REPORTS OF CASES

DETERMINED BY THE

HIGH COURT OF AUSTRALIA

1909-1910.

[HIGH COURT OF AUSTRALIA.]

WILLIAM ROWE . . . . . APPELLANT;
PLAINTIFF,

AND

THE AUSTRALIAN UNITED STEAM NAVIGATION COMPANY, LIMITED . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 28, 29, 30. *May* 10.

Griffith C.J., O'Connor and Isaacs JJ.

New trial—Surprise—Permanent injury—Contract of carriage—Proof of conditions on steamer ticket—Excessive damages.

The statement of claim alleged that the plaintiff was a passenger for reward on a steamer of the defendant company, and that by reason of the negligence of the defendants' servants he received such personal injuries that he suffered great pain, and was for a long time incapacitated from work. The defendants by their defence admitted that the plaintiff was a passenger for reward, but said that it was a term of the contract of carriage that the defendants should not be responsible and should be exempt from liability in respect of any damage which any passenger might suffer by reason of the negligence of the defendants' servants, and denied the negligence alleged. In reply, the plaintiff

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denied knowledge of any such term in the ticket, and said that the defendants did not do what was reasonably necessary to give him notice of the said term.

At the trial, after the close of the plaintiff's case, in the course of which the plaintiff himself and a medical practitioner had given evidence as to the *permanent* nature of the injuries, and after the defendants' case had been opened and several witnesses examined, counsel for defendants asked for an adjournment till next sittings of the Court, which meant a delay of six months, on two grounds :—(1) To enable the defendants to produce the passenger ticket issued to the plaintiff, or to prove its loss, and to give secondary evidence of its terms. (2) To enable the defendants to obtain evidence of the nature and extent of the plaintiff's injuries.

The presiding Judge refused this application, and the jury found a verdict for £1,750.

The defendants appealed on the following grounds :—(*a*) That the defendants were taken by surprise in that defendants believed, and were led to believe by plaintiff, that plaintiff's ticket, being the contract between the parties, was in the possession of plaintiff, in consequence whereof defendants, not having the said ticket at Cairns, were prevented from offering evidence of the conditions endorsed on same. (*b*) That the Judge wrongfully refused to adjourn the trial so as to enable defendants to procure the said ticket. (*c*) That defendants were taken by surprise in that defendants believed, and were led to believe by the statement of claim herein, that plaintiff was not claiming damages for permanent injuries. (*d*) That the Judge wrongfully admitted evidence as to plaintiff's alleged permanent injuries. (*e*) That the Judge wrongfully refused to adjourn the hearing until defendants had an opportunity of having a medical examination made of plaintiff, or of making inquiries as to the alleged permanent injuries. (*f*) That the Judge wrongfully directed the jury to take into consideration the permanent injuries alleged to have been suffered by plaintiff in assessing the damages. And (*g*) That the damages were excessive. The Supreme Court decided in their favour on grounds (*f*) and (*g*), and from this decision the plaintiff appealed.

Held (*O'Connor* and *Isaacs* JJ., *Griffith* C.J. dissenting), that :—(1) The application for adjournment was properly refused : (*a*) Because the words of the statement of claim were capable of being construed as asserting permanency of injury, and having been supported by evidence which was not objected to as inadmissible, the jury were properly directed.

Miles v. *Commercial Banking Co. of Sydney*, 1 C.L.R., 470, distinguished.

(*b*) Because, the pleadings having admitted that plaintiff was a passenger for reward on defendants' steamer, it was not necessary for him to produce the ticket, and plaintiff was in no way responsible for defendants' surprise at discovering it to be in their own possession. (2) The damages were not so excessive that reasonable men with the full facts before their minds could not have reasonably awarded them. (3) Where a party would suffer by an order being made for a new trial such disadvantage as could not be adjusted by an order for costs, the order should not be made when the party asking for it is solely to blame for the position.

Decision of the Supreme Court: *Rowe* v. *Australian United Steam Navigation Co., Ltd.*, 1909 St. R. Qd., 1, reversed.

APPEAL from a decision of the Full Court of Queensland.

