Supreme Court of Canada
Geall v. Dominion Creosoting Co. / Salter v. Dominion Creosoting Co., 55 S.C.R. 587
Date: 1917-10-15

Grace S. Geall and George W. Adams (Plaintiffs) appellants;

and

The Dominion Creosoting Company, Limited (Defendant). Respondent.

Joseph A. Salter (Plaintiff). Appellant;

and

The Dominion Creosoting Company, Limited (Defendant) Respondent.

1916: October 20; 1917: October 15.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRTISH COLUMBIA.

Negligence—Findings of jury—Railway company—Cars left on tracks— Extraneous interference—Anticipation.

The respondent was engaged in delivering creosoted paving blocks brought in freight cars over the British Columbia Electric Railway's tracks. The employees of the railway company, after having placed the cars so loaded at points indicated by the servants of the respondent, had taken care to set the air brakes and to have blocks placed and "pinched" in front of the wheels. Later on the respondent's men, for their convenience, moved the cars further down the grade, put back the blocks without "pinching" them and applied the brakes by hand. Then some school boys unloosened the brakes on the car furthest uphill which, being propelled by its own gravity against the lower ones, moved all the cars so that a collision took place at the foot of the hill between them and a passenger coach of the Electric Railway.

Held, Davies and Duff JJ. dissenting, that, upon the evidence, the employees of the respondent should have anticipated that the school boys might release the cars and that the respondent was liable for having taken no steps to guard against such interference.

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Per Idington J.—The question as to whether or not this interference was such an occurrence as ought to have been foreseen and provided against, is not a question of law, but a question of fact within the province of the jury.

Per Davies and Duff JJ. dissenting.—The proximate and effective cause of the accident was the interference of the school boys, which the respondent had no reason to anticipate.

APPEAL from the judgments of the Court of Appeal for British Columbia[1], reversing in each case the judgment of the trial court and dismissing the actions against the respondent.

The material facts of the present case and the questions of law are fully stated in the above headnote and in the judgments now reported.

J. W. de B. Farris for the appellants.

Tilley K.C. for the respondent.

The reasons for judgment of the trial judge in *Green* v. *British Columbia Electric Railway Company*[2], are applicable to the present cases, as the grounds of action are the same in the three cases.

THE CHIEF JUSTICE.—The facts of the cases from the judgments in which these appeals are brought are fully set out in the notes of my brothers Idington and Anglin. The cars which caused the accident were left by the servants of the respondent (The Dominion Creosoting Company) in a dangerous position, insecurely fastened and without any protection. There can, I think, be no doubt on the evidence that they were actually set in motion on the down grade by mischievous school boys interfering with the insecure fastenings.

The employees of the company had reason to foresee the probability of such interference and they

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took no steps to guard against it. Had the case come before me, sitting as a trial judge without a jury, I should, on these facts, have had no difficulty in finding for the plaintiffs.

The jury, however, simply found that the negligence of the defendant was the proximate cause of the accident and I entertain considerable doubt whether the omission of all reference to the action of the boys did not render it impossible to support this finding. I have come to the conclusion, however, that the negligence of the respondents' servants as involving the natural consequences that flow from it may be said to have been the proximate cause of the accident in the same way as it would have been if the cars had started moving through the mere force of gravity. It is of course obvious that the accident could not have happened at all but for the respondents' negligence.

[1] 10 W.W.R. 620; 10 W.W.R. 617.
[2] 25 D.L.R. 543; 9 W.W.R. 75.

It would certainly have been more satisfactory if the jury's attention had been pointedly directed to the exact facts and they had been invited to give a verdict accordingly. The alternative of allowing the appeal, however, is to send the case back for retrial, a most unsatisfactory proceeding in the case of a practically foregone conclusion. Since therefore I am satisfied that the appellants have a good claim on the merits and the majority of the court is prepared to find for the appellants, I am glad to be able to conclude that such finding can be reconciled with strict legal principles.

The editor of the Law Quarterly, commenting on the case of *Crane* v. *South Suburban Gas Company*[3], says:—

> People who create a dangerous nuisance on the verge of a highway, come under the good and fairly old authority of *Barnes* v. *Ward,*[4]

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> and will not save themselves by trying to divert the argument into refined distinctions about negligence and intervening acts of third persons.

