

MEREDITH, C.J.O., reading the judgment of the Court, said that the plaintiff alleged negligence at common law and breach of a statutory duty by the defendant, the duty imposed upon him by sec. 287 (a) of the Criminal Code.

The defendant for some time before the accident had been engaged in harvesting the ice, and had set off a part of the river, about 212 feet in width and 566 feet long, as the field for his operations. This he enclosed by a wire, strung from posts 75 to 80 feet apart, planted in the ice and resting upon the river-bottom. At the west end there were placed bushes at intervals, and there were bushes also on the north side. The wires had sagged in some places, and at some points had become partly embedded in the ice.

It was conceded that the two boys entered upon the ice-field at the west end; before entering it, they conversed with two boys, Irwin and Babcock. The conversation took place at the west end; and Irwin, seeing that they were on the ice-field, called to them, "I would not go in there"—that it was dangerous. But they went on, probably hearing though not heeding the warning. According to the testimony of Irwin, there was, in addition to the posts, wire, and bushes, a bank of snow, and the field could not be entered without ducking under the wire.

The accident occurred between 4 and 5 o'clock in the afternoon and in daylight. According to the testimony of some of the plaintiff's witnesses, it was quite apparent that ice-cutting was going on in the ice-field. The boys were 13 and 11 years old respectively—bright and intelligent lads.

The view of the trial Judge was, that the defendant had not complied with sec. 287 (a) of the Code—that it was not sufficient to have fenced the ice-field; the hole that had been made by removing the ice should have been fenced.

The section provides that every person who cuts or makes any hole, aperture, or place of sufficient size or area to endanger human life through the ice on any navigable or other water open to or frequented by the public, and leaves such hole unenclosed by bushes or trees or unguarded by a guard or fence, is guilty of an offence and liable to punishment.

At common law, the ice which forms upon a navigable body of water, the bed of which is in the Crown, belongs to the public, but becomes the property of him who has gathered it and reduced it into possession as an article of personal property: per King, J., in *Lake Simcoe Ice and Cold Storage Co. v. McDonald* (1901), 31 Can. S.C.R. 130, 133, 134.

The defendant discharged his common law duty by fencing the ice-field as it was fenced; and, even if he had failed to discharge it, the effective cause of the accident was not his breach of duty,