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* May 6, 7.
* May 27.

W. C. RICKARD AND HERBERT RICKARD (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES RAMSAY AND GEORGE CONCHAR RAMSAY (AN INFANT, BY JAMES RAMSAY, HIS NEXT FRIEND) (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Negligence—Horses—Child running towards, and kicked by, colt led on highway on grassy strip between gravelled roadway and cinder sidewalk—Liability in damages for injury to child.

The junior defendant, a boy 17 years old, was riding a pony northerly on a street in Calgary, Alberta, and leading by a rope a haltered colt on

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

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the east side of him. He went on to a grassy strip on the highway, east of its gravelled portion. He met two young boys running southerly on a cinder sidewalk east of the grassy strip. One of them, the the infant plaintiff, 6 years and 7 months old, ran towards the colt after it had passed him and was kicked by it. Said defendant and his father (who owned the colt and was following in a wagon some distance away) were sued for damages.

Held (Kerwin J. dissenting): Defendants were liable. Judgment of the Appellate Division, Alta., [1935] 3 W.W.R. 554, affirmed.

Per Duff C.J., Crocket, Davis and Hudson JJ.: The junior defendant, the moment he saw the boys running along the cinder path towards him, should have foreseen the danger and taken the horses off the grassy strip on to the gravelled roadway. His failure to discharge this duty to the children must, in the circumstances disclosed by the evidence, be held to be both the primary and proximate cause of the accident. No intervening act by a child too young to be capable of appreciating an obvious danger, which primarily arises from another's negligence, can avail to relieve that other from the consequences of his own negligence, unless the child's act be such as could not reasonably have been foreseen. The child's act in going upon the grassy strip and following the horses, so likely to attract him, should have been anticipated as a likely consequence of keeping them on the grassy strip after seeing the children running towards them.

Per Kerwin J. (dissenting): As the pony was lame, the junior defendant acted prudently and properly in travelling on the grassy strip, but having seen the children he was bound to proceed in a reasonable manner and so as not to endanger them. There was no *scienter;* the colt was under proper control and defendant had no reason to expect that the boy would run after the colt or that the colt would kick. It could not be said, on the facts appearing from the evidence, that defendants were responsible in law for the injury.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Simmons C.J.T.D. at trial (2).

The action was brought to recover damages by reason of injury received by the infant plaintiff when kicked by a colt owned by the defendant W. C. Rickard and led, on the occasion of the accident, by his son, the defendant Herbert Rickard.

The accident occurred on March 31st, 1933, on Second street North West, in the city of Calgary, Alberta. The defendant Herbert Rickard, who was 17 years of age, was riding a pony northerly on said street and was leading by a rope a haltered colt on the east side of him. His father, the defendant W. C. Rickard, the owner of the colt, was following in a wagon about half a block back. Herbert Rickard went on to a grassy strip on the highway, east of

(1) [1935] 3 W.W.R. 554; [1936] 1 D.L.R. 308.

(2) [1935] 3 W.W.R. 554, at 554-558; [1935] 3 D.L.R. 623.

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its gravelled portion. He met two boys, the infant plaintiff who was six years and seven months old, and a companion who was about seven years old, who were running southerly on a cinder sidewalk east of the said grassy strip. The infant plaintiff ran towards the colt after it had passed him and the colt kicked him. There was conflicting evidence as to certain facts in connection with the accident. The facts and circumstances are discussed in the judgments now reported, and in the judgments below, above referred to.

The trial judge concluded, on the evidence, that the plaintiffs had not satisfied the burden that was on them to establish by a preponderance in the weight of evidence that the children were still in the "danger zone," that is, in the zone which called for the defendant to keep a look-out for them, when the infant plaintiff ran out after the horses. The Appellate Division (Mitchell J.A. dissenting) held that the trial judge was in error in holding that the defendant had removed himself from the "danger zone"; that if the defendant had paid attention to the boys after he passed them, as he should, until all risk of danger was passed the accident might have been avoided, and in his failure to do so he was guilty of such negligence as rendered the defendants liable for the damages caused. It reversed and set aside the judgment of Simmons C.J. T.D., and gave judgment against the defendants for the infant plaintiff for $5,000 and for his father, the other plaintiff, for $457. The defendants appealed to this Court (special leave to appeal having been granted by the Appellate Division in respect of the judgment in favour of the adult plaintiff).

