

TAYLOR V. GRAND TRUNK R. W. Co.—DIVISIONAL COURT—NOV. 21.

*Master and Servant—Injury to and Consequent Death of Servant—Railway—Brakesman—Negligent Order of Foreman—Cause of Injury—Finding of Jury—Conjecture—New Trial—Costs.*]—Appeal by the defendants from the judgment of MAC TAVISH, Co. C.J., sitting for MULLOCK, C.J.Ex.D., on the findings of a jury, in favour of the plaintiff, in an action to recover damages for the death of Silas Taylor, a son of the plaintiff, who was a brakesman in the employment of the defendants, and was killed, while in the discharge of his duties in the defendants' yard at Madewaska, owing, as the plaintiff alleged, to the negligence of the defendants' servants. The jury found that the cause of the accident which resulted in the death of Silas Taylor was the negligence of the foreman, Kilfoyle, in ordering the deceased to climb to the top of a car while it was in motion, and acquitted the deceased of contributory negligence; and they assessed the damages at \$500. There was, in the opinion of the Divisional Court (MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.), evidence that Kilfoyle was guilty of the negligence found by the jury; but the difficulty the Court saw in the way of the plaintiff, upon the evidence, was as to the connection between the negligent order and the accident. No witness was able to tell how the accident happened. The finding of the jury was based on mere conjecture, and was not a reasonable inference from the facts proved. There were, however, some matters mentioned by the witnesses which were not fully developed, and which, if more fully investigated, might have enabled an inference to be drawn in support of the theory that the accident happened while the deceased was in the act of getting on the car. While, upon the present evidence, the judgment could not stand, the ends of justice would be best served by directing a new trial, to enable the plaintiff to develop the matters referred to; but, as the granting of new trial was, in the circumstances, an indulgence to the plaintiff, the costs of the last trial and of the appeal should be costs to the defendants in any event of the action. D. L. McCarthy, K.C., for the defendants. J. R. Osborne, for the plaintiff.

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DRAKE V. CADWELL—DIVISIONAL COURT—NOV. 22.

*Contract—Work and Labour—Assertion of Substituted Contract—Evidence—Finding of Fact of Trial Judge—Reversal on*