Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Minnie Ann McKenzie and others v. *The Corporation of the Township or District of Chilliwack, from the Court of Appeal for British Columbia; delivered the 30th October* 1912.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.

LORD ATKINSON.

LORD SHAW.

THE PRESIDENT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

[DELIVERED BY THE PRESIDENT OF THE PROBATE DIVISION.]

The Appellants brought an action in the Supreme Court of British Columbia, under Lord Campbell's Act, claiming damages for the death of Daniel McKenzie. They were the widow, son, and daughter of the deceased. His death was caused by a fire which burnt down a cell which was used as a "lock-up" for the rural Municipality of Chilliwack. The deceased had been placed in this cell by a constable after arrest. The action was brought against the Corporation of Chilliwack.

After much hesitation, the learned Judge at the trial left the case to the jury. The verdict of the jury was, "We find that Daniel McKenzie "met his death through the negligence of the "Municipality of Chilliwack. We award the "wife $3,000, and the children $2,000 each."

Subsequently on motion made for the Defendants for a non-suit, the learned Judge dismissed the action without costs. The Appeal of the Plaintiffs from that decision to the Court of Appeal for British Columbia was dismissed with costs.

The question for decision is whether there was any evidence of negligence on the part of the Defendants fit to be left to the jury.

There appears to have been some confusion in the Courts below between two matters, which should be kept quite distinct, *viz.* (1) acts of negligence on the part of the Defendants' servant in charge of the lock-up, which, if alleged and proved, would involve the question of the liability of the Defendants therefor; and (2) alleged negligence on the part of the Defendants themselves.

In their Lordships' opinion, no question of fact, or of law, of the former kind arises at all in this case.

The verdict of the jury affords no indication of what the negligence was which they found.

The Statement of Claim (paragraph 4) averred the duty of the Defendants to have been "to "cause some person to be constantly in and "about the said building, (*i.e.*, the lock-up), and "to be constantly in charge thereof, and of the "persons confined therein." The negligence alleged in the Statement of Claim (paragraphs 5 and 6) was that of the Defendants, in not having some person constantly in charge, so that in case of fire or other danger the persons confined in the lock-up might be rescued. It was also pleaded (paragraph 5) that by reason of such alleged negligence the lock-up took fire, and the deceased was burned to death.

Counsel for the Plaintiffs who argued at the Bar before their Lordships, and who also conducted the case in the British Columbian Courts, did not contend that the Defendants'

servant had been guilty of any negligence. His case was that the Defendants were directly guilty because they employed the person who arrested the deceased and who was in charge of the cell to perform other duties also which made it impossible for him to be in constant attendance at the lock-up.

Their Lordships are willing to assume for the purposes of this Appeal (but without pronouncing any decision on the point) that the Respondents are responsible for the appointment of the gaoler for the lock-up, and that if the appointment was not fitly or carefully made, they would be liable for any reasonably probable consequence.

The facts are few and simple.

Chilliwack is a small rural municipality. The "lock-up "which the Respondents provided or used was a wooden cell, part of the Court House buildings which were situate about the centre of the little town.

In May 1906, the Respondents appointed one Calbeck to be "Chief of Police, Sanitary "Inspector, Pathmaster, and Pound-Keeper."

He was the only constable in the municipality. As constable he arrested the deceased man on the 27th October 1906 for being drunk and disorderly, and placed him in the cell about 6 o'clock p.m. He searched him and took away the matches found upon him. About an hour later he arrested another man; he also searched him and deprived him of matches and placed him in the same cell.

Shortly after 9 o'clock that evening a fire broke out in or about the cell. Calbeck was then in the town attending to some of his humble but useful duties; but he came on the scene of the fire before the fire company arrived.

Between the time of the arrest of the deceased, about 6 o'clock, and a quarter past 9 o'clock,

when he went to the fire, Calbeck appears to have been at the cell four times, and he was able to attend there and to look round within about half an hour of the occurrence of the fire.

The evidence went to show that the fire originated in the cell in which the arrested men were. There was no stove, or fire, or furnace alight in or near the cell. The statement in the Appellants' printed case upon the appeal to their Lordships as to the origin of the fire is as follows :—

"The fire, which occurred during Calbeck's absence, "appears to have originated in the cell in which the "prisoners were confined, but apart from the fact that "matches could have been handed to one or other of the "prisoners through a window by persons passing outside "the cell, there is no evidence as to the actual cause of the "fire."

If an inference is to be drawn it would not be unreasonable to infer that the place was set on fire by the deceased, or his fellow-prisoner, or both.

In any event the Plaintiff failed to prove how the fire was caused, or to show that any one could reasonably expect that a fire might take place.

The principle of law to be applied to these facts is that which was stated by Lord Halsbury, L.C., in the leading case of *Wakelin* v. *The London and South-Western Railway Company* (12 A.C. 41), as follows :—

"It is incumbent upon the Plaintiff to establish by proof "that her husband's death has been caused by some negli- "gence of the Defendants, some negligent act, or some "negligent omission, to which the injury complained of in "this case, the death of the husband, is attributable. That "is the fact to be proved. If that fact is not proved the "Plaintiff fails, and if in the absence of direct proof the "circumstances which are established are equally consistent "with the allegation of the Plaintiff as with the denial of "the Defendants, the Plaintiff fails, for the very simple

"reason that the Plaintiff is bound to establish the "affirmative of the proposition: '*Ei qui affirmat non ei qui* "'*negat incumbit probatio.*'"

In their Lordships' opinion the Appellants in this case entirely failed to establish, or to adduce any proof, that the death of the deceased was in any way attributable to, or materially contributed to, by any negligent act or omission on the part of the Respondents. Their Lordships concur in the way in which the case was dealt with in the judgment of Macdonald, C.J.A.

It was not unreasonable, in their Lordships' view, for the Defendants in the small rural Municipality of Chilliwack to allot to Calbeck the other duties to some of which he attended on the evening of the fire; nor was it the duty of the Respondents in the circumstances to keep Calbeck or any other person constantly at the lock-up. No breach of duty on their part caused or contributed to the death of deceased.

Upon the facts proved at the trial there was no evidence whatsoever of negligence on the Respondents' part fit to be left to the jury.

Their Lordships will therefore humbly advise His Majesty that the Judgment appealed from ought to be affirmed, and this Appeal dismissed with costs to be paid by the Appellants.

In the Privy Council.

MINNIE ANN McKENZIE AND OTHERS

v.

THE CORPORATION OF THE TOWNSHIP OR DISTRICT OF CHILLIWACK.

DELIVERED BY THE PRESIDENT OF THE PROBATE DIVISION.

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