CANADIAN NATIONAL RAILWAYS (DEFENDANT) ..... } APPELLANT; *Nov. 15, 16 1948 *Jan. 7 1949

AND

JOSEPH LANCIA ES QUAL. (PLAINTIFF) ..... } RESPONDENT.

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

Railways—Negligence—Jury trial—Evidence—Trespasser boy fell off moving freight car—Finding of jury that railway employee's shouting was a fault contributing—Liability of railway company—Province of judge and jury—Judgment after verdict—Arts. 475, 491, 508 C.C.P.—Art. 1053 C.C.—Railway Act, R.S.C. 1927, c. 170, s. 443.

Respondent's minor son, age 9, boarded a freight car at the corner of Murray and Wellington Street, in Montreal, which car formed part of a then stationary freight train. The train then started to move and while it was in motion, the boy still holding on, one of appellant's employee, from the caboose of the train, shouted to him to get off. The boy, jumped off, fell and was injured. It is undisputed that the boy was a trespasser. The jury found that the boy, immediately prior to the accident, was riding on the ladder of one of the cars and that the appellant's employee, one Tremblay, was in the cupola of the caboose when he shouted at the boy the last time. The verdict of the jury was that the accident was due to the fault, negligence and imprudence of both the boy because he had no business on the train and the appellant's employee for shouting. The jury assessed the contribution of each at fifty per cent. Appellant moved the Court to set aside the jury's verdict on the ground that the fault against the appellant, as determined by the jury, was not a fault in law in the circumstances of the case. The trial judge refused the motion as did the majority of the Court of King's Bench.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Locke JJ.

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Held: The Court should have declared that, in the circumstances, the shouting, as found by the jury, did not amount to a fault in law and should have dismissed the action. *C.P.R.* v. *Anderson* [1936] S.C.R. 200; *Grand Trunk Ry.* v. *Barnett* [1911] A.C. 361; *Addie* v. *Dumbreck* [1929] A.C. 358; *Latham* v. *Johnston* (1913) 1 K.B. 398 and *Metropolitan Ry. Co.* v. *Jackson* (1877) 3 A.C. 193 referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), confirming (McDougall J.A. dissenting) the decision of the trial judge, Tyndale J., refusing to reject the verdict of the jury that appellant was at fault and awarding damages to respondent.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Lionel Coté K.C. for the appellant.

Louis Fitch K.C. for the respondent.

THE CHIEF JUSTICE:—On the 5th of March, 1943, between eight and nine a.m., the respondent's minor son Angelo boarded a freight car at the corner of Murray and Wellington Streets, in Montreal, which car formed part of a then stationery freight train which started to move.

Whilst the boy was holding on to the then moving freight car and waiting for the train to come to a stop, one of the appellant's employees stepped out of the caboose of the train and, seeing young Lancia, shouted to him to get off. Young Lancia states that he became frightened, jumped off the moving train and a freight car passed over one of his legs. The employee in question then got back into the caboose and stopped the train.

It is established, beyond any possible question of doubt, (as found by the learned trial judge) that Angelo Lancia (the boy) was at all relevant times a trespasser on the property of the appellants.

The matter came before a jury and the latter found in its verdict that the respondent's minor son, just before he fell under the train, was riding on the ladder of one of the cars and that the appellant's employee, one Tremblay, was in the cupola of the caboose when he shouted at the boy the

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last time. Another finding of the jury was that at the date of the accident the boy was capable of discerning right from wrong.

The jury was put the questions which are usually put in similar trials in the Province of Quebec. They found that the accident was not due solely to the fault, negligence and imprudence of the appellant or its employees, nor solely to the fault, negligence and imprudence of the respondent's minor son, adding to their answer in that respect a rider reading as follows:—

> The affirmative answer is based on the fact that the boy got on the train, got off and on again and persisted in doing so despite the trainman's shoutings.

The verdict was that the accident was due to the fault, negligence and imprudence of both the respondent's minor son and the appellant's employee, or its employees, and stated that the respective fault, negligence and imprudence consisted in:

> Tremblay for shouting and the boy had no business on the train.

They assessed the damages as a result of the accident in the total amount of $17,800, but, as they arrived at the conclusion that there was common fault, they fixed the proportion in which the respondent's minor son and the appellant, or its employees, contributed to the accident at fifty per cent each, as a result of which the amount allowed the respondent, who was sueing in his quality as tutor of his son, was the sum of $8,900.

