THOMAS W. DOBIE (PLAINTIFF)..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDENT) ..... } RESPONDENT

1930

*Apr. 23.
*June 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railway—Negligence—Passenger falling off platform—Platforms enclosed by vestibules—Vestibule door left open—Railway Act, R.S.C., 1927, c. 170, s. 390.

The appellant, when nine years old, in 1919, was crossing the continent as an immigrant, with his mother, in one of the respondent's vestibuled trains. While the train was approaching Piapot station, in Alberta, the appellant went to the rear end of the car in which he was riding and, just as he was stepping from the passage to the platform, and while his hand was on the door, there came a sudden jerk of the car, in consequence of which the boy was thrown to the platform and, the vestibule door being open, down the steps to the ground, where his legs came under the wheels and it was found necessary, by reason of his injuries, to amputate his right leg above the knee and his left foot above the ankle. The appellant, in 1928, nine years after the accident, brought an action to recover damages. The jury found that the respondent railway was negligent in that the "exits of the train (were) not properly safeguarded," that the appellant was not

*PRESENT:—Duff, Newcombe, Lamont, Smith and Cannon JJ.

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"guilty of negligence" and that the "proximate cause of the accident" was the appellant's "falling off the train," and the jury gave a verdict for $10,000. After the conclusion of the evidence, the respondent's counsel moved to dismiss the accident; and the trial judge, after the verdict of the jury, dismissed the appellant's action on the grounds that there was no negligence in law established by the evidence or found by the jury and that the action was barred by section 282 of the *Railway Act*, 1906. Two of the four judges sitting in the Court of Appeal held that the appellant had failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the respondent, a third one held there had been a mistrial and the fourth would have rendered judgment according to the verdict; the judgment of the trial judge was therefor affirmed.

Held, reversing the judgment of the Court of Appeal (42 B.C. Rep. 30), that judgment should have been rendered in favour of the appellant pursuant to the findings of the jury and that the appellant was thus entitled to recover the $10,000 damages awarded to him by the verdict.

Skelton v. *London and North Western Ry. Co.* ((1867) L.R. 2 C.P. 631) distinguished; in that case, the plaintiff failed by reason of his contributory negligence.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial court, Morrison J. with a jury, and dismissing the appellant's action for damages.

The material facts of the case are fully stated in the judgment now reported.

R. S. Robertson, K.C., for the appellant.

A. MacMurchy, K.C., and *H. J. Dempsey* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The action was brought on 17th May, 1928, to recover compensation for injuries which the plaintiff suffered in an accident which occurred on the defendant company's railway, at or near Piapot Station, in Alberta, on 28th March, 1919, when the plaintiff, then a boy of nine years, was crossing the continent as an immigrant, with his mother, in one of the defendant's vestibuled trains. While the train was approaching the station the boy went to the rear end of the car in which he was riding, and, according to the evidence which the jury accepts, just as he was stepping from the passage to the platform, and

(1) (1929) 42 B.C. Rep. 30; [1930] 1 W.W.R. 6.

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while his hand was on the door, there came a sudden jerk of the car, in consequence of which the boy was thrown to the platform and, the vestibule door being open, down the steps to the ground, where his legs, unfortunately, came under the wheels, and it was found necessary, by reason of his injuries, to amputate his right leg at or just above the knee, and his left foot above the ankle.

The case was tried on 25th November, 1928, before Morrison J., with a jury. Questions were submitted by the learned judge, and these, with the answers returned by the jury, are as follows:

Q. Was the defendant guilty of negligence?—A. Yes.

Q. And if so, what was it?—A. The exits of the train not properly safeguarded.

Q. Was the plaintiff guilty of negligence?—A. No.

Q. What was the proximate cause of the accident?—A. Falling off the train.

Q. Damages, if any—A. $10,000.

There is no objection that the charge was unfavourable to the defendant.

After the conclusion of the evidence, the defendant's counsel had moved to dismiss the action; judgment upon this motion had been reserved until after the verdict, and, on 19th January, 1929, the learned judge having in the interval considered the matter, directed the dismissal of the action. He reviewed the evidence and expressed his conclusion as follows:

There was no evidence on which a jury could reasonably find that the defendant company had not complied with all the statutory requirements in handling this particular train. The evidence on behalf of the plaintiff that the train jerked at the particular juncture and about which the testimony was conflicting, would be sound ground, if believed by the jury, upon which negligence could be charged. The only ground so found by the jury was that in answer to the first question—that brings me to Mr. McMullin's submission that there is no negligence in law established by the evidence or found by the jury and with which I agree. There was no legal duty imposed upon the defendant company to have vestibule doors at all. *Skelton* v. *The London N.W. Railway Co.* (1). There was no evidence that they were defective or left in such a way as to invite a passenger to rely upon their structure or condition. The period in which the plaintiff was on the train and the warnings given him by a fellow passenger should have familiarized him with the inherent dangers and risks to which passengers are subjected when availing themselves of this mode of travel. It would be imposing too great an onus even upon a railway company to require that they must have an employee posted at each vestibule door of a car to prevent passengers from opening them.

(1) (1867) L.R. 2 C.P. 635.