By his statement of claim, the plaintiff, who was an engine driver, claimed £2,000 damages in respect of personal injuries sustained by him, whilst he was a passenger for reward on board the defendants' steamship "Aramac."

The statement of claim alleged that, whilst the plaintiff was a passenger as aforesaid on the said steamship, the defendants' servants negligently left open and unguarded part of one of the hatches of the said steamship, whereby the plaintiff fell through the hatchway into the hold, and thereby suffered personal injuries, and that by reason of the said personal injuries the plaintiff suffered great pain and was for a long time incapacitated from work.

The defendants denied negligence on their part, attributed the plaintiff's injuries to his own drunkenness and wilful disregard of the warnings addressed to him, and also pleaded contributory negligence. They further set up a term of the contract under which the plaintiff became a passenger in their steamship, exempting them from all liability in respect of any damage or injury whatsoever to the person of any passenger which might arise or be occasioned by any acts, defaults, or negligence of the defendants' agents or servants of any kind whatsoever.

In reply the plaintiff, whilst not admitting the alleged term of the contract, stated that if there were such a term it was contained in printing on a ticket issued by the defendants, and that the plaintiff did not know that the printing on the said ticket contained the said term, and that the defendants did not do what was reasonably necessary to give the plaintiff notice of the said term.

On the second day of the trial, after the close of the plaintiff's case, in the course of which the plaintiff himself and the medical practitioner who attended him after the accident had given evidence as to the permanency of the injuries, which evidence was not objected to by defendants' counsel, and after the defendants' case had been opened by their counsel, and two

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witnesses had been called on their behalf, the defendants' counsel applied for an adjournment of the trial on two grounds:—First, to enable the defendants to produce the passenger ticket issued to the plaintiff, or to prove its loss, and to give secondary evidence of its terms; and, secondly, to enable the defendants to obtain evidence of the nature and extent of the plaintiff's injuries.

The application for an adjournment, being opposed by the plaintiff's counsel, was refused by the learned Judge.

The jury found that the plaintiff was injured by falling down the hatch into the hold, solely in consequence of the defendants' negligence in leaving the hatch open and unguarded, and without any contributory negligence on the part of the plaintiff, and they assessed the damages at £1,750.

On appeal to the Supreme Court a new trial was granted on the grounds that the damages were excessive and that the Judge had wrongly directed the jury to take into consideration the permanency of the injuries: *Rowe* v. *Australian United Steam Navigation Co., Ltd.* (1).

From this decision the plaintiff now appealed.

Lilley and *E. A. Douglas*, for the appellant. The Full Court really found in the plaintiff's favour on all the points taken by the defendants in their notice of appeal, but evolved a new one —namely, the absence of evidence necessitating any inference of permanent injury—and granted a new trial.

Lukin and *Macgregor*, for the respondents. The defendants are entitled to a new trial on the ground of surprise—non-production of ticket by the plaintiff. It was only on the second day of trial that it was discovered that the ticket was in defendants' possession: see *Broadhead* v. *Marshall* (2); *Jones* v. *Anderson* (3); *Young* v. *Kershaw* (4).

[ISAACS J.—The defendants here, however, did not ask for an affidavit of documents: *Turnbull & Co.* v. *Duval* (5).]

On this point also see *Anderson* v. *George* (6); *Atkins* v. *Owen* (7).

(1) 1909 St. R. Qd., 1.
(2) 2 Bl. W., 955.
(3) 7 N.Z. L.R., 148.
(4) 81 L.T., 531.
(5) (1902) A.C., 429.
(6) 1 Burr., 352.
(7) 4 A. & E., 819.

[GRIFFITH C.J. referred to *White* v. *Great Western Railway Co.* (1); *Kelly* v. *Metropolitan Railway Co.* (2).]

There was abundant evidence from which a jury could conclude that the conditions on the ticket, which was given to him open and not folded up, had been brought to the notice of the plaintiff.

[ISAACS J. referred to *Harris* v. *Perry & Co.* (3).]

The statement of claim did not set up that the plaintiff had been permanently injured.

[O'CONNOR, J.—You really waived this when no objection was made at the trial to the evidence going in: *Browne* v. *Dunn* (4).]

