

The plaintiff, being upon a coach of the Pere Marquette Railway Company, not as a paying passenger, but getting a gratuitous lift, was injured by reason of a collision with a car of the defendants, caused by the negligence of the defendants.

The Divisional Court held that the plaintiff was a licensee, and entitled to recover damages against the defendants.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, J.J.A., and SUTHERLAND, J.

D. L. McCarthy, K.C., for the defendants.

J. F. Faulds and P. H. Bartlett, for the plaintiff.

Moss, C.J.O.:—Upon consideration, I am of opinion that the judgment of the Divisional Court should be sustained. While I do not desire to be understood as not agreeing with any of the grounds upon which that judgment proceeds, as set forth in the opinion of the Chancellor of Ontario, I am satisfied to rest my conclusion on the ground indicated by the Chancellor in dealing with the argument of the plaintiff's counsel that, even if the plaintiff was a trespasser, the defendants were liable.

Whatever may have been the true position of the plaintiff as far as the Pere Marquette Railway Company were concerned, he was not at the time a trespasser upon the rights of the defendants. For the time being the defendants had no right of occupation or passage upon the place at which the accident occurred. The act of suddenly and improperly projecting their cars upon the line over which the Pere Marquette Company's train was lawfully proceeding was due to the gross negligence of the defendants' servants and agents, and this was found to be the cause of the accident. Under these circumstances, I am unable to see how it is any answer to the plaintiff's claim to say that, because it may be that, if the Pere Marquette Company or their employees had known of his presence, they would have objected and perhaps taken steps to remove him, the defendants are not responsible for the injury they inflicted upon him.

It does not appear that as between the defendants and the Pere Marquette Co. there was an obligation upon the latter not to permit any but their own employees to be upon their train. They might, as the evidence shews their trainmen were in the habit of doing, allow others besides their own employees to be upon the same train under similar circumstances. There was nothing to absolve the defendants from the duty of exercising due care to avoid collision with the Pere Marquette train.