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*Feb. 13, 14.
*April 21.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

TORGIL ANDERS ANDERSON, AN INFANT SUING BY HIS NEXT FRIEND, ASTRID OLIVIA ANDERSON, AND ASTRID OLIVIA ANDERSON (PLAINTIFFS).. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Railways—Negligence—Highways—Railway track on public street—Children playing in vicinity—Track used for assembling of freight train—Child climbing on car of assembled train just before train hauled away, falling through jerk of starting train and injured—Liability of railway company.*

Defendant railway company had a track on the north side of H. street in the city of Winnipeg, on which it would assemble a freight train by moving easterly successive "cuts" of cars to be added to those already assembled. When the assembling was completed an engine was attached and the train was hauled westerly to connecting tracks within defendant's yards. Children played in the vicinity. One evening, after a long train had been assembled, and the hauling crew had taken charge, and were about to start the train, the plaintiff, a boy aged 4½ years, ran across the street, unnoticed by the trainmen, climbed the end side ladder of a car, crossed to the rear ladder, and fell at the jerk of the starting train and was injured by the moving train. Defendant was sued for damages.

*Held* (Crocket J. dissenting): Defendant was not liable. (Judgment of the Court of Appeal for Manitoba, 43 Man. R. 345, reversed).

*Per* Duff C.J. and Rinfret J.: Plaintiff was a trespasser on the train and on that ground alone was precluded from maintaining a right of action for negligence. The case is governed by *Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361. (*Lygo* v. *Newbold,* 9 Ex. 302, *Hughes* v. *Macfie,* 2 H. & C. 744, and *Addie* v. *Dumbreck,* [1929] A.C. 358, also cited). Further, no breach of duty by defendant had been established. Towards people using the public street defendant was bound to exercise reasonable care. Engaged in the execution of statutory powers, it was bound to take reasonable care not to cause unnecessary harm to those who might be injured by a careless or unreasonable

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

exercise of its rights. But it was under no obligation to intending trespassers, children or adults, to prevent them effectuating a trespass upon its cars. Its duty towards such a trespasser was limited to refraining from intentionally injuring him or "not to do a wilful act in disregard of ordinary humanity towards him"; "not to act with reckless disregard of the presence of the trespasser." On the evidence it was clear that defendant did not permit children to climb on the cars and tried to prevent them; it was not in the position of a tacit licensor. There was here no nuisance; the action rested upon negligence; (the distinction, and its importance, discussed, and *Lynch* v. *Nurdin,* 1 Q.B. 29, *Liddle* v. *Yorkshire,* [1934] 2 K.B. 101, *Cooke* v. *Midland,* [1908] 2 Ir. R. 242, [1909] A.C. 229, *Latham* v. *Johnson* [1913] 1 K.B. 398, discussed). The present case has no analogy to *Lynch* v. *Nurdin,* 1 Q.B. 29, *Glascow Corporation* v. *Taylor,* [1922] 1 A.C. 44, *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404, or *Cooke* v. *Midland,* [1909] A.C. 229. A person who is using his vehicle in the usual way, having committed no wrong, and though the vehicle may be attractive to children, is guilty of neither negligence nor nuisance, and is not responsible for injury to children caused by their trespassing thereon.

*Per* Davis J.: The case cannot be treated in law as one of nuisance, and falls to be determined upon the question of negligence. That distinction is fundamental. The presence and movement of cars on the street was the inevitable result of the ordinary exercise of defendant's public authority. It was not shewn that plaintiff was on the car with leave or licence of defendant. He was a trespasser on the car. It was clear upon the evidence that no employee of defendant saw him approaching the car or upon it. It could not be fairly said upon the evidence that defendant's conduct toward him was such wilful or reckless disregard of his presence as to amount to malicious conduct toward him. To hold defendant liable would make it virtually an insurer of a trespasser. (*Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361, *Addie* v. *Dumbreck,* [1929] A.C. 358, and *Liddle* v. *Yorkshire,* [1934] 2 K.B. 101, cited. *Lynch* v. *Nurdin,* 1 Q.B. 29, *Cooke* v. *Midland,* [1909] A.C. 229, *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404, and other cases, discussed).

*Per* Kerwin J.: Defendant's railway track was legally on the street, and its employees were lawfully engaged in moving the cars. Defendant owed no duty to plaintiff which it failed to fulfil. Plaintiff's act in running out and getting on the car when none of defendant's employees happened to be looking, was something against which defendant could not guard, and which, in law, it was not incumbent upon it to foresee. (*Donovan* v. *Union Cartage Co.,* [1933] 2 K.B. 71, *Liddle* v. *Yorkshire,* [1934] 2 K.B. 101, and other cases, referred to).

*Per* Crocket J. (dissenting): Defendant, in the exercise of its right to assemble cars and move trains on its track along the street, was bound to take such precautions for avoidance of injury to the public as were fairly commensurate with the danger created by said operations. Its degree of care and vigilance owed to the public depended on existing conditions and risks, as they were known or ought to have been known to defendant or its servants in charge. At the particular point where the accident happened there was a special danger from the presence of children in play in close proximity, and upon the evidence defendant through its servants and agents must be charged

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with knowledge thereof. The standing cars were an attraction to younger children, and this should have been known to defendant's servants; and defendant did not take reasonably adequate precautions to guard against the obvious danger of such a thing as happened. It should have kept one or two watchmen to patrol the dangerous sections, specially charged with looking out for children, from the time the hauling crew took over the train until it was moved off the street. In the circumstances defendant could not avail itself of the fact that plaintiff was a trespasser on the car; he was no more so than were the infant plaintiffs in *Lynch* v. *Nurdin*, 1 Q.B. 29, and *Excelsior Wire Rope Co.* v. *Callan*, [1930] A.C. 404.

APPEAL by the defendant railway company from the judgment of the Court of Appeal for Manitoba (1) allowing (Dennistoun and Trueman JJ.A. dissenting) the plaintiffs' appeal from the judgment of Adamson J. (2) dismissing the action. The Court of Appeal set aside the judgment of Adamson J. and gave judgment for the infant plaintiff for $5,000 and for the adult plaintiff (the mother of the infant plaintiff) for $800. The action was brought to recover damages by reason of injury to the infant plaintiff caused when, having climbed on a car of defendant's freight train which had been assembled on defendant's track on Higgins Avenue in the city of Winnipeg, he was jerked off by the starting train and run over. The material facts of the case are sufficiently stated in the judgments now reported. The defendant's appeal to this Court was, as against the infant plaintiff, allowed, and the judgment of the trial judge restored, Crocket J. dissenting. The appeal as against the adult plaintiff was dismissed for want of jurisdiction, no order granting special leave to appeal having been obtained.

*W. N. Tilley K.C.* and *L. J. Reycraft K.C.* for the appellant.

*J. T. Thorson K.C.* for the respondents.

The judgment of Duff C.J. and Rinfret J. was delivered by

DUFF C.J.—The infant respondent, it would appear, was a trespasser on the appellant's train, and on that ground alone would seem to be precluded from maintaining a right of action for negligence.

(1) 43 Man. R. 345; [1935] 3 W.W.R. 225; [1936] 1 D.L.R. 198.

(2) 43 Man. R. 345, at 346-350.

The case is governed by *Barnett's* case (1). No pertinent distinction can, I think, be drawn between a train which is momentarily upon a part of the railway that traverses a public street and a train which, at the time of the injury, is on a part of the company's line where the title to and possession of the soil are vested in the railway company. Indeed, in *Lygo* v. *Newbold* (2), a person who was riding in the defendant's wagon on a public road in such circumstances as to constitute him a trespasser was held to be precluded by virtue of that fact from recovering damages from the owner for injuries resulting from the negligence of the owner's servant who was driving the wagon. This case is cited with approval in the judgment of the Privy Council in *Barnett's* case (1). The principle of *Lygo* v. *Newbold* (2) was applied in *Hughes* v. *Macfie* (3). The judgments of Lord Hailsham and Lord Dunedin in *Addie* v. *Dumbreck* (4) establish that for this purpose no distinction can be drawn between adults and infants.

*Lynch* v. *Nurdin* (5) is said to establish such a distinction. It is convenient to discuss that case later.

But the respondent also fails because no breach of duty by the appellants has been established. Towards people using the public street the appellants are bound to exercise reasonable care. They are engaged in the execution of statutory powers and are, therefore, under an obligation to take reasonable care not to cause unnecessary harm to those who may be injured by a careless or unreasonable exercise of their rights. But they are under no obligation to intending trespassers to prevent them effectuating a trespass upon their cars, which are a part of the railway; whether they be children or adults. If they permit children to climb upon their cars they may find themselves in the position of tacit licensors and, in consequence, affected by duties towards them as licensees; but nobody suggests (such a suggestion is negatived by the evidence) that the respondent was a licensee.

The duty of the appellants towards a trespasser on one of their trains, as explained in *Barnett's* case (6), is limited

(1) *Grand Trunk Ry. Co.* v. *Barnett*, [1911] A.C. 361.
(2 (1854) 9 Ex. 302.
(3) (1863) 2 H. & C. (Exch. Rep.) 744.
(4) [1929] A.C. 358.
(5) (1841) 1 Q.B. 29.
(6) [1911] A.C. 361.

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to refraining from intentionally injuring him, or what is virtually the same thing, "not to do a wilful act in disregard of ordinary humanity towards him." The distinction between cases of nuisance and cases of negligence where the plaintiff is a trespasser is illustrated in *Liddle* v. *Yorkshire* (1).

Three lines of argument founded upon three separate decisions are presented in support of the judgment. Before dealing with these decisions, two observations would appear to be pertinent. First, as a general rule, it is not a legitimate use of a judgment to separate particular expressions from their context and, without regard to the point at issue or the facts of the case, to treat those expressions as governing the decision in other cases. Second, we must be careful, as Farwell L.J. said in *Latham* v. *Johnson* (2),

> not to allow our sympathy with the infant plaintiff to affect our judgment: sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles.

The first of these decisions is *Lynch* v. *Nurdin* (3). There has been some difference of opinion upon the question whether the ground of liability in *Lynch* v. *Nurdin* (3) was nuisance or negligence. Notwithstanding the observations of Lord Macnaghten in *Cooke* v. *Midland* (4), I can not escape the conclusion that the view expressed by Lord Sumner (then Hamilton L.J.) in *Latham* v. *Johnson* (5), by Farwell L.J. in the same case, and by Greer L.J. in *Liddle* v. *Yorkshire* (1), correctly gives the effect of that case. Lord Sumner says:

> It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway. Such cases, so far as they relate to children, may in that particular be to some extent in point, but the differences between cases of nuisance and cases of negligence must never be lost sight of. The cases of *Lynch* v. *Nurdin* (3); *Jewson* v. *Gatti* (6); *Harrold* v. *Watney* (7), and *Barker* v. *Herbert* (8) are all of this class (see especially *per* Vaughan Williams L.J. in the last cited case at pp. 637 and 638).