There is nothing to show that defendants' counsel at the trial ever conceded that there was any evidence of permanent injury.

The damages are excessive. [The following cases were referred to:—*Rowley* v. *London and N.W. Railway Co.* (5); *Praed* v. *Graham* (6); *Miles* v. *Commercial Banking Co. of Sydney* (7); *Johnston* v. *Great Western R. Co.* (8); *Warncken* v. *Moreland (R.) & Co.* (9); *Metropolitan Railway Co.* v. *Wright* (10); *Jones* v. *Spencer* (11); *Toronto Railway Co.* v. *King* (12); *Phillips* v. *London and S. W. Railway Co.* (13); *Bennett* v. *Australian Newspaper Co.* (14).]

Lilley in reply. It is not necessary for the plaintiff to put the ticket in evidence, the onus being on the person who wishes to set up the conditions contained in it.

[GRIFFITH C.J.—It is for plaintiff to show the terms of a contract if he wishes to recover on it.]

Counsel for defendants made no objection to evidence of permanent injury being given, and the case was opened for the plaintiff and fought on the assumption that he had been permanently injured. [The following cases were referred to:—*Phillips* v. *London and South Western R. Co.* (13); *Praed* v.

(1) 2 C.B.N.S., 7.
(2) (1895) 1 Q.B., 944.
(3) (1903) 2 K.B., 219.
(4) 6 R., 67.
(5) L.R. 8 Ex., 221.
(6) 24 Q.B.D., 53.
(7) 1 C.L.R., 470.
(8) (1904) 2 K.B., 250.
(9) (1909) 1 K.B., 184.
(10) 11 App. Cas., 152.
(11) 77 L.T., 536.
(12) (1908) A.C., 260.
(13) 5 C.P.D., 280; 5 Q.B.D., 78.
(14) 12 N.S.W. L.R., 141; 15 N.S.W. L.R., 234.

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Graham (1); *Johnston* v. *Great Western R. Co.* (2); *Lambkin* v. *South Eastern R. Co.* (3); *Saunders* v. *London and North Western R. Co.* (4); *White* v. *Great Western R. T. Co.* (5); *Turner* v. *Meryweather* (6); *Boucicault* v. *Boucicault* (7); *Cross* v. *Goode* (8); *Eyre* v. *Highway Board of New Forest Union* (9); *Murray* v. *Munro* (10); *Bell* v. *Thompson* (11); *Caldwell* v. *Johnston* (12); *Ward* v. *Hearne* (13); *Dwyer* v. *Railway Commissioners of N.S.W.* (14); *Tonkin* v. *Jumbunna Coal Mine No Liability* (15); *Britton* v. *South Wales R. Co.* (16). And on the question of costs, *Weak* v. *Calloway* (17); *Chitty's Archbold*, 14th ed., vol. I., 741.]

Cur. adv. vult.

The following judgments were read :—

May 10.

GRIFFITH C.J. This case presents itself to me as one in which the defendants (respondents in the appeal) invoke the rules of ordinary fair play, to which the plaintiff (appellant) replies that by the laches of their counsel in the conduct of the case at the trial they have lost the right to ask for it. The rules of law applicable to the questions actually in issue are free from doubt, but the right of every man to a fair hearing before he is condemned lies at the root of the tree of justice. The relevant facts are in some respects singular, and no decided case has been found which can be said to govern the present. One thing is certain, that a material part of the case which the parties came to try was not tried, and that a case which they did come to try was tried—in both instances to the detriment of the defendants.

