1906

*Oct. 23, 24.
*Oct. 29.

THE GUARDIAN FIRE AND LIFE ASSURANCE COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE QUEBEC RAILWAY, LIGHT AND POWER COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Electrical installations — Cause of fire—Defective transformer—Improper installations—Evidence—Onus of proof.

In an action to recover the amount of a policy of fire insurance paid by the plaintiffs upon the destruction of the premises insured by fire caused, as alleged, through the defective condition of a transformer of the defendant company, whereby a dangerous current of electricity was allowed to enter the insured building, the evidence failed to shew conclusively that the transformer was out of order previous to the occurrence of the fire, and at the same time it appeared that the wiring of the building may have been defective.

Held, affirming the judgment appealed from, that the onus of proof upon the plaintiffs had not been satisfied and that they could not recover. *Abrath* v. *The North Eastern Railway Co.* (11 Q.B.D. 440) referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, sitting in review at Quebec (1), and restoring the judgment of Andrews J., at the trial,

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) Cf. *Union Assurance Co.* v. *The Quebec Railway, Light and Power Company,* Q.R. 28 S.C. 289.

by which the plaintiffs' action was dismissed with costs.

The respondents are a company incorporated for the purpose of generating and supplying electric power and light in the City of Quebec, and furnished electric light to the owner of the building, insured by the plaintiffs, which was destroyed by fire said to have been caused through a defect in the defendants' transformer which they had negligently allowed to remain in an unsafe condition so that it broke down and sent a current of 2,000 volts of electricity over the secondary wires by which the building was lighted and which were calculated to stand a current of 110 volts only. The insurance company paid the amount of the insurance, obtained a subrogation from the proprietor of the building and claimed re-imbursement from the defendants on the ground that they had been guilty of the negligence by which the fire occurred in failing to maintain their transformer in a proper condition to ensure their consumers against the consequences of dangerous high tension currents entering on the secondary wires. The defence was that the defendants' appliances were of the best known quality and skilfully set up, and that, if the fire had actually been caused by an electric current, it resulted from the unskilful and improper installations in the building itself.

At the trial Mr. Justice Andrews found that the fire was caused by electricity, but that no fault or negligence had been proved against the defendants. This judgment was set aside by the Court of Review(1), but, on appeal, the judgment of the Superior Court, at the trial, was restored by the judgment now appealed from.

(1) See 1 Q.R. 28 S.C. 289.

1906

GUARDIAN FIRE AND LIFE ASSURANCE CO. v. QUEBEC RAILWAY, LIGHT AND POWER CO.

The facts of the case are shortly stated in the headnote and more fully referred to in the judgments now reported.

J. E. Martin K.C. and *L. A. Taschereau K.C.* for the appellants.

Stuart K.C. and *Lafleur K.C.* for the respondents.

GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal with costs.

IDINGTON J.—In my view of this case there is no necessity of passing upon any of the many questions of law (some of them of a most interesting nature) presented to us here for consideration, save the very common-place one that a plaintiff, when his cause of action is denied, must prove his case by evidence that can be relied upon, before he can be held entitled to succeed.

The appellant complains that a house was destroyed by fire, started by electric wires, conducting an electric current, supplied by the respondents, to light the house in question.

The wiring inside the house was, where at least one fire, or part of the whole fire, first broke out, very defective.

The respondents' transformer through which the current was supplied for use by means of this defective wiring was found after the fire to be then broken down.

One side blames the fire on the defective wiring, and the other on the defective or broken down transformer.

The transformer admittedly was of the best make known, and had been well tested before being placed,

and had only been in use three years. It is not known how long it might live, but, barring accidents, might reasonably have been expected to serve for seven years longer. . Periodical inspection from day to day, or other short period, would seem from the evidence of appellants' expert witness, as well as the other evidence, to be quite impracticable, that is, an inspection of such character as might have discovered the derangement complained of inside this transformer in question.

In their normal condition, these appliances and their connections should have brought into the house a low tension current of only 100 to 110 voltage.

It is asserted by respondents that no fire can, in such a place as the wires in question ran, be produced by such a current. The evidence of respondents' witnesses, however, admits the possibility, and under certain unusual conditions the probability, of fire therefrom.

It seems to be admitted, or at least not seriously denied, that once a fire started in this house the result might possibly be to break down the transformer and leave it as found after this fire, though up to the time of the fire it had been in good working order.

Notwithstanding these respective possibilities arising from the circumstances referred to, in each of the respective conditions relating thereto, we are asked to find that as a fact, in some way or other unexplained, the transformer, working well up to 3 a.m., suddenly broke down and let into this house a higher tension of current than that necessary to serve the house.

Such is the problem of fact to be solved by the appellants before they can succeed. And this problem must be so solved as to satisfy us that the solution

1906

GUARDIAN FIRE AND LIFE ASSURANCE CO. v. QUEBEC RAILWAY, LIGHT AND POWER CO.

Idington J.

arrived at is in accord with the evidence, supported by the evidence, and appeals to our reason in such a way as to enable us to find this transformer had suddenly gone wrong.