With this view Farwell L.J. agreed, at page 403. He said:

> No question therefore arises of the duty not to do anything that may be a nuisance close to or upon a highway, such as arose in *Jewson* v. *Gatti* (6), *Harrold* v. *Watney* (7), or in *Lynch* v. *Nurdin* (3), which, with all respect to Lord Macnaghten's contrary opinion in *Cooke* v. *Midland Great Western Railway of Ireland* (9), was clearly a case of

(1) [1934] 2 K.B. 101, at 123.
(2) [1913] 1 K.B. 398 at 408.
(3) (1841) 1 Q.B. 29.
(4) [1909] A.C. 229.
(5) [1913] 1 K.B. 398 at 412-413.
(6) (1886) 2 Times L.R. 441.
(7) [1898] 2 Q.B. 320.
(8) [1911] 2 K.B. 633.
(9) [1909] A.C. 229 at 234.

nuisance. The horse and cart left unattended in the highway, to use the language of Vaughan Williams L.J. (1), "constituted a danger to those using the highway—that is, it constituted a nuisance."

Greer L.J. in *Liddle* v. *Yorkshire* (2) approved the pronouncements of these eminent judges. He said:

> That was a case of nuisance, and the question involved in the case was whether the damage to the infant plaintiff could rightly be said to have been caused by the wrongful act of the defendant. As the act of the infant plaintiff in getting into the cart and the act of the other child who set it in motion were acts which any one would expect to follow as a probable result of the defendants' wrongful act, the defendants were held liable. The story began with a wrongful act by the defendant. Here there was no wrongful act by the defendants unless it be a wrongful act not to prevent children from trespassing. We have the high authority of Lord Sumner, then Hamilton L.J., in *Latham* v. *Johnson* (3) for this explanation of *Lynch* v. *Nurdin* (4). * * *

The discussion in the judgments in *Liddle* v. *Yorkshire* (5) illustrates the importance of the distinction between actions founded on negligence and actions founded on nuisance as regards the fact of the plaintiff being a trespasser.

Then, in *Cooke* v. *Midland* (6), the Lord Chancellor of Ireland explains *Lynch* v. *Nurdin* (4) as a case of nuisance. So also does Holmes L.J. at p. 284. FitzGibbon L.J. does not use the term nuisance but employs these words:

> *Lynch* v. *Nurdin* (4) was the case of injury on a public highway, where a man left his horse and cart unattended in the street, and a probable danger resulted in actual injury.

The question of causal relation between the wrongful act of leaving the horse and cart unattended in a public highway and the injury to the plaintiff was, of course, a question of importance in *Lynch* v. *Nurdin* (4). I am inclined to think that it is to this matter of causal relation that the observation usually quoted from Lord Denman's judgment is addressed. Lord Denman said:

> For if I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first (7).

This sentence taken by itself would require considerable qualification, but the succeeding sentence shews what was in the mind of the Lord Chief Justice. He said:

(1) [1898] 2 Q.B. 324.
(2) [1934] 2 K.B. 101, at 123.
(3) [1913] 1 K.B. 398, at 413.
(4) [1908] 2 Ir. Rep. 242, at 277.
(5) [1934] 2 K.B. 101.
(6) [1908] 2 Ir. Rep. 242, at 277
(7) 1 Q.B. at p. 35.

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If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of school boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party.

The true doctrine as regards causal relation is stated with accuracy, if I may say so, by Hamilton L.J., in his judgment in *Latham* v. *Johnson* (*supra,* at p. 413), in these words:

> Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non,* but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief. Such cases are collected and elaborately discussed in *Sullivan* v. *Creed* (1). The following are instances: *Dixon* v. *Bell* (2); *Illidge* v. *Goodwin* (3); *Lynch* v. *Nurdin* (4); *Clark* v. *Chambers* (5); *Englehard* v. *Farrant & Co.* (6); *McDowall* v. *Great Western Railway* (7); *Williams* v. *Eady* (8).

The sentence in the judgment in *Lynch* v. *Nurdin* (9) following the passage I have quoted above seems to support the conclusion that nuisance was within the contemplation of that judgment. Lord Denman says,

> This might possibly be assumed as clear in principle; but there is also the authority of the present Chief Justice of the Common Pleas in its support; *Illidge* v. *Goodwin* (3).

The decision of Tindal C.J. to which the Lord Chief Justice refers is expressed in these words:

> * * * If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done; (10).

which seems clearly enough to point to nuisance.

In this view, *Lynch* v. *Nurdin* (4) could have no application to the present case. There was here no nuisance; the action rests upon negligence and the appellants owed no duty to a trespasser beyond that stated above.

Then, one asks oneself whether there is any analogy between a railway train, to which an engine is attached, guarded by its train crew, and a horse and cart left wholly

(1) [1904] 2 I.R. 317, 335.
(2) (1816) 5 M & S. 198.
(3) (1831) 5 C. & P. 190.
(4) 1 Q.B. 29.
(5) (1878) 3 Q.B.D. 327.
(6) [1897] 1 Q.B. 240.
(7) [1903] 2 K.B. 331.
(8) (1893) 10 Times L.R. 41.
(9) 1 Q.B. 29 at 35-36.
(10) 5 C. & P. at 192.

unguarded in a public street. The horse and cart was not only likely to attract children, it was calculated to entice them to interfere with it, to set it in motion. The only way a child can interfere with a railway train is by attempting to get on it. In the judgment already referred to, Hamilton L.J. considers the elements of attractiveness and of danger as envisaged by the general rule,

> that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook* (1); *Lynch* v. *Nurdin* (2)), that injury would not have occurred.

At p. 419, he says:

> One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or only licensed. There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation.

I cannot in any intelligible way apply this language to the appellant's train. Hamilton L.J. is speaking of property which, in neglect of ordinary care, is placed or left in a " condition which may be dangerous to another "; and is something which, by reason of being left unguarded, will not only attract children to it, but will induce them heedlessly to put it into operation or tamper or play with it.

Hamilton L.J., at page 415 in the same judgment, discusses the phrases " trap," " attraction " and " allurement." A trap, he says,

> involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger.

*Lynch* v. *Nurdin* (2) has never been applied, so far as I am aware, to a vehicle actually in use and guarded in the normal way. It is well known that all boys experience the pressure of the invitation to climb on the back of a vehicle in order to get a ride. It has never been held, so far as I know, that a farmer driving hay to market must have somebody on top of the load to keep an eye on boys who may, and almost certainly will, indulge their propensities

(1) (1828) 4 Bing. 628. (2) 1 Q.B. 29.

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by getting on the back of the vehicle. In *Lygo* v. *Newbold* (1) Alderson B. appears to have rejected the idea that liability could arise in such circumstances if the child were injured through *negligent* driving. Indeed, he puts this possibility as a *reductio ad absurdum*.

So long as a person is actually using his vehicle in the ordinary and accustomed way, he is, it would appear, entitled to the enjoyment of it without the curtailment of his rights by trespasses or encoachments of anyone. The fact that the vehicle may present an irresistible allurement to children in the street can make no difference. There is neither negligence nor nuisance in making use in the ordinary way of a vehicle presenting attractions of such a character to infants. If, unfortunately, children of an age too tender to possess the capacity to take care of themselves put themselves in a position of danger by getting into it without the consent of the persons in charge of the vehicle, and without their knowledge, then there arises just one of those risks to which such children, when left unguarded, will unhappily be subject. The person who is making use of a vehicle he employs in the usual way, having committed no wrong, is not chargeable with responsibility for them.

It was considered in the Court of Appeal that *Glasgow Corporation* v. *Taylor* (2) governs this case. There, a shrub with poisonous berries was growing in the Botanical Gardens in Glasgow; and a child ate some of the berries and died in consequence. The Corporation was held responsible.

The question was raised by way of demurrer. Lord Buckmaster, in his judgment at pp. 49-50, sums up thus the averments in the pursuer's condescendence:

> On a small piece of fenced ground in the gardens the appellants grew, among other botanical specimens, a shrub known as *Atropa Belladonna*, whose berries present a very alluring and tempting appearance to children. Notwithstanding the fence the piece of ground on which this shrub grew was open to the public. There was no isolation of the shrub nor warning that could be seen of its dangerous character. The spot where it grew was frequented by children, and according to the pursuer's allegations the circumstances were such that the defenders knew that it was probable, and indeed practically certain, that children would be tempted and deceived by the appearance of the shrub and would eat the berries. The knowledge that these berries were poisonous was also said

(1) (1854) 9 Exch. 302.

(2) [1922] 1 A.C. 44.

to be possessed by the defenders. The pursuer's child, a little boy of seven, ate some of these berries and, in consequence, died.

All the judgments proceeded upon the circumstance that, according to the allegations, within reach of the children who, in pursuance of undoubted legal right habitually frequented the place, there had been put something which they were tempted to eat, while to eat was the certain prelude to sickness, and the probable precursor of death; as well as the facts that, though this danger was well known to the Corporation, no warning was given to parents or those having the custody of the children, and that these had no knowledge of the danger. The allegation that the defenders knew it was probable, and, indeed, practically certain, that the children would be tempted and deceived by the appearance of the shrub and would eat the berries would seem to put the matter beyond all question, and that is the basis of the decision. Lord Shaw says (at p. 62):

> I do not find myself able to draw a distinction in law between natural objects such as shrubs whose attractive fruitage may be injuriously or fatally poisonous, and artificial objects such as machines left in a public place unattended and liable to produce danger if tampered with.

The case plainly falls within the general rule stated in the judgment of Hamilton L.J., as quoted above (of which *Bird* v. *Holbrook* (1), is given as an instance), and all the elements mentioned in that judgment as constituting danger, attraction and trap were present. It is important to observe that the Lords who took part in *Taylor's* case (2) unanimously stated, either in explicit words or impliedly, that the decision has nothing whatever to do with cases where the peril is not concealed. Lord Buckmaster emphasizes "the element of mistake and deception" (p. 51). At page 53, Lord Atkinson says:

> The defenders were, therefore, aware of the existence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger of which he was entirely ignorant, and could not by himself reasonably discover, yet they did nothing to protect him from that danger or even inform him of its existence.

Lord Shaw says, at pages 60 and 61:

> In grounds open to the public as of right, the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the persons prohibited.

(1) (1828) 4 Bing. 628.

(2) [1922] 1 A.C. 44.

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And again,

> Where the dangers are not familiar and obvious, and where in particular they are or ought to be known to the municipality or owner, special considerations arise. In the case of objects, whether artificial, and so to speak, dangerous in themselves, such as loaded guns or explosives, or natural objects, such as trees bearing poisonous fruits which are attractive in appearance, it cannot be considered a reasonably safe procedure for a municipality or owner to permit the exhibition of these things with their dangerous possibilities in a place of recreation and without any special and particular watch and warning.

He adds:

> When the danger is familiar and obvious, no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this, that the municipality or owner is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each; but each is entitled to assume it of the other.

Furthermore, the analogy of the case to that of an unguarded machine left in a place frequented by children and possessing, by reason of its unguarded state and other circumstances, all the elements of allurement and trap, as explained by Hamilton L.J., seems to exclude its application to the facts now under examination. If it be said that the child in plucking the berries was guilty of trespass, then the answer is that the averments, as summarized by Lord Buckmaster, would seem to bring the defenders within the rule that the land owner is under a duty even towards a trespasser " not to do a wilful act in disregard of ordinary humanity towards him."

I now come to *Excelsior Wire Rope Co.* v. *Callan* (1). Before considering the application of that case to the facts before us, it will be convenient to state those facts with some particularity.

In Winnipeg, a street named Higgins street runs along the southern boundary of part of the freight yards of the appellants. The street is 66 feet wide and in the northerly strip of 14 feet there runs a railway track, part of the appellants' railway, and, admittedly, lawfully there for the railway purposes of the appellants. This track connects at its westerly end with other tracks within the freight yards and extends between 2,500 and 3,000 feet along Higgins street, and is known as the " K " lead. There are

(1) [1930] A.C. 404.

freight sheds in the freight yards along the northern boundary of Higgins street.

