THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) } APPELLANTS ;

AND

THOMAS JOSEPH BLAIN (PLAINTIFF) ..... } RESPONDENT.

1905
*March 30.
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

New trial—Decree of appellate court—Reasons for judgment.

B., a passenger on a railway train, was thrice assaulted by a fellow passenger during the passage. The conductor was informed of the first assault immediately after it occurred and also of the second but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally for the injuries complained of. The verdict was maintained by the Court of Appeal but the Superior Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 Can. S. C. R. 74). In the reasons given for the last-mentioned judgment written by Mr. Justice Sedgewick for the court, it was held that damages could be recovered for the third assault only but the judgment as entered by the registrar stated that the court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused a new trial was had on which B. again obtained a verdict the damages being apportioned between the second and third assaults. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict :

Held, Taschereau C.J. and Davies J. dissenting, that as the decree was in accordance with the judgment pronounced by the court when its decision was given, and as it left the whole case open on the second trial the jury were free to give damages for the second assault and their verdict should not be disturbed.

Held, per Taschereau C.J. that the decree of the court should have been framed with reference to the opinion giving the reasons for the judgment and, if necessary, could be amended so as to be read as the court intended.

APPEAL from a decision of a Court of Appeal for Ontario maintaining a verdict at the trial in favour of the plaintiff.

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Idington JJ.

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The facts material to this appeal are fully stated in the above head-note.

Johnson K.C. and *Denison* for the appellant.

Riddell K.C. and *D O. Cameron* for the respondent.

THE CHIEF JUSTICE.—I am not quite convinced that, under the state of facts brought out at the trial, this respondent has any right of action whatever against the appellants upon any of the allegations of his statement of claim. That is why, though I did not enter a dissent, I had, upon the first appeal (1) to ask my brother Sedgewick to write down the reasons for our judgment, not feeling satisfied that I could myself find any good ones in support of the conclusion of the court that the appellants were liable for the third assault complained of by the respondent, though not for the two others. However, that judgment is, of course, binding upon me. It is the settled law of the case.

As to the $2,500 for the second assault, the only point now before us, I would allow the appeal. The respondent was not entitled to a second trial as to this assault. The order or rule for a new trial drawn up in the office must be construed with reference to the opinion of the court upon which it is based, and, consequently, has to be read with the words

as to the third assault complained of by the respondent in his statement of claim,

after the words "parties." This judicial opinion was the only effective authority for the drawing up of that rule or order. See per Esher M. R., in *Holtby* v. *Hodgson* (2). It does not, strictly speaking, form part of the record, but it cannot, as the respondent would contend, be entirely disregarded in the construction of the formal order. On the contrary, as laid down by

(1) 34 Can. S. C. R. 74.

the annotator to the word "Mandate," vol. 13, Ency. of Pl. & Pr. 847:

The lower court, in giving effect to the mandate of the appellate court, should construe such mandate with reference to the opinion accompanying it.

Where a cause is remanded to the trial court for further procedings, they must be had in accordance with the opinion or the direction of the appellate court.

Id. vol. 2, 378. See *Davidson* v. *Dallas* (1).

In *Pitts* v. *La Fontaine* (2), in the Privy Council, their Lordships, upon the construction of a previous order-in-council, referred to a passage in their judgment to demonstrate what had been their intention in making that order.

The opinion, delivered by this court at the time of rendering its decree, said Mr. Justice Gray, for the court, *In re Sanford Fork and Tool Co.* (3)

may be consulted to ascertain what was intended by its mandate and * * * upon a new appeal it is for this court to construe its own mandate and to act accordingly.

See also *West* v. *Brashear* (4); *Supervisors* v. *Kennicott* (5); *Graff* v. *Boesch* (6); and *Smith* v. *Day* (7).

In *Thompson* v. *Maxwell Land Grant and Rway. Co.* (8), Mr. Justice Brewer, delivering the opinion of the court, said, in the same sense:

We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, *and what ha become settled for further disposition of the case.* We therefore turn to the former opinion and the mandate to see what was presented and decided.

The reasons for the judgment do not constitute the judgment, but the formal judgment is void if inconsistent with the opinion of the court and in direct opposition to it. And upon that ground would the

(1) 15 Cal. 75.
(2) 6 App. Cas. 482-487.
(3) 160 U. S. R. 247.
(4) 14 Peters, 51.
(5) 94 U. S. R. 498.
(6) 50 Fed. Rep. 660.
(7) 117 Fed. Rep. 956.
(8) 168 U. S. R. 451-456.