The evidence of the fire in this house being caused by electricity might reasonably be found in this case. I am, however, quite unable, after a most careful consideration of the evidence and all else in the case, to find such evidence as would establish that the fire was caused by a current of higher tension than the owner of the house agreed might be transmitted therein.

The contract between the parties was in writing, but that is not produced, and the contents are not proven. We must deal with the case as if the relations between said parties had for their basis an agreed service such as I have adverted to.

Much ingenuity was displayed in the argument by suggesting certain presumptions. I think the evidence has not reached that stage at which, on any theory of this case possible on the evidence before us, there can be any presumption that would operate in appellants' favour. If the appellants had succeeded in establishing as a fact upon which we could act that, with the low tension current permissible, the fire in question could not possibly have arisen, perhaps we might have had to consider these suggestions.

As the case stands the appellants have not established a *primâ facie* case of any possible cause of action.

With such inaccurate data as given here to build upon it would be an impossible task to make even a reasonably fair appearance of a case.

The evidence has been so fully analyzed in the courts below, and so fully dealt with in the argument

before us, that I see no good purpose to be served by any lengthy exposition of it here.

Much seeming strength was given to the appellants' case by the apparent coincidence of a little flame scorching on this occasion a rosette through which the service wire from this same transformer entered another house. To support the appellants' case, such an apparent coincidence ought to have been clearly shewn to have been coincident and taken place immediately before, or simultaneously with, the fire in question.

We can only guess at the exact time when the fire broke out.

The owner was awakened by a child's cry and found smoke, that indicated fire between a ceiling and a floor, coming through the floor in the child's room. Common experience forbids us accepting the time of this awakening as that when the fire started. If the fire was the result of a low tension current it might have begun in such a place long before the awakening, and remained unnoticed for an indefinite time.

This is one of many obvious weaknesses of the case upon which a very ingenious theory has had its foundation laid.

Accuracy in something—absolute accuracy if possible—is the first essential for a scientific investigation of anything. And in approaching the solution of a question in which the working of electricity has to be reckoned with, if we cannot find some solid basis of accuracy in time or place or both, we had better leave the problem as unsolved.

The appellants' chief expert witness frankly admits he was only sent to find out if the fire had been caused by electricity, and that if he had thought he

1906

GUARDIAN FIRE AND LIFE ASSURANCE CO. v. QUEBEC RAILWAY, LIGHT AND POWER CO.

Idington J.

was sent to build up a case against the respondents he would have taken many more precautions to secure additional evidence then.

The appellants' whole case exemplifies this as absolutely true. Doubtless this accounts for many missing links one would like to have seen supplied in order to understand what actually had happened. Thirty to forty other houses were served through this transformer, yet this scorching of the rosette referred to is the only indication of even seemingly concurrent accident. The setting of this rosette was unusually fitted to attract to it the current, and much dispute occurs as to whether its scorching was the result of a low tension current, or a result flowing from the fire in question.

To indicate some of the many proofs wanting in this connection, I may say that the doubt as to the order of events in relation to the fire in question, and that developed at this rosette, is such as to deprive the latter circumstance of any possible value.

Each side in argument seemed satisfied that they had established this rosette fire as before or after (as their interest required) the main fire in question. I find it utterly impossible on the evidence to determine which may be right. Either may be right. I am quite clear the evidence does not satisfactorily establish either view.

This scorched rosette no doubt influenced many parties having to deal with this matter from the beginning, including the courts through which the matter has been carried.

I repeat that owing to the impossibility of determining the time when the fire in the house began, the

determination of this point is impossible. In the evidence upon which the appellants' expert proceeded, he says this rosette scorching was only a confirmation of his judgment.

I rather think it so impressed him that it vitiated his whole attitude to the issue raised.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred in the judgment dismissing the appeal with costs.

DUFF J.—Admittedly a condition of the plaintiffs' success is the proof by them that the fire giving rise to the litigation was caused by the introduction into Morissette's house, through the defendants' system, of a current of electricity having a tension higher than 110 volts. The burden of this proposition of fact remained throughout the trial upon the plaintiff, and accepting the contention of the plaintiffs' counsel that proof of the derangement of the transformer was alone sufficient to establish a *primâ facie* case, I am still unable to disagree with the opinion of the majority of the court of appeal that the evidence viewed as a whole is upon this issue inconclusive. In this I am much influenced by the fact, not, I think, open to dispute, that owing to the defective state of the wires and appliances which Morissette himself, to connect his lamps with the defendants' system, placed in his house (and over which the defendants exercised no supervision or control), the house was exposed to the hazard of fire from the ordinary current of 110 volts which the defendants were under their contract bound to supply. In *Abrath* v. *North Eastern Ry. Company*(1), Brett M.R., said:

(1) 11 Q.B.D. 440.

1906

GUARDIAN FIRE AND LIFE ASSURANCE CO. v. QUEBEC RAILWAY, LIGHT AND POWER CO.

Duff J.

It is contended (I think fallaciously) that if the plaintiff has given *primâ facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. * * It seems to me that the proposition ought to be stated thus: the plaintiff may give *primâ facie* evidence which, unless it be answered, either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider, upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. * * Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced, to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

The facts in evidence leading to this state of doubt I think the plaintiff must fail.

Appeal dismissed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Pentland, Stuart & Brodie.*