company, the act done by the defendant Jarman being outside the scope of his employment and not authorized by them.

W. R. Riddell, K.C., for defendants the Grand Trunk R. W. Co.

R. C. Clute, K.C., and E. G. Morris, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

STREET, J.—Defendant Jarman was employed by defendants the Grand Trunk R. W. Co. to lower the bars across the highway as a train was approaching, and to raise them as soon as it had passed. This duty carried with it that of warning persons who were obstructing the raising or lowering of the bars, and thereby preventing him from using them for the purpose for which they were required. The infant plaintiff was obstructing the raising of the bars, and defendant Jarman threw a cinder at him, or in his direction, and put out his eye. This was an act for which the defendant company might or might not be answerable. If the acts were done out of mere malice and ill-temper and to punish the boy, the company would not be answerable; but if it were done for the purpose of warning him to get off the bars so that they might be raised, then it is clear that they would be answerable, although the act done was a tort: Bayley v. Manchester R. W. Co., L. R. 7 C. P. 415; Seymour v. Greenwood, 6 H. & N. 359; Dyer v. Munday, [1895] 1 Q. B. 742; Richards v. West Middlesex, 15 Q. B. D. 660; Coll v. Toronto R. W. Co., 25 A. R. 55.

This distinction was clearly put before the jury by my brother Anglin in his charge. He said to them: "Now what was the object with which Jarman threw that cinder? If he threw it in a moment of irritation—annoyed at the boys being on the gate—not for the purpose of getting them away so that he could open the gate, but simply to gratify some spiteful feeling of his own against the boys, then it was not an act done in the course of his employment, and the railway company would not be responsible for it. If, on the other hand, his object was not to hit the boy, but to attract his attention and get him away from the gates so that they could be opened, you all probably come to the conclusion that he did it in the course of his employment—the opening of the gate—and if you reach that conclusion, then that makes the employers liable for the act which the servant did."

Upon this charge the jury found for plaintiff, and they must be taken to have found, as they might properly do upon