O. M. Biggar K.C. and *W. B. Cromarty* for the appellants.

J. K. Paul for the respondents.

The judgment of Duff C.J. and Crocket, Davis and Hudson JJ. was delivered by

CROCKET J.—In my view, it was the duty of the junior defendant, when he saw the infant plaintiff and his young companion running along the cinder sidewalk towards the pony he was riding on the boulevard with this young colt beside him, to take the animals off the boulevard on to the

gravel roadway. The boys were not more than 150 feet away from him when he saw them running towards him and he ought to have foreseen the danger he was creating for the children by keeping the pony and the colt on the boulevard so close to the cinder path with the colt on the inside. The children were naturally attracted by the spectacle of a young man riding a pony along a boulevard with an exhibition colt haltered beside him, and, if the infant plaintiff did run out from the sidewalk after he reached the horse and colt and run after them, he did what any child of his years might reasonably be expected to do, as the colt did what he might naturally be expected to do, viz., to kick the child when he approached too closely. The danger became apparent the moment the children were seen running towards the animals. It was a danger for which the junior defendant was certainly primarily responsible. In my opinion, he might easily have avoided it by simply turning the animals he was riding and leading on to the gravel portion of the highway, which was the proper place for him to be with them. The child, a boy of 6 years and 7 months, was too young to appreciate the danger himself, and, in my judgment, in the circumstances of this case, it makes no difference where the junior defendant met the boys or whether he had got beyond the boys 10 or 25, or 35 or 70 feet, when the infant plaintiff was kicked. It was the junior defendant's duty to take all reasonable precautions to see that neither of the two children was endangered and not merely to assume that the moment he passed them there was no occasion for him even to look back to see if they were following. The obvious thing for him to do, the moment he saw the little fellows running towards him, was to lead the animals, which were so likely to attract them, away from the boulevard on to the gravel roadway. His failure to discharge this duty to the children must, in my opinion, in the circumstances of this case as disclosed by the evidence of the defendants themselves, be held to be both the primary and proximate cause of the accident for the reason that no intervening act on the part of a child too young to be capable of appreciating an obvious danger, which primarily arises from the negligence of another, can avail to relieve that other from the consequences of his own negligence, unless the act of the child be such an act as

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could not reasonably have been foreseen. The act of the child in going upon the boulevard and following the pony and colt was, as above suggested, just such an act as the junior defendant ought to have anticipated as a likely consequence of his keeping the horses, of which he was in charge, as agent for his father, the co-defendant, on the boulevard, after he saw the children running towards them.

It may be that there was no negligence on the part of the junior defendant in going on to the grassy strip with the horses, when no children were about, though the gravel roadway ordinarily would surely be the proper place for the riding and driving of horses, but the approach of young children, for whose use, rather than that of horses, such a grassy strip along the gravel roadway would seem to have been intended, should have at once brought home to him the danger of continuing there and the necessity of getting out of the children's way. Assuming that he had a right of passage with his horses along the boulevard strip of the public highway, he was clearly under an obligation to exercise that right with due regard to the rights and safety of others thereon, whether young children or adults.

For these reasons I concur in the decision of the Court of Appeal and would dismiss this appeal with costs.

KERWIN J. (dissenting)—The appellant, W. C. Rickard, was the owner of a Percheron male colt which at the time of the occurrence complained of by the respondents was ten and one-half months old. It had been weaned four months earlier and had been handled since birth; it was halter broken and free from vice.

Having been exhibited at the Calgary Spring Horse Show the colt, on March 31st, 1933, was being taken thence to Rickard's home on the outskirts of Calgary and was in charge of the appellant, Herbert Rickard, W. C. Rickard's son. Herbert was then nearly eighteen years of age and, as the trial judge found, was a competent person for the purpose, having performed all the usual duties of a farm lad and having looked after the colt since its birth. Herbert was astride a pony; the colt was haltered and a stout rope reaching from the colt to the pommel of the saddle on the pony was turned twice around the pommel with the end in one of Herbert's hands. The length of the rope between the colt's head and the pommel was about eighteen

inches. W. C. Rickard followed his son in a wagon hauled by a team of horses. In the course of the journey from the show grounds the colt had balked at every set of street car tracks but upon being prodded by the tongue of the wagon driven by W. C. Rickard had proceeded on its way without any further difficulty. The trial judge found that the colt "was behaving very well up to and immediately preceding the time of the accident. He was under proper control."