It is a practice of the appellants every day in the evening to assemble a drag or train of freight cars on "K" lead. That is done by a group of men known as the shed crew who bring, first, a "cut" of cars, as the phrase is, to the west end of the lead and then, moving from the west, to add successive cuts until the whole drag is assembled. The drag in the present case included 55 cars and was something over 2,000 feet long. As each successive cut is added, the cars of the preceding cuts are necessarily pushed easterly along the lead. The car at the east end is known as the "point" car.

For the safety of people using the street, the appellants employed a man, Messier, whose primary duty it was to protect the "point," in the language of the witnesses, which means that it was his duty to see that the car at the eastern end did not come into contact with any obstruction in the street and that people using the street should be warned of its approach. It was also his duty to protect the cars against intruders and, as children played on the street in the immediate vicinity and had a playground on the corner of Higgins street and another street, Ellen, entering Higgins street from the south, it was his business to see that children were kept away from the cars. His duty came to an end when the drag was assembled, as the learned trial judge has found, and, no doubt, rightly found. When the drag is assembled, also, the duties of the shed crew come to an end. It is then taken over by a hauling crew. An engine is attached and it is moved away into yards on the west.

Unfortunately, the respondent, who was only four and a half years of age at the time, had climbed the iron ladder which, as usual, was attached to the side of one of the cars in the drag and at its end, and had succeeded in crossing to the ladder attached to the rear of the car adjacent to that attached to the side, just before the hauling crew, pursuant to their duty, started the train on its westerly movement; and, when the train started, he fell from his place on the ladder to the track below and had his leg severed from his body by one of the moving wheels.

The procedure in starting the train seems to be something like this: The engine is started on a movement towards

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the west, and then, if the driver is apprized, by signal originating with the trainman stationed near the easterly end of the train, that all the couplings are working, he proceeds with hauling the train west. The boy's fall seems to have been occasioned either by the first jerk or by that combined with the movement of the train an instant later.

The hauling crew consisted of the locomotive driver and fireman (with whom we are not concerned), the train foreman Wilkinson, two trainmen, Boardman and Smith. There was also a railway constable, Crick.

Wilkinson gave this account of his movements. He said that he and his two trainmen, Boardman and Smith, came to the west end of the drag before the assembling of the drag was quite complete; that he and Boardman walked to the east end of the train, then turned and walked west again. He left Boardman at a place about twelve or fifteen cars west of the east end, and proceeded to the west end of the drag where the other trainman, Smith, was stationed. It was Boardman's duty to see that, on the initiation of the movement of the train, the cars were all "pulling," and, if so, to signal to Wilkinson at the west end of the train. Boardman gave the signal from a position approximately fifteen cars west of the east end of the train, and the train moved on. Boardman, still looking towards the west end of the train, climbed on top of the train, as did Wilkinson and Smith.

Crick, the constable, says that it was his duty to check the seals on the cars and at the same time to keep watch to see that there was nobody around the train. He started at the east end of the train and walked along the northern side examining the seals and then again walked from the west end to the east end. Neither Wilkinson, nor Boardman, nor Crick saw any children near the train, although there were children playing on the southern side of Higgins street. At the time the respondent climbed the ladder, Boardman apparently was between 150 and 200 feet to the west of him with his face turned to the west. Crick, apparently, was at the car at the east end with his face turned towards the east. As to the actions of the respondent, there seems to be little doubt. The learned trial judge has accepted the story of a boy, Voss, who was eleven years of age at the time of the accident. Voss was lying on the east side of Ellen street about, as the learned judge

says, 150 feet from the train. He saw the respondent rush past him, run to the car, climb the ladder just before the train started. The learned trial judge says this must have occurred just as Boardman was giving the signal. It was either just as he gave the signal or just before, when Boardman's face, as the learned judge says, was turned to the west. The boy's statement, as the learned trial judge interpreted it, virtually coincides with this. The learned trial judge, referring to the boy's movements and to the fact that he escaped the attention of the train men, says it "would all happen in a few seconds."

Mr. Thorson, who presented a very able argument on behalf of the respondent, contended most earnestly that there was evidence from which it ought to be concluded that this child had been playing near the train just before he started to climb the ladder. That view cannot be reconciled with the account given by Voss (who was a witness for the plaintiff, and whose account of what occurred was put forward by the plaintiff in Voss's evidence in chief), which, as I have said, was accepted by the learned trial judge.

Another boy named Hobson, who was riding about on his bicycle, gives some evidence upon which Mr. Thorson relied. Unfortunately, the effect of Hobson's evidence is rather obscure. He said in examination in chief that he had seen the little boy playing "around the cars." In cross-examination he said he saw him playing where the tracks switch off into the platform. This platform is on the south side of Higgins street where a spur from "K" lead crosses that street. He says the boy was not playing on the platform but near there, and he adds that he was not in Ellen street at all.

Now, Hobson's story as to his own movements is this. He saw the little boy, as he says, playing near the platform, which is about sixty or seventy feet from Ellen street. Just then he turned his bicycle west and rode on down Ellen street, not quite as far as Henry street which is distant from Higgins street about 180 feet, then he turned around and proceded towards Higgins street, and, when he was about half way between Henry and Higgins, he noticed the boy "hanging on to" the ladder on the end of the car.

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It is quite evident that Hobson's story cannot be reconciled with that of Voss. According to Hobson, the boy was never on Ellen street. And it is quite clear that, accepting Hobson's account of his own movements, a very short time indeed must have elapsed between the time he left the respondent playing near the platform on Higgins street and the time he saw him hanging from the ladder. It is difficult to suppose that a boy of that age could, within that short space of time, have got over to the place at which he passed Voss running towards the train, climbed the ladder on the side of the car and passed over to the ladder on the rear of the car.

If the learned trial judge was right in the view he took, accepting Voss's account that the child dashed from the lower part of Ellen street not far from Henry to the train, mounted the ladder and was knocked off by the jerk of the train in starting, all in a "few seconds," as the trial judge finds, that this occurred when Crick's face was turned towards the easternmost car, and when Boardman's face was turned in the opposite direction, it would seem to have been the merest accident indeed that this little lad in his rapid dash escaped the observation of both the trainman and the constable.

The contention on behalf of the respondent is that Messier should have been kept on duty until the train was hauled out. I have already pointed out that there is no rule of law by which the appellants owe a duty to adults or to children to prevent them trespassing on their cars. If they permit such trespasses, then they may incur the obligations of licensees, but the evidence is clear and uncontradicted that everything that could reasonably be done was done to keep children away from the cars while the drag was being assembled. Messier's primary duty was to warn people using the street of the approach of the train. Very naturally and properly, he was required to keep children away from the cars; occasionally a child would attempt to get on a car and would have to be driven away. Apart altogether from humanitarian considerations, the railway company probably understood the risk from the legal point of view of permitting the children to trespass. I see no reason to reject the view of the trial judge that, after the drag was assembled and while the train was stationary under the care of the hauling crew,

they had no reasonable ground to suppose that, in the presence of the hauling crew passing up and down the south side of the train, as has been explained, and of the constable, any child attempting to get on the train would escape observation; there is no suggestion in the evidence of any other child having attempted to do so on the same or any other occasion after the hauling crew came on duty.

In this conection it should be observed that the evidence all points to the conclusion that the danger of approaching the train when the engine was attached was quite well understood even by children. The little boy says, and what he says has in it the probability of truth, that two boys who were with him when he approached the train refused to climb with him on the car and he adds (where he got the information does not appear) that they saw the engine and he did not.

I come now to the *Excelsior Wire Rope* case (1). The facts in their general features are important. The appellants there had a siding on some land which was the property of the Marquis of Bute, and, as a haulage apparatus, they had on the same property a post and sheave to which wires and ropes were attached and which was worked by a dynamo. Children used the vicinity of this post and sheave as a playground. They played uninterruptedly, not only in the vicinity, but with the machine and ropes and other things attached to it, except on the occasions, a few times a week, when the machine was just to be put into operation; and then it was the duty and the practice of the employees working the machine to see that the children were not in danger. Except on these occasions, they were permitted to play with the machine.

The case was tried by Shearman J. who

> held that the appellants were liable on the ground that the appellants had acquiesced in children frequenting the siding, so as to constitute the children licensees, and that the setting in motion of the haulage apparatus constituted a trap * * * (p. 405).

There was an appeal to the Court of Appeal.

> The Lords Justices proceeded on the assumption that the children were trespassers, and held that their injuries were caused by an act done by the appellants' servants with reckless disregard of the presence of children whom they had every reason to think might be injured. (pp. 405-406).

(1) [1930] A.C. 404.

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The pertinent facts are stated by Lord Buckmaster who delivered the leading judgment in the House of Lords:

On August 5, 1927, the Excelsior Wire Rope Works were going to use this line for one of their trucks. There is evidence that just before it was in fact so used a little child was seen swinging on the wire. What actually happened is a matter about which there is no direct testimony at all. There were two men whose business it was to superintend the operations, one named Williams and the other named Osborne, and they both came up to the sheave for the purpose, no doubt, of seeing that the wire was properly put round the pulley, and also for the purpose of driving the children away. They knew the children would be there, and because of that knowledge, before putting the wire in motion, they used to go and send them away. * * * There is no doubt that these people do what is obviously their duty to do in the circumstances, that is, go and adjust the wire, and when doing that see if there are any children before they start the work. They did that on this occasion, but they went back and started the machinery without being clear that the wire was free from children, and one little child who was either sitting on it or playing with it—what she was actually doing no one knows—got her hands entangled in the machinery, and her little brother, who came to help her, got his hand injured too.

His conclusion is as follows:

To the knowledge of the Excelsior Wire Rope Company these children played uninterruptedly round the post; there was nothing to prevent them doing it, and I cannot find that there is any evidence to show that, except at the moment when this machine was going to be set in action, they were ever driven away. It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger.

In such circumstances the duty owed by appellants, when they set the machinery in motion, was to see that no child was there, and this duty they failed to discharge.

Lord Warrington says:

There is ample evidence that, to the knowledge of the servants of the appellants, children were in the habit, not only of playing around this sheave and using it for purposes connected with their games, but were actually in the habit of playing with the machine, and the ropes and so forth attached to it, so that it was found necessary, when they were about to use the machine, to see that it had not been put out of gear by the children. Under those circumstances, it seems to me quite plain that there was a duty upon the present appellants, by their servants, when they were about to put this machine in motion, so that it would become a danger to any children who might be in the neighbourhood, to see whether or not at that moment there were children in such a position as to be exposed to danger. That duty was plainly neglected, and under the circumstances I think the appellants have rightly been held liable.

Lord Thankerton says (p. 414):

* * * the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children

away from that spot. My Lords, that last fact itself appears to me to recognize a necessity and a duty to see that the children were away from this dangerous machine.

Lord Dunedin says: On the assumption that the children were not licensees the appellants' servants acted "with reckless disregard of the presence of the trespasser," quoting from the judgment of Lord Hailsham in *Addie's* case (1).

The decision really rests upon the circumstances that the children habitually and with the permission of the defendants played with the machine except when, on the occasions when it was to be put into motion, they were actually kept away from it. The persons responsible for putting the machine in motion knew that children in the ordinary course would be there and in a position of danger and, on the occasion in question, that it was extremely likely they would be in such a position.