After the verdict the appellant moved the Court to set aside the jury's verdict and dismiss the respondent's action on the ground that the fault against the appellant, as determined by the jury, was not a fault in law in the circumstances of the case; that it did not constitute a fault, since what the appellant's employee, Tremblay, did was the only reasonable thing he could do in the circumstances and showed sound judgment on his part; that it was absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the appellant; that, at all events, the facts as found by the jury required a judgment in favour of the appellant, as the fault attributed to the latter at the most would constitute an error in judgment only, for which the appellant could not be held liable; that it was within the province or

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jurisdiction of the presiding judge to decide whether or not the fault or negligence found by the jury constituted a fault in law; that the jury's finding in that respect clearly indicated misunderstanding by the jury of the presiding judge's directions as to the duty or obligation of the appellant towards the respondent's minor son, a trespasser, or refusal on the part of the jury to follow the directions of the presiding judge as to such duty or obligation, and that the verdict was contrary to law and also to the evidence and ought to be set aside.

In his judgment the learned trial judge stated that he would have had no hesitation in answering the questions put to the jury as to whether just before he fell under the train the boy was running beside the train with his hand grasping a rung of the ladder or some other part of one of the cars; which answers, in the opinion of the learned judge, would have been in accordance with the weight the evidence and would obviously have required a decision in favour of the appellant, because it would then have been impossible to find any fault against Tremblay, the employee. The learned judge stated that it was only with "very considerable hesitation" that he accepted the answers of the jury.

With respect to the appellant's motion contending that, even accepting the majority answers to the four specific questions of fact, the fault found against Tremblay by the majority of the jury was not a fault in law, here again the learned judge stated that, acting as a judge alone, he would unhesitatingly have decided in favour of the appellant. He added:—

> In view of the admitted fact that Angelo Lancia was a trespasser, it seems clear that Tremblay committed no breach of the obligation or duty owed to him.

However, the learned judge concluded that as nine out of twelve presumably reasonable men considered that Tremblay's shouting at the boy constituted a fault, he "very reluctantly" refused to reject the verdict.

Likewise, when judgment was rendered in the Court of King's Bench (Appeal Side) (1), where the verdict and judgment of the trial Court was affirmed (E. McDougall, J.A. dissenting), St. Jacques J.A. in his reasons refers particularly to the statement of the trial judge that he

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very reluctantly refused to reject the finding of the jury to the effect that "Tremblay's shouting at the boy constituted a fault". St. Jacques J.A. added that since the jury found that such a fact was a fault and applying what he construed to be the meaning of a certain passage of the judgment of Mr. Justice Duff, as he then was, in the case of *Napierville Junction Rly. Co.* v. *Dubois* (1), he concluded his reasons by saying:—

> Comme la Cour Supérieure, je me crois lié par le verdict ainsi motivé et, conséquemment, je rejetterais l'appel avec dépens.

Marchand, J.A. considered the answers of the jury as being pure questions of fact without any implication of law. After stating that he could not say that the verdict is clearly against the weight of evidence (C.C.P., Sec. 498, s.s. 4), he was of the opinion apparently that such a consideration concluded the duty of the judge, in view of Article 501 which states: "A verdict is not considered against the weight of evidence unless it is one which the jury, viewing the whole of the evidence, could not reasonably find." However, the learned judge said that he could not make up his mind to come to that conclusion. He stated that he did not know how he himself would have dealt with the facts, but that, at all events, he would not have considered a contrary finding of fact altogether unreasonable. He referred to what Sir Lyman Duff, C.J.C., said in the case of *Canadian Pacific Railway* v. *Anderson* (2), with regard to the duty of the owner towards a trespasser, that the owner should not intentionally injure the trespasser, not do a wilful act in disregard of humanity towards him and not act "with reckless disregard of his presence".

Then the learned judge pointed out that, with respect, he could not subscribe to the opinion of the trial judge that if a verdict of a jury finds fault which is not a fault in law, he (the trial judge) is bound to accept the verdict for the simple reason that it is the jury's finding. The learned judge very properly says that it seems impossible to accept such a principle, a principle that if the verdict of a jury finds a so-called fault which does not constitute a fault or a *delict* in law, nevertheless the trial judge must accede to the verdict and give judgment accordingly. In the view of Marchand J.A. that would be unjust, contrary

(1) [1924] S.C.R. 375 at 380. (2) [1936] S.C.R. 200.

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to law, and it would be the duty of the presiding judge to refuse to admit and to sanction such a verdict. There is no doubt, he added, that the young boy was a trespasser and that he placed himself in the dangerous position in which he found himself, that he had exposed himself to the danger of a fall which might have been provoked by an abrupt movement of the car, or by the gradual ebbing of his strength. But, in the view of the learned judge, Tremblay's warning was an order to the boy to let go of the car and to jump to the ground—an order which, according to the learned judge, was evidently and obviously dangerous, with the result that the boy, seized with fright, loosened his grip on the rung of the ladder and fell a victim to the danger that would necessarily result, and this should have been obvious to all and to Tremblay in particular. The learned judge stated that this was an imprudence towards the child which had a direct effect on the accident which took place subsequently. Accordingly, Marchand J.A. concluded that the appellant company had failed to demonstrate that the verdict of the jury was unreasonable or contrary to law and on that ground he dismissed the appeal.