I would allow with costs.

DAVIES J. (dissenting).—I think the judgment of the Court of Appeal for British Columbia with respect to the defendant, the Dominion Creosoting Company, was right and that these appeals should be dismissed.

The negligence of which they were found guilty by the jury and the only negligence found against them was

> in moving the cars without the B.C. Electric Company's shunter and crew in attendance with proper facilities.

I am unable to see in what respect this negligence could be said to be a proximate or effective cause of the accident. I agree with the Court of Appeal that this moving of the cars in the way they did move them "did not effect the situation at all."

The proximate and effective cause of the accident was the interference of a number of mischievous young boys about eleven years of age, two of whom worked together to unloose the brakes of the car and let them loose upon the track on which they stood.

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[3] [1916] 1 K.B. 33.
[4] 9 C.B. 392.

Two of the boys worked together, one prying up the dog of the brake with a piece of iron and the other twisting on the wheel.

They succeeded after a good deal of ingenuity and labour in loosening the brakes of the upper cars which ran down the inclined grade of the rails they were on by force of gravity and collided with the two cars lower down the grade.

Two of these cars, the upper ones, were stopped by one of two men left with the cars by the defendant company but the lower cars, which had been hit by the upper ones, ran down the grade and collided below

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the switch through the knife switch with a passenger car going north, in which collision the plaintiffs were injured.

There are two or three important and controlling facts which must be kept in mind in determining the liability of the Creosoting Company.

One is that when and after moving the cars on the day of the accident, in order to get from them the paving blocks necessary to enable the company to go on with the work they had contracted to do, the cars were braked and blocked in the same way in which they had been braked and blocked by the Railway Company on the day previously, and the other is that but for the mischievous intermeddling and loosening of the brakes of the two upper cars by the boys, the accident would not and could not have happened.

There was no finding of the jury that the paving company (defendant) had any reason to fear or anticipate this mischievous action of the boys, nor was there any evidence to justify any such finding had it been made. The only negligence found was that I have previously stated

> in moving the cars without shunter and crew of the Railway Company in attendance.

There was no negligence found by the jury that the cars had not been left on the tracks well and sufficiently braked and secured by the Creosoting Company.

The mischievous interference and action of the boys in unloosening the brakes of the two upper cars which the evidence shews were effectively and securely fastened was the

proximate and effective cause of the accident and without which it neither would nor could have happened.

It is not the province of this court to make findings of other negligence on the defendant's part than that

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found by the jury. The explicit and definite negligence found excludes from our consideration any other suggested negligence not found by the jury.

If the jury had found that the company had reasonable grounds to anticipate any such mischievous interference of the boys as was proved and had neglected to take reasonable care to guard against it, or if they had found that the company defendant had not properly braked and secured the cars on the inclined grade, a totally different case would have been presented for our consideration.

On the findings of fact, however, of the negligence of the company, I am quite unable to hold them liable.

I think the principles laid down by the Court of Appeal in the case of *McDowall* v. *Great Western Rly Co.*[5], must govern our judgment here. These principles stand unquestioned to this day. One of them, as stated by Vaughan-Williams L.J. at p. 337 I take to be this that

> in those cases in which part of the cause of the accident was the interference of a stranger or third person the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident,

and

> that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury.

Having regard to the facts proved and the findings of the jury, I cannot reach a conclusion that the defendants are liable in this action.

I have carefully considered the cases of *Cooke* v. *Midland Great Western Railway,* decided by the House

[5] [1903] 2K.B. 331.

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of Lords[6], and of *Crane* v. *South Suburban Gas Co.*[7], neither of which, it appears to me, question or qualify the principles upon which *McDowall* v. *Great Western Railway Co.*[8] above cited was decided. On the contrary, Lord Macnaghten, in the former case, with whose opinion Lord Loreburn concurred, approved expressly of the opinions expressed by Romer & Sterling L.JJ. in *McDowall* v. *Great Western Rly. Co.,*[8] which, as I read them, are in full accord with those of Vaughan-Williams from which I have quoted.