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court have said to this respondent upon appellant's motion for a new trial,

you cannot recover upon the evidence for the first and second assaults, but we will give you another chance to prove that part of your case.

The order of this court now in question limits to $1,000 the amount that the respondent, in our opinion, was entitled to, not because we held that he was entitled to that amount for the three assaults complained of in his statement of claim, but because he was not, in our opinion, entitled to recover for the two first assaults; and as the jury had rendered a general verdict in his favour for a lump sum of $3,500, for which judgment had been entered against the appellants, and as we were of opinion that this sum upon the evidence was grossly in excess of the damages resulting to him from the third assault, the only one for which the appellants were liable, their appeal was allowed and a new trial ordered unless he, the respondent, agreed to take $1,000 for the damages he had suffered from that third assault. Had we been of opinion that the appellants were liable for the three assaults, their appeal would have been dismissed. And had we been of opinion that they were not liable at all for any of the three assaults, it is clearly not a new trial that we would have ordered; judgment would then have been entered in their favour and the respondent's action dismissed. And had the respondent accepted the $1,000, the judgment entered for that amount would clearly not have been a judgment for the damages resulting to him from the two first assaults (1).

If necessary, in view of the circumstances of this case, the order should be amended *nunc pro tunc*, in furtherance of justice, so as to read as the court intended it to be.

(1) 34 Can. S. C. R. 74-80.

Every court has an inherent jurisdiction to put its records in correct form, on application, or *ex mero motû*, in default of application. No court will allow an order to stand which does not speak the truth. *Re Swire* (1), approved of in House of Lords, in *Hatton* v. *Harris* (2). And for ascertaining what it was that the court really ordered or determined, can there be a safer and more reliable guide than the written opinion of the court filed as its judgment ? And the parties are not at liberty either by consent express or implied, nor by waiver or acquiescence to bind a court to accept as its judgment anything else but that which the court intended to be its judgment.

North J. in *Shipwright* v. *Clements* (3), allowed an amendment of a decree 20 years old so as to make it confortable to the written opinion of the judge who had pronounced it. In *Hatton* v. *Harris* (2), in the House of Lords, a decree forty years old was amended, Lord Penzance, in *Lawrie* v. *Lees* (4) said.

> I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or the office of the court,—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful to make it plain.

See *Smith* v. *Goldie* (5) and *Rattray* v. *Young* (5), in this court.

In *Rajunder Narain Rae* v. *Bijai Govind Sing* (6) their Lordships of the Privy Council held that

> By the common law this court possesses the same powers as the courts of record and statute have, of rectifying mistakes which have crept in by misprision or otherwise, in embodying its judgments.

In *Insurance Company* v. *Boon* (7) in the United States Supreme Court, it was said by Strong J. : —

(1) 33 W. R. 785 ; 30 Ch. D. 239.
(2) [1892] A. C. 547.
(3) 38 W. R. 746.
(4) 7 App. Cas. 19 at p. 35.
(5) Cout. Dig. 1123.
(6) 2 Moo. Ind. App. 181 at pp. 207-216.
(7) 95 U. S. R. 117.

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> Every court of record has power to amend its records so as to make them comform to and exhibit the truth. Ordinarily, there must be something to amend by, but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was ;

and the learned judge goes on to say that though the opinion of the judge is no part of the record, yet it is a guide for amending the formal judgment.

However, in this case, I would not think an amendment necessary. The order should be construed as if it, in express terms, restricted the new trial to the third assault. If the trial judge had so construed it and, reading it by the light of the opinion delivered by this court, had charged the jury accordingly, the respondent would not have asked us, I am sure, to hold that the judge had erred in acting in conformity to the unanimous opinion of this court and to send the case back for a new trial because he had not directed a verdict for all the assaults.

SEDGEWICK—I am of opinion that the appeal should be dismissed.

GIROUARD J.—The whole difficulty arises out of what appears to have been an oversight in the judgment of this court delivered in this very case. The court did not seem to have anticipated that the respondent might refuse the $1,000 allowed him in full satisfaction of his claim and take the chances of a new trial.

