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*Oct. 5.

*Dec. 14.

DAVID ROBERTS AND WILLIAM THOMPSON (DEFENDANTS) ..... } APPELLANTS;

AND

HENRY HAWKINS, *ès qualité* (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Negligence—Trespasser—Dangerous way—Art. 1053 *C. C.—Warning—Imprudence—Arts.* 491, 496, 508 *C. P. Q.*

A cow-boy aboard a ship on the eve of departure from the port of Montreal, was injured by the falling of a derrick then in use which had been insecurely fastened. He was not at the time engaged in the performance of any duty and although he had been warned to "stand from under" he had not moved away from the dangerous position he was occupying.

Held, reversing the judgment of the Court of Queen's Bench, that the boy's imprudence was not merely contributory negligence but constituted the principal and immediate cause of the accident and that, under the circumstances, neither the master nor the owners of the ship could be held responsible for damages on account of the injuries he received.

APPEAL and CROSS-APPEAL from the judgment of the Court of Queen's Bench for Lower Canada maintaining in part the appeal of the defendants against the judgment of the Superior Court, District of Montreal, in favour of the plaintiff for $750 with interest and costs.

The appellants are the captain and the managing owner of the steamship Kildona, plying between Montreal and Liverpool, and the respondent as tutor of Herbert W. Ball, a minor, sued them for $4,000 damages, for injuries alleged to have been caused to

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

Ball by the falling of a derrick on the ship in the port of Montreal. The case was tried with a jury and the Superior Court interpreting the verdict as being against the appellants, condemned them to pay respondent $750, interest and costs. The Court of Queen's Bench, on appeal, varied this judgment reducing it to $375, with costs, in the Superior Court, Bossé J. dissenting, and from the latter judgment the defendants now appeal, asking for its reversal and the dismissal of the action with costs. The plaintiff, by cross-appeal, asks to have the Superior Court judgment restored.

A further statement of the case will be found in the judgment reported.

Macmaster Q.C. and *Peers Davidson* for the appellants. We ask that, upon the findings made by the jury, a judgment should be entered for the defendants; Arts. 491, 496, 508 C. P. Q. The court below erred in varying the judgment, and had only jurisdiction to grant a new trial or to render a different judgment. There was no question of contributory negligence to be considered. The owners cannot be held insurers of trespassers going aboard their vessel, and they have not been shown to have committed any fault to make them responsible, under Art. 1053 C. C.; *Tooke* v. *Bergeron* (1); *Montreal Rolling Mills Co.* v. *Corcoran* (2). The boy Ball, after being warned to "stand from under," refused to move away, but remained as a trespasser in the dangerous position near the hatch where he ought not to have been.

The slipping of the knot did not constitute fault in law. The appellants are only responsible if guilty of the determining, principal or proximate cause, and the injury was found by the jury to have been the result of Ball's own fault or folly. Moreover the result of the findings of the jury is actually a verdict in favour

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of the defendants; *Cowans* v. *Marshall* (1). The defendants owed no duty to Ball at the time of the accident; *The Caledonian Railway Co.* v. *Mulholland* (2). It is evident that the reasonable expectation of being engaged, as found by the jury, was the expectation which any cattleman might have had at that season of the year. It would be an engagement on the wharf. There is no evidence that cattlemen are ever engaged on the ship itself. Hence a reasonable expectation of being engaged in no sense warranted his presence on the ship. Neither was Ball at his work and duty when injured.

The appellant relies upon the following authorities to support the contention that upon the findings a verdict ought to be entered for the defendants. 7 Larombière, (ed. 1885) no. 29; Dal. supp. v. "Responsabilité" no. 198; v. "Travail" no. 370; *Prud'homme* v. *Vincent* (3); *Chartier* v. *Quebec Steamship Co.* (4).

The plaintiff moved for judgment on the verdict. By doing so he accepted the verdict as it stands and is now precluded from taking any exception to any of the answers. *Fletcher* v. *Mutual Fire Insurance Co. for Stanstead and Sherbrooke* (5).

