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*Feb. 9. 10.
*Mar. 8.

OLE SIGERSETH, AS ADMINISTRATOR OF THE ESTATE OF MATIAS SIGERSETH, DECEASED (DEFENDANT) ..... APPELLANT;

AND

ERLING PEDERSON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Master and servant—Injury to farm employee in employer's dwelling—Defective conditions alleged as cause—Alleged negligence of employer—Reasonable efforts by employer to remedy condition—Error of judgment as to cause of trouble—Acceptance by employee of risk.

Plaintiff was employed by S. as a farm labourer. They lived together in a shack on S.'s farm. It was heated by a stove, which gave trouble by smoking, which S., assisted by plaintiff, tried to remedy. One afternoon plaintiff, feeling ill, went to bed, S. sitting up to look after the stove. Plaintiff awoke two days later with his feet frozen. S. was found dead on the floor. The cause of his death was matter of conjecture. The fire in the stove had burned out. Plaintiff claimed damages from S.'s estate.

Held, plaintiff could not recover; S. did all a reasonable man would have done to render the shack safe; assuming that S. committed an error of judgment in thinking (as apparently plaintiff thought also) that the cause of the trouble was in the stove (which S. proposed to replace by a new one as soon as weather permitted) and in not suspecting it to be in the "roof-jack" (serving as a chimney), such an error

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

of judgment would not support a charge of negligence under the circumstances; moreover, if there was an obvious danger, it was as obvious to plaintiff as to S.; and plaintiff, with every means of information that S. possessed, voluntarily remained in the shack; on the evidence, it was not merely a case of knowledge by plaintiff of a possible danger, but of free acceptance by him of any risk there might have been in the existing conditions.

Judgment of the Court of Appeal of Saskatchewan (20 Sask. L.R. 468) reversed. (1926) 2 D.L.R. 1065.

APPEAL by the defendant, the administrator of the estate of Matias Sigerseth, deceased, from the judgment of the Court of Appeal of Saskatchewan (1) which, reversing judgment of Mackenzie J., held plaintiff entitled to recover damages from the defendant for personal injuries resulting, as alleged, from defective conditions in the deceased's shack, where plaintiff, who was employed by the deceased as a farm labourer, lived with the deceased. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs. As to a small item for arrears of wages the judgment below for the plaintiff was not disturbed.

C. E. Gregory K.C. for the appellant.

J. S. Rankin for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The respondent, Erling Pederson, after having failed in the trial court (Mackenzie J.), succeeded in obtaining from the Court of Appeal of Saskatchewan a judgment for substantial damages for personal injuries. His action was brought against the administrator of the estate of Matias Sigerseth, deceased, who now appeals to this court.

Pederson is a young Norwegian who, in the late autumn of 1924, was employed as a farm labourer by the deceased, a man said to have been sixty-eight years old, with whom he resided in a shack on the latter's farm. The shack was a wooden structure, divided into two rooms, a kitchen, and a bedroom with two beds, one for the respondent and the other for the deceased. There was no door between the

(1) 20 Sask. L.R. 468; [1926] 2 W.W.R. 205.

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kitchen and the bedroom, but only an opening. In the kitchen there was a coal stove or range with a seven-inch smoke pipe which rose straight from the stove and thence was carried along the ceiling to the middle of the room where it went through the roof. There was no chimney, but on the roof, where the smoke pipe passed, there was what is called a roof-jack, which served as a chimney, and was itself enclosed in a wooden box filled with cement or sand from which the pipe emerged.

For some time previous to the 16th of December, the coal stove had smoked rather badly, and to let out the smoke the deceased used to open the outside door slightly. Together with the respondent, he sought to discover the cause of the trouble, and in the beginning of the month the two men took the stove and pipes outside and cleaned them, afterwards setting them up in their previous position. They did not go up on the roof to inspect the roof-jack. There appears to have been some improvement, but, in the middle of December, a spell of extremely cold weather set in, and the stove again gave trouble.

In the afternoon of Tuesday, December 16, the respondent complained of a headache, and the deceased advised him to go to bed, saying that he would do his work that evening, and that he would also sit up to look after the stove. The respondent, therefore, went to bed, fully dressed, and with three blankets over him. The deceased was then sitting by the stove and the shack door was partly open to let out the smoke.

The respondent states that he awoke only in the afternoon of Thursday, the 18th of December. His two feet were frozen. He arose and went to the kitchen to get some food. There was then no fire in the stove, the coal being fully burned out, and on the kitchen floor, in front of the stove and facing the door, he found the dead and frozen body of Sigerseth. The shack door was closed. A little later, the son of a neighbour came to the shack and brought the respondent to his father's house, from which he was taken to the hospital. There is no doubt his injuries were of a serious nature.

The evidence is that on the 16th and following days the weather was extremely cold, and it is stated that the temperature reached 40 degrees below zero.