SALTER V. THE DOMINION CREOSOTING COMPANY.

IDINGTONJ.—This action was brought against the British Columbia Electric Railway Co. and the respondent, the Dominion Creosoting Co. The jury found a verdict against both. The learned trial judge thereupon entered judgment against both. Upon appeal to the Court of Appeal for British Columbia, that court maintained the judgment against the British Columbia Electric Railway Company but allowed the appeal as against the respondent.

The British Columbia Electric Company appealed to the Judicial Committee of the Privy Council and that appeal is still pending there.

The appellant brings the appeal here against the judgment of the Court of Appeal exonerating the respondent.

The question of the liability of the respondent does not necessarily turn upon the facts implicating, or alleged to implicate, the British Columbia Electric Company.

Both companies may be liable, but the facts are such that the liability of either cannot in itself necessarily in law imply the liability of the other. They

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were independent actors and whether jointly liable or not need not concern us herein. I desire under such circumstances as I have set forth to refrain from passing any opinion upon the liability of the company which is not before us. Yet it is necessary to state a good many facts which may bear upon the question of that company's liability in order to understand the claim made against the respondent.

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[6] [1909] App. Cas. 229.
[7] [1916] 1 K.B. 33.
[8] [1903] 2K.B. 331.
[8] [1903] 2K.B. 331.

The respondent was engaged in delivering creosoted blocks, for paving streets in Vancouver, brought in railway freight cars, loaded therewith, over the British Columbia Electric Railway Company's railway tracks. The latter company operated a street railway in said city and the appellant whilst a passenger in one of its passenger cars, used in such service, received serious injuries caused by a collision of one of the said freight cars with the said passenger car under circumstances I am about to relate.

The British Columbia Electric Railway Company had placed at different times on its track freight cars carrying said blocks for the respondent till there were in all four such cars at one time placed at short distances apart to be unloaded by the respondent at points where its servants had directed them to be placed for that purpose. The British Columbia Electric Company had taken care, when so placing each of said cars, to have the brakes applied by the air compressor available in the operation and took care in connection with that operation to have blocks put in front of the wheels and so pinched thereby as to render it difficult, if not impossible, to move any of them by such means as were resorted to by the mischievous boys who later interfered.

The respondent's men later on, for their convenience, having desired the cars to be moved further down the grade, opened the brakes and removed these blocks and

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then moved the cars further down than they had originally been placed. They then again put some blocks in front only of the car furthest down the grade, and applied the brakes by such simple contrivances as they found available in the absence of a shunter. It seems clear that this second attempt to fix the cars and prevent their moving was far from being as efficient as the first operations performed by the British Columbia Electric Company's men.

It is said that the car, or perhaps two cars, last placed by the British Columbia Electric Company were left by it on a level part of the track, but all were, as finally placed by respondent, on a down grade of from two to two and a half per cent.

It was attempted to be proved that this second operation was done by the authority of the British Columbia Electric Company. That attempt at proof failed to convince the jury, who answered a question submitted on the point, by saying that it was doubtful if any authority had been given.

It seems clear from all this that whatever responsibility existed for securing the cars from being moved by any extraneous cause was thus made to rest upon the respondent. Not only did it assume the responsibility for its men attempting to fix the cars, where they placed them, by the less efficient means they had adopted than the British Columbia Electric Company had applied; but also the entire responsibility for whatever might arise, which either company was bound to have anticipated and against which it should have protected any one liable to suffer from the consequences of want of due care.

It may well be that the means adopted by the British Columbia Electric Company were less efficient than the surrounding circumstances demanded; and

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that seems to be the basis of the finding against the company.

From the moment the respondent took upon itself to meddle with the cars it assumed, in such a case, the entire responsibility, whatever it was, for seeing that neither life, nor person, nor property, was jeopardized by having the cars on such an incline, movable, or in danger of being set rolling down the incline.

The cars were started rolling down that incline by some mischievous boys, from a nearby school, at noon hour, unloosening the brakes on the car furthest uphill.

According to the story of Law, an eleven year old actor in that enterprise, there were no blocks removed from the front of the car wheels.

Of course the momentum of the loaded car furthest from the point of collision (which was the one the boys meddled with) would account for much and that be aided by those started thereby lower down.