In his dissenting judgment McDougall J.A. expresses this view:—

> If, in law, such finding does not constitute fault within the purview of the law (C.C. 1053), the very basis upon which the action rests is demolished. It would be idle to speculate as to the effect of such finding. Without negligence, in a case of this nature, there can be no liability. As to the respective functions of the Judge and Jury in such circumstances, I can do no better than cite the clear and direct remarks of St. Jacques J. in the case of *Bouillon* v. *Poiré* (1):—
>
> Pour conclure que quelqu'un est en faute, il faut d'abord savoir ce qu'il a fait, ou ce qu'il a omis de faire.
>
> C'est là le rôle du jury. Il doit constater après avoir entendu la preuve, si les faits allégués ont été prouvés. Il ne devrait pas aller plus loin. Quand il a fait cette constatation, le rôle du juge commence alors. C'est à lui qu'il appartient de décider si les faits constatés par le jury ont été imputés comme faute au défendeur et si, en droit, ces faits comportent en réalité une faute.

To reiterate the statement of St. Jacques J.A., just quoted, it is for the judge to decide whether the facts found by the jury ought to be imputed as a fault to the appellant and if, in law, those facts, as found, really constitute a fault.

(1) 63 (Que.) K.B. 1 at 20.

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McDougall J.A. continued that it is, he considered, beyond question that upon the judge, not upon the jury, rests the responsibility of declaring whether or not the facts as found by the jury constitute a fault in law. He added that in dealing with mixed questions of fact and law, notwithstanding the jury's answer, the judge retains his decisive authority to pronounce upon the law. It is clear, he says, that in the present case the learned presiding judge did not consider that such facts constituted negligence because he (the trial judge) said it was with "very considerable hesitation" that he accepted the answers of the jury. Nevertheless, the learned trial judge gave effect to these answers, which amounted to saying that "Tremblay's shouting" constituted a fault for which the appellant company and its employees should be held responsible.

Now, the finding of the jury did not mean anything more than that Tremblay shouted. It was for the learned presiding judge to decide whether, in the circumstances of the case, that fact constituted a fault in law.

I agree with McDougall J.A. when he says:—

> What is not a fault in law can scarcely become such by the mere erroneous or ill-considered finding of the jury to that effect. They go beyond their sphere of action and usurp the functions of the judge when they assume to trench the question of law by declaring an actionable fault an act which is not such.

McDougall J.A. goes on to say:—

> With the greatest deference I cannot find that the shout of the brakeman, in the circumstances, constitutes actionable fault. His acts do not constitute a breach of the principle of law stated by the learned trial judge in his charge to the jury when indicating the duty owed by the appellant's employee to the victim of the accident . . . Tremblay was exercising his best judgment in a difficult situation, not of his choosing, but cast upon him by the actions of the victim of the accident, and the very most that can be said is that in the imminence of the danger he apprehended, Tremblay may have committed an error of judgment in the course which he pursued.
>
> In my opinion he did what any reasonable person placed in the same circumstances would have done. To have done nothing would have exposed him to even greater criticism.
>
> From a slightly different angle, I find it difficult to say that the shout of the brakeman was the direct and foreseeable cause of the accident (again a question of law). The element of a sure and certain relation between cause and effect is distinctly doubtful. The act of the brakeman may possibly be an *"incuria"*, but not an *"incuria dans locum injuriae"*. (See *Davey* v. *L. & S. W. Ry. Co.* (1))

(1) (1883) 12 Q.B.D. 70.

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McDougall J.A. then referred to the opinion expressed by the Chief Justice of the Province in *Collard* v. *Farrar* (1), which seems very much in point in the present case, and also to the judgment of this Court in *Grand Trunk Railway* v. *Labrèche* (2).

Gagné J.A., agreeing with the majority of the Court appealed from, recited the answer of the jury to the effect that the fault, negligence and imprudence of the appellant's employee, Tremblay, "for shouting", was the only fault found against Tremblay and that this shouting consisted of the word "Get off, get off". On that point he added that the verdict of the jury must be accepted, because there was certain evidence to support it, even though it was weak. Tremblay did shout, he said, since he admitted it himself, but Tremblay did so because he thought that that was the best means of protecting the boy. Shouting alone cannot constitute a fault, the learned judge stated, but he believed that it must be interpreted broadly when taking into account all the other circumstances and more particularly the allegations of the declaration; that one must conclude that this answer of the jury blames Tremblay for having shouted to the boy to get away, or to climb down from the train (it was evident to the jury that the boy was on the train) at a time when the train was moving and that Tremblay was aware of the danger that might result. In the opinion of Gagné J.A. that is the fault which the verdict attributes to Tremblay.

