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*Nov. 11, 12.
*Nov. 30.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Assault on passenger—Duty of conductor.

If a passenger on a railway train is in danger of injury from a fellow passenger, and the conductor knows, or has an opportunity to know, of such danger it is the duty of the latter to take precautions to prevent it and if he fails or neglects to do so the company is liable in case the threatened injury is inflicted. *Pounder* v. *North Eastern Railway Co.* ([1892] 1 Q. B. 385) dissented from. Judgment of the Court of Appeal (5 Ont. L. R. 334) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment entered on the verdict at the trial in favour of the plaintiff.

PRESENT:—Sir Elzéar Taschereau, C. J. and Sedgewick, Girouard Daveis and Killam, J. J.

(1) 5 Ont. L. R. 334.

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The facts of the case are stated by Moss C. J. O., in giving judgment for the Court of Appeal, as follows:

"The plaintiff was a passenger on one of the defendants' trains as holder of a ticket issued by the defendants, entitling him to be carried as a first class passenger from the city of Toronto to the town of Brampton. While on the train in question, on the night of the 10th of October, 1901, he was thrice assaulted and beaten by a fellow passenger. The injuries inflicted were severe, permanently impairing his hearing, and otherwise affecting his health. The action is for the recovery of damages for the negligence of the defendants or their servants, in failing after due notice to properly guard and protect the plaintiff against the assaults of which he complains.

"The defendants deny liability, allege that they did, through their servants and agents to the best of their ability preserve order on their train, and as far as they were able to do so, protected the plaintiff from being beaten or assaulted, and further, that if plaintiff suffered any damage by reason of the assaults of which he complained, such assaults were induced by his own conduct.

"The last allegation may be disposed of at once by the observation that no evidence was given or tendered at the trial to show that there was anything in the plaintiff's conduct on the train, before or at the time of the several assaults, calculated to provoke them. He appears to have conducted himself throughout in a peaceable and lawful manner. He was guilty of no act, while at the station, or on the train, which could in any manner justify the assaults made upon him. The defendants did tender evidence with a view of showing that the relations between the plaintiff and his assailant were of a hostile and unfriendly nature,

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and they complain that this evidence was improperly rejected.

"At the trial, it was shown that the plaintiff and his wife boarded the train at the Union Station, at Toronto, shortly before the hour of the night at which it was timed to depart; that amongst other passengers was one Anthony, by whom the assaults were committed; that Anthony was drunk and quarrelsome, and that before he first struck the plaintiff, he violently assaulted another passenger named Noble without any provocation whatever, seizing him by the throat and swearing he would choke him.

"Very soon after this he assaulted the plaintiff, striking him from behind so that he fell forward among the seats of the car, and repeating his blows until the plaintiff escaped. During the scuffle, Anthony struck Mrs. Clendenning, and another passenger a violent blow on the arm, and he also used violent and threatening language towards one Thorburn, another passenger.

"The plaintiff left the car to seek a constable, and during his absence Anthony assaulted one Beatty, another passenger. Soon after the conductor entered the car and spoke to Anthony warning him against making a disturbance. The plaintiff having failed to find a constable, returned to the train just as it was about to move off, apparently after having been already started and drawn up again. Before getting upon the train again he told the conductor, in the presence of the brakesman and others, that he had been assaulted in the car, and that two or three others had also been assaulted, and that he wished the man arrested and put off the train. He told the conductor that he would not go on if the man was allowed to go on, that he was drunk and had assaulted him and two or three others.

"The conductor said the man had a ticket, and had as much right as the plaintiff had to go on, but finally told the plaintiff to go on, that 'we will have a constable at Parkdale.' Plaintiff thereupon entered the train and it proceeded to Parkdale. At Parkdale the plaintiff renewed his request to the conductor to get a constable. He told him that he had been informed that the man intended to attack him again, to which the conductor replied that the plaintiff was the only man creating a row.

"The plaintiff continued urging the conductor to get a constable, but the latter signalled the train to start and told the plaintiff to get on board or he would be left. His wife was in the car, he had no means of communicating with her, and he got on. Not long after he was again assaulted by Anthony, and received very serious injuries. He again complained to the conductor, who took the position that he could do nothing unless he saw the man strike the plaintiff, to which the plaintiff not unnaturally replied that it was very unfair if he was not to be believed until he was killed. The conductor refused to do anything and went away, and shortly after Anthony renewed the assault. In consequence of this and of his wife's fright, the plaintiff and his wife left the train at Streetsville and passed the remainder of the night there.