It is not necessary here to enter upon the story in all its details. Suffice it to say that the car furthest up the incline having been released was propelled by its own gravity against the lower one and all so moved on, that a collision took place between those freight cars and the passenger coach of the British Columbia Electric Company in which the appellant was, and he thereby sustained serious injuries.

It is hardly arguable and indeed was not much pressed in argument that, if the respondent can on any ground be held liable for the result of those boys' actions there was no evidence to submit to a jury.

I am unable to accept the view presented by the Chief Justice of the Court of Appeal, and acted upon by that court, in exonerating respondent from any liability.

The attempt to handle these cars without the necessary appliances to control their possible movements was rather a hazardous proceeding in itself.

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Suppose the cars or any of them had got beyond the control of those so handling them and then accidentally collided with a passenger car, surely the respondent would have been held liable for the damages suffered thereby. It would have furnished no excuse for respondent to have said that it or its servant had not any knowledge of railway business or of the precautions needed to be taken.

In assuming as the court below does that the moving of the cars

> without the British Columbia Electric Company's shunter and crew in attendance with proper facilities,

did not affect the situation at all, I respectfully submit there is error. Indeed it seems to me there is a grave misapprehension of the facts, for the cars were not braked and blocked in the same manner, and by the same efficient means, as I understand the evidence, they had been when placed by the British Columbia Electric Company.

The jury heard the men who performed the operation and looking at the evidence may not have accepted literally all they said as true. And even if there was a perfunctory doing of that so as to lend a similarity of appearance to the results, it is not self evident that they were identical in efficiency.

To my mind there is ample evidence to warrant the jury in making the broad distinction they do.

The place where these cars were placed was on the public highway. One had been placed there on a Monday and later removed. Two of those in question were placed on Tuesday morning and two more on Tuesday evening and all left braked and blocked by the British

Columbia Electric Company. On Wednesday at noon, the time of the accident, they stood, as imperfectly braked by respondent, and without any blocking in

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front of any but the one furthest down the hill. This position of the cars and these conditions as to blocking is that outlined by the respondent's foreman. I fail to find them wear much resemblance to that which is stated to have been the condition in which they were left by the railway company.

The difficulty in the case is caused by the interference of the boys, and the question of law thus started is as to whether or not that was such an occurrence as ought to have been foreseen and provided against Its determination depends on the facts which I think were clearly questions for the jury.

The cars were clearly liable to all sorts of interference by boys or grown-up idlers, or by movements of other cars or by storms of wind, and their situation liable in such case to produce the disastrous result in question herein.

The question in the analogous case of *Cooke* v. *Midland Great Western Railway Company*[9], for the consideration of the jury is put thus at page 234 by Lord Macnaghten:—

> Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?

Lord Macnaghten proceeds to say:—

> This, I think, was substantially the question which the Lord Chief Justice presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in *Lynch* v. *Nurdin*[10], and the opinion expressed by Romer and Sterling L.JJ. in *McDowall* v. *Great Western Rly.* Co.[11].

The *McDowall Case*[11] is that upon which the respondent most strongly relies.

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[9] [1909] App. Cas. 229.
[10] 1 Q.B. 29.
[11] [1903] 2K.B. 331.
[11] [1903] 2K.B. 331.

The respective facts in each case, as to the care taken to provide against the contingency of interference by boys, makes a marked distinction between that case and this in hand.

There reliance was also placed upon the fact that boys had trespassed for years upon the company's premises in question but had never ventured to move a car. In this case, so far from having such assurance to rely upon, these very boys had just got done, on the day in question, amusing themselves in going a step beyond the ordinary form of boyish trespass by running a hand-car of the railway company without interference by any one. Having tried that experiment unchecked, they grew bolder and tried to follow the bad example of what they or others had done a few weeks before with another car. What is the law applicable thereto?

I have considered the *McDowall Case*[12] and all the other cases counsel have referred us to, and others, including the recent case of *Ruoff* v. *Long & Co.*[13], not cited. I doubt if it is possible by any ingenuity to reconcile all that has been said in these numerous cases and give even an appearance of consistency to the decisions, or find in some of them an observance of the principles of law which have many times been set forth, relative to the duty of anticipation to be observed in such like cases, and the province of a jury as absolute judges of the fact.