The learned trial judge very clearly stated what the doctrine was with respect to the obligations of an owner towards a trespasser. After such direction, the jury found the employee of the appellant company guilty of a fault. It is argued that the jury did not limit itself to the question of passing upon the facts alone, but that it has passed upon the law as well and that, therefore, this Court must intervene. In the opinion of Gagné J.A. that is the question to be decided in this case and he remarked that to him it did not appear to have been a simple question, because the answer of the jury raises a mixed question of fact and law. He very properly said that it was for the jury to determine the facts which gave rise to the accident; but he went on to say that in that regard the presiding judge,

(1) Q.R. 60 K.B. 445.

(2) 64 S.C.R. 15 at 23, 27.

as well as the Court of King's Bench (Appeal Side), (1) cannot intervene unless the answers are manifestly and clearly against the weight of evidence. On the other hand, the jury should not be called upon to decide a question of law.

Gagné J.A. continued by saying that the jury must necessarily declare whether there was fault or not; that that is how the jury characterizes the facts which it finds to have been proven. The learned judge asked himself if that were within the province of the jury and answered by saying: "I believe it, in view of the Canadian, as well as the English, jurisprudence." Basing his decision on that alleged jurisprudence and on what he describes as the "doctrine", he states that he finds himself bound (whatever might be his opinion as to the responsibility of the respondent with regard to the accident) to decide that the Court cannot intervene, the jury having determined the facts upon the evidence, evidence which the Court may consider insufficient but which, nevertheless, is on record, and also having passed upon the question of responsibility after having been correctly directed on the law governing the parties.

In the opinion of MacKinnon J. (*ad hoc*) there was manifest inaccuracy in the evidence which led to the jury's answers as to whether the boy ran along the train or was standing on the ladder of the car until he slipped and fell from the train. He pointed out that he could not possibly have got on the third car from the caboose, which was a considerable distance east of where the boy said he got on the train. He added:—

> It is clear from the judgment that the learned judge was greatly embarrassed in having to arrive at the decision he did and that can be readily understood. I am entirely in agreement with him when he says that he would have no hesitation in answering question 2-A in the affirmative and question 2-B in the negative, as being in accordance with the weight of the evidence. However, there is sufficient evidence to make it impossible to say that the verdict was one that, taking the evidence as a whole, the jury could not reasonably find.

The learned judge continued:—

> The learned judge also had difficulty in dealing with the finding of the majority of the jury that Tremblay had committed a fault in shouting. Although it seemed clear to him that Tremblay had committed no breach of any obligation or duty owed by him to a trespasser, he was of the opinion that as his charge to the jury was as clear as he could

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make it, and as nine out of twelve jurors considered Tremblay's shouting constituted a fault, he was reluctantly obliged to accept this finding. I find myself in the same position . . .

It is evident that the jury must have considered that Tremblay when he shouted acted either with the intention of injuring Angelo or did a wilful act with disregard of humanity towards him or acted with reckless disregard of his presence.

The jury was instructed that if they found that what Tremblay did was an error of judgment, then there was no fault. Accordingly the finding of fault on the part of Tremblay means that the jury considered that there was no question of any error in judgment. My opinion that there was an error in judgment cannot be substituted for the opinion of the jury. I consider that Tremblay was faced with a situation in which he had to act quickly and what he did should be considered an error of judgment. Angelo was on a moving train picking up speed and had got on with the intention of getting off at or near Bridge Street. His position was rapidly getting more dangerous as the train proceeded. Shouting to the boy to hang on might have frightened him more than telling him to get off. Tremblay says the only means of stopping the train was by the emergency air-brake in the caboose, which would probably have jolted Angelo off the train had he applied it.

MacKinnon J. concludes:—

I am reluctantly forced to accept the verdict of the jury as confirmed by the judgment *a quo* and to dismiss the appeal, with costs.

The law of Quebec on this point is (C.C.P., article 475):

The jury finds the facts, but must be guided by the directions of the judge as regards the law.

It is quite clear from this Article of the Code that the Quebec law is exactly the same as under the common law, that is to say, that the jury's province is exclusively limited to the finding of facts and that the law is exclusively the province of the presiding judge. It may be, as suggested by Mr. Justice Rivard, formerly of the Court of King's Bench (Appeal Side), at p. 75 of his book entitled "Manuel de la Cour d'Appel", that the wording of the questions in the present case (it has invariably been the same in all jury trials in the Province of Quebec) is the source of difficulties which can be avoided by limiting the questions put to the jury to the facts purely and simply. However, no criticism can be made of the questions as they were put in the present case, since they followed the invariable practice in the Province.

