Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Grand Trunk Railway Company of Canada v. *Walter C. Barnett, from the Court of Appeal for Ontario; delivered the 28th March* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ROBSON.
SIR ARTHUR WILSON.

[DELIVERED BY LORD ROBSON.]

This is an Appeal from a Judgment of the Court of Appeal for Ontario (Meredith, J.A., dissenting) affirming the Judgment of a Divisional Court of the High Court of Justice, which reversed the Judgment of Meredith, C.J., delivered in favour of the Appellants on the findings of the Jury.

The Respondent was Plaintiff in the action, and sued for damages for personal injuries caused by the negligence of the Defendant Railway Company's servants.

The Grand Trunk Railway Company and the Pere Marquette Railway Company have each a station and railway yards a short distance from each other in the City of London, Canada. The Grand Trunk Railway, under some arrangement with the Pere Marquette Railway, which was not given in evidence, allow the latter Company's trains, or some of them, access to the Grand Trunk Company's station by means of a cross

line called a "lead." This line begins on the Pere Marquette Company's property, and, entering the railway yard of the Grand Trunk Company, crosses its lines so as to bring the Pere Marquette train up to the Grand Trunk station. The particular train concerned in the accident was the Pere Marquette train which arrived at the Pere Marquette station at about 9 25 on the night of the 23rd August 1909. It was signalled from the Grand Trunk Company's yard to come along the "lead," which it did, and duly discharged its passengers at the platform of the Grand Trunk station. Its ordinary and proper course then was to wait until it received a signal from the Grand Trunk switch operator, after which it backed out over the Grand Trunk tracks and returned to the Pere Marquette yard, where it remained for the night. The Respondent Barnett was aware of this practice. 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 a 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, and he of course had no ticket and does not pretend that he received any invitation or had any right to do what he did. He must also have been aware that in thus standing on the platform, and particularly in a position so precarious as having one foot on the platform step, he was disobeying a bye-law of the Grand Trunk Railway Company. His knowledge on that point however, is immaterial, for the bye-law has the force of a Statute. His counsel contended that it bound only the passengers of the Grand Trunk Railway Company, but it is applicable to any person taking any train

on their premises. A similar prohibition existed on the Pere Marquette Railway, and is even said to have been affixed to the door of the car by which the Respondent was travelling on this occasion. His breach of duty in thus standing on the car platform seems, in the events that happened, to justify a charge of contributory negligence against him, but the view their Lordships take of the rest of the case makes it unnecessary to decide this point.

The train backed as usual along the "lead" 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 Respondent was standing. He was thereby thrown off the car platform and seriously injured.

In their Lordships' opinion, the Respondent was a trespasser both on the premises of the Grand Trunk Company and on the train of the Pere Marquette Company.

At the trial the Respondent contended that he, in common with other persons and with the knowledge of the Pere Marquette officials, had frequently made use of this train when backing from the Grand Trunk station to the Pere Marquette Company's yards and had not been turned off the train or called upon to pay a fare. He gave evidence on this point which, if it had been believed by the Jury, would have sufficed to show that on the occasion in question he was there with the knowledge, at all events, of the brakesman of the train. The brakesman and the other Pere Marquette servants in charge of the train were called and stated that they did not allow passengers to use it on the way back to the Pere Marquette yards, and did not acquiesce in such user. Their evidence was that if they saw such persons in time they put

them off, but they could not stop the train to put them off, and still less could they put them off while the train was moving, so that no doubt a certain number of persons on some occasions managed to use the train in this irregular way. The evidence on both sides as to this user of the empty train by persons without tickets, and the alleged acquiescence therein on the part of the Pere Marquette railway officials, was fully and carefully put before the Jury by the learned Trial Judge, and he directed them that if in their opinion there was a general practice of persons going, as the Plaintiff had gone, on the platform of this train with the knowledge, not merely of one set of officials or railway servants connected with the train, but of different officials and on different occasions, then that was evidence upon which they might come to the conclusion that it was a practice sanctioned by the Company itself.

The following are the questions submitted to the Jury by his Lordship, so far they are now material:—

(1.) Was the Plaintiff, at the time of the accident, upon the train of the Pere Marquette Railway Company by the permission of the Company?

Answer.—No.

(2.) Was the Plaintiff upon the platform by the permission of the Pere Marquette Railway Company?

Answer.—No.

Before putting these questions his Lordship invited counsel for the Plaintiff to suggest any other question which they thought should be put to the Jury, but the only suggestion in answer to that invitation was that the Jury should be asked to say whether or not the negligence was gross, and in view of the admissions of the parties the learned Judge very properly declined to put

that question. It was further agreed by the parties that if there was any point necessary for the determination of the rights of the parties not covered by the questions submitted that point should be determined by the Courts.