The action was for damages for negligence. The statement of claim alleged (par. 3) that the plaintiff was a passenger for reward by the defendants' s.s. "Aramac," (4) that by reason of the negligence of the defendants' servants the plaintiff suffered per-

(1) 24 Q.B.D., 53.
(2) (1904) 2 K.B., 250.
(3) 5 App. Cas., 352.
(4) 2 L.T., 153.
(5) 26 L.J.C.P., 158; 2 C.B.N.S., 7.
(6) 7 C.B., 251.
(7) 4 T.L.R., 195.
(8) 8 N.S.W. L.R., 255.
(9) 8 T.L.R., 648.
(10) 3 C.L.R., 788.
(11) 2 Chitty, 194.
(12) 6 I.R. C.L., 233.
(13) 10 V.L.R. (L.), 163; 6 A.L.T., 49.
(14) 5 C.L.R., 686, at p. 690.
(15) (1906) V.L.R., 41, at p. 65, *per Madden* C.J.
(16) 27 L.J. Ex., 355.
(17) 7 Price, 677; 21 R.R., 780.

sonal injuries, and (5) that "by reason of the said personal injuries the plaintiff suffered great pain and was for a long time incapacitated from work." There was nothing in the statement of claim to suggest permanent disablement.

The defendants admitted that the plaintiff was a passenger for reward on their steamship, and further said that it was a term of the contract mentioned in par. 3 of the statement of claim that the defendants should not be liable for personal injuries to passengers arising through the negligence of their servants.

The allegation in par. 3 of the statement of claim might be taken as meaning either that the defendants' obligations were governed by the common law relating to carriers of passengers, or as alleging the mere fact stated. Under the old system of pleading a plea of a special contract pleaded to a declaration in assumpsit founded on the common law obligation of a carrier was bad on special demurrer, as amounting to the general issue: *Brind* v. *Dale* (1), and the same rule applied if the declaration was framed in tort: *Walker* v. *York & North Midland Railway Co.* (2); *White* v. *Great Western Railway Co.* (3). According to the modern system of pleading the defence in the present case must be read as admitting the bare fact alleged, but denying that the obligation of the defendants was governed by the common law. Upon the pleadings, therefore, it was incumbent on the plaintiff to prove the terms of the contract of carriage, which are put in issue, and if he did not prove them he could not succeed, just as a plaintiff suing upon a *quantum meruit* could not succeed if it appeared in the course of his case that there was a special contract in writing which was not produced. The case of *York, Newcastle and Berwick Railway Co.* v. *Crisp* (4) is to the same effect.

The action came on for trial at Cairns, a town distant 900 miles from Brisbane where the defendants have their head office. The trial began on Thursday, 24th September, and was concluded on Friday the 25th. In the course of the plaintiff's case it appeared that the contract of passage was embodied in a ticket which contained conditions. The ticket was not produced. It

(1) 2 M. & W., 775.
(2) 2 El. & Bl., 750.
(3) 2 C.B.N.S., 7.
(4) 14 C.B., 527.

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also appeared that the plaintiff, who had not at the time of the injury completed the passage to which the contract related, had applied to the defendants' Townsville office for, and had obtained, a refund of part of the fare, and had given back the ticket to the defendants' agents at that town. The ticket was issued at Cairns which is 180 miles from Townsville, and the only means of communication is by sea. It also appeared that the defendants issued over 2,000 tickets a month in Queensland.

The plaintiff called as a witness the person who had issued the ticket, but who was no longer in the defendants' employment. In cross-examination he was shown the form of passage ticket used by the defendants, but said that he was unable to say whether the conditions contained in it were the same as those in the ticket issued to the plaintiff. The defendants' counsel thereupon (as we are informed by counsel at the bar) urged that it was incumbent upon the plaintiff to prove the conditions of the contract of carriage. The point was, in my opinion, as I have already said, well taken. The learned Judge, however, did not accede to it, and counsel, instead of merely insisting upon his right, asked with, perhaps, unnecessary generosity, for an opportunity for the defendants to produce the ticket. Notice to produce it had been given by the defendants to the plaintiff, and also notice to admit a copy, and it was clearly apparent that the defendants had honestly believed that it was not in their possession. The facts which led to their being under this impression were brought to the notice of the Court by affidavit on the motion for a new trial, and I will afterwards refer to them. Before the close of the evidence, however, the ticket was found in the defendants' head office at Brisbane, and their counsel so informed the Court. (This fact was stated and admitted at the bar). I proceed with the narrative of the events at the trial.