It is clear, however, as the learned judges both in the Superior Court and in the Court of King's Bench (Appeal Side) (1) have said, that when the jury was asked to decide the fault that caused the accident that was putting

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a question of mixed law and fact. Notwithstanding the form of the question, it cannot detract from the principle laid down in Article 475 of the Code of Civil Procedure, nor from the well-established principle that the jury's verdict must be limited to the finding of facts and that the law is exclusively the domain of the courts.

With respect, it was, therefore, the duty of the presiding judge and of the learned judges forming the majority in the Court of King's Bench (Appeal Side) (1) to accept the verdict of the jury in the present case as a finding of fact that Tremblay had shouted and perhaps also that such shouting was one of the causes of the accident, the other cause being, as found by the jury, that "the boy had no business on the train". The result of the jury finding was that the boy was a trespasser and, in its opinion, the shouting at the boy was a contributory cause of the accident.

It remained, however, for the Courts to decide whether, in the circumstances, the mere shouting, as found by the jury, amounted to a fault in law, or, in the language of the Civil Code (Article 1053) amounted to a fault or "offence" within the four corners of that section of the law.

It can be seen, from the review I have made of all the judgments of the learned judges both in the Superior Court and in the Court of King's Bench (Appeal Side) (1), that not only was the shouting of Tremblay not an offence or fault in the circumstances, but, moreover, it was not a contributory cause of the accident of which the boy, Lancia, was a victim.

To arrive at that conclusion it is only necessary to proceed as did MacKinnon, J. (although he did not press his analysis of the facts to its normal result) and to follow the reasoning of the dissenting judge, McDougall J.A.

One can only ask what Tremblay could have done in the situation of imminent danger in which the boy had placed himself—a situation, for the making of which, the boy was exclusively responsible.

At the hearing before this Court, Counsel for the respondent was asked several times what he could suggest that Tremblay might have done instead of shouting. He could not claim that it would have been better to have

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stopped the train immediately, because Tremblay himself explained that would have created a greater danger as a freight train of some forty cars suddenly coming to a stop would have jolted more sharply and caused the fall of the boy from the car. On the other hand, if he had done nothing, there is every likelihood that the jury would have found that his remaining inactive was truly negligence, for which he himself and his company should be held liable.

Now, of these three alternatives—stopping the train suddenly, doing nothing, or shouting to the boy to get off—one may properly ask which was the correct decision to arrive at, quite apart from the fact that Tremblay had to act on the spur of the moment and without the slightest hesitation, because the predicament of the boy was becoming increasingly dangerous as the train gathered momentum. In my opinion what Tremblay did was not even an error of judgment. I verily think that he chose the best way of protecting the boy and coming to his rescue, that what he did could never be apprehended as a fault or an offence; and that the course he took to try and protect the boy was, in the circumstances, the best means at his disposal. It really comes to this—that the sole fault committed by any one in this accident was caused by the boy's own reckless act in getting on the freight car and remaining there while the car was moving. Such being the case, it is impossible to say that the finding of the jury (shouting) could ever be declared a fault under the law of Quebec. As it was not a fault, it was the duty undoubtedly of the judges to so declare it, and, therefore, to dismiss the action on the verdict rendered. That is what should have been done by the trial judge (C.C.P., article 491), or by the Court of King's Bench (Appeal Side) (C.C.P., article 508). *Canadian Pacific Rly.* v. *Anderson* (1) is conclusive on the point of trespass in this Court.

For the reasons stated I think that the appeal should be allowed and the action of the respondent dismissed, with costs throughout.

KERWIN J.:—There was no evidence upon which the jury could reasonably find that the shouting of Tremblay,

(1) [1936] S.C.R. 200.

said by them to be the latter's fault, was negligence contributing to the accident. The appeal should be allowed and the action dismissed, all with costs if demanded.

TASCHEREAU J.:—I agree that the appeal should be allowed with costs throughout and the action dismissed with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of King's Bench (Appeal Side) (1), for the Province of Quebec, affirming a judgment at the trial in favour of the respondent. The action was brought to recover damages in respect of personal injuries sustained by the minor son of the respondent when injured by being run over by one of the appellant's trains. The boy, who was nine and one-half years old, had climbed on to the side of a car and the injuries were sustained when he attempted to get off the moving train in circumstances to be mentioned.

In his declaration the respondent alleged that his son boarded the freight car while the train was stationary; that the train suddenly started; that while it was in motion an employee of the appellant shouted to the boy from the steps of the caboose to get off; and that when the boy did not do so the employee pretended to pick up something from the side of the rail to throw at him, whereupon the boy became frightened and in attempting to jump fell under the moving train.