The respondent, while travelling as a passenger on a train of the appellants, was thrice seriously assaulted by a drunken fellow passenger, first, at the Toronto Union Station, before the departure of the train, and twice after, and claimed damages, in consequence, from the railway company. The case was tried by a judge and jury who rendered a general verdict for $3,500.

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This verdict being sustained by the trial judge and the Court of Appeal, an appeal was taken to this court, which, on the 30th November, 1903, pronounced the following judgment, as per written memorandum read in open court, and then and there handed down to the Registrar, which was recorded in the minute book of the court, as follows :

Appeal allowed, no costs in this court nor in the Court of Appeal. New trial ordered unless respondent accepts a reduction of damages to $1,000, interest and costs of court of first instance, the latter costs to be costs in cause to abide the event if respondent takes a new trial.

About a couple of weeks afterward, namely, on the 17th day of December, 1903, the reasons for the said judgment were handed down to the said Registrar, who is empowered by statute to publish the reports of the "decisions" of the Supreme Court (sec. 112 of the Supreme Court Act). In the course of time, frequently several months after their delivery, in this instance on the 30th of March, 1904, they were published in the Supreme Court Reports (1).

It appears from the report of the case that, as the court had come to the conclusion, on the evidence adduced at the trial, that the company was liable only for injury caused by the third assault, a new trial was ordered

unless the plaintiff agrees to accept $1,000, together with costs, in full of his claim against the company. There will be no costs in the court below nor in this court.

It must be noted that the reasons for judgment, like the judgment, do not provide for the case of refusal by the plaintiff of this reduced amount of damages, by limiting the new trial to the third assault or by dismissing the action for any injury caused by the second assault. A new trial was ordered generally.

Later on, on the 5th of January, 1904, the respondent, having declined the option, applied to the Regis-

(1) 34 Can. S. C. R. 74.

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trar for a settlement of the minutes of the judgment, and, after hearing him and due service of said application having been accepted by the solicitor of the company who was also present, and no objections being made, the said Registrar settled and entered the minutes of judgment as follows:

1. This court did order and adjudge that the said appeal should be and the same was allowed, and that the said judgments of the Court of Appeal for Ontario and of the Chief Justice of the King's Bench should be and the same were reversed and set aside, and a new trial had between the parties, unless the respondent should accept a reduction of damages to $1,000, interest and costs of court of first instance, which option the respondent did, on the 31st day of December, 1903, refuse.

2. And this court did further order and adjudge that the costs in the High Court of Justice for Ontario, in the event of such refusal, should be costs to the successful party in the cause.

3. And this court did not see fit to make any order as to the costs in this court.

I cannot conceive that this formal judgment, transmitted to the court below, is at variance with the written memorandum read in open court as the judgment of the court. I cannot even say that it contradicts the very terms of the reasons. But suppose it is inconsistent with their tenor and meaning, which document is to govern and constitute the judgment of this court? Is it the judgment pronounced in court, which alone should be transmitted and certified to the court appealed from, or the reasons for judgment which were not read in court nor transmitted to the court below? Can it be said that the reasons for judgment contain the "judgment or order" of the court within the meaning of the Supreme Court Act? As I understand that Act, R. S. C. ch. 135, especially sec. 2 (*d*), and sections 19 and 67, the pronouncement in court, oral or written, of the decision of the court in any case constitutes the judgment of the court. The reasons of judgment are mere opinions which may be considered as part of the judgment in so far as they

disclose the grounds upon which it is rendered, but they cannot vary the text or *dispositif* of the formal judgment.

The judges of the lower courts are not bound by any expressions used by the appellate court beyond and contrary to the decree. Such is also the well established jurisprudence not only in England but in the United States, and I submit, with due respect, that no other rule can reasonably and safely be adopted. I hardly believe that it is necessary to quote authorities upon this point; I will merely refer to the following where all the cases are collected; Encyl. of Pleading and Practice, vol. xi., pp. 825-826; Seton on Decrees, (6 ed.) 187; Daniels Chan. Prac. vol. i., p. 636. The new trial had to take place as ordered by this court. It was held, accordingly, and the jury found negligence as to both second and third assaults—a finding not shewn at the first trial, the verdict being a general one—and returned a verdict for $1,500 by reason of the third assault, and $2,500 for the second one, which has been sustained by the trial judge Anglin J., and the Divisional Court, Chancellor Boyd, Teetzel and Magee JJ. We are now asked to set it aside as to the second assault, the appellant relying upon our reasons for judgment on the first appeal. I cannot examine the evidence in the latter case, the same not being before us, and applying the principles of law laid down in our said reasons of judgment and reading the evidence as I do in the present case, I have come to the conclusion not to disturb the verdict.