The plaintiff's counsel in opening his case said that the plaintiff was "permanently disabled." The defendants' counsel did not then take the objection that no case of damages for permanent disablement was made by the statement of claim. If he had done so, an amendment might or might not have been granted, and could not justly have been granted without giving the defendants an opportunity of meeting the fresh case then made for the first

time. The evidence given for the plaintiff was such as to warrant the inference that he had sustained permanent injury, but not that he was permanently disabled, except in a very qualified sense. None of the evidence was open to objection as going beyond the statement of claim. The defendants had not asked for particulars of the injury, which, indeed, would have been irrelevant on the case made on the pleadings.

The plaintiff's case was closed on Friday morning, and the defendants' counsel thereupon asked for a short adjournment to enable him to consider what course he would take under the unexpected turn which the case had taken on both points. This was refused by the learned Judge, and evidence was given for the defendants as to the circumstances of the accident. Defendants' counsel applied for an opportunity of having the plaintiff examined by a medical practitioner, but the application was objected to by the plaintiff's counsel, and was refused. (This fact appears upon an affidavit filed by the plaintiff on the motion for a new trial).

At the close of the defendants' evidence their counsel asked for a postponement of the trial till the next sittings of the Court in order to give the defendants an opportunity of producing the passage ticket, and obtaining evidence of the nature and extent of the injury complained of. It is suggested that the adjournment asked for was too long. In the ordinary course of post the ticket could have been in Cairns by the following Tuesday morning, and this must have been present to the mind of every one, but counsel did not formally ask for an adjournment till that day.

After the refusal of the plaintiff to submit to be examined, the only evidence which the defendants could possibly obtain as to the nature of the injury was the evidence of medical men at hospitals where the plaintiff had been treated, which were at a distance, one of 180, the other of 280 miles, without railway communication. An adjournment of three days would have been useless for that purpose.

The application was refused. The note made by the learned Judge of his reasons for refusing the application is as follows :— "I refuse to postpone trial. On the first ground. Not shown that the defendants made any attempt to discover the ticket. It

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was in their possession since May 1907, and should have been easily found, or if lost secondary evidence obtainable. On the second ground. On the ground that the defendants have made no attempt until to-day to obtain any such evidence."

As to the first ground it is to be remarked that it was apparent that the defendants' advisers did not know until the trial was proceeding that the ticket had been given up to them. Whether they ought to have known is another question, which depends upon facts disclosed by affidavits which were not before the learned Judge.

Moreover, it seems a strange thing that a defendant who, instead of insisting upon his right to a nonsuit (already asserted), asked for an adjournment for the purpose of enabling him to supply a fatal defect in the plaintiff's case should be treated as estopped by his own generosity from claiming his manifest rights. On this point, the defendants' request was refused because they did not ask enough.

As to the reason for rejecting the second ground, it seems to me to be a mere mockery to tell a party on whom a case is sprung for the first time on Thursday that he made no attempt until Friday to obtain any evidence to meet it. It is now suggested that the adjournment asked for was too long, and that the application was properly refused because the defendants asked for too much.

My conclusion as to this part of the case is that the defendants were entitled *ex debito justitiæ* either to a nonsuit, or, if they did not press for that, to an adjournment of the trial, unless they had by the laches of their counsel in the conduct of the case forfeited the right. As Lord *Halsbury* L.C. said in *Neville (Lord William)* v. *Fine Art and General Insurance Co.* (1) a party cannot lie by at the trial and allow an issue to be fought and decided, and afterwards take an objection to the decision. But this rule has no application where the objection is taken during the progress of the trial.

The case was accordingly left to the jury, who found a verdict for the plaintiff with £1,750 damages. It appeared from the plaintiff's evidence that he was an engine driver, 52 years of age,

(1) (1897) A.C. 68 at p. 76.

who when in work earned £3 10s. a week. At the time of the accident he was apparently out of work, and had taken a passage to a new mineral field where he might or might not have obtained it. The injury was occasioned by falling down the hold of the ship late in the evening when he was half tipsy. The damages awarded represented the present value of an annuity of £123 per annum for his whole expectation of life—not his working life only. Allowing, say, £500 for compensation for pain and suffering, past and future, they represent an annuity of £90 per annum for his whole expectation of life.