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The platforms of a train in motion are taken to be danger spots and railway companies are obliged so to warn their passengers, which the defendant had done. Assuming I may have misconceived the law in this respect, I think the action is barred by virtue of section 282 of the Railway Act, 1906, re-enacted in section 390 of the *Railway Act* of 1919.

At the hearing before us it was urged, on behalf of the defendant, that the plaintiff was disentitled to recover, by reason of his breach of one of the defendant's printed regulations, at the time admittedly posted up in the car in which the plaintiff was riding. The regulation is in evidence, and it provides that

> No person shall use the platform or any step of any car on any line of railway owned or leased or operated by the company as a place on which to stand or stay, but only as a place over which to pass in getting on or off a car, or from car to car; and no person shall travel or be in any baggage car or other car not intended for the conveyance of passengers.

It is, moreover, provided by section 390 of *The Railway Act*, 1919,

> No person injured while on the platform of a car, or on any baggage or freight car, in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time.

This is the clause to which the learned judge refers at the conclusion of his judgment.

The provincial Court of Appeal, consisting of four judges, was divided. The Chief Justice, with whom Galliher, J. A. agreed, holding that

> the plaintiff has failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the defendants.

Martin, J. A. considered that

> there was a case to go to the jury on at least two heads of negligence, and that after the jury had found for the plaintiff the learned judge below should not, with respect, on the facts and findings, have acceded to defendants' motion to dismiss the action.

But, he held that there had been a mistrial because there was no definite finding as to the proximate cause of the accident, and that the answer, "falling off the train," is,

> in the circumstances, meaningless and has no other effect than if the question had remained unanswered, and shews that the mind of the jury was not properly directed to the gist of the case.

Macdonald, J., on the other hand, considered that the case should be governed by the verdict of the jury.

Although, as said by the learned trial judge, the defendant was not expressly required to provide vestibule doors, such doors were, nevertheless, in common use, and, according to the evidence led by the defendant, it is part of the duty

of the trainmen "to see that they are kept closed when running". Two of these witnesses testified that the doors were shut after leaving Tomkins, the last preceding station, and that, when they came through the train, about 25 or 30 minutes before reaching Piapot, where they slowed down to pick up an order, these doors were closed. There is no doubt, however, that the door at the platform where the boy fell, was open at the time. It is suggested that it might have been opened by a passenger; but this was the last of the passenger cars and was directly followed by the caboose, in which the train-crew rode, and immediately behind that came an official car at the end of the train, and there was evidence from which it may be inferred that the two trainmen, who, at the time of the accident, were on the platform or steps of the caboose, engaged in the reception of the order, did not perceive that the vestibule door was open while the train was slowing down for the order. The jury may, therefore, have considered that the proof of the closing of the door was not satisfactory, or that the fact was not adequately established. The case differs from that of *Skelton* v. *London and Northwestern Railway Company* (1), where the plaintiff failed by reason of his contributory negligence, although Willes J., following the leading case of *Coggs* v. *Bernard* (2), considered also that there was no proof of actionable negligence by the railway.

Vestibules upon passenger trains, while conceded not to be a statutory requirement, add much to the safety and convenience of travellers, and presumably have resulted from consideration of the duty which the railway companies, as carriers, owe to their passengers. The provision and use of vestibules are not, in my view, self-imposed or voluntary duties or precautions, in the sense in which Willes, J., used the term in *Skelton's* case (1); rather I think, it may be said that vestibules, for the class of cars upon which they are usually provided, are in practical use as a part of reasonable railway equipment, and cannot be neglected by the operator with due regard to the general safety, and so we find the defendant's servants instructed in their manipulation, and to keep them closed when the steps are not in use. Obviously, the jury considered that

(1) (1867) L.R. 2 C.P. 631. (2) (1703) 1 Sm. L.C. 6th ed. 177.

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it was unsafe to leave the doors open and unguarded when the train was in motion.

As to the posted notice, forbidding the use of the platform or steps as a place whereon to stand or stay; it is to be observed that, according to the boy's testimony, he was not making use of them for either of these purposes, although, very possibly, he may have had the intention to do so. His several accounts of what happened are inconsistent, and for that reason, along with the other circumstances, I should feel better satisfied if the jury had denied the proof of his case; but what he maintained at the trial was that as he was in the act of passing through the door, which opened from the rear end of the car to the platform, and that, while he had his hand on the knob of the door, he was thrown down by a jolt of the train, and so fell from the steps to the ground. It must, I think, be assumed that the jury adopted this version of the facts, and it was within their province to do so; and assuming that to be right, the boy committed no breach of the regulation, and therefore section 390 of *The Railway Act*, 1919, does not apply to his case.

As to proximate cause, I would not impute any defect to the finding; the plaintiff's' fall to the ground and injury sustained were natural and direct consequences of the open trap-door, and it is not charged that he lost his footing by reason of any contributory negligence.

I would, in these circumstances, maintain the appeal with costs, and direct judgment to be entered pursuant to the findings. The plaintiff should also have the costs of the action and trial and of the provincial appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Arthur Leighton.*

Solicitor for the respondent: *J. E. McMullen.*