It is contended that the evidence is the same at the two trials. I do not know that, and I have no means of knowing. I see no admission of the parties to that effect. I notice also an order of the master permitting the use of any deposition of any witness given at the

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first trial only in the event of the plaintiff being unable to obtain the evidence of such witness. I find in the present printed case only one deposition taken at the first trial, that of Dr. McCallum. True, the evidence given at the former trial is on file among the archives of our court; but, as I understand my duty, I am *functus officio* and incompetent to take it into consideration I must decide this appeal like any other one, just as the Privy Council would do if ever called to review our decision, upon the record before us.

The appellants have only themselves to blame if they are deprived of the benefit of the former judgment of this court. They raised no objection to the judgment as pronounced, nor to the settlement of the minutes, although they were duly notified and appeared before the Registrar. They did not move to have them corrected or completed by this court or a judge thereof, either before they were transmitted to the court below or after, in the manner and form indicated in several cases collected in the digest of the reports of this court (1) in *The Chambly Manufacturing Co.* v. *Willett* (2) and *Letourneau* v. *Carbonneau* (3), both decided in this court in 1904, and also in Annual Practice (4).

On the first of February, 1904, the appellants moved in the court of first instance for a stay of proceedings upon the ground that they had applied for leave to appeal from the decision of this court to the Privy Council, which leave was later on refused (5). They must be presumed to have known then the tenor of the judgment, and yet they did nothing to have the former properly rectified. They seemed to have

(1) Cout. Dig. 1121-1124.
(2) 34 Can. S. C. R. 502.
(3) 35 Can. S. C. R. 701.
(4) [1905] p. 361.
(5) [1904] A. C. 453.

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relied entirely upon the principle of law involved in the case.

And, when the second trial was held, no objection to the charge of the judge as to the second assault was raised; probably, in face of our judgment, none could be made; not even a suggestion was thrown out that this branch of the case had been disposed of by the judgment of this court. The appellants evidently understood that the whole case was re-opened and relied upon a fresh verdict as to both assaults, it being conceded by the plaintiff that the company was not liable for the first one. It is now too late to allow them to take a different view of the situation.

The appeal should be dismissed with costs.

DAVIES J.—This is the second time that this case has been before us on appeal. On the first appeal (1) this court laid down the rule as to a carrier's liability, as follows:

> Whenever a carrier through its agents or servants knows or has the opportunity to know of the threatened injury, or might reasonably have anticipated the happening of an injury, and fails or neglects to take the proper precautions or to use the proper means to prevent or mitigate such injury, the carrier is liable.

Applying that rule to the facts as proved we held that the carrier company was liable for damages for the third assault (so called), and was not liable for what was called the second assault. We, therefore, ordered a new trial, and, in such trial, the judge very properly directed the jury to find separately the damages for each of the assaults, which was done. No question was raised here as to damages for the last assault, the appellant finding itself precluded on the question of liability as to that by our previous decision, and not raising any question as to their amount.

(1) 34 Can. S. C. R. 74.

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The question, and the only question raised, is as to the defendant's liability for what has been called the second assault, but which, as the trial judge justly remarked, might more properly, as against the defendants, be called the first assault.

I have very carefully read all the evidence given at this second trial, but am quite unable to see any difference on the only point now before us between that evidence and the facts we had before us on the first appeal. We then held that the facts were not such as would justify a conclusion that the conductor ought reasonably to have anticipated this assault and taken measures to prevent it. So far as the facts are concerned the evidence as to what occurred at the Union Station and the Parkdale Station were admittedly the same at both trials. Mr. Riddell contends that on this trial the evidence of the conductor was not given and that Mr. Blain's evidence is fuller and more complete as to the facts at the moment the second assault took place. I am not able to see that these two contentions in any way should alter the result. So far as the assault which was made on the plaintiff at the Union Station, and before the train started, is concerned, it is common ground that the defendants are not liable. The conductor had no knowledge whatever of this assault except what he heard from Blain himself just as the train was leaving. In fact the train had actually started, but was stopped by some one to enable Blain, who, after the assault, had left the train, as, he says, to get a constable, to get aboard again. Then, for the first time, both men standing on the platform, the conductor hears from Blain that he had been assaulted by some one, but whether Anthony's name was mentioned or not Blain could not say. He told the conductor he would not go on the train unless the man was put off, and says the conductor replied there