The defendants applied for a new trial on the grounds of (1) surprise with regard to the ticket, (2) the refusal of the learned Judge to grant an adjournment of the trial, and (3) excessive damages. On the first ground they adduced evidence to show that they had caused diligent search to be made in the places where the ticket, if it had come into their possession, might be expected to be, but had not been able to find it until 25th September, when it was found amongst vouchers for refunds allowed to passengers who had not completed their full passage. They also gave evidence to show that their solicitors had on more than one occasion asked the plaintiff's solicitors for information as to where the ticket was, and that nothing was said by the latter to suggest that the ticket had been given up to the defendants.

On the second point evidence was given by affidavit that on the day after the trial the medical practitioner who had deposed to the nature of the plaintiff's injuries informed the defendants' counsel that the injuries were not necessarily permanent, but might probably be cured by a surgical operation. That gentleman made an affidavit in reply, in which he said that the conversation occurred on the evening of the first day of the trial. If this was so, it is incomprehensible that the defendant's counsel, a gentleman of long experience and high reputation, should not have asked that the witness might be recalled for further cross-examination.

I think the probability is that the conversation took place after and not during the trial.

The Full Court did not express any decided opinion on the

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first ground taken. They thought that there was nothing in the second, but thought that the evidence did not necessitate the inference of permanent injury, (by which I understand them to mean permanent disablement), and directed a new trial limited to the issue as to the ticket and assessment of damages.

The principles on which a new trial will be granted on the ground of the discovery of evidence after the trial are well settled. If the non-discovery of the evidence is due to the party's own default or carelessness a new trial will not be granted. In the present case one of the issues which the parties came to try was as to the terms of the contract. As I have already said, it was in my opinion incumbent upon the plaintiff to prove them. The defendants, instead of merely pressing the objection in that form, asked for themselves an opportunity of proving them. Thus regarded, the case is analogous to that of a document having been pleaded which one party honestly and on reasonable grounds believes to be in the possession of the other, to whom they have given notice to produce it, but which is unexpectedly found in his own possession during the trial, but under such circumstances that it cannot be produced at the moment. If such a difficulty arose with regard to a plaintiff's case, the worst that could happen to him would be to be nonsuited if the Court did not grant an adjournment. Why should a different rule be applied to a defendant? I can see no reason for such a distinction, unless the proceedings in a Court of Justice are to be regarded as a game of mixed skill and chance, in which the prize goes to the most efficient player and not according to the very right of the case. Complete justice can be done in such a case by indemnifying the temporarily successful party against the costs which have been thrown away.

In my opinion the mistake which the defendants made in not sooner discovering the passage ticket is not under the circumstances such as to disentitle them to set up the defence founded on the conditions of the contract, and in any view the penalty of being deprived of the opportunity of setting up that defence is disproportionate to the offence. On this ground, therefore, if there were no more in the case, I think that a new trial should

be granted on payment of the costs of the first trial and of the motion.

As to the second ground, I have already expressed my opinion that the claim for damages for permanent disablement was sprung upon the defendants at the trial, and that the refusal to give them an opportunity of meeting it, even apart from the discovery of new evidence after the trial, was a denial of justice.

With regard to the third ground the case is perhaps upon the border line. The rule for determining the measure of damages is well settled: *Rowley* v. *London and North Western Railway Co.* (1). The jury ought to have had regard to the probable duration of the plaintiff's working life, and to his probable future earnings, and to their diminution by reason of his partial incapacity, and were not entitled to award damages in the nature of complete pecuniary compensation even after making that allowance. Upon a review of all the facts it seems to me that they have not only done so, but have estimated them on the basis of complete permanent disablement from work, which was not established by the evidence.

For all these reasons I think that the defendants are entitled to a new trial as of right. But, even if they are not, I think that the Court ought in the exercise of its discretion to grant a new trial upon terms, which might be such as to do full justice to the plaintiff, although for the reasons already stated they would not, in my opinion, do full justice to the defendants.