The evidence for the respondent was to the effect that the boy was on the ladder on the side of the car firmly grasping the rungs and did not get off at any time until the appellant's employee shouted and made the gesture referred to in the declaration from the latter's position on the steps of the van. The evidence of the appellant's employee, Tremblay, however, is that he was not on the steps of the caboose at any time but in the cupola on the top; that he saw two boys on the train, one on the front of the second car from the caboose and one on the rear of the third car, and that there were several other boys on the ground further away; that he called to the two boys to get off and that they did so. He says that the respondent's son, when first seen by him, was holding on to one of the cars and running beside it and that when he shouted the boy

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released his hold and let a couple of the cars pass but then grabbed another and ran about fifty feet. When Tremblay shouted again he says the boy fell under the car. At this time the train was proceeding at about seven or eight miles an hour. Tremblay immediately applied the brakes and brought the train to a stop in about 200 feet. On being asked why he had not put on the brakes and stopped the train before the boy fell he said that in his opinion it would have caused a jerk which might have thrown the boy from the train and that in doing what he did he had acted in accordance with his best judgment under the circumstances.

In answer to specific questions the jury found that the boy, just before he fell, was not running beside the train with one hand grasping the ladder or some other part of the car but was riding on the ladder itself. They also found that Tremblay was not standing on the steps of the caboose when he shouted but was in the cupola. They also found that the accident was due to the joint negligence of the boy and Tremblay, this negligence consisting on the part of "Tremblay for shouting" and on the part of the boy in that he "had no business on the train." All other allegations of negligence were therefore negatived. The jury found the boy and Tremblay guilty of fault in equal degrees.

The learned trial judge refused a motion by the appellant to dismiss the action on the answers of the jury, being of opinion that although the boy was a trespasser, as was admitted, and although it seemed clear to him that Tremblay had committed no breach of duty, nevertheless he could not interfere with the verdict.

In the Court of Appeal (1), MacKinnon J. took the same view. He pointed out that the jury had been instructed that if they found that what Tremblay did was an error of judgment, there was no fault and that, accordingly, the finding of fault on the part of Tremblay excluded such error. The learned judge was of opinion that his own view that Tremblay's action amounted merely to error of judgment could not be substituted for the opinion of the jury.

As he expresses so clearly and concisely the situation which Tremblay faced at the time, I quote from the notes of the learned judge:

> I consider that Tremblay was faced with a situation in which he had to act quickly and what he did should be considered an error of judgment.

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Angelo was on a moving train picking up speed and had got on with the intention of getting off at or near Bridge Street. His position was rapidly getting more dangerous as the train proceeded. Shouting to the boy to hang on might have frightened him more than telling him to get off. Tremblay says the only means of stopping the train was by the emergency air-brake in the caboose which would probably have jolted Angelo off the train had he applied it.

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McDougall J. dissented from the majority. Accepting the findings of fact made by the jury, he was of opinion that the answer of the jury with respect to Tremblay did not constitute fault in law within the meaning of Article 1053 of the Civil Code and that the act of Tremblay in shouting, while it may have been *causa sine qua non,* was not *causa causans.*

With respect to the duty owing to the infant trespasser, the learned trial judge charged the jury in accordance with the law laid down in *Anderson* v. *C.P.R.* (1). In that case however, the presence of the trespasser upon the train was not known to the railway company. It was known however, in *Canadian Northern Railway Co.* v. *Diplock* (2), but in that case, as in Anderson's case, both of which followed the decision of the Privy Council in *Grand Trunk Railway* v. *Barnett* (3), it was held that it is not sufficient to enable one who is a trespasser to recover, merely to show negligence on the part of the servants of the railway. In the case where the presence of the trespasser is known to the servants of the railway, the respondent contends that these authorities are not applicable in the Province of Quebec. The judgment of Lord Wright at least, in *Glasgow* v. *Muir* (4), indicates that with respect to positive acts of an occupier of premises, the duty owed to a trespasser may not differ from that owed to other classes of persons who are known to be thereon. In the case at bar I am content to deal with the case on the basis, although without deciding the point, that the duty owed to the minor in the case at bar was of this higher nature. But, in my opinion, the answer made by the jury with respect to Tremblay does not amount to a finding of fault in law. It is of course clear that while it is for the jury to find the facts it is the function of the court to determine whether or not there is any evidence to support the findings and also to decide whether any particular answer is in law a finding of fault

(1) [1936] S.C.R. 200.
(2) 53 S.C.R. 376.
(3) [1911] A.C. 361.
(4) [1943] A.C. 448.