On the 19th of December a hardware merchant and undertaker, named Saunders, who had sold the stove to the deceased, and who says it was a good stove, although a little hard to clean out, went to the shack to remove the body. He states that he noticed something on top of the roof-jack which looked like a rag stuffed into it. With the aid of a ladder he climbed up and examined it; it was like frost, and the chimney or roof-jack was filled as though the smoke had condensed and frozen. In appearance, he says, it was kind of white, almost like snow, with a small hole or vent, about an inch in diameter. He is unable to form any idea how long it had been that way. In cross-examination he expresses the opinion that it was the cold, during the few days of extreme cold weather, that caused the obstruction. He is asked by the appellant's counsel:

Q. And you would think it was probable during these two or three cold days immediately preceding the time you were there this filled up?

A. Well, I would imagine it would be, although I am not in a position to say, of course.

The inquiry was not pushed further, and it is a matter of conjecture whether the condition observed by Saunders, on the 19th, existed on or prior to the 16th of December. What caused Sigerseth's death is also a matter of conjecture. The physician who was called at the trial never saw his body, no post-mortem examination was made, and his assertion that the deceased died from suffocation by carbon monoxide and freezing is only a surmise from what he was told by others.

The respondent testifies that the deceased "was doing the best he could under the cold weather," that "he tried his best to keep the fire going," that he "was doing what he thought best around the stove under the cold weather" and that "he was always careful about the fires." Conditions in regard to the stove became worse when the extreme cold weather set in, and the deceased then spoke of going to town to get a new stove but was prevented from doing so by the excessive cold. It is impossible to read the respondent's testimony—and he is the only witness who can speak of what happened prior to the accident—without coming to the conclusion that the deceased made every effort to remedy the smoking condition of the stove, and the respondent joined with him in this attempt. Apparently none of them suspected that the cause of the trouble

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was elsewhere than in the stove, or that the roof-jack had anything to do with it. That the respondent was fully aware of the conditions which prevailed, and nevertheless consented to remain in the shack with the deceased cannot be questioned.

Under these circumstances, the learned trial judge considered that a case of negligence was not made out and he dismissed the action. In his opinion, when the respondent went to bed indisposed on the afternoon of the 16th of December, the effect of the trouble and its possible dangers were as obvious to him as they were to the deceased. The latter's duty to the former was to take reasonable precautions to see that the house was kept warm enough to prevent the respondent from perishing from the cold on the one hand and from suffocating from the coal gas on the other. To meet this situation the deceased, instead of going to bed, stayed up by the fire to tend and watch it. That, in the opinion of the learned trial judge, was a reasonable course for him to take and as much as could well be expected of him. To his mind, the whole case was one of pure misadventure.

The Court of Appeal reversed this judgment and awarded substantial damages to the respondent. In the opinion of Mr. Justice McKay, with whom the other judges concurred, the smoking condition was caused by the gradual accumulation of the condensed smoke and frost at the top opening of the roof-jack during the cold weather. He held that when the cold weather came and the stove was smoking greatly, a dangerous situation was created and it was then the duty of the deceased to take all reasonable steps to remove this danger. The roof-jack and not merely the pipes and stove should have been cleaned by the deceased.

With great respect, and in so far as this is a finding that the deceased did not take reasonable steps to discharge the duty he owed the respondent, I am unable, on a careful reading of the testimony, and especially of that of the respondent, to come to the same conclusion as the Court of Appeal. The roof-jack served as a chimney, and neither the respondent nor the deceased ever suspected that there was in it any obstruction to the escape of the smoke. It is mere conjecture—and a doubtful one at the best—

whether the condition observed on the 19th December existed before the cold spell set in. Assuming that the deceased committed an error of judgment after the cleaning of the stove and pipes in thinking that the cause of the trouble was in the stove which he proposed to replace by a new one as soon as the weather would permit, such an error of judgment would not support a charge of negligence under the circumstances. In my opinion, the deceased did all that a reasonable man would have done to render the shack safe as a residence for the respondent and himself. If the respondent's suggestion that his death was caused by suffocation from coal gas and freezing be justified, he sacrificed his life in looking after the fire while the respondent slept. It is a case of misadventure and not of negligence.

Moreover, if, as the respondent contends, there was an obvious danger, this danger was as obvious to the respondent as to the deceased. And the respondent, with every means of information that the deceased possessed, voluntarily remained in the shack and slept there after the cleaning of the pipes. On the evidence, it is not merely a case of knowledge by the respondent of a possible danger, but of free acceptance by him of any risk there might have been in the existing conditions.

I cannot see any ground for holding the appellant liable in damages for the respondent's injuries.

The Court of Appeal granted the respondent $28.85 for arrears of wages. This item, which was claimed by the action, was apparently overlooked by the learned trial judge when he dismissed the respondent's demand *in toto*. I would not disturb the judgment of the Court of Appeal in that respect, but allowance of this small item should not affect the disposition of the costs of this litigation, for the respondent fails as to the principal object of his action.

I would therefore allow the appeal with costs throughout against the respondent, and restrict the latter's recovery to the sum of $28.85, to be offset against the costs which he must pay.

Appeal allowed with costs.

Solicitors for the appellant: *Buckles & Graham.*

Solicitor for the respondent: *R. A. Hutchon.*