was no time then, but that he would get a constable at Parkdale, a station a couple of miles away. Just after this promise was given, the plaintiff Blain swears, that Mr. Thornton, the ticket agent at Brampton, from whom he had purchased his return ticket, came along the platform where he and the conductor were standing and called out, "its all right, Mr. Blain, get on, and, I still hesitated, he added, he (meaning Anthony) is quiet now, and, I thought he was quiet now till we got to Parkdale."

The only information the conductor had was that there had been an assault but that the man who committed it was all right and then quiet. Before hearing this he had given the promise about the constable.

At Parkdale, Mr. Blain spoke to the conductor on the platform about the constable and was told there was none there and to get on. But he does not say a single word intimating that the man had not remained quiet or that anything had occured since assurances had been given to Blain and the conductor that Anthony was quiet to make the conductor fear or anticipate any renewal of trouble.

In all the evidence before us I have not been able to find a single word or fact indicating that from the moment on the Toronto platform, when the assurances were given about it being all right to get on, that the man was quiet, up to the moment when the second assault took place, the man Anthony had not remained perfectly quiet or that the conductor could or ought to have had any knowledge to the contrary. In the absence of any such evidence, how can it be held that the conductor could or should have anticipated a renewal of the troubles? He knew nothing of the previous relations between the parties. He was in charge of an excursion train filled with passengers, and learns, at the moment of starting, that there had been

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an assault committed, whereupon, he tells the complaining party to get on the train and he would have a constable at the next station. This is followed by assurances from friends of the parties that the man had become quiet and that it was all right. No subsequent information was given to the conductor of any change in the man's attitude, nor did any facts occur from which he could or ought to have inferred any such change till after the second assault took place. No evidence whatever was given that any change did as a fact take place till the actual commission of the second assault. The conductor, therefore, had been lulled into a false security and could not reasonably have anticipated this assault. Mr. Blain, himself, did not anticipate it. The assault was sudden, so much so that the friends of Mr. Blain, who were sitting around him at the time, could not interfere in time to prevent it.

Under these facts I feel that unless we reverse our previous decision we are obliged to set aside the finding of damages for the so-called second assault and to reduce the verdict to the sum of $1,500, the damages awarded for the third assault.

The appeal should be allowed accordingly.

IDINGTON J.—Plaintiff having entered as a passenger one of the defendants' passenger cars forming a train which was to leave Union Station, Toronto, for Brampton 11 p.m. on 10th October, 1901, was in passing along the aisle assaulted, knocked down between two seats and pounded there by one Anthony, till fellow passengers took him off.

Anthony was wild, boisterous, in a very noisy condition and quarrelsome. He was drunk. He had immediately previous to this assault upon plaintiff seized another passenger on the same train, shoved him back on a seat threatening that he would choke

him to death. He was a big, strong, powerful man, weighing about two hundred and fifty pounds.

The train was a large one. The plaintiff with his wife, got off the car, and he went for a constable, whilst she stood on the platform. Meantime Anthony was scuffling with others on the car striking at them. People were standing up and quite a row and noise were going on in the car.

This was five minutes before the train was due to leave. No conductor or brakesman was about. After traversing the tracks going upstairs and inquiring in vain for a constable, plaintiff returned to the train which was starting.

Plaintiff says:

And some one called out, here is Mr. Blain; he is coming; and the car stopped, and the conductor then for the first time came to me, and he says: What did you stop the train for?

Q. Is that the tone he said it in?

A. A good deal more surly than that. I said, I did not stop the train. He said why don't you get on. I said I have been assaulted by a man in there—I think I mentioned the name Anthony, but I am not sure—he has assaulted two or three other parties, and he threatens to do it again, and I am not going on the train unless he is removed or arrested. He says, well, the man has a ticket, and he has a right to go. Well, I said, he has no right to go on and commit a breach of the peace, and I won't go on. He said, you get on; and I positively refused. I had abandoned the idea of going. Well, he said, there is no constable here, and if you get on we will have a constable at Parkdale. I hesitated; and just at that moment Mr. Thorburn, the ticket agent at Brampton, who had sold me the ticket, called out, he is all right, Mr. Blain, you get on.