This decision can have no application to the present case. It is true that occasionally children climbed on the cars while the drag was being assembled, but they were always sent away. The learned judge has in effect negatived the conclusion that the hauling crew ought to have been aware that some child would likely be on one of the cars, or even might be on one of the cars, at the time the signal was given. There was none of the probability or practical certainty of children being in danger, which was averred in *Taylor's* case (2).

There was nothing in the conduct of the railway company, as in the *Excelsior* case (3), to encourage the children to think they were safe in playing near the cars except when they were driven away. The constable was there, whose duty it was to keep people away from the cars, the foreman and his trainman had walked the whole length of the drag immediately before the signal was given and had seen no child in dangerous proximity to the cars. The evidence warrants the finding of fact that, with the exception of the respondent and, possibly, his two companions, in the dash at the last instant, there were no children in any place of danger in respect of the train after the hauling crew came on duty. It was the sudden unanticipated dash of the child which the hauling crew could not, in any

(1) [1929] A.C. 358. (2) [1922] 1 A.C. 44.
(3) [1930] A.C. 404.

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reasonable view of the situation, be expected to anticipate, that made the accident possible.

To summarize briefly: the respondent is precluded from recovering by reason of the fact that, being a trespasser, the only duty owing to him is that explained in *Barnett's* case (1), not intentionally to injure him or "not to do a wilful act in disregard of humanity towards him," "not to act with reckless disregard of the presence of the trespasser." The findings of the learned trial judge, which completely negative any such misconduct by the appellants, are quite adequately supported by the evidence. The case has no analogy to *Lynch* v. *Nurdin* (2) (whatever be the legal explanation of that case) where a horse and cart were left wholly unattended in a public street and where the injury suffered by the child on whose behalf the action was brought was caused by another child interfering with the horse and putting the horse and cart into motion, as well as the fact that the plaintiff himself had climbed into the cart and where, as Lord Denman said, "it was extremely probable that some other person would unjustifiably set" the horse and cart "in motion to the injury of a third." It has no analogy to *Glasgow Corporation* v. *Taylor* (3), where the Corporation had caused a shrub bearing poisonous berries to grow in a place frequented by children, knowing, as the pursuer averred, that children would probably, even certainly, eat the berries; that this would certainly be followed by illness or death; and, knowing the poisonous character of the berries, failed to give any warning to the parents or others responsible for the safety of children in the park. In *Taylor's* case (3), the elements of concealment and surprise and of knowledge of the Corporation of the probability or certainty that children would eat the berries, were the foundation of the judgment. It has no analogy to the *Excelsior Wire Rope Company's* case (4), where the defendants knew that, in the ordinary course, children would be playing, not only near the machine, but with the machine itself and its attachments, unless steps were taken to keep them away from it when the machine was put into operation; and knew it to be "extremely probable" that there would be children in a

(1) [1911] A.C. 361.
(2) (1841) 1 Q.B. 29.
(3) [1922] 1 A.C. 44.
(4) [1930] A.C. 404.

position of danger when the machine was put into operation on the particular occasion on which the plaintiff was injured. Nor does it bear the least resemblance to *Cooke's* case (*supra*) (1), where the children were licensed to be in the field where the turntable was and to play on the turntable itself; where the turntable was a trap in the full sense of the judgment of Hamilton L.J. (though usually locked in a way that it could not be set in motion by a child, it was on the particular occasion unlocked), and there was, as the Lords held, an extreme probability that the children playing on the turntable would set it in motion to the injury of themselves or others. Even on these facts, Lord Loreburn assented with great hesitation, saying that the case was near the line.

The findings of the learned trial judge negative the existence of any knowledge on the part of the appellant company or the train crew of the certainty or the reasonable likelihood that any children would be on one of the cars at the time the train was put in motion. Leave and licence were expressly disclaimed in the very able and candid argument of Mr. Thorson. The evidence is wholly incompatible with any suggestion that the conduct of the company in any way inspired (as in the *Excelsior* case (2)) among the children a belief that it was safe to play in close proximity to the cars except when they were driven away.

The appeal should be allowed and the judgment of Mr. Justice Adamson restored. I assume the appellants will not ask for costs.

As to the appeal against the judgment in favour of the mother, we announced at the hearing that there was no jurisdiction to entertain the appeal and that we should not reserve judgment in order to enable the appellants to apply for leave. It stands dismissed for want of jurisdiction.

DAVIS J.—The respondent, the infant plaintiff, when a little less than four and a half years old, climbed a ladder on the side of a standing freight car belonging to the appellant railway company and then lost his balance and fell to the ground with the result that one of his legs was so injured as to require amputation below the knee. This action was brought by his widowed mother, personally and

(1) [1909] A.C. 229. (2) [1930] A.C. 404.

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as his next friend, against the railway company for damages.

The freight car was standing at the time on railway tracks that were on a public street in the City of Winnipeg. We have therefore to consider the case not only in the light of the private rights of the railway company in its own property, but of the public rights of the child upon the street. Nothing turns in the case upon the right of the railway company to operate its railway upon the street in question. Counsel for the plaintiff at the trial admitted that the tracks in question were properly upon the street and that the defendant was lawfully entitled to operate its railway where it did upon the street. With this admission of public authority in the railway, the case cannot be treated in law as one of nuisance, and falls to be determined upon the question of negligence. That distinction is fundamental, and it seems to me that failure to bear that distinction in mind may have accounted for some of the divergent views in the court below.

The case then, like all cases of negligence, turns upon its own particular facts. The street in question is 66 feet wide; the railway track occupies the northerly 14 feet thereof; of the southerly 52 feet, 34 feet 4 inches adjoining the railway track is paved and used by vehicles, and the remainder, 17 feet 8 inches, is a cinder path for pedestrians and a boulevard. The railway track in question extends along the street a distance of some 2,900 feet and was in daily use by the railway company for the assembling of freight trains. Freight trains would be made up of a variable number and of different types of freight cars necessary for particular runs. The cars would be picked up from other tracks and collected or assembled upon the particular track or siding with which we are concerned. A "switch" engine used for assembling would back down the track the different cars that had been selected for a particular run. The first car or group of cars would be backed down to the rear end of the track and then the next car or group of cars would be backed down to meet the cars already placed in position, and so on until the whole train would be assembled. This involved, as one can readily understand, a good deal of movement and shunting of the cars on the track in the process of assembling the train. On the day in question the particular freight train that had

been assembled consisted of 55 cars, with a total length of about 2,200 feet. Now whenever a freight train had been assembled, the engine that had been used in assembling the cars and the "shed" or "assembling" crew in charge of that operation would depart for some other siding where a similar operation had become necessary. The company employed one Messier, a disabled employee, to be present during the assembling operations to warn persons against crossing the tracks when the cars were being placed in position. Then, when the time came that the assembled train was to proceed on its journey, a different engine and a different crew would come to take it away. The hauling crew consisted of an engineer, a fireman, a yard foreman and two yardmen. The movement of the train at this time would be a forward movement and involved no switching or shunting.

The accident happened after the assembling crew had completed its operations and had left the track in question and during the time that the hauling crew had arrived to take the train away to another place. The infant plaintiff had climbed the ladder of one of the freight cars (about the fourteenth car from the rear end of the train) and was thrown from the car either at the moment that the hauling engine attached itself to the train or at the moment that the hauling engine commenced to pull the cars out. The period of time between these two events would be a matter of only a minute or two and the evidence does not make plain, and it is really a matter of no consequence, the exact moment that the child fell. The child was unquestionably a trespasser on the car, the private property of the railway company. Counsel for the plaintiff, however, focuses our attention upon the public right of the child to be upon the street and asks us to treat the freight cars in question as an allurement to children generally and presents a case against the railway company of alleged negligence based upon evidence that was directed to shew that the railway company knew that children in the neighbourhood, and particularly at the very place on the street where the accident occurred, were accustomed to play upon the street in and around the freight cars and occasionally were even known to climb upon the cars. The statement of claim puts the case against the defendant in these words: that the defendant

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by its agents, servants or employees negligently caused the said freight cars to be set in motion without any warning to the said plaintiff.

and that

the defendant, its agents, servants and employees, having the knowledge hereinbefore alleged, well knew or should have known that small children, such as and including the plaintiff, being adventuresome, would be likely to be allured and enticed and attracted as the said plaintiff and the said several other small boys were in fact allured, enticed and attracted, and would be likely to respond to the invitation and yield to the temptation held out * * * and would be likely to climb the said ladders and hang and ride on the said freight cars * * * and that injury such as that which actually did result to the said plaintiff would be likely to result, if the said railway tracks were left unprotected by the defendant or the said freight cars were left unattended by the defendant, or the said freight cars were set in motion without adequate warning and precautions by the defendant, or small children such as and including the said plaintiff were not prevented by the defendant from coming near or being on the said freight cars while they were in motion.

Where, as here, there is admitted public authority to maintain and operate a railway upon a public street, the presence and movement of cars is the inevitable result of the ordinary exercise of such authority. Lord Dunedin in *Manchester Corporation* v. *Farnworth* (1) said:

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized.

But the company is responsible, of course, in an action of negligence for any want of reasonable care in its operations.

No one of the railway crew engaged at the time and at the place of the accident in moving the train saw the child before he fell from the car. The case made against the railway company is that the railway crew, or some of them, ought to have seen the child or that under all the circumstances, having regard to the habit of children to play upon the street near cars left standing there, the railway company did not take special precautions or give an adequate warning before moving the train.

There is evidence that the children in the neighbourhood, to the knowledge of the defendant, played on the street in question, particularly in the evenings after supper; that the older children played games in a vacant yard across the street from the place of the accident, leaving the smaller children to play somewhere else; that the children were in the habit of playing on a loading platform, across the

(1) [1930] A.C. 171 at 183.

street from the place of the accident, which lay alongside a spur track of the defendant. There is evidence that children frequently played near the cars on the tracks. One witness, Hobson Sr., said that he had seen from thirty to fifty children at times playing on the street after supper in the immediate neighbourhood of the accident. It is further in evidence that when children were playing ball in the yard across the street, the ball often went over the fence, rolled across the street and under the train of cars standing on the tracks on the street; that sometimes the children would get the ball themselves and sometimes Messier would get the ball for them; that sometimes the children climbed under the cars to get the ball and sometimes they would ask Messier whether they might go and get the ball. Hobson, Jr., a boy of 17, said that Messier used to tell the boys when it was all right to go across and get the ball, and the boys would then climb up the ladder steps between the cars, go over the couplings and then climb down the other side. He had done this himself and had seen other boys do it. Stevens, a night watchman at a factory nearby, said he had frequently seen boys and girls go under the cars to get the ball and was always afraid that an accident would happen where it did. There is some evidence that children at times climbed up on the freight cars when they were standing on the street. Gustaffson, a boy of fifteen, said that he had seen a boy on a ladder of a freight car, once. Messier said that children did actually climb on the cars, " as often as he could not stop them," but that when they did, he stopped them as part of his duty, took his cane to them and chased them away. Voss, a boy of thirteen, said that Messier " used to chase the kids off the box cars."