We also refer to *Mercier* v. *Morin* (6), at page 90, and *Paterson* v. *Wallace* (7), per Cranworth L.J. at page 754, and to the French authorities summed up by His Lordship Mr. Justice Girouard in *The George Matthews Co.* v. *Bouchard* (8). Ball was *volens*; he took the risk of staying in a dangerous way and suffers solely on account of his own imprudence.

Geoffrion Q.C. and *J. M. Ferguson* for the respondent. Ball went aboard the ship with a lawful object, expect-

(1) 28 Can. S. C. R. 161.
(2) [1898] A. C. 216.
(3) Q. R. 11 S. C. 27.
(4) Q. R. 12 S. C. 261.
(5) 6 Legal News, 340.
(6) Q. R. 1 Q. B. 86.
(7) 1 Macq. H.L. 748.
(8) 28 Can. S. C. R. 580.

ing to be signed on the ship's articles. He was licensee and invitee of the owners and entitled to be protected from the consequences of their negligent acts; *The Canada Atlantic Railway Co.* v. *Hurdman* (1). The proof showed only an indefinite notice to "stand from under," a place where there would have been no danger but for a "slippery hitch" on the derrick chains, a negligently made knot which allowed the derrick to fall and cause the injuries at a spot beyond the usual area of danger in the swinging of the derrick. The defendants were guilty of gross fault in permitting such negligence in the working of a derrick, an operation which, under any circumstances, is attended with more or less danger. There is a presumption of fault against the defendants resulting from the mere fact of the fall of the derrick which is not rebutted and renders them liable; *Ross* v. *Langlois* (2); *Corner* v. *Byrd* (3); *Evans* v. *Monette* (4); *Dupont* v. *Quebec Steamship Co.* (5) *Great Western Railway Co. of Canada* v. *Braid* (6); *Scott* v. *The London and St. Katharine Docks Co.* (7); *Smith* v. *Baker & Sons* (8); *Meux* v. *Great Eastern Railway Co.* (9). In matters of *délit* and *quasi-délit*, the French law applies. See in *Cossette* v. *Dun* (10), at page 247, per Fournier J. referring to *Carsley* v. *The Bradstreet Co.* (11). See also 2 Domat. *tit.* 8 sec. iv, par. 1; 7 Larombière p. 541, no. 8, p. 560, no. 28; 20 Laurent, nos. 466, 467, 468, 472, 485, 487, 489, 490, 491.

Contributory negligence, or what is called *faute commune*, does not bar plaintiff's right of action, but only tends to a diminution of damages in proportion to the

(1) 25 Can. S. C. R. 205.
(2) M. L. R. 1 Q. B. 280.
(3) M. L. R. 2 Q. B. 262.
(4) M. L. R. 2 Q. B. 243.
(5) Q. R. 11 S. C. 188.
(6) 1 Moo. P. C. (N.S.) 101.
(7) 3 H. & C. 596.
(8) [1891] A. C. 325.
(9) [1895] 2 Q. B. 387.
(10) 18 Can. S. C. R. 222.
(11) M. L. R. 2 S. C. 33.

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plaintiff's contributory share in the injury. S. V. 1875, 1, 204; S. V. 1879, 1, 463; S. V. 1885, 1, 129; S. V. 1894, 1, 223; S. V. 1894, 4, 4; S. V. 1895, 1, 285 and notes 1, 2, 3; S. V. 1896, 1, 461 and note 4; "Responsabilité," No. 198; S; V. 75-1-25; D. P. 75-1-320; D. P. 96-1-19; S. V 80-1-55; Dal. (1896) vo. "Responsabilité," No. 51; *Cossette* v. *Leduc* (1); *Ibbottson* v. *Trevethick* (2) and *Cowans* v. *Marshall* (3).

