, under the authority of the statute 6 Geo. V. (Ont.) ch. 19, sec. 37, and asked this court to order a new trial so as to permit him to file these rules and regulations in the record. But if the rules in force in 1916, and of which he sent us a copy, prohibited the respondent from maintaining the high voltage wires where they are over the pipe lines, effect could probably be given to them without ordering a new trial, unless more testimony than that actually given were required. Unfortunately, however, for the appellant these rules and regulations, which were framed for the purpose of inside electrical installations, do not apply to the respondents' wires or to their installation and maintenance where they are. Moreover, as shewn by sub-sec. 8 of sec. 37, the intention of the statute was not to affect the liability of the company for damages caused by reason of defective installation or protection of electric works or appliances.

The question therefore remains whether it was negligence to have these wires at a distance of four

(1) 59 Can. S.C.R. 127; 49 D.L.R. 90.

feet or thereabouts above the pipe line where the accident occurred. In the absence of any statutory prohibition, and in view of the jury's finding that children or others were not in the habit of walking there, I am clearly of the opinion that this question must be answered in the negative.

The pipe over which the plaintiff attempted to walk was a twelve inch pipe carried on trestles, and in the deepest part of the ravine was seventeen feet above the ground. To walk on it, even without the high voltage transmission wires, was extremely hazardous to say the least. A sign had been placed at this spot with the words "Danger, 11,000 volts" in large letters, and a barricade had been erected to prevent anyone going along the pipe. The defendant certainly could not have anticipated that any one would walk over this pipe and be injured by coming in contact with the wires. Under these circumstances, a verdict of negligence against the defendant is one which the jury, considering the whole of the evidence, could not reasonably find.

In my opinion the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Auguste Lemieux.*
Solicitors for the respondents: *Fasken, Robertson, Chadwick & Sedgewick.*