Counsel for the plaintiff presents this picture of a dangerous situation known to the railway company. But it must be observed that the railway company had no right to keep children off the public street. Messier said that it was part of his duty during the assembling of the trains to keep children away from the cars. He was discharged by the railway company the day after the accident and colour is put upon the picture by that fact, though the railway company explained his dismissal upon other grounds than his absence from the place of the accident at the time the accident occurred.

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The child gave unsworn testimony at the trial *quantum valeat*. He was then about six years of age. He said he saw three other boys and he said to them,

> "Let us go to the train." So we went to the train, and then we sat down * * * on the first seat (meaning, I take it, the first rung of the ladder) and then I said, "Let us climb." And they said "No." And I went up and then they seen the engine coming * * * They didn't tell me that the engine was coming and I didn't even see it, and they were running. I didn't know what they were running for. When I got to the top, I climbed around to the back and it jerked and my foot slipped, and I fell.

The child did not name any of the three other boys to whom he refers and no one of them was called as a witness. It is plain, however, upon the evidence that the child was thrown from the ladder on the back of the car by the "jerk" or "bump" of the train. While the exact moment of the accident is, as I have said, of little consequence, it seems clear that when the hauling engine attached itself to the cars there was a jerk or a bump to the particular car upon which the child had climbed.

An important fact to be determined is whether the child had been playing with other children around the freight cars before he climbed the ladder on one of the cars or whether he had suddenly run across the street by himself and climbed up the ladder at once. The boy Hobson said in his evidence that when he first saw the infant plaintiff that night "he was playing with some other boys around the freight cars," but on cross-examination Hobson leaves the exact place where he said he first saw the infant plaintiff very doubtful, for he then says, "Right around where the tracks switch off into the platform on the lot east of the vacant lot * * * He wasn't on the platform; he was playing on the street near there." Voss, another boy, tells a totally different story. Voss says that he himself was lying down on a side street, Ellen Street, about half way in between Higgins and Henry Streets, and he says that when he first saw the infant plaintiff, "he was running past us," on Ellen Street, "towards the box cars, to the north. He started climbing up the side of a box car that was standing still, then went over on to the ladder on the back of the box car." The trial judge (1) accepted the evidence of Voss, though he is in error in stating that young Voss said that the infant plaintiff "with two other boys

(1) 43 Man. R. at 347.

ran out of Ellen Street and across Higgins Street north towards the box cars." The evidence is that Voss was asked, "Who was with you—who was lying down with you?" And his answer was, "There were some other boys and girls around there." But Voss very definitely says that the place on Ellen Street where he was lying on the grass "was about half a block away" from the car on which the infant plaintiff had climbed. Voss said that when the train started with a jerk and knocked the infant plaintiff's feet from under him and he was just hanging on with his hands, he and two other boys started toward the car. Hobson was one of these boys and another was Gustaffson. Hobson ran with Voss to the car but Gustaffson turned sick at the sight of the infant plaintiff and did not go on to the car. The trial judge in delivering his judgment plainly accepted the evidence given by Voss rather than the evidence of Hobson, who said that he saw the infant plaintiff playing with some other boys around the freight cars, for the trial judge, after referring to the evidence of Voss, said,

> He (the infant plaintiff) ran out a few moments before the train started and evaded being seen by the trainmen or the constable who had both passed the car to which he ran a short time before.

The hauling crew were on duty making ready for the train to be pulled out. This crew, if I may repeat, consisted of an engineer, a fireman, a yard foreman and two yardmen. The foreman of the crew, Wilkinson, and one of the yardmen, Boardman, had walked along the full length of the train on the opposite side from what may be called the street and then walked back along the street side about 600 feet from the rear end of the train to a point not far from the exact place of the accident. Boardman waited there, looking toward the engine as was his duty (with his back to the place where the child climbed on one of the cars). Wilkinson continued along the street side of the train toward the engine which was some considerable distance ahead. The engine was brought to the train by the other yardman, Smith; Wilkinson gave the signal to proceed; Boardman gave him the signal that the cars were all moving; Wilkinson repeated this to the engineer; the yardman climbed on the train, and the train proceeded. Another employee of the railway company, Crick, a constable, had gone up and down the cars on each side testing

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the seals. Just before the train started he was in the act of testing the seal on the street side of the last car. He turned round and saw three boys running across the street and then run alongside the train. Crick started after them and when the speed of the train increased he jumped on the train and came to the point where the infant plaintiff was lying at the time. Wilkinson, Boardman and Crick all stated that there were no children near the train as they had walked up and down beside it. Crick, the constable, said that he considered it to be part of his duty to warn children away. It was not suggested that any of the crew or Crick saw the child.

In the opinion of Mr. Justice Adamson, the trial judge, the defendant company "did all that was reasonable to see that all was clear when the train started," and he dismissed the action with costs. Upon an appeal, the Court of Appeal for Manitoba by a majority (Dennistoun and Trueman JJ.A. dissenting) allowed the appeal and directed judgment to be entered in favour of the infant plaintiff in the sum of $5,000 and in favour of the adult plaintiff, the mother of the child, in the sum of $800. From that judgment the railway company appealed to this Court. No leave having been granted to appeal in respect of the judgment in favour of the adult plaintiff, there was no jurisdiction in this Court to entertain the appeal against her, and, at the conclusion of the argument, we dismissed the appeal against the adult plaintiff. The sole question reserved was as to the right of the infant plaintiff to hold the judgment in his favour in the sum of $5,000.

The child was, strictly, a trespasser upon the freight car of the defendant, and it is clear upon the evidence that no one in the employ of the railway company saw the child either approaching the cars or upon the car from which he was thrown. The question is whether or not, notwithstanding these facts, there was a duty in law upon the railway company under all circumstances to take care of the child. Counsel for the infant plaintiff, while admitting that the child was, strictly speaking, a trespasser on the car, contended that under all the facts and circumstances of the case the child should be treated as a licensee or the defendant's conduct should be treated as such a neglect of a duty to take care as to entitle the infant plaintiff to succeed in law.

Mr. Thorson, in his very able and exhaustive argument on behalf of the infant plaintiff, placed much reliance upon the judgment in the old case of *Lynch* v. *Nurdin* (1). In that case the defendant left his horse and cart unattended in the street and the plaintiff child, seven years old, climbed into the cart in play, another child incautiously led the horse on and the plaintiff child thereby fell out and suffered injuries. It was held that the defendant was liable, although the plaintiff child was a trespasser on the cart and contributed to the mischief by his own act. That decision, nearly a hundred years old, has been much discussed in subsequent cases and the judgment may very properly be regarded now as really founded upon the fact that the horse and cart were an allurement to young children and, being left in the street wholly unattended, constituted a trap. In the recent case of *Liddle* v. *Yorkshire* (2), Slesser, L.J., discussed *Lynch* v. *Nurdin* (1) and said, at p. 129:

> Although *Lynch* v. *Nurdin* (3) remains an authority on the question of contributory negligence of children, the present state of the law seems to me to justify me in declining to think that it binds me to-day to say that the defendants are liable when they do not put a trap intentionally or intend to injure if the plaintiff is a trespasser.

In *Harrold* v. *Watney* (4), the defendant was the owner of a fence abutting on a highway. The plaintiff, a child of four years of age, attracted by some boys at play on the other side of the fence, put his foot on it, and it fell on and injured him. The jury found that the fence was very defective but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over. The trial judge directed that judgment should be entered for the defendant but the Court of Appeal held that, the defective fence being a nuisance and the cause of the injuries to the plaintiff, the defendant was liable. But even in cases of nuisance there will be no liability to the child unless the thing through which the accident happened was something that was likely to attract children to intermeddle with it and was dangerous if intermeddled with. Thus, in *Donovan* v. *Union Cartage Co.* (5) an unhorsed van belonging to the defendants was left by them, unattended, in a public street outside their premises.

(1) (1841) 1 Q.B. 29.
(2) [1934] 2 K.B. 101.
(3) 1 Q.B. 29.
(4) [1898] 2 Q.B. 320.
(5) [1933] 2 K.B. 71.

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The plaintiff, an infant aged seven years, while playing in the street with other children, climbed on to the van, fell and was injured. It was held, in an action for negligence, that the defendants, the owners of the van, were not liable because there was no inherent danger in a sound, stationary and immobile vehicle, left unattended in the street, and even if the stationary van was an obstruction to the use of the highway, there was no relation of cause and effect between an obstruction to the use of the highway and the occurrence of the accident.

In *Cooke* v. *Midland Great Western Railway of Ireland* (1), Lord Atkinson at p. 237 said that the authorities from *Lynch* v. *Nurdin* (2) downward established, it appeared to him, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that the public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of these machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred.

This decision in *Cooke* v. *Midland* (3) was much criticized and Lord Atkinson took occasion in *Glasgow Corporation* v. *Taylor* (4) to point out the *ratio decidendi* of the *Cooke* case (3) when he said at p. 53, referring to it,

(1) [1909] A.C. 229.
(2) 1 Q.B. 29.
(3) [1909] A.C. 229.
(4) [1922] 1 A.C. 44.

The decision of this House in the first of these two cases has, no doubt, been frequently criticized. I am familiar with the criticisms, and have noticed that in them not unfrequently either no weight or not full weight is given to the vital fact that there was evidence there to go to the jury from which they might reasonably conclude that the children mentioned in that case not only entered upon the lands of the company with its leave and licence, but also played upon the dangerous machine, the turntable, they found there, with that very same leave and licence.

And Lord Atkinson continued at p. 54,

And I, myself, after referring to the question which would arise in a case where the boys or children were trespassers, proceeded to say: "In the view I take it is not necessary to determine that question in the present case, because I think there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it, but also played upon the turntable—a most important addition—with the leave and licence of the defendant company." Such were the real facts and the real question decided in *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1).

Lord Shaw, at p. 63 of the *Glasgow* case (2) said:

I do not desire, my Lords, to close my opinion without stating that I attach my express concurrence to the statement of my noble and learned friend Lord Atkinson in regard to the true scope and effect of *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1).

In the *Liddle* case (3), Lord Justice Scrutton said at p. 111 that confusion was temporarily introduced into the law of England by the decision of the House of Lords in *Cooke* v. *Midland* (1) but he thought,

it is now established by the judgment in *Latham* v. *Johnson* (4) and the explanation of *Cooke's* case (1) by Lord Atkinson in *Glasgow Corporation* v. *Taylor* (5) that *Cooke's* case (1) must be treated as the case of a child impliedly licensed to use a plaything which was, for a child, a trap.

*Grand Trunk Railway Company* v. *Barnett* (6) was a case that went to the Judicial Committee from the Court of Appeal for Ontario. The Grand Trunk Railway Company and the Pere Marquette Railway Company had each a station and railway yards a short distance from each other in the city of London, Ontario. The Grand Trunk Railway, under some arrangement with the Pere Marquette Railway, allowed the latter company's trains, or some of them, access to the Grand Trunk Company's station by means of a cross line so as to bring the Pere Marquette train up to the Grand Trunk station. The particular train concerned in the accident was the Pere

(1) [1909] A.C. 229.
(2) [1922] 1 A.C. 44.
(3) [1934] 2 K.B. 101.
(4) [1913] 1 K.B. 398.
(5) [1922] 1 A.C. 44, 53.
(6) [1911] A.C. 361.