The law so set forth is simple and in the last analysis nothing but enlightened common sense. It would be futile to demonstrate, even if one could, by an analysis of the cases and what is implied therein, how and why such clear law has become so much mystified, merely by an appearance of learning, through the use of words and possibly more words; for the law has not been

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changed thereby. It may have been thus rendered confusing to those who feel they have to resort to decided cases and the numerous dicta to be found therein, rather than rely upon the long established principles of law by which the case to be decided should be governed, either as regards the liability in question or the mode of its determination, by which in our system of jurisprudence the trial of fact rests solely with the jury, and only the law with the judiciary.

[12] [1903] 2 K.B. 331.
[13] [1916] 1K.B. 148.

The result of the test suggested by Lord Macnaghten and accepted, at least in words, by those he refers to, when it comes to be applied by a jury, and their verdict has been approved by an able judge, as happened in the *McDowall Case*[14] may be set aside by three or more other men, who may be possessed of greater learning relative to law in general, but perhaps, for aught one knows, of less actual experience than either jury or judge, of the world of affairs relative to possibilities or probabilities of what was likely to have happened, for example, to a brake van and cars left in a particular situation, unless due care has been taken to avert the consequences of such possible or probable acts as produced the injury complained of in such case.

Why should this be so? The jury may not have been properly instructed in regard to the law and exactly what they have in such a case to consider and determine; or they may not have had the evidence to warrant such finding as would answer the test suggested; or from some cause or other in the way of sympathy or prejudice, failed to act within their limits of law and evidence and thus reached a conclusion that twelve reasonable men could not properly have come to. In any such case an appellate court may interfere.

There is such an infinite variety of possible situations

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and possible surrounding circumstances out of which may arise the question of likelihood of some injury happening through the acts of others relative to the car left on a railway track that each case must be determined by the facts presented therein.

There should not in reason, I imagine, be demanded the same care to protect, against such contingencies, a car or cars left upon a siding far from the haunts of men or children, as on a public highway in a town or city. But that there is need for such care in such latter situation surely no one of sense can now deny. Why did the British Columbia Electric Company's men who left the cars there take such steps as they did by braking, tightly as power could, each car? Why put blocks in front of the fore wheels of each car if nobody is likely to interfere? Why do we hear of the use of toggles in such a connection? And apart from these means and need for their use being present to the minds of railway men in Vancouver as shewn by evidence and signifying, if common sense be applied, why the need of these things was felt, we have also another means suggested by the witnesses herein as not uncommon, when cars have to be kept in an exposed situation. Surely all

[14] [1903] 2 K.B. 331.

these things imply much knowledge of needs begotten of sad experience. Are we to be assumed to be so astute as to find another meaning therein, or so stupid as not to be able to read or interpret what the man in the street can?

Any single appliance of either sort would quite suffice to keep the car from moving of its own weight or by reason of wind even on a slight down-grade.

It is the possibility of improper interference that evidently suggested a combination of all these means being used. To say that no one could be called upon to

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anticipate the pranks of children is not to my mind self evident. And indeed the possibility of that being a cause of cars moving when left unsecured, must depend upon the quality of the children in each country and the vigilance of the police coupled with the kind of education and bringing up the children get.

The conditions must vary in different places. I am not diposed to criticize a jury's view of what evidence may be needed in their own neighbourhood in regard to the probability of such things being done by school children as proven herein. I am not prepared to say that the jurymen who had to consider the probability of such injury happening in the way it did and the need of its being provided against, were without evidence entitling them to find that the respondent was negligent in that regard and its negligence a proximate cause of the injury complained of.

I quite agree with the learned Chief Justice of British Columbia in appeal, when he remarked that the practice of submitting a separate question relative to the necessity of anticipating the result complained of is to be preferred because it keeps before the minds of the jurors what they might otherwise overlook.

In saying so, I by no means desire to encourage the submission of a multiplicity of questions which often tend to confuse the minds of jurors. That aspect of this particular class of cases does not often occur in accident cases where negligence is charged.