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or negligence; *Verdun* v. *Yeoman* (1); *McKay* v. *Grand Trunk Railway* (2); *Bouillon* v. *Poire* (3), per St.-Jacques J.

In the case at bar it is plain that the act of negligence pleaded as against the appellant was not established in evidence. The jury have negatived anything of a threatening nature in the gesture made by Tremblay or that he was in the position the respondent alleged he was. The situation confronting Tremblay is as I have said, clearly expressed by MacKinnon J. and I think there was no element of negligence in the choice which he made. Upon the facts as found by the jury, any finding that Tremblay fell short of the conduct of a reasonably careful man must be regarded as perverse. That situation had been created by the wrongful act of the boy and forced upon him the necessity of making a choice. As to stopping the train, he did not do so because he thought the shock might throw the boy off. Had he done nothing, the train was gathering speed and the boy might well have been placed in a more dangerous situation later if he were allowed to remain. He did not know that the boy himself intended to jump off at Bridge Street, a comparatively short distance further on. There is no allegation and no finding that the speed of the train at the time the boy attempted to get off was such that Tremblay should not have ordered him off at that time. Tremblay says the speed was from seven to eight miles an hour and the respondent himself in his factum describes this speed as slow. Tremblay had observed the other boys jump off very shortly before. While the act of leaving any moving train no doubt involves some danger, I do not think that Tremblay's act in ordering the boy off amounts to any breach of duty toward him in the circumstances. It could not be more than an error of judgment, even if it could be said to be an error, and it was not open to the jury, in my opinion, to bring it to the level of fault.

I would therefore allow the appeal and dismiss the action with costs here and below if demanded.

LOCKE J.:—In the plaintiff's declaration it is alleged that the infant plaintiff boarded a freight car of the defendant company which was part of a train then stationary at the

(1) [1925] S.C.R. 177.
(2) 34 S.C.R. 81.
(3) 63 (Que.) K.B. 1 at 20.

corner of Murray and Wellington Streets in Montreal, that the train suddenly started to move and that while it was in motion an employee of the defendant company stepped out of the caboose of the train and "on seeing the said boy imprudently shouted to him to get off." There were further allegations that when the boy did not get off the train an employee of the defendant threatened violence to him and pretended to pick up something from the side of the rail to throw at him, whereupon the boy being frightened had jumped and fallen under the wheels of the moving train. Various other charges of negligence were made but all of these, including the allegation that an employee of the defendant had frightened the boy by threatening him with violence or pretending to pick up a missile, were negatived by the answer made by the jury that the negligence attributable to the defendant was that of its employee Tremblay "for shouting"; *Andreas* v. *Canadian Pacific Railway Co.* (1).

The undisputed fact is that the infant plaintiff was a trespasser upon the property of the defendant. Upon conflicting evidence the jury found that immediately prior to the accident he was riding on the ladder at the side of one of the freight cars of the moving train, and not running beside the train with his hand grasping a rung of the ladder as stated by Tremblay, an air brakeman employed by the defendant and who was riding at the time in the cupola of the caboose at the rear of the train. The boy admittedly got on to the train without permission, with the intention of riding on it a short distance to the west to the vicinity where he lived and, when observed by Tremblay, the train was travelling some seven or eight miles an hour and it must be taken that he jumped from the ladder at the side of the freight car after the brakeman had shouted to him to "get out of there."

The defendant company was operating the train in question upon its right-of-way in the exercise of its statutory powers. Of necessity, the operation of freight and other trains involves danger to those who trespass upon the right-of-way in the path of these trains, or who attempt to ride upon the freight cars without permission. For damages caused by the operation of such trains in pursuance of its

(1) 37 S.C.R. 1.

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powers the defendant is not, in the absence of negligence, liable. Here the infant plaintiff, in defiance of the provisions of sec. 443 of the *Railway Act*, cap. 170, R.S.C. 1927, trespassed upon the freight car in question and the contention to be made on his behalf must be put upon the ground that while he had of his own motion unlawfully placed himself in a position of danger, the defendant or its servants had failed in some duty owed to him to protect him from the consequences of his own rash act. In the situation in which Tremblay was placed when he saw the boy he might perhaps have shouted to him to hang on tightly to the ladder or conceivably have brought the train to a halt by using the emergency air brake or have followed the course which he did pursue in shouting to the boy to get off the train. There was risk to the boy in continuing to ride on the ladder at the side of the car, since the train was picking up speed. There was danger if the air brakes were applied suddenly since, as stated by Tremblay, the jolting stop might shake the boy off the ladder. There was also obviously some risk to the boy if he jumped from the train though, in view of the slow speed at which it was travelling, this would appear to be slight. In these circumstances Tremblay ordered the boy to get off the train and it is this act which the jury found to be negligent and to have contributed to the accident.