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Marquette train, which had arrived at the Grand Trunk station and had duly discharged its passengers at the platform of the Grand Trunk station. Its ordinary and proper course then was to wait till it received a signal from the Grand Trunk switch operator, after which it would back out over the Grand Trunk tracks and return to the Pere Marquette yard to remain for the night. The plaintiff was aware of this practice, and on the night in question he came into the Grand Trunk station and, going to the Pere Marquette train before it began to back out, he jumped on the platform at the rear end of the car and stood with one foot on the platform and one foot on the step, his object being to get a lift as far as the Pere Marquette station, which was on his way home. He was aware that the train was not at that moment in use as a passenger train, he had no ticket and did not pretend that he received any invitation or had any right to do what he did. The Pere Marquette train backed as usual along the cross line and while still on the property of the Grand Trunk Company, a freight train of that company, which was being made up at an adjacent siding, was negligently backed so as to come into collision with the train on which the plaintiff was standing. He was thereby thrown off the car platform and seriously injured. In their Lordships' opinion, the plaintiff was a trespasser both on the premises of the Grand Trunk Company and on the train of the Pere Marquette Company. On the footing that the plaintiff was a trespasser the question was, what, under the circumstances of the case, were his rights against the Grand Trunk Company? Lord Robson, in delivering the judgment, said, at p. 369:

> The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances.

And at p. 370:

> Again, even if he be a trespasser, a question may 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. An instance of this occurred where an owner placed a horse he knew to be savage in a field which he knew to be used by persons as a short cut

on their way to a railway station: *Lowery* v. *Walker* (1). In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.

In *Addie* v. *Dumbreck* (2), the House of Lords had to consider a case where the plaintiff claimed damages for the death of his son, a child of four, who had been crushed in the terminal wheel of a haulage system belonging to a colliery company. The system was used in a field owned by the company and consisted of an endless wire cable operated from the pithead by an electric motor, while at the other end of the system, which was not visible from the pithead, there was a heavy iron wheel round which the cable passed and returned. The field was surrounded by a hedge which was quite inadequate to keep out the public, and it was used, to the knowledge of the company, as a playground by young children. The company officials at times warned children out of the field but their warnings were disregarded. The wheel was dangerous and attractive to children and at the time of the accident it was insufficiently protected. The accident occurred owing to the wheel being set in motion by the company's servants without taking any precaution to avoid accident to persons frequenting the field. The House of Lords held unanimously that the child was a trespasser and went on the premises at his own risk and that the company owed him no duty to protect him from injury. In the following year, however, in *Excelsior Wire Rope Co.* v. *Callan* (3), the House of Lords was presented with a case which, upon a superficial examination of the facts, might seem to require a similar decision. But the facts of this case when carefully examined were materially different from those in *Addie* v. *Dumbreck* (2) and the House gave judgment for the plaintiff. Lord Dunedin was prepared, if it were necessary, to describe the children, upon the special facts of the case, as licensees to whom the defendants owed an obvious duty of care. But if they were to be regarded as trespassers, he considered the conduct of the defendants to be so reckless as to amount to an intent to injure. Lord Thankerton, at the top of p. 414, sets the facts out thus:

* * * the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the

(1) [1910] 1 K.B. 173; [1911] A.C. 10.
(2) [1929] A.C. 358.
(3) [1930] A.C. 404.

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habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children away from that spot. My Lords, that last fact itself appears to me to recognize a necessity and a duty to see that the children were away from this dangerous machine.

Upon that state of the facts the children were obviously where they were with the leave and licence of the company. But as Lord Dunedin said, assuming that the children were trespassers, he thought that the company's servants acted, to use the words of Viscount Hailsham in *Addie's* case (1), " with reckless disregard of the presence of the trespasser," or, in his own words, " that the acting was so reckless as to amount to malicious acting."

The American cases, such as *Railroad Company* v. *Stout* (2), have taken what has been said to be a more humanitarian or liberal view of the duties of an occupier of dangerous premises toward children trespassing thereon and coming to harm. In the last edition of Salmond on Torts (8th edition) at p. 529, the editor says that

> In England it may be said with some confidence that no such rule of liability is recognized.

Lord Justice Scrutton in the *Liddell* case (3) said:

> I agree with the view of Mr. Justice Salmond in his work on Torts (7th ed.) at p. 472, where he says, " The humanitarian impulse which prompts such decisions as that of *Railroad Company* v. *Stout* (4) and seeks to impose upon the occupiers of premises a legal duty in the guardianship of infant trespassers will in the long run do more harm than good. The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company."

It is not shown in the case before us that at the time of the accident the infant plaintiff was where he was by the leave or licence of the railway company, nor can it be fairly said upon the evidence that the railway company's conduct toward the infant plaintiff was such wilful or reckless disregard of his presence on the freight car as to amount to malicious conduct toward him. To hold the railway company liable in damages to the infant would make the railway company virtually an insurer of a trespasser.

There is no course open to us upon the settled law as I understand it but to allow the appeal and dismiss the action, with costs if asked for.

(1) [1929] A.C. 358.
(2) (1873) 17 Wall. 657.
(3) [1934] 2 K.B. 101, at 110.
(4) (1873) 17 Wall. (U.S.) 657.

KERWIN J.—The appellant's railway tracks were legally on the highway, Higgins avenue, and at the time of the accident the company's employees were lawfully engaged in moving the railway cars. The infant respondent was entitled to be on the highway but not on the appellant's cars.

The trial judge has found that, after what has been called the assembling of the cars had been completed, the boy "ran out a few moments before the train started and evaded being seen by the trainmen or the constable who had both passed the car to which he ran a short time before." I understand this to mean, not that the boy, who was then but four and a half years of age, intentionally waited until he saw the coast was clear but that he ran out when none of the appellant's employees happened to be looking. I agree that in fact, this is something against which the appellant could not guard, and in law, conduct which it was not incumbent upon the appellant to foresee.

The authorities are legion and not easy to reconcile. Two of the recent cases in the House of Lords, *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1) and *Excelsior Wire Rope Company* v. *Callan* (2), are referred to in *Mourton* v. *Poulter* (3) and in the 8th Edition of Salmond on "Torts," 527. Lord Justice Scrutton in the *Mourton* case (3) and the editor of the text-book seem to agree that the difference between the two cases is that in the latter the trespassers were, and in the former they were not, known to be present. In my opinion that is a correct statement of the distinction.

In the present case, while the appellant's employees knew that children were playing in the enclosed field, on the landing platform, and on the street, the fact that the boy darted to the cars and commenced climbing one of them disposes of any contention that the employees knew or should have known that the young lad either was on the cars or that he might run out and climb upon them.

(1) [1929] A.C. 358. (2) [1930] A.C. 404.
(3) [1930] 2 K.B. 183.

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With respect, I find myself unable to agree with the learned Chief Justice of Manitoba (1) that "commensurate care must be exercised however wide the field of danger" as that begs the question of the duty owing by the appellant to the infant. And on the evidence, I cannot find that "the field of particular danger, as well known by the company, was practically restricted to the corner in question." The evidence discloses that the children played at other spots along the length of Higgins avenue, and, in any event, we are concerned with what actually did transpire and not with what might be the situation under other circumstances.

Two late cases in England, *Donovan* v. *Union Cartage Company* (2) and *Liddle* v. *Yorkshire (North Riding) County Council* (3), indicate the limits within which an infant trespasser must fall in order to entitled it to recover. However, in my view, nothing can be gained by an exhaustive survey of all the decided cases. In each the question must be the extent of the duty owing by one party to the other, and in the case at bar I am unable to find that the appellant owed any duty to the infant which it failed to fulfil. So far as the judgment for $5,000 in favour of the infant plaintiff is concerned, the appeal should therefore be allowed, with costs if demanded.

On the argument the attention of counsel was drawn to the fact that the judgment of the Court of Appeal in favour of the adult plaintiff was for $800 and costs, and that no order granting special leave to appeal had been obtained. The appeal from the judgment in favour of the adult plaintiff was thereupon dismissed.

CROCKET J. (dissenting):—The defendant many years ago was permitted by the City of Winnipeg to lay a railway track along the northerly side of Higgins avenue as an adjunct of its terminal yards system, which occupies an extensive area abutting the northerly side line of that street. This track is known as K lead and extends along the avenue a distance of 2,900 feet. There is no fence or visible boundary between the terminal yards proper and the street, so that the lead practically forms part of the railway terminal system, though for most of its length it

(1) 43 Man. R. at 360. (2) [1933] 2 K.B. 71.
(3) [1934] 2 K.B. 101.

is planked between the rails and for a few feet on either side, the rails and planking being flush with the street pavement on the south side. The north rails of the lead are parallel to and about 8 feet from the northerly limit of the avenue, which is 66 feet wide. The lead thus actually forms part of a public street, and with the planks, which border it on either side, and the few feet between the north side planking and the southerly side line of the railway terminal yards proper, occupies nearly one-fourth of the width of the avenue. In its length of 2,900 feet the lead passes two north and south streets which end on the south side of the avenue, viz., St. Patrick's and Ellen streets. A third street, Lizzie street, intersects Higgins avenue about 600 feet east of Ellen street and runs past the defendant's local freight shed. There is a cinder path 5½ feet wide all along the south side of the avenue and an open space of 10 or 11 feet, which was described as a boulevard, between it and the south curb of the street pavement. The lots along the south side of the avenue across from the lead are occupied for the most part by warehouses and industrial plants, but along the north and south streets and along Henry avenue, which parallels Higgins avenue about 176 feet to the south, there are many dwellings from which children come to Higgins avenue to play in the evening hours. There is a large vacant lot at the northeasterly corner of Ellen street, surrounded by a board fence with a gate affording entrance and exit from and to the south side of Higgins avenue directly across from the lead and in which children were in the habit of playing ball and other games. Just east of this lot there is a loading platform, to which a railway spur curves across the street pavement and the boulevard, upon which children frequently played after supper, and the approach to which rises gradually from the level of the avenue.

For some years past, the railway has used the Higgins avenue track after 5 o'clock every afternoon except Sunday for the assembling of a westbound freight train. In accordance with its usual practice, an assembling or shed crew, as it was called, went to work for the purpose stated at 5 o'clock p.m. on April 18, 1933, with a switch engine, which collected cuts of from 10 to 14 cars in the adjoining yard and backed these cuts down, one at a time, on to K lead

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over a switch curve at its westerly end until the whole train or drag, as it is called, of 55 cars was assembled. When completed this drag extended from a point about 150 feet west of Lizzie street to a point on the curved track at the west end of the lead—a distance of about 2,200 feet, and was left standing on the lead for another crew, called the hauling crew, to take over and move on to another track in the adjoining terminal yards. After the assembling crew had finished their work and left the lead and while the drag was standing on the track awaiting its transfer to the yard, while it was still daylight, the infant plaintiff, a boy of four and a half years, started climbing the side ladder of one of the box cars. As this ladder was placed close to the east end of the car, and there was another ladder on the rear of the car within easy reach, the boy, after climbing a few rungs of the side ladder, reached around the corner and got on the end ladder, and was in the act of climbing the latter when the train started with a jerk, causing him to fall to the ground outside the south rail. His right leg, however, got across the south rail and was run over by the wheels of the next car and had in consequence to be amputated a few inches below the knee.