The cause and consequences are usually self evident. In this class of cases they are not always of necessity so. Want of direction by the learned trial judge in that behalf was not complained of at the trial or indeed pressed in argument.

I see, however, no reason to suppose that the jury did not fully appreciate the point and understand what

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was involved in the question submitted. After all, it comes back to the question of the respondent attempting that which ought never to have done by its men.

It seems quite clear that the placing of these cars was a matter which had been so safeguarded by the railway company as to require a special leave to its employees to permit cars to be placed for any consignee receiving freight.

I think respondent must abide by the consequences of its meddling with them.

It is, I respectfully submit, rather an absurd excuse that is urged on its behalf that its servants had not the necessary experience. So much the more reason why they should have asked the railway company to lend its aid with the light of that experience, instead of attempting something they possibly knew nothing about. As a matter of fact some of them seem to have had some railway experience but not enough of the sense of responsibility they ought to have had.

Can any one doubt that the mischievous boys, if of an age to appreciate what they were about, would be liable for all the damages they caused? How much better is respondent's position than theirs?

Of course if it had succeeded in establishing that what was done by it was with the leave and as directed by the railway company, this excuse would be intelligible. But failing that, I can find no excuse for it, even in relation to the question, so much debated, of the likelihood of the boys or others intervening and their acts being provided against.

I conclude for all these several reasons that the appeal should be allowed and the judgment as against the respondent be restored with costs of this appeal and so much of the costs of the appeal in the court below as properly attributable to its share in that

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appeal beyond what was necessarily additional to said appeal by reason of the railway company being a party thereto.

IDINGTON J.:—This appeal was argued along with the case of Salter v. same parties.

The railway company having been held liable by the Court of Appeal and the respondent exonerated by that court this appeal is taken as against the latter part of said judgment. The main facts bearing upon the liability of the respondent are the same as in the Salter Case. I have reached the same conclusion in this as in that case and for the reasons I assign therein save as hereinafter expressed.

I observe that the verdict of the jury is not in the same language as that adopted in the Salter Case but is more general and comprehensive. It seems to me that the finding must be read in light of the proceedings and charge of the learned trial judge and that when regard is had to these things there is not much difficulty in understanding what the meaning of the jury's finding is.

There was no objection taken to the learned trial judge's charge in relation to anything in question herein or any request by counsel to submit any more specific question bearing upon the question of the likelihood of the cars being interfered with by boys or other idlers.

That aspect of the case was no doubt well treated by counsel in addressing the jury. I do not think, in absence of any objection to the learned trial judge's charge relevant to that, we should presume that there was any oversight in the learned judge's charge in failing to do more than he did. I may repeat, however,

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that we should prefer specific attention in this class of cases being drawn to the question of the likelihood of boys or others improperly meddling with the cars as a matter to be foreseen and guarded against.

The case of *Jamieson* v. *Harris*[15], is cited by respondent's counsel. Is it unfair to assume that the decision in that case should have been present to the minds of counsel at the trial? If not, then was the time to have pointed out the need of a specific question and answer.

[15] 35 Can. S.C.R. 625.

That was a case where the unfortunate plaintiff suffered from the multiplicity of the questions submitted. Indeed, there were no less than twenty-five questions submitted there and, as the majority of this court held, the real point at issue had not been effectively hit by any of them.

I did not think then that the jury should have been held to have misunderstood what they were trying. Nor do I find here that they failed to comprehend what they were about.

I must, however, frankly say that the answer returned in this case does not as clearly lend itself to the meaning I have attached to that in the Salter Case and hence the stress I have laid in the latter part of my opinion in that case does not seem to have as much force when applied to this verdict as to that in the Salter Case.

The other reasons I have there assigned, however, seem to me sufficient to entitle me to reach the result I do herein upon the assumption that the case at the trial was fought out on all that was involved in the question of due care to be taken by the respondent.

If I had reached any other conclusion it would not be that of the court below dismissing the action as

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against respondent but of a new trial for which nobody seems anxious herein.

The appeal should be allowed and the trial judgment restored with costs of this appeal and in the court below, save such extra costs (if any) as entailed by the British Columbia Electric Company being a party thereto.