When Herbert, on his pony, with the colt beside him, was at the corner of 19th avenue and Second street in Calgary and proceeding northerly on Second street, he turned from the gravel portion of the highway to a grassy strip at the east composed of virgin prairie. This was because the pony was lame. Second street is 66 feet wide; in the centre is the gravelled portion about 30 feet in width; adjoining on either side are strips of virgin prairie about 12 to 13 feet wide, and on the eastern limit of the street is a cinder path about 5 feet wide. There is no curb between the various sections of the highway. Midway between 19th and 20th avenues is a lane and when Herbert arrived at a point about 25 feet south of this lane he noticed two boys on the cinder path at 20th avenue running southerly. According to the evidence the boys were then about 155 feet north of Herbert.

The chief variations in the evidence at the trial were as to where these parties met, as to where they were when the colt kicked one of the boys, the infant respondent George Ramsay, then six years and seven months of age, and as to the part of the highway upon which the colt was travelling.

The respondents' contention is that the parties met at a point approximately 122 feet north of the lane, that the accident happened at the instant of meeting, and that the colt was either on the cinder path or on that part of the grass immediately adjoining the path. The appellants' view is that the parties met opposite a telephone pole approximately 70 feet north of the lane, that the accident occurred 35 feet north of the pole, and that the pony carrying Herbert Rickard was on the westerly edge of the grass plot with the colt immediately next to the pony on the east.

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The trial judge disregarded the evidence of Mrs. Thomas, the only witness for the respondents who attempted definitely to locate the point of meeting, as he considered she had not been in a position to fix it with any degree of precision. Apparently he deemed the evidence of Mrs. Ramsay and F. H. Bounds as of no assistance on the point, as he makes no mention of it. Irrespective of the findings of the trial tribunal, a perusal of the evidence leads me to the same conclusions. On the other hand, the trial judge found himself unable to accept the evidence of the adult appellant, W. C. Rickard, as that individual was about half a block south of the colt at the time of the accident and was paying no particular attention. With that I also agree. The trial judge apparently relied on the unsworn evidence of Herbert Osterbauer, the seven year old companion of the unfortunate child who was kicked, but, after a perusal of Osterbauer's evidence, I believe it would be unsafe to attach any weight to it. However, I see no reason to disagree with such reliance as the trial judge placed upon the evidence of Herbert Rickard.

In view of this and also of the evidence of the respondent James Ramsay (the father of the infant respondent George Ramsay) that he discovered a blood mark on the cinder path 35 feet north of the telephone pole, I conclude that, according to Herbert Rickard, he passed the boys at the pole, and that, according to the location of the blood stain, the accident happened at the latter point. I am also of opinion that the evidence of Herbert Rickard that his pony was on the westerly edge of the grass plot should be accepted. The trial judge did not make any finding in that connection.

No one testified that either of the young boys shouted or ran after the colt except Herbert Osterbauer, and, as already indicated, I place no reliance upon his statement. In view, however, of what I have already set forth, it would appear that the infant respondent, George Ramsay, did run towards the colt after it had passed him. While relying on the evidence of Herbert Rickard as to what transpired up to the time of the meeting, the trial judge states that "he (Herbert Rickard) did not give any particular attention to the boys after he passed them and that his evidence, outside of the location of the children, is not of

much value even although some of it is against his interest." The part underlined has reference to Herbert Rickard's statement that he watched the boys until the rear of the colt was about 10 feet beyond them and that he had proceeded possibly 5 feet further before he heard the sound of the impact.

In dismissing the respondents' action the trial judge took the view that the plaintiff had failed to show how far past the meeting point Herbert Rickard had progressed with the colt before the accident happened, but in my view that problem is solved by the evidence indicated above. In view of the pony's lameness Herbert Rickard was acting prudently and properly in travelling on the grass plot, but, having seen the children, he was bound to proceed in a reasonable manner and so as not to endanger them. There was no *scienter;* the colt was under proper control, and Herbert Rickard had no reason to expect that the boy would run after the colt or that the animal would kick. I cannot find that he or his father as owner of the animal are responsible in law for the injury to the unfortunate infant respondent. I would allow the appeal with costs throughout and restore the judgment of the trial judge.

Appeal dismissed with costs.

Solicitors for the appellants: *Edwards & Cromarty.*
Solicitor for the respondents: *J. K. Paul.*