This action was brought in the Court of King's Bench for Manitoba by the boy's mother as his next friend to recover damages in his behalf as well as in her own right for hospital and medical expenses she was compelled to pay. It was tried before Adamson J., without a jury. His Lordship found that the defendant did all that was reasonable to see that all was clear when the train started; and, relying on the decision of the House of Lords in *Addie* v. *Dumbreck* (1), also held that the boy was a trespasser and the author of his own injury, and for these reasons dismissed the action. On appeal the Court of Appeal, by Prendergast, C.J.M., and Robson and Richards, JJ.A. (Dennistoun and Trueman, JJ.A., dissenting), set aside the trial judgment and awarded $5,000 damages to the infant plaintiff and $800 damages to the mother with costs of appeal as well as of the action throughout.

The case, I think, with all respect, is one in which, if there was really any negligence on the part of any of its servants which materially contributed to bring about the

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

boy's injury, the defendant cannot avail itself of the fact that the infant plaintiff wrongfully got upon the ladder and was consequently a trespasser on the railway car. If he was a trespasser in that sense he was no more so than was the infant plaintiff, a boy aged 7, a trespasser in the cart, which the defendant's servant left unguarded in the street in *Lynch* v. *Nurdin* (1), or than the two infant plaintiffs aged respectively 5 and 9, were on the wire rope, on which they were swinging, in *Excelsior Wire Rope Co.* v. *Callan* (2). Yet in both these cases the infant plaintiffs were held entitled to recover, notwithstanding that it was strongly urged that the infant plaintiff in the former and the two infant plaintiffs in the latter were trespassers. Certainly a child too young to be capable of caution or of appreciating a danger, which would be obvious to older children, could not well be held to be guilty of negligence either causing or materially contributing to cause injury or damage.

The true test of the liability of the defendant in this case, under the authorities as I read them, is whether the defendant took reasonably adequate precautions to protect children such as the infant plaintiff, with their natural propensities to inquisitiveness, play and mischief, and whom it must be taken to have known through its servants were likely to be upon the street in close proximity to its cars at the time, from the danger attending the assembling and movement of these cars along its railway track, situated, as it was, actually upon a public street, and whether its failure to do so was the cause of the infant plaintiff being upon the ladder when the train was started. Whether the boy was a trespasser, a licensee or an invitee, and the manner in which he came to get on the ladder, is quite irrelevant except in so far as it may bear upon the question of the alleged negligence of the defendant's servants, as similar considerations were held to be in the recent *Excelsior Wire Rope* case (3), already cited. In that case Lord Buckmaster, who wrote the leading judgment, referred to some evidence which had been adduced to shew that the children, who were in the habit of playing on the land on which the wire apparatus was placed, were mischievous and had

(1) 1 Q.B. 29.
(2) [1930] A.C. 404.
(3) [1930] A.C. 404.

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broken lamps by the side of the path which led to that field, and said:

but that appears to me to be totally irrelevant. It really is a ridiculous thing to imagine that you can expect the same gravity and decorum from children as that which is sometimes associated with advanced years, and for the purposes of this case it is important to remember that the duty which we are about to examine is a duty to these children.

In the same case Lord Atkin said:

There has arisen in respect to the duties of owners and occupiers of land an elaborate series of decisions which have involved the consideration of the precise difference between invitees of the occupiers, licensees of the occupiers, or trespassers upon the land. In my view, in this case none of these questions is relevant, * * * The defendants in this case were not occupiers of the land in question. They had a right from the Marquess of Bute, who in fact owned the land, and, as far as I can see on the evidence, was the occupier of the land, to place a line of rails upon it,

and after pointing out that there was a term in the lease that the Marquess retained the right to make what use he pleased of the land on which the siding was placed subject to there being no unreasonable interference with the siding, His Lordship continued:

A similar position existed in reference to the erection of this particular hauling machinery that was placed upon this siding (the wire rope apparatus for the movement of trucks along the siding). In those circumstances, my Lords, the only question that appears to me to arise is: What was the obligation on the owners of this hauling machinery to persons who might be endangered by its use?

Though the defendant had a right, as was admitted on the trial, to assemble cars and move trains on K lead notwithstanding its location upon and along a public street, there can be no doubt that in the exercise of that right it was bound to take such precautions for the avoidance of injury to the public as were fairly commensurate with the danger created by its operations thereon. What degree of care and vigilance the railway owed to the public depends, as indeed it always does in such cases, on the existing conditions and risks, as they were known or ought to have been known to it or to its servants and agents in charge of those operations, but there can, in my opinion, be no question that it was the unmistakable duty of the railway to guard the public as far as was reasonably practicable against any and every danger which its operations created on this highway and which ought reasonably to have been foreseen by those in charge thereof. That there was a special danger at particular points along the lead, arising from the presence of children in close proximity to the railway cars while the train was being made up

by the shed crew and in starting it by the hauling crew after its assembly was completed on its transfer to the adjoining yard, cannot, I think, fairly be questioned on the evidence.

The witness, Messier, a former switchman in the employ of the defendant, who when so employed had lost a leg in 1925 and was spoken of as an old man, and who at the time of the accident to the infant plaintiff had been employed for about two years as a kind of watchman on Higgins Avenue, during the assembling operations by the shed crew, testified that his duties were "to keep traffic away from the cars and keep the kids away," by which he explained he meant "the children away from the cars as they were coming down the street." Asked where he was supposed to be stationed on Higgins Avenue, he replied, "Well, that is pretty hard to say, but stationed anywhere along the street where there was traffic and where there was kids; down around Ellen Street, the intersection of Ellen and Higgins Avenue." He told of the vacant lot at the corner on which he said the children played baseball, football and sometimes tag, and of the loading platform just east of it where children played also sometimes, and of children playing as well on Ellen Street and on Higgins Avenue. When asked if children ever climbed on to the box cars, he answered "Yes."

Q. How often did they do that?
A. I couldn't tell you how often, they done it occasionally.
BY THE COURT:
Q. As often as you could not stop them?
A. Yes.
Q. You stopped them as often as you saw them, as part of your duty?
A. Yes.
BY MR. THORSON:
Q. What did you do?
A. I chased them away from the cars. I took my cane to them.

* * *

Q. Coming back to the yard, Mr. Messier, on the southeast corner of Ellen and Higgins you say the children played games there?
A. Yes.
Q. Ball games?
A. Ball, any kind of games, all kinds of games.
Q. Did the ball ever go over the fence across Higgins avenue?
MR. REYCRAFT: I object to that and I submit it is all irrelevant. I don't care whether the ball went over the fence.
A. Yes, many times.
Q. Did the ball ever go under the train?
A. Yes.

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Q. What happened then?

A. Sometimes they would get the ball themselves, and sometimes I would get it for them.

Q. When they got the ball themselves what did they do?

A. They continued playing.

Q. But how did they get the ball?

A. They would go underneath the cars and get the ball, and go away again. Sneak away if I wasn't around.

Q. You say that sometimes you would get the ball yourself?

A. Yes, sometimes I would get the ball for them. Reach in with my stick and knock the ball out.

Q. Did the children ever ask you whether they might go and get the ball?

A. Yes, sometimes they would. They would come and tell me their ball was under the cars. I would tell them to leave it there for a few minutes, and I would get it for them.

CROSS-EXAMINATION BY MR. REYCRAFT:

Q. Any time you were on Higgins avenue near the shed and you saw children in danger, you would drive them away, or tell them to go away, you always did that?

A. Yes.

Q. Wasn't your duty, Mr. Messier, to watch the point or the end car as they were shunting the different cars down on that siding on that day?

A. It was partly.

Q. That is if they had shoved a few cars down and left them on the track, and then they would go back and get some more, and as those were pushed down your duty was to be at the east end of the east car to see nobody passed by there?

A. Yes.

Q. And when the drag was assembled your duties were through?

A. Yes.

The evidence of Messier was not contradicted, though much reliance was placed by the defendant on the fact that the witness Gustaffson, who gave testimony in its behalf, said that he thought he saw boys climb on the car ladders only once and that he didn't recall seeing any *small* boys playing on the street at any time, and on the testimony of some of the members of the hauling crew to the effect that they never saw any more children about the corner of Ellen Street than elsewhere along the avenue.

As to the value of Gustaffson's evidence, it should be pointed out that he was put on the stand for the apparent purpose of substantiating the contention which was put forward by the defendant that the infant plaintiff had not fallen from a car ladder at all but was knocked down by the train while he was running alongside it with another companion. The trial judge rejected his evidence in this regard and found that the infant plaintiff was on the ladder when the train started, as sworn to by two companions of

Gustaffson. If one reads Gustaffson's cross-examination in full one cannot fail, I think, to be impressed by its inconsistency and uncertainty throughout.

The foreman, or head of the hauling crew (Wilkinson), however, stated in his cross-examination that there were always children on Higgins Street when they went down there in good weather, all the way down Higgins, though he couldn't say he noticed them particularly at the corner of Ellen Street—that " there are always children playing on Higgins Ave," and that he had noticed that in the ordinary course of his duties as a foreman there.

Another member of the hauling crew, Boardman, said he had seen children on Higgins Avenue at different times playing there. When asked if he had seen them playing on the corner, he replied that he wouldn't say on the corner, anywhere along the whole street—he didn't want to specify Ellen any more than any other street, but he reiterated that he had seen them all along Higgins Avenue while he was working there as a switchman.

Beatty, the defendant's general yardmaster, when asked as to Messier's duty, said that his principal duty was to protect the east end of the drag, but that if he was standing there and saw children in danger he was supposed to warn them and he admitted that he had seen children playing on Higgins Avenue.

Q. At the corner of Ellen and Higgins?
A. Well, in all the district.
Q. There are a lot of children in the district, aren't there?
A. No more than normal, I imagine.

In addition to the evidence of Messier another witness for the plaintiff, Voss, swore that Messier used to chase the kids off the box cars.

Hobson, Jr., another witness for the plaintiff, who was 17 years old at the time of the trial and 15 at the time of the accident, who actually saw the infant plaintiff fall from the ladder, testified that Messier used to tell them, when the ball would go over on the other side of the tracks, whether it was o.k. to go across and get it, and that he usually told them whether the train was going out or not and say "Yes" or "No," and that if the train was stationary they climbed up the ladder steps on the couplings and climbed down the other side; that he had done that himself and that he had seen other boys do it.

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Hobson's father also gave evidence to the effect that children all around the district generally played in that neighbourhood around by the vacant lot on Ellen Street, especially in the evenings when the cars of the defendant were on the Higgins Avenue track; that he had often seen children playing on the top of the loading platform and along by the warehouse where the drag comes in on Ellen Street between Henry and Higgins and on Higgins Avenue itself; that lots of times he had seen from 30 to 50 children.

Another witness, Stevens, who was employed as night man in a warehouse which extends to Higgins Avenue on Ellen Street, also swore that children were in the habit of playing in and around the corner of Ellen and Higgins in large numbers in the summer; that he had seen them playing on the loading platform, rolling tires, balls and rolling hoops down the slope over towards the train; that he had seen the ball knocked over the fence of the vacant lot and roll under the cars and seen both boys and girls go under the cars; that that was a frequent occurrence, "two or three times an evening."

The boy, Hobson, was riding a bicycle towards the top of Ellen Street when he saw the infant plaintiff fall from the ladder of the box car. Though at the outset of his testimony, when asked where he first saw the little boy on the day in question, he answered "On Ellen Street," and that he (Hobson) was riding a bicycle at the time, it is clear from his evidence that before he saw the boy on the ladder of the box car he had seen him that night on Higgins Avenue and he distinctly swore that he was then playing with some other boys around the freight cars.