"The conductor was not called as a witness at the trial, but portions of his depositions taken on examination for discovery were put in by the plaintiff. He would not deny that the plaintiff complained to him of Anthony at the Union Station and Parkdale. Asked how many passengers spoke to him that night about Anthony, he replied that he did not know, there might have been twenty, there might have been forty for all he knew. He admitted that after the second assault the plaintiff complained to him and wanted him to

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put Anthony off. He was told of the assault by a great many other people, but did not think it as bad as the plaintiff tried to make out. He told Anthony he would put him off. Asked, 'then you did think it was your duty to put the man off?' he answered 'No, I did not think it was my duty to put the man off. He was not in a fit state to be put off.'

'Q. Then he was drunk? A. Yes.

Q. He was too drunk to be put off? A. Yes, I think he was.'

And again question 135. 'And you were going to put him off? A. I told him I would put him off if he did not behave?

'Q. And he got hold of the seat and was hanging on to the seat and you let him go? A. Something like that, I would not be positive. I think when the train was stopped we were closing the switch.' He was then speaking of a time after the third assault and before the train reached Cooksville, a station just east of Streetsville."

The verdict of the jury was in favour of the plaintiff and the damages were assessed at $3,500. The Court of Appeal having sustained the verdict the defendant company appealed to this court.

Johnson K.C. and *Denison* for the appellants. The duty of a carrier of passengers is not that of insurer as in the case of a carrier of goods; he is liable only for negligence. *Christie* v. *Griggs* (1); *Sutherland* v. *Great Western Railway Co.* (2).

A railway company owes no such duty to a passenger as is contended for in this case and decided by the judgment appealed from. *Pounder* v. *North Eastern Railway Co.* (3); *Cannon* v. *Midland Railway Co.* (4).

(1) 2 Camp. 79.
(2) 7 U. C. C. P. 409.
(3) [1892] 1 Q. B. 385.
(4) 6 L. R. Ir. 199.

The American decisions are not founded on any rule of our common law but on a state of affairs not existing either in England or Canada. *Putnam* v. *Broadway, & Seventh Ave. Railroad Co.* (1).

Riddell K.C. and *D. O. Cameron* for the respondent. Both the Criminal Code and the Railway Act empower a conductor to preserve the peace on his train.

Pounder v. *North Eastern Railway Co.* (2), is not good law and was seriously questioned in *Cobb* v. *Great Western Railway Co.* (3).

It is the duty of a railway company to provide a sufficient staff to maintain order and to protect passengers from injury; *Metropolitan Railway Co.* v. *Jackson* (4); and this duty is strictly enforced in the United States. *New Orleans, St. Louis & Chicago Railroad Co.* v. *Burke* (5); *Lucy* v. *Chicago Great Western Railroad Co.* (6); *Putnam* v. *Broadway & Seventh Ave. Railroad Co.* (1).

The learned counsel referred to *Smith* v. *Great Eastern Railway Co.* (7).

The judgment of the court, Davies J. taking no part, was delivered by:

SEDGEWICK J.—The learned Chief Justice has asked me to shortly express the grounds upon which our decision on this case is based. We are of opinion that the following statement in 5 Am. & Eng. Ency. 553, embodies the correct rule upon the question in controversy:

> 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.

(1) 55 N. Y. 108.
(2) [1892] 1 Q. B. 385.
(3) [1894] A. C. 419.
(4) 2 C. P. D. 125; 3 App. Cas. 193.
(5) 53 Miss. 200.
(6) 64 Minn. 7.
(7) L. R. 2 C. P. 4.

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It appears to us that this principle or rule of duty was violated by the appellant company's conductor in so far as the third assault upon the respondent is concerned. If the case of *Pounder* v. *North Eastern Railway Co.* (1), is in conflict with the doctrine now propounded we cannot assent to it, and in that view we are to a large extent supported by the doubt which was thrown upon it in the case of *Cobb* v. *Great Western Railway Co.* (2), where Lord Selborne and Lord McNaughton doubted that that case was properly decided, and the other learned law Lords refrained in terms from expressing any opinion in regard to it.

Attention may be called to an admirable article by a learned text writer in 18 Law Magazine and Law Review, 449.

Then upon the measure of damages. It seems clear from the evidence that the jury in assessing these at the sum of $3,500 took into consideration the second assault. It does not appear to us that the appellant company is liable for any injury caused to the respondent on that occasion. Neither he nor the conductor anticipated that attack. They both thought there was no necessity then to eject the passenger who was the cause of the trouble. But after the second assault it was the conductor's duty to eject him. The damages caused by the third assault were comparatively slight and we think justice will be done by directing that the appeal be allowed and a new trial 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.

Appeal allowed without costs.

Solicitor for the appellants: *Angus MacMurchy.*

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

(1) [1892] 1 Q. B. 385.

(2) [1894] A. C. 419.