Q. You told him you had been assaulted by some person, and that you had been told he had assaulted two or three others, had you?

A. Yes.

Q. What others?

A. I saw him striking at Beattie, and I saw him striking at Jim Noble before he made the assault on me.

Q. And then you also said he threatened to do it again?

A. Yes. As I was coming down the stairs somebody said, you get a constable, Mr. Blain; he is threatening to go after you again.

Q. You do not know of your own knowledge about a threat?

A. No.

Q. But did you tell the conductor that?

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A. Yes.

Q. Then did you get on when he said he would get a constable at Parkdale ?

A. Yes.

Q. Would you have got on without that promise ?

A. I certainly would not. I had abandoned the idea. I had no hat; my hat had been knocked off, and I was running through the station without a hat.

Q. Did not you see any of the officers at all around the Union Station when you were running around that way without your hat looking for assistance ?

A. I did not ; I tried earnestly to get a constable.

Q. Then did you get on ?

A. I got on.

Q. Did you see Anthony at all between Toronto Union Station and Parkdale ?

A. I did not.

Q. Then at Parkdale what did you do ?

A. I got off at Parkdale, and did not see the conductor or Anthony. The car that I got off was not quite up to the station. I walked up the platform past a car, and in the next car, one next to the one I passed, was Anthony standing with a crowd around him, and I could hear him ; he was talking in a loud voice.

Q. Was he in the car ?

A. He was in the car ; and, of course, I was surprised he was there. I looked around for the conductor, and I went into the station house and the conductor was there ; he was getting his orders. Mr. Burnett from Brampton was there. After he got his orders I said to him, have not you got a constable ? Are you not going to remove this man ? He said, there is no constable here. Well, I said, it is only a matter of a few minutes to get a constable, and that man will cause trouble all the way to Brampton, and he has been threatening me again. *He said : There is no one making a row but yourself.* Well, I said, I had a right to make a row. I continued addressing him as I was walking on towards the train. He would hardly listen or stop, and when he got to the train he waved his lantern and says, you get on or you will be left. So I had not time to get back to the car I got off ; I got on the car ahead of the one I got off.

Q. Where was your wife ?

A. She was in the car behind the one I got on. I hesitated a moment, but my wife was in the car, and I could not possibly communicate with her, and I got on.

Q. Then there was no way by which you could have communicated with her if you had stayed off at Parkdale ?

A. No.

Q. Where was your hat at that time ?

A. I had no hat.

Q. Then you got on at Parkdale ?

A. I got on at Parkdale.

* * *

Q. Then did you see the conductor before the next assault ?

A. No. The conductor got on the car in front of the one I got on.

Q. Then from Union Station up to Parkdale, did the conductor pass through the train ?

A. No.

Q. Parkdale, that is the first station after you leave the Union Station ?

A. Yes.

Q, Did he pass through your car, at all events, from the time that you left the Union Station until such time as you were assaulted for the second time ?

A. No.

Within three miles from this point where plaintiff so imploringly made an appeal for protection, he was again assaulted by this drunken man in such a violent manner that for the damages arising therefrom the jury has awarded $2,500 damages, and the defendants say nothing as to the amount of the damages.

The conductor came along just after this second assault, and plaintiff relates thus what passed and was said, p. 21 :

Now this man has attacked me again. Well, he said, I did not see it. Well, I said, surely I am not to be killed before you believe me. There are plenty of people who saw him and know what is going on, and you ought to have him removed. Well, he said, he has a ticket, and he has a right to go on ; and he did not give any satisfaction in any way.

Q. Would he interfere to prevent him striking another assault or is that all he said ?

A. That is all he said.

Before reaching next station two miles further on, that is less than five miles from where the protection was asked and refused, a third assault took place, and plaintiff finally quit the train.

From Union Station the man Anthony is described to have been "mad drunk" all the time and the condition of things in the car is described thus, p. 32 :

The ladies could hear what was going on in the smoking compartment—a fearful noise, and everybody was crowding around to see the man. He was perfectly wild, and people came. He was mad drunk all the time.

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Q. Were the people in the car quiet all the way going up from Toronto, too ?

A. They were in a great state of excitement ; the car in which the first assault took place the women folks all left that car and went into another car.

