1898
*May 18.
*Nov. 21.

FREDERICK MAKINS, AN INFANT, BY JAMES PARSONS, HIS FRIEND (PLAINTIFF).......... APPELLANTS;

AND

PIGGOTT & INGLIS (DEFENDANTS)...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Use of dangerous material—Evidence—Trespass.

Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require.

Held, reversing the judgment of the Court of Appeal, that in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shown to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M. in exploding the cap as he did did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it.

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

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APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division of opinion, the judgment at the trial in favour of the defendants.

The facts of the case are sufficiently stated in the above head-note.

Wallace Nesbitt, (*Gauld* with him,) for the appellant, cited *McGibbon* v. *The Northern Railway Co.* (1); *Williams* v. *Eady* (2); *Scott* v. *London and St. Katherine Docks Co.* (3) at page 601; Broom's Legal Maxims 298; *Snyder* v. *Wheeling Electrical Company* (4); Beven on Negligence, 561; Pollock on Texts, (5 ed.) pp. 21-41; *Clark* v. *Chambers* (5); *Consolidated Traction Co.* v. *Scott* (6); *Jewson* v. *Gatti* (7); *Dixon* v. *Bell* (8)

Osler Q.C. for the respondents, cited *Hughes* v. *MacFie* (9); *Mangan* v. *Atterton* (10) per Bramwell J.; *Carter* v. *Towne* (11), and cases there discussed; *Singleton* v. *Eastern Counties Railway Co.* (12); *Rogers* v. *Toronto Public School Board* (13); *Nagle* v. *Allegheny Railroad Co.* (14); Beven on Negligence (ed. 1889) p. 148.

TASCHEREAU J.—I would dismiss this appeal. The jury could not have reasonably given a verdict for the plaintiff upon the evidence adduced, and therefore the case was properly withdrawn from them. I adopt the reasoning of the Chief Justice of Ontario in the Court of Appeal.

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

KING J.—The negligence complained of, consisted in the leaving of a number of highly explosive detonators

(1) 14 Ont. App. R. 91.
(2) 10 Times L. R. 41.
(3) 3 H. & C. 596.
(4) 46 Cent. Law Jour. 254.
(5) 3 Q. B. D. 327.
(6) 55 Am. State Rep. 620.
(7) 2 Times L. R. 441.
(8) 1 Stark 287; 5 M. & S. 198.
(9) 2 H. & C. 744.
(10) L. R. 1 Ex. 239.
(11) 98 Mass. 567.
(12) 7 C. B. N. S. 287.
(13) 27 Can. S. C. R. 448.
(14) 88 Penn. 35.

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or caps in a place where they might innocently be picked up and handled in a way leading to their explosion by persons unaware of their dangerous character

At the trial the plaintiff was non-suited upon the ground that there was no evidence connecting the defendants with the act of leaving the caps where they were found. Upon direct appeal, the Court of Appeal upheld the non-suit, per Burton C.J.O. and Maclennan J.A., Osler and Moss JJ.A. dissenting.

The facts of the case are shortly stated in the opinions of the learned judges.

Assuming what, upon the evidence, the learned Chief Justice thought might properly be found by a jury, viz.. that the caps which were picked up were the property of defendants; and having regard to the proof that such kind of caps were kept by defendants in the tool box, in front of and near which the caps in question were found, and that they were taken out and put back as occasion might require by defendants' workmen; and having regard to the proof mentioned by the learned Chief Justice and Mr. Justice Maclennan, that workmen in defendants' service, upon the same work but in other gangs, found it useful and expedient when a blast was about taking place to hurriedly place any such explosives as they might happen to have in their possession under their tool box and then run away; it would seem to be a fair inference, (in the absence of circumstances leading to a different conclusion) to attribute the act of placing the defendants' caps upon the ground outside the box to those who alone are shown to have had the handling of them or the right of handling them. The alternative supposition that they may have been removed from the tool box by a stranger and then left upon the ground has no probabilities, and no evidence

in its support. If there were circumstances leading to such conclusion it was for defendants, with their fuller knowledge of the way in which their property was managed, to supply the proofs. On the case as it stands, the evidence seems sufficiently to connect defendants with the act or omission by which the caps were placed or left where they were found.

Then as to the negligence involved in such act or omission, the law imposes a duty of carefulness upon those who have the management or control of things which are or may be dangerous to human life or limb. The danger to be apprehended from the indiscriminate handling of these detonators was so great and so obvious that a high degree of caution was reasonably to be observed on the part of defendants to prevent them falling into the hands of strangers. None of the learned judges suggested that there was any lack of evidence from which negligence might be deduced, provided that the defendants were proven to be responsible for the detonators being found outside the tool box.

As to the plaintiff's act in exploding the cap by picking the apparently harmless substance in the bottom of the case with a piece of wood, this was not an act necessarily importing want of due caution. Assuming that defendants negligently suffered such a dangerous instrument to fall into the hands of persons unaware of its character, they might reasonably have foreseen that it might in the hands of such persons be treated in such a way as to explode it, and the act of such person in ignorance of its dangerous character, whereby an explosion took place, could not be said to be his voluntary act in the sense that would incapacitate him from recovery. If he was negligent and thereby contributed to the result still, unless such

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negligence is necessarily to be imputed upon the evidence, it would be for the jury to pass upon it.

A question was raised as to whether the place where the caps were found was a place where the plaintiff had no right to be; this however (as stated by the judges of the Court of Appeal) was, upon the evidence, a question for the jury.

For these reasons the appeal should be allowed with costs, the non-suit set aside and a new trial had. The defendants must also pay the costs in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Nesbitt, Gauld & Dickson.*

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