Even in English law it is not every species of contributory negligence that bars plaintiff's right of action; *Radley* v. *The London & North West Railway Co.* (4), per Penzance L. J. at pages 758-59 and 760; *Foulkes* v. *The Metropolitan District Railway Co.* (5); *Tuff* v. *Warman* (6); *Sewell* v. *British Columbia Towing Co.* (7), per Strong J. referring to *Davies* v. *Mann* (8); *Barnes* v. *Ward* (9); at page 420, *Lynch* v. *Nurdin* (10), approved in *Harold* v. *Watney* (11), which also refers to and approves *Jewson* v. *Gatti* (12). Ball's alleged fault contributed but little, if any, to the injuries, and the jury though probably somewhat led astray by the judge's charge, have a very wide latitude in the determination of an action of this nature. *Bridges* v. *Directors, etc., of North London Railway Co.* (13) and *The Connecticut Ins. Co* v. *Moore* (14) confirming the judgment of this court. Although the Court of Queen's Bench had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, they had no power to set aside the verdict for the plaintiff, and direct a verdict

(1) 6 Legal News, 181.
(2) Q. R. 4 S. C. 318.
(3) 28 Can. S. C. R. 161.
(4) 1 App. Cas. 754.
(5) 5 C. P. D. 157.
(6) 27 L. J. C. P. 322.
(7) 9 Can. S. C. R. 545.
(8) 10 M. & W. 546.
(9) 9 C. B. 392.
(10) 1 Q. B. 29.
(11) [1898] 2 Q. B. 320.
(12) 2 Times L. R. 381, 441.
(13) L. R. 7 H. L. 213.
(14) 6 App. Cas. 644.; 6 Can. S. C. R. 634.

to be entered for the defendant in direct opposition to the finding of the jury on material issues.

The verdict of a jury assessing damages is not interfered with unless for very grave reasons. none of which appear in this case. Arts. 499, 500, 501, and 503 C. P. Q. are simply declaratory of the law, and settled jurisprudence as it existed previously ; *Ford* v. *Lacey* (1); *Great Western Railway Co.* v. *Braid* (2); and Dorion C. J. in *Wilson* v. *Grand Trunk Railway Co.* (3) affirmed in this court (Cass. Dig. 2 ed. 722); *Metropolitan Railway Co* v. *Wright* (4); *Brown* v. *Commissioner for Railways* (5); *Wilkinson* v. *Payne* (6); *Lambkin* v. *South Eastern Railway Co.* (7).

The Court of Appeal held, inasmuch as the jury found that both sides were in fault, and awarded $750.00 without mentioning that they had reduced the damages to this figure on account of contributory fault, that there was nothing to show that this figure did not represent the entire damage suffered, and so reduced the verdict by one half to represent plaintiff's contributory share in the injury. It is respectfully submitted that in so doing the court entirely misapplied the law. The presiding judge properly instructed the jury on the question of contributory fault, that if they found that the defendants' fault was the cause of the injury, but also found that plaintiff's fault contributed thereto, they should take this fault of the plaintiff's into consideration in awarding damages and so reduce the damages accordingly, and there is a presumption *juris et de jure* that the jury followed their instructions and the trial court judgment ought to be restored.

30 L. J. Ex. 351.
(2) 1 Moo. P. C. (N. S.) 101.
(3) 2 Dor. Q. B. 135.
(4) 11 App. Cas. 152.
(5) 15 App. Cas. 240.
(6) 4 T. R. 468.
(7) 5 App. Cas. 352.

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The judgment of the court was delivered by

GIROUARD J.—As we intimated at the time of the argument, we have come to the conclusion that this appeal should be allowed. The action was instituted by the tutor Hawkins, to recover $4,000 for compensation for certain injuries alleged to have been caused on the 17th July, 1897, to the minor, Ball, by the fault of the master and managing owner of the cattle steamship "Kildona," then lying in the port of Montreal, and on the point of sailing for Europe. It appears that the boy, aged about eighteen, was injured by the falling of a chain in connection with the derrick, after due warning had been given to him to move off the hatch. The case was tried with a jury in January, 1898, and to determine the question of responsibility it is sufficient to refer to the following questions submitted to them, and their answers:

4th. Was the injury to said Ball caused by any fault or imprudence of the defendants, and if so, state in what manner the same consisted?

Answer. Nine for; three against. Yes, imperfect hitching of the knot connecting the gantling with the chain.

5th. Was said injury caused by any fault or imprudence of said Herbert William Ball, and if so, state in what the same consisted?

Answer. Unanimous. Yes, after due warning had been given.

6th. Was the said Herbert William Ball engaged on board the said steamship "Kildona," at his work and duty at the time and place when and where the accident happened?

Answer. Unanimous. No, but on the ship with reasonable expectation of being engaged.