Q. And what about the other cars : were they quiet ?

A. They were in an uproar all the way along.

Q. Then at any time was that uproar put an end to ? Was it quieted down at any time from the time you were assaulted at the Union Station until you got off ?

A. Never.

Burnett, another passenger, who was also assaulted complained to the conductor and told him also of the assault on the plaintiff, and is asked :

Q. Then what did he say to that ?

A. Well, he did not see the row or anything to that effect at all. He did not seem to be around to see this row.

Q. No, I do not want the words ; I want the substance of it ?

A. He said there was no one around here to arrest him ; there was no policeman around.

Again, others desired arrest.

Q. What did he say when they wanted him arrested ?

A. Well, he said he did not see any row at all.

Q. Well, then, when Mr. Blain spoke to the conductor about having been assaulted upon the train what did the conductor say to him then ?

A. The conductor said there did not seem to be any police around or any one around here to arrest this Anthony.

Witness repeats variations of this view conductor took of the incident.

The condition of Anthony, the excitement in the car and the expectation that Anthony would be arrested at Parkdale, and the attitude of the conductor as testified to by each and all are corroborated by Beattie, and as to the excitement in the car and Anthony's condition, by Gilkinson and Broddie, Mr. Clendenning and Mrs. Clendenning, and Graham.

The last named also adds, p. 69 :

The conductor said he had a ticket and he had as good a right to ride as Mr. Blain. Mr. Blain said he would not get on. Then the conductor said he would have a constable at Parkdale and have him arrest him there. Then we got on and the train went.

Q. What else did Mr. Blain tell the conductor in addition to the ssault?

A. He told him that he thought he had threatened to attack him again.

And Mrs. Blain, corroborating the general story adds, p. 74:

Q. Was anything said as to what the conductor would do at Parkdale?
A. He said he would have him arrested.

A number of the passengers testify that the conductor and brakesman could have managed Anthony if they had tried to arrest him and each of the gentlemen says that, if asked by the conductor, they would have assisted to arrest the drunken man.

In regard to those passages from the evidence cited above, that relating to what transpired after the second assault I refer to as throwing light upon the attitude of the conductor. It seems to rebut all that was adduced in argument, as to the conductor having relied upon something that had gone before, lulling him into apathy. It indicates an entirely different frame of mind on the part of the conductor. He clearly did not, at the time, take the position that counsel now takes here, that by reason of what had transpired, after his promise at the Union Station to have the man arrested, he had been induced to change his mind by his observance of the man's condition or any other facts that would lead a reasonable man to believe the danger had passed away.

He seems, on the contrary, to have taken the stand even after the second assault, boldly upon the ground that he had no right or power or duty to interfere, unless the matter had come directly under his own eye.

No such position is open to a conductor under such circumstances. I take it he was in duty bound, upon finding the disturbance that existed in his train, and hearing the complaint that was made, to have taken

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due care to prevent a recurrence of such incidents as had been already explained to him.

I think this evidence furnishes, within the principles laid down in *The Canadian Pacific Railway Co.* v. *Blain* (1), which govern cases like this, sufficient to entitle the plaintiff to have the questions submitted to the jury which were submitted, and to support the findings of fact the jury have by their answers found, in relation to the circumstances in question.

There is no objection taken to the charge of the learned trial judge who seems to have left the case fairly to the jury, nor is there anything else in the trial of the case to indicate that it was not fairly tried. The results arrived at are wholly within the province of the jury, and I submit cannot be interfered with by this court.

The order granting a new trial left the whole case open as if nothing had transpired before the trial now in question. The case must therefore be considered, I think, solely in the light of the evidence given at that trial. It sometimes may be instructive to look at the facts of a previous decision to ascertain what the exact point, if not sufficiently illustrated in the opinion judgment, really was, that the court intended to decide. The doing so however, must always be liable to produce error, for when the facts are not set forth in the opinion judgment, it may well happen that some particular fact may have been overlooked, or may not have been presented in the same light that it may bear upon later and better argument. I have therefore not considered, beyond listening to the arguments of counsel upon the point, the facts that may have been reported as the result of the first trial. Counsel claims that the evidence did differ in this, and

(1) 34 Can. S. C. R. 74.

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that is not denied though the materiality of the difference is questioned.

I think, therefore, the judgment of the Divisional Court should be upheld, and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Angus McMurchy.*

Solicitor for the respondent: *D. O. Cameron.*