DUFF J. (dissenting).—The judgment of Mr. Justice Lush in *Ruoff v. Long & Co.*[16], contains at page 157 of the report an exposition of the principles and considerations which were held to govern the decision of the case in which he was giving judgment and which, I think, are precisely applicable for the decision of the dominating question raised by this appeal. That question is whether the acts of the respondent's servants could properly be held by a jury to be the proximate cause of the most unfortunate accident which led to the proceedings in these actions. I quote from Mr. Justice Lush verbatim in these words:—

> But in the present case there is no ground for saying that the defendants placed a dangerous thing or an obstruction upon the highway, or in any sense used the

[16] [1916] 1 K.B. 148.

highway unlawfully. They left a motor lorry in the street for a few minutes. It could not start of itself. In leaving it standing in the street for that short time they did nothing unlawful. . Then what is the duty of a person situated as the defendants were? He must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. As a matter of fact the County Court Judge did not find that this accident was likely to arise from the defendants' user. If he had so found I agree that there was no sufficient evidence to support the finding. There would have been no danger if these two persons had not by their irresponsible acts converted into a source of danger a thing which in itself was perfectly safe and could do no harm to anybody. We need not go so far as to hold that a person lawfully leaving a vehicle standing unattended in a highway can in no circumstances be held responsible for damage through the intervening act of a third party. The circumstances might be such that he ought to recognize that he was offering a temptation or invitation to another to set the

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vehicle in motion and that danger might result to third persons. The chain of causality may be complete although a link in the chain is the intervening act of a third person. But the act which causes the mischief must be one which he would properly anticipate. In *Latham* v. *Johnson*[17], Hamilton L.J. states a rule which he says is as old as *Scott* v. *Shepherd*[18], namely, 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 that injury would not have occurred. The Lord Justice proceeds: "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 cause *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." That indicates that a person who so leaves his property will not be responsible if the mischief is created by a fresh, independent cause, and that a fresh, independent cause may be one which in the circumstances he is under no obligation to contemplate.

The question, which must be answered in the affirmative then if the appellants are to succeed, is this: Could the jury properly find that the respondents servants ought reasonably to have anticipated the acts of the boys who loosened the brake on the first car and to have foreseen that such intervention would lead to mischief? As to the second branch of the question, I should have no trouble with that if an affirmative answer to the first branch could be justified on the evidence, but to that branch of the question I think there is no evidence to justify such an answer. There was something, it is true, to shew that apprehensions of interferences by school boys were entertained by some of the servants of the railway company and it may be, I express no opinion on the point, that an

[17] [1913] 1 K.B. 398, at p. 413.
[18] 3 Wils. 403.

inference might properly be drawn that the experience of the employees of that company had proved more instructive than the experience of others; but

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there is nothing in the evidence to suggest that the extent or nature of the risk proved to have been incurred by leaving these street cars unattended when the mischievous propensities of the school boys frequenting the neighbourhood are revealed by the court had been brought home by any special warning or experience to the present respondents.

ANGLIN J.—The negligence charged against the defendants, the Dominion Creosoting Company, in both these cases is that after four cars of their co-defendants, the British Columbia Electric Company, had been placed by that company in a situation of comparative safety on level ground at the top of the grade, the Creosoting Company moved them to a place of much greater danger, i.e., down on to the slope or grade, failed to brake them properly, failed to block three of the cars and "to pinch" the block under the fourth, and, knowing the risk to be apprehended, left the cars in this dangerous position unguarded. The finding of the jury in the Geall Case is that the Creosoting Company neglected

> to take proper precautions when the cars were in their charge to be unloaded,

and in the Salter Case, that the Creosoting Company was negligent

> in moving the cars without the British Columbia Electric Railway Company's shunter and crew in attendance with proper facilities.

In both cases the jury also found that the Creosoting Company had failed to establish authority from the British Columbia Company to move the cars down the grade. The fact that they moved the cars from above the grade down the hillside is undisputed.