O'CONNOR J. This case was heard at the Circuit Court, Cairns, before *Chubb* J. and a jury on the 24th and 25th of September last, and resulted in a verdict for the plaintiff of £1,750. The Supreme Court ordered a new trial on one out of the seven grounds of application, namely, that the Judge had wrongfully directed the jury to take into consideration in assessing damages the permanent injuries alleged to have been suffered by the plaintiff. From that order the plaintiff has now appealed, and the defendants in the argument before this Court contended not only that the order was right as made, but that it ought to have been granted, and may now be supported on each of the other grounds of the application.

(1) L.R. 8 Ex., 221.

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In face of the evidence given at the trial, the order of the Supreme Court granting the new trial cannot in my opinion be supported. The plaintiff swears that ever since the accident he has suffered, that he is never rid of the pain, that up to the accident he always had constant work, that since the accident he has not done any work, that he is not likely to do any work, and that he is permanently lame. Dr. Tyrie, who had attended the plaintiff immediately after the accident eighteen months before, gave evidence that he found, on examining him three days before the trial, the knee fixed, not bendable either way to the full extent, the ankle joint also stiff, and a certain amount of paralysis of the muscles of the foot. He goes on to explain that in the case of a man suffering from such an injury his general labour value is according to medical authorities depreciated 50 per cent. He further says:—"I would not now pass plaintiff as a qualified engine driver. He would have to pick his work." There is no fact or circumstance proved in the case which cuts down the effect of this evidence. The learned Judges state that it contains nothing which necessitates the inference that the injuries are permanent, but they advance no reasoning in support of that opinion. It appears plain to me on the other hand that the evidence as it stands does fairly lead to the conclusion that the injuries are permanent and to no other conclusion, and that having regard especially to the way in which the case was conducted on both sides the learned Judge was justified in putting it to the jury as one of permanent injury. It follows that in my opinion the order for a new trial because of misdirection in that respect cannot stand. The grounds having relation to the circumstances dealt with in the affidavits, I shall consider later on.

I proceed now to the question whether the damages awarded are excessive. There can be no doubt as to the rule to be followed by a Court of Appeal in reviewing a jury's finding on damages. Out of the many decisions cited I shall quote from one which appears to me to lay down the principle in language most appropriated to the circumstances now under consideration. But before doing so I would point out that no exception has been taken to the learned Judge's direction to the jury, except in regard to the

evidence of permanent damage which I have already dealt with. Nor is there anything to indicate that in arriving at the amount of their verdict the jury gave effect to any consideration that was not properly admissible. The only question for consideration is whether the verdict is so excessive in amount that the Court ought to set it aside. In *Johnston* v. *Great Western Railway Co.* (1) *Vaughan Williams* L.J., after pointing out that Lord *Esher's* statement of the law in *Praed* v. *Graham* (2) must be read in the light of the other decisions on the subject, says:— "But I repeat that, in my judgment, if the only matter which can be urged against the verdict is the overestimate of the damages, then the rule laid down by Lord *Esher* M.R. should govern our decision, and there is nothing, so far as I can see, in any other decision of the Court of Appeal which at all impugns what I have just said." Now the rule laid down by Lord *Esher* M.R. in *Praed* v. *Graham* (3) is thus expressed: "I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only: 'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,' then they ought not to interfere with the verdict." If one looks merely at the alleged overestimate of the damages in the present case, I am not prepared to say that the damages are so large that twelve sensible men could not reasonably have given them.

That puts the test in a very few words: "Are the damages so large that a jury of sensible men could not reasonably have given them." The first question that arises in applying that test is: What are the heads of damage which a jury must take into consideration. In the leading authority on this aspect of damages, *Phillips* v. *South Western Railway Co.* (4), *Cockburn* C.J. uses these words: "But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a

(1) (1904) 2 K.B., 250, at p. 250.
(2) 24 Q.B.D., 53.
(3) 24 Q.B.D., 53, at p. 55.
(4) 4 Q.B.D., 406, at p. 407.

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plaintiff complaining of personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict."