Did said Herbert William Ball persist in remaining at the spot where the accident happened, notwithstanding defendants' warning as to the danger?

Answer. Unanimous. Yes, in ignorance of the danger.

11th. Has the said Herbert William Ball and the plaintiff in his capacity suffered any damages from the injury above referred to, and if so, in what sum do you assess such damages?

Answer. Nine for; three against. Yes, seven hundred and fifty dollars.

Upon these findings the trial judge (Archibald J.) condemned the defendants to pay $750 and costs.

It is clear from the answers of the jury that they found fault both against the plaintiff and the defendants, but failed to determine what was the principal and immediate cause of the accident; and consequently, after weighing the evidence, the majority of the Court of Appeals thought that, under art. 496 of the new Code of Civil Procedure, the ends of justice would be attained by reducing the amount of the judgment one half, that is, to $375. Mr. Justice Bossé dissented, being of opinion that the facts disclosed show no right to damages, the accident being the result of the negligence of the boy alone. Mr. Justice Hall, who rendered the judgment of the court, stated that

> Ball had been engaged to go upon the voyage and assist in the care of the cattle, by one who was authorised to make such engagement.

This statement is certainly contrary to the finding of the jury, who, in answer to question six, returned that Ball was not engaged on the steamship at his work and duty, but that he was "on the ship with reasonable expectation of being engaged." There is evidence in favour of this finding. Walter Roffey, the only man authorised to engage the cattlemen for the voyage, does not remember having engaged Ball, but he further swears that when the time came to sign the ship's articles, the full list of the men engaged answered to the call. Ball's name was not among them. Therefore, it does appear that Ball was a mere trespasser on the ship, to whom the defendants owed no obligation or duty. But we do not rest our judgment upon that ground; even if he had any legitimate cause or right to be on the ship, for instance to seek for employment, he certainly was not employed in the movements of the derrick; he had no business to be

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on the hatch, and when ordered to "stand from under," he should have moved from the hatch. The "due warning" is proved by Anderson, Greeshaw and other witnesses. It is not disputed; it is found by the jury and is admitted by the trial judge and the judges in appeal. But we do not share their opinion that the fault of the boy constitutes merely contributory negligence. We agree, on the contrary, with Mr. Justice Bossé, that it was the principal and immediate cause of the accident. See Dalloz, J. G. Sup. vo. Responsabilité, n. 193; vo. Travail, n. 370, where several decisions are collected. A recent *arrêt* of the Cour de Cassation (S. V. 83, 1, 402) is remarkably in point:

LA COUR.—Sur le moyen unique, tiré de la violation des art. 1382, 1383 et 1384 C. civ. Attendu que l'arrêt attaqué (Chambéry, 28 juill. 1880) déclare, en fait, que, si les blessures qui ont entrainé la mort de Pierre Duret ont eu pour cause l'effondrement d'un échafaudage établi par Encrenaz pour le compte de Carton, et si cet effondrement a été déterminé par un vice de construction imputable à Encrenaz, il est constant, d'autre part, d'après les éléments de la cause et des enquêtes, que Duret, loin d'avoir été engagé, soit par Encrenaz, soit par Carton, à monter sur cet échafaudage, où sa présence n'était motivée par aucun travail même accidentel, avait été expressément averti que son concours était inutile aux travaux alors exécutés sur le dit échafaudage; qu'il avait été formellement invité à se retirer et à aller travailler ailleurs:—Attendu qu'en décidant, dans ces circonstances, que Duret a été victime de son propre fait et de sa seule imprudence, et en rejetant pour ce motif, la demande en dommages-intérêts intentée par sa veuve contre les défendeurs éventuels, l'arrêt attaqué n'a violé aucun des textes précités;—Rejette, etc.

This court laid down the same principle in *Tooke* v. *Bergeron* (1).

We are therefore unanimously of opinion that the appeal should be allowed and the cross-appeal of the respondent, for a restoration of the judgment of the Superior Court, dismissed with costs. The action of

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the respondent is dismissed with costs before all the courts.

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Appeal allowed with costs;
Cross-Appeal dismissed with costs.

Solicitor for the appellant: *Peers Davidson.*

Solicitor for the respondent: *J. M. Ferguson.*