The evidence makes it reasonably clear that brakes can be more securely set by air pressure than by

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hand—so much so that, whereas a boy could release brakes set by hand with comparative ease, he probably could not release brakes set by air; that it is a reasonable precaution to block as well as to brake cars on a grade; that the blocks should be "pinched" so that they cannot slip and cannot be easily dislodged; and that there is a knack in hand-braking,

which is acquired by training and experience. The Creosoting Company's employees were not trained or experienced brakesmen. There is also evidence from the respondent's foreman that he knew of the proximity of the school boys and of their mischievous tendencies and had in mind the danger of their tampering with the cars and feared that "they might have got the cars going," as they had on other occasions. He was aware of the danger involved in this. Yet he left the cars in the temporarily disused highway near a school-house at the "noon hour" when he knew the boys would be out of doors and without supervision, on the grade braked only by hand by inexperienced men, and with a block under only one car, and that block not "pinched." What he anticipated might occur then happened.

Under these circumstances, notwithstanding the very meagre charge to the jury, I think we may and should read the verdict in each case as covering the negligence charged against the respondents and involving a finding that their employees either anticipated, or should have anticipated, that the school boys might release the cars. That they did in fact so anticipate was established by their foreman's undisputed testimony. Without so finding, the juries (as is pointed out by Macdonald C.J.) could not properly have found, as they did, that the respondents' negligence was the proximate cause of the collision in which the plaintiff

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Salter and the deceased Geall were injured. They were explicitly told that the plaintiffs must establish "negligence (which) was the proximate cause of the accident," consisting in a failure

> to take reasonable care under all the circumstances not to injure another * * * not to expose other people to unnecessary risk in connection with (their) operations.

These cases are distinguishable from *Richards* v. *Lothian*[19], relied on by Mr. Tilley, because there the verdict was held not to involve a finding of failure to guard against a mischievous act that should have been anticipated, which I think may fairly be held to be implied in the findings in the case before us, as it was in *Cooke* v. *Midland Rly. Co.*[20].

Upon the findings so viewed the respondents are liable in both these actions, which seem to me to fall directly within the principle of the decision of the *Cooke* Case[20]. There a

[19] [1913] A. C. 263.
[20] [1909] A. C. 229.
[20] [1909] A. C. 229.

turntable was left unlocked and therefore easily movable by children. It was situated close to a public road from which it was separated only by a defective fence through which children were in the habit of trespassing to the knowledge of the company's servants. Here the cars were left on the temporarily unused highway, insecurely braked and insufficiently blocked, on a dangerous grade and therefore capable of being easily moved by children, whose proximity and mischievous propensities were known to the company's foreman in charge. This is indeed an *a fortiori* case because the injury here was sustained not by the mischievous meddlesome trespassers themselves, as it was in the *Cooke Case*[20] but by innocent third persons. The language of Denman C.J. in the case of *Lynch* v. *Nurdin*[21], is in point:—

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> If I am guilty of negligence in leaving anything 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 brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

Lord Atkinson in his speech in the *Cooke Case*[22], at p. 237, if I may be permitted to say so with respect, admirably expresses the ground of liability in a case such as this.

The latest case illustrating liability for leaving unguarded near a highway a dangerous thing which it should have been anticipated might be so interfered with as to cause injury, though not directly in point, is *Grain* v. *South Suburban Gas Co.*[23].

The *McDowall Case*[24], relied on by the respondents, is, I think, distinguishable from that at bar in several respects. In that case the cars were left on a private right-of-way safely braked. Upon the evidence the Court of Appeal concluded that there was nothing to warrant a finding that the railway company ought reasonably to have anticipated that the boys would do or might do, what they in fact did, or that the risk of their doing such acts was known to the company. The evidence of the company's foreman in the present case is not merely that the risk was known, but that he feared that the very thing that occurred might happen.

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[20] [1909] A. C. 229.
[21] 1 Q.B. 29 at p. 35.
[22] [1909].A. C. 229.
[23] [1916] 1 K.B. 33.
[24] [1903] 2 K.B. 331.

I would, therefore, allow these appeals with costs in this court and in the Court of Appeal and would restore the judgments of the trial courts.

Appeal allowed with costs.

Solicitors for the appellants Geall and Adams: McLellan, Savage & White.

Solicitors for the appellant Salter: Farris & Emerson.

Solicitors for the respondent: Bowser, Reid & Wallbridge.