I cannot avoid the conclusion upon the whole record that the defendant through its servants and agents must be charged with knowledge that there was a special danger to young children, more particularly in the immediate vicinity of the corner of Ellen Street, not only in the shunting of cars during the assembling operations by the shed crew on this railway track, but in the starting of the completed train by the hauling crew. The railway cars of the first or second cut, it seems, were usually standing upon the railway track directly opposite the top of Ellen Street, where it was the habit of children to gather for their after supper play—some in the ball field, some on

the loading platform, and some on the street and boulevard —and were clearly an object of attraction to the younger children, who doubtless had seen the older ones climb the car ladders. If the defendant's servants and agents in charge of these operations did not actually know of these conditions and of that danger, they ought to have known of them, and that one or more of these children were more than likely to be about or upon the cars when the train was started. This was the real basis of the action, so that, as already indicated, the vital question is: Did the defendant take reasonable and proper precautions to guard against this obvious danger to such children as the infant plaintiff, who was too young to see it himself.

It is quite apparent from his reasons for judgment that the learned trial judge's finding that the defendant did all that was reasonable to see that all was clear when the train started was based upon a consideration of the conduct of the infant plaintiff rather than upon a consideration of whether on the whole evidence the railway took adequate precautions to guard against such a thing as happened. His Lordship says the little fellow "ran out a few moments before the train started and *evaded* being seen by the trainmen or the constable who had both passed the car to which he ran a short time before," and immediately adds:—

> How could the defendant guard against such conduct? The little lad told what happened without being sworn. For what it is worth he said that he and two companions ran across the street to the cars—that the other two boys saw the engine and ran on. He did not see the engine, crawled up the side ladder and went to the back ladder when the train started. He fell and his foot was cut off. This would all happen in a few seconds. They must have run out just when Boardman (one of the two trainmen referred to) was giving his signal and when his back was turned. If Boardman is correct as to where he was, he must have been very few car lengths from the very car the boy climbed. Crick (the constable) says he saw a boy fall while running, but it must have been one of the other boys. He was fifteen car lengths east. He did not happen to look during the few seconds it took these boys to cross Higgins avenue to the cars.
>
> On the facts it is clear that the plaintiff was a trespasser.

It will be seen that these findings are for the most part inferences drawn from undisputed facts and are therefore quite open to review by a Court of Appeal.

If Boardman was at all concerned in seeing "that all was clear (in the sense that no young children were endangered) when the train started," and was standing

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opposite Ellen street just west of the switch, as the evidence clearly shews he must have been, it seems to me to be an altogether remarkable thing that he could have failed to see three children run across the street to the cars and one of them climb the lower rungs of the side ladder behind him and then crawl around the corner to get on the back one, without any lack of vigilance or failure of duty on his part. Why should he before the train started be looking away from the place of greatest danger at the critical moment? When the defendant's counsel in his examination-in-chief asked Boardman if there were any children near the cars when he was standing there, his answer was: "Not that I noticed particularly; there might have been some up on the sidewalk or the boulevard." The truth is that Boardman was not there for the purpose of being on the lookout for children, but simply for the purpose of giving his O.K. signal after the train started to Wilkinson, the other yardman who was standing near the engine, that the cars were all coming, as he explained to the defendant's counsel. It is true that before he took up his position for this purpose he had passed the car to which the boy ran, and in fact walked down Higgins avenue the full length of the drag, but this was not for the purpose of seeing that no young children were on or about the cars either, but for the purpose of making a list of all the car destinations. This work must have taken more than a few minutes. After completing his list he walked back to the point west of the switch from which he gave his signal to Wilkinson. He was not asked if on his way back to this position he looked to see if any children were on or about any of the cars. No doubt, however, if he had seen the infant plaintiff on the side ladder he would have said so.

Wilkinson, the other trainman, who is said to have passed the car, from which the plaintiff fell, a short time before, does not agree with Boardman that he accompanied the latter on his walk east along the whole length of the drag. He says he left Boardman at a point about 12 car lengths from the rear of the train, but was not at all sure as to whether it might not have been 13 or 14 car lengths. Apparently it depended in his mind upon how many cars were included in the first cut of cars which had been placed on the lead by the shed crew, for he said they went

down together to that point to see that the first cut was coupled. It was clearly not for the purpose of seeing if any children were on or about the train when it started, and would have been of no avail in this regard, for he thought it was 15 minutes before the train pulled out that he left Boardman and walked back to take up his signalling position near the engine. It was Wilkinson who said that there were always children playing on Higgins avenue, but notwithstanding this he stated he never got any instructions about children.

As regards Crick, who is described as a constable, the record shews that he went on duty at the lead at 7.15 p.m.—about an hour before the train pulled out—for the purpose of taking the seal records of all the cars, and that he walked along both sides of the full length of the train for that purpose, first along the north side from east to west and then the south side from west to east. It is true he says he kept watch while doing so to see there was nobody around the train, but his principal duty was to take the seal records on all the cars, which obviously would take considerable time, and not enable him to properly perform the duty of seeing that "all was clear," so far as children were concerned, "when the train started," for the train was a train of 55 cars and stretched along the track for not far short of half a mile.

Crick himself in his examination-in-chief testified that when he got to the east end car and was reading that seal record the train started to move and that he immediately turned round and saw three small boys run across Higgins avenue from Ellen street towards the train; that they turned west and ran alongside of the train; that he saw one boy fall; that he (Crick) immediately proceeded to catch up to him, and after walking a short distance alongside the train got on the moving train, and when within about 200 feet of where the boy fell, saw another boy come across from Ellen street and pick the lad up. In cross-examination he first said he was walking east towards the end of the train when it started, but immediately afterwards said he was "at the east end car of the train" at the time. Whether, however, he was walking towards the east end or had reached the end car and was standing there, he afterwards distinctly affirmed that when the train

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started to move he was about 150 feet west of the west line of Lizzie street with his back to the engine, looking east. The learned trial Judge did not accept that portion of Crick's evidence, which clearly pointed to the infant plaintiff as the boy who fell while running west alongside the train, but he finds that Crick was 15 car lengths east (of where Boardman was standing to give his O.K. signal to Wilkinson) when he says he saw the boys running. "He did not happen," His Lordship adds, "to look during the few seconds it took these boys to cross Higgins avenue to the cars." So that if it was Crick's duty to see that all was clear, so far as children were concerned, when the train started, there was a clear failure of duty on his part also. He was looking east from the rear car 450 feet from Ellen street with his back to the engine at the critical time.

That both Boardman and Crick should have had their backs turned to the danger point at the critical moment, if it was the duty of either to see that no children were on or about the cars when the train started, is surely a most extraordinary coincidence. The fair inference from it is that neither regarded it as his duty to see that all was clear and that no children would be endangered when the train started to move.

The finding of the learned trial judge that the defendant did all that was reasonable to see that all was clear when the train started could only be justified on the assumption that it owed no duty to guard young children against such an obvious danger, for it was not pretended that there was anyone else than Boardman, who could have seen the children run to the train from the vicinity of the Ellen Street corner, and warn them when it was about to start, and Crick, who, as stated, was 450 feet east of that point, was too far away to warn them, and was actually looking east when the train started to move west. No other precautions of any kind were taken by the railway to guard against such a danger.

Messier, who appears to have been the only employee of the defendant whose real duty was to watch for children and others and warn them of the movement of cars on the lead during the operations of the assembling crew, was not in the locality at all. He went on duty with the shed crew and left when that crew finished their work. Beatty, the general yardmaster, said that Messier did not usually

stay on Higgins Avenue until the train pulled out; that as long as the shed crew was through he was through. Messier himself in his cross-examination by the defendant's counsel said that when the drag was assembled his duties were through. Had he been stationed at the corner of Ellen Street, where he stated that he usually stationed himself, he would surely have seen the infant plaintiff run across with the two or three other boys and climb the ladder and this unfortunate accident would not have occurred.

It seems to me that ordinary prudence should have suggested to the defendant's terminal officers the necessity of keeping Messier or some other watchman, specially charged with the duty of looking out for children, from the time the hauling crew took over the drag until it was moved safely off the street, and that it was in no sense sufficient for the railway to rely for the avoidance of such a thing as happened that night, and as might have happened at any moment while the little boys were about the street, upon its ordinary hauling crew and a man like Crick, who was engaged at the very time the train started, according to his own evidence, in examining the seal of the last car 15 car lengths east of the most obvious point of danger with his back to the engine.

As regards the learned trial judge's finding that the infant plaintiff ran out a few moments before the train started and "evaded" being seen by the trainmen, I cannot think it possible that a boy of but 4½ years could have had any thought of taking advantage of Boardman's lack of vigilance when he ran across the street with his three companions and climbed the ladder. The boy himself in his unsworn statement, to which His Lordship refers "for what it is worth," says that when he and the other boys ran over to the train he, before climbing the first few rungs of the side ladder and pulling himself around the corner to the end ladder, sat down on the first seat (of the ladder) and then said to his companions, "Let us climb," and they said, "No," but that he went up the ladder and that the other boys then saw the engine coming and ran away. If this statement is to be relied upon at all and the boy had any appreciation of the surroundings, it would surely indicate that he could not possibly have had any idea of "evading" Boardman. In any event he was merely

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indulging the natural instinct of children to play and amuse themselves, which was the cause of the special danger against which it was the defendant's duty to guard.

It was strongly contended in behalf of the defendant that it was not reasonably practicable for the railway to guard against such a danger, inasmuch as to do so effectually would require it to employ special watchmen all along the street when the trains were about to start, and such a requirement would be an intolerable and unreasonable burden to impose upon the railway. I quite agree that it would be unreasonable to insist upon the employment of special watchmen "all along the street," if that means at every car along the lead, and that the only duty resting upon the defendant towards the children was to take reasonably adequate precautions to gaurd them from the danger involved in the shunting of cars and the starting of trains in such a locality. I do not agree, however, that there was no more danger at the corner of Ellen Street than elsewhere, and that there was consequently no more obligation on the part of the defendant to provide a watchman there than at any other point along the track. The weight of the evidence is decidedly to the contrary. The testimony of Messier, who had acted as a special watchman for the defendant for two years during the assembling of the cars on the lead, and which was not contradicted in any of its essential features, conclusively proves that he himself recognized the fact that there was a special danger at that corner, apart altogether from that of the other witnesses, which I have above summarized. I have already called attention to the fact that there were but two north and south streets west of Lizzie Street, which ended on Higgins Avenue. This duty, it seems to me, could properly have been discharged by the employment of one or two special watchmen at the most to patrol the really dangerous sections when the hauling crews took over the assembled drags. It was, in my opinion, not adequately discharged by relying wholly upon the yardmen of the ordinary hauling crew, supplemented only by a constable, charged with the duty of examining and recording the car seal records, and who was most likely in his fulfilment of that duty to be at the extreme end of the drag when the train started, with his mind centred on his particular work. One or two such special watchmen as I have suggested would

have been required for a period of not more than half an hour before the train moved off the street.

I entirely agree with the majority judgment of the Appeal Court on the issue of liability, and as there can be no objection to the quantum of damages, which the Court itself assessed on undisputed testimony in order to avoid the expense of a new trial for the assessment of damages only in such a case, I would dismiss this appeal with costs.

*Appeal as against infant respondent allowed, with costs if asked for. Appeal as against adult respondent dismissed for want of jurisdiction.*

Solicitor for the appellant: *L. J. Reycraft.*

Solicitor for the respondent: *J. T. Thorson.*