In *Grand Trunk Railway Company* v. *Barnett* (1) where the plaintiff was a trespasser on the railway company's property and on a train which to his knowledge was not at the time in use as a passenger train and on which he had taken up a precarious position on the platform and steps of the carriage, Lord Robson said that the railway company were undoubtedly under a duty not wilfully to injure him, nor were they entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, and that though he was a trespasser a question might arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. It was this statement of the law which was adopted by Duff, C.J. in *Canadian Pacific Railway Company* v. *Anderson* (2), and while it does not appear that in either of these

(1) [1911] A.C. 361.

(2) [1936] S.C.R. 200 at 218.

cases the presence of the trespasser was known to the employees of the railway company, the manner in which the principle is stated makes it quite clear that its application is not limited to such cases. In *Addie's* case (2) Viscount Dunedin quoted with approval what was said by Hamilton, L.J. in *Latham* v. *Johnson* (2), that "the owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity toward him'; but otherwise a man trespasses at his own risk," and said further that as to trespassers there is no duty, save only that of not inflicting malicious injury. As to the decision in *Excelsior Wire Rope* v. *Callan* (3), I agree with what was said by Humphreys, J. in *Walder* v. *the Mayor, Alderman, etc. of Hammersmith* (4), that that case was decided on the fact that it did not matter whether the child who had been injured was a trespasser or not, since there was such carelessness amounting to recklessness on the part of the owners of the property, the persons responsible for the land, as would have given a good cause of action even to a trespasser. Applying the law as thus stated to the present case the judgment cannot, in my opinion, be supported. The plaintiffs had pleaded various acts of negligence, including the alleged act of Tremblay in frightening the boy by a threatening gesture as if he was going to throw a stone so that, as matters stood at the conclusion of the plaintiff's case, I think the learned trial judge would not have considered withdrawing the case from the jury. If, however, the plaintiff's case as proven had been as found by the jury, that the only act complained of was that Tremblay shouted at the boy to get off, a motion for non-suit should have succeeded on the ground that no facts had been established in evidence from which negligence might be reasonably inferred. (*Metropolitan Railway Company* v. *Jackson* (5)).

In the judgment of the learned trial judge on the motion made by the defendant after the jury's verdict the following passage appears:—

> The next important point in Defendant's Motion is the contention that, even accepting the majority answers to the four specific questions

(1) [1929] A.C. 358.
(2) (1913) 1 K.B. 398, 410.
(3) [1930] A.C. 404.
(4) (1944) 1 A.E.R. 490 at 494.
(5) (1877) 3 A.C. 193, 197.

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of fact, the fault found against Tremblay by the majority of the Jury is not a fault in law. Here again the undersigned, acting as a Judge alone, would unhesitatingly have decided in favour of Defendant. In view of the admitted fact that Angelo Lancia was a trespasser, it seems clear that Tremblay committed no breach of the obligation or duty owed to him.

I take from this that he considered that negligence could not be inferred from the mere fact that Tremblay had shouted to the boy to get off the train under the circumstances then existing. The position of the plaintiff cannot possibly be improved by the fact that, rejecting the evidence as to the threat by Tremblay that he would throw the stone and the various other charges of negligence, the jury found that shouting alone was actionable. If Tremblay, instead of shouting to the boy to get off the slowly moving train, had told him to remain where he was and the boy had thereafter fallen, or had he stopped the train with the emergency air brake and the jolt had thrown the boy under the wheels, it could scarcely be contended that there was a right of action for the resulting injuries. It seems to me that the present claim is equally without foundation. It was the boy who was in danger through his own actions and if Tremblay erred in the course he took for the boy's protection (and I think he did not), there is no actionable negligence in the circumstances of this case. The reckless driver of an automobile who, by his negligence, places the driver of another vehicle in a position of danger cannot complain if in the situation thus created the other person makes an error in judgment and a collision results. A trespasser cannot, in my opinion, create a situation of danger to himself and complain of an error of judgment in the steps taken to extricate him. There was here no evidence upon which to find that there had been any wilful act in disregard of humanity towards the boy, nor any act done with reckless disregard of his presence, nor any wilful act involving something more than the absence of reasonable care nor, in the language of Viscount Dunedin in *Addie's* case (1), any "malicious injury."

In my opinion, the finding made that the act of Tremblay in shouting under the circumstances of this case amounted

(1) [1929] A.C. 358.

to fault or negligence cannot be supported. The appeal should be allowed and the action dismissed. If costs are asked they should follow the event.

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Appeal allowed and action dismissed with costs.

Solicitors for the appellant: *Coté & Perrault.*

Solicitor for the respondent: *Allan A. Grossman.*