The counsel for the Respondent now complain that the Jury were not asked whether the Respondent was on the car on the occasion in question with the knowledge and acquiescence of the brakesman of the train. It was not suggested that the brakesman had authority to give permission, and, so far as standing on the car platform was concerned, the Respondent must have known from the prohibitory notice on the car door that the brakesman had no authority to allow that. The brakesman, however, swore that he did not know the Respondent was there, and even had he known it, the circumstance would only have been material as evidence of the general practice alleged by the Respondent. In the absence of any such practice, a specific finding that the brakesman had, on this occasion, allowed the Respondent to get on the train without a ticket, and then to stand on the platform of the car, could not have given the Respondent a cause of action. The learned Judge adopted the course of directing the Jury as to the facts necessary to establish a cause of action, and then putting a question which covered those facts. He was neither invited nor bound to put further questions on any particular fact.

There was a further question raised on Appeal, though not in dispute at the trial, as to whether the collision took place on the property of the Grand Trunk Railway Company, or on that of the Pere Marquette Railway Company. The Respondent's counsel now contend that it took place on the property of the latter company so that their client could not be said to be a trespasser on the property of the Appellants. The evidence

is quite clear that at the trial the collision was treated by everybody as having taken place on the ground or in the yards of the Grand Trunk Company. The junction between the two properties was stated by the Respondent himself as being in or near Colborne Street, and that is some distance further along in the direction in which the train was backing, and beyond the point at which the collision took place. The Respondent himself said the train " travels along " the Grand Trunk track to Colborne Street, and " then they throw a switch for it to get on to the " Pere Marquette," and the other witnesses refer to the Pere Marquette yard as beginning at Colborne Street.

The Court of Appeal said that, as the Pere Marquette Railway Company was entitled, under its arrangement with the Grand Trunk Company, to use the "lead" as a means of access to the Grand Trunk station and back again to the Company's yard, it would, while actually using that "lead," be necessarily in " exclusive posses- " sion " thereof even as against the Grand Trunk Railway Company. From this it is inferred that the Respondent was no trespasser *quo ad* the latter Company. There is no evidence that the Pere Marquette Railway Company have any right of property in the "lead." So far as can be judged from the facts before the Court the Pere Marquette Company would seem only to have a right-of-way for themselves and persons lawfully claiming under them, but, subject to that right, the property remains in the Grand Trunk Company. Under those circumstances the Respondent was not the less a trespasser on their property because he was there in the car of another Company who might possibly have been able to give him leave or license to be there, but had not, in fact, done so. The notion that the Pere Marquette Company while using its right-of-way

was in "exclusive possession" of the way, and therefore was alone entitled at that time to maintain an action for trespass, does not seem to distinguish adequately between the rights of a tenant and those of a licensee.

The case must therefore be taken on the footing that the Respondent was a trespasser, and the question is, what under those circumstances are his rights against the Appellant Company? In order to make good a case of actionable negligence against them he must show some breach of a duty on their part towards himself. The Divisional Court have held that "the personal safety of a human being (though "he be a trespasser) must not be endangered "by the negligent act of another. Given the "circumstances of this case, it does not seem ". . . . that the Defendants are exempt from "liability though the Plaintiff was nothing else "than a mere trespasser." The Court of Appeal was not prepared to agree with this general statement of the law, but rested its Judgment on the ground above mentioned, *viz.*, that the Grand Trunk Railway Company had parted with its right of possession, and therefore could not have maintained an action of trespass against the Respondent. 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. A carrier cannot protect himself against the con-

sequences which may follow on the breach of such an obligation, (as, for instance, by a charge to cover insurance against the risk) for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.

The general rule, therefore, is that a man trespasses at his own risk. This is shown by a long line of authorities, of which the *Great Northern Railway Company* v. *Harrison* (10 Ex. Reports, p. 376), *Lygo* v. *Newbold* (9 Ex. Reports, p. 302), and *Murley* v. *Grove* (46 J.P., p. 365), are familiar examples.

There is sometimes difficulty, however, in deciding when a man is really a trespasser. That is a question of fact, and in the present case it has been decided against the Plaintiff by a Jury properly directed.

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*, L.R. 1910 1, K.B. 173, and H.L., A.C. 1911, p. 10). In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.

When these qualifications are borne in mind, the cases pressed by the Respondent on the Courts below present little difficulty. Thus, in *Harris* v. *Perry* (L.R. 1903, 2 K.B. 219) the Plaintiff was on the train in response to an invitation by a superintendent, who represented the Defendant, and under those circumstances

a previous verbal prohibition by the Defendant was held not sufficient to justify the Plaintiff in being treated as a trespasser.

In *Lowery* v. *Walker*, the Court of Appeal (Vaughan Williams and Kennedy, L.JJ.) held that the Plaintiff being a trespasser could not recover, and though their Judgment was reversed in the House of Lords it was only on the ground that on a proper construction of the findings of the County Court Judge the Plaintiff ought not to be treated as a trespasser. Otherwise, as Lord Halsbury says, "the word 'trespasser' would "have carried the learned Counsel for the "Defendant all the way he wants to get."

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be allowed and that the Judgments of the Court of Appeal for Ontario and of the Divisional Court ought to be reversed and the Judgment of the Trial Judge restored. At the trial the Appellants do not appear to have asked for costs, but they have been ordered to pay the costs of the two Appeals in the Courts below. These costs must be repaid to them by the Respondent, and they will also have their costs of this Appeal.

In the Privy Council.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA

v.

WALTER C. BARNETT.

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