The plaintiff when in full work earned £182 a year. On that basis, which it was open to the jury to adopt, his actual loss of earnings up to the time of the trial would be £274. Mr. *Lilley* contended that for pain and suffering at the time of and since the injury, and in the time to come for so long as pain and inconvenience are likely to last, a sum of £500 would not be an unreasonably large compensation. On such a calculation that would leave not more than £1,000 to make up to the plaintiff for the decrease in earning power for the rest of his life which his permanently crippled condition would necessarily entail. There is nothing unreasonable in that view. The amount awarded is no doubt full and liberal; it is probably more than would be allowed by this Court if it were charged with the responsibility of awarding the damages in the first instance. But can it be said that the amount is so large that a jury of sensible men could not reasonably have awarded it? There is no evidence from which this Court can gather the extent to which the plaintiff's ordinary powers of movement have been affected; the jury have had the advantage of seeing him and judging for themselves to what extent his crippled condition will interfere not only with his capacity of doing his work, but with the likelihood of his getting work. A man in search of employment at 52, even if his limbs and health are perfect, begins to feel the competition of the younger men who will eventually drive him

off the field. To what extent that stage has been hastened in the plaintiff's case?—How far his lameness will diminish his chance of employment in his own business?—How long it will be before he drops into the ever crowded ranks of those who have to live by casual employment?—These are aspects of the plaintiff's future of which it is impossible that this Court can form as accurate a forecast as the jury who have seen him and heard him give evidence. In a case like this, where the amount is so near the border line between what may be or may not be excessive, I find myself forced to the conclusion that the Court would run a grave risk of doing injustice if it were to send the case back for the consideration of another jury on the ground that the amount of damages was such as sensible men with these considerations before their minds could not have reasonably awarded.

I turn now to the grounds arising out of the circumstances set forth in the affidavits. They may all be stated substantially in one, namely, that certain occurrences at the trial, which the defendants could not reasonably be expected to have anticipated, took them by surprise and prevented them from putting their whole case before the jury, and they appeal now to the discretion of the Court in the control of its process for an opportunity of putting their case before another jury. It may be taken as a general principle that the Court will on a fitting occasion interfere with the usual course of procedure in order that all the issues raised between the partes shall be fully and fairly tried. But it will not do so in the case of a judgment obtained in the ordinary course regularly and in good faith unless satisfied that it can interfere without injustice to the party who has obtained it. Where the ground of the application is surprise the Court will as a matter of course grant a new trial if the applicant has been deceived by some unfair dealing of the other party. Even where there has been no unfairness in the other party, but his conduct has been such that the applicant may well have been misled by it and thrown off his guard, the Court will generally interfere, adjusting the position of the parties as fairly as possible by its order. But where a party has fairly and regularly obtained a judgment in accordance with the ordinary procedure, is not to

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blame for the original surprise, and has acted reasonably when the surprise has come upon his opponent, the Court will seldom grant a new trial, and then only, when it is satisfied that by imposing conditions as to costs and otherwise it can so adjust the position that the party who has obtained the verdict shall not be unfairly prejudiced.

Turning now to the facts, on which the Court has had the advantage of obtaining information from the counsel on both sides on points left doubtful by the Judge's notes and the affidavits, it appears that the defendants have put forward two grounds of surprise. First, that which relates to the passenger ticket. The defendants have in my opinion entirely failed to prove that they were misled by the plaintiff's solicitor before the trial into believing that the plaintiff had the ticket in his possession. On the contrary, it is clear that on two occasions he told them that he had not got it and did not know where it was. Nor was there anything in the pleadings which should have led the defendants to suppose that the plaintiff would be bound to produce the ticket or give secondary evidence of its contents in his case in chief. The third paragraph of the statement of claim alleges that the plaintiff was carried by the defendants as a passenger for reward on one of their steamers. On the contract implied from that relation of carrier and passenger the law infers the duty, failure in the discharge of which is the negligence complained of. The statement of defence admits that the plaintiff was carried by them as a passenger for reward on one of their steamers but avers that the contract arising from that circumstance was subject to a certain condition. On those pleadings it is, I think, clear that the plaintiff could prove his case without production of the ticket, and that the onus of establishing the condition was on the defendants. This, indeed, was apparently the view taken by all parties at the trial. The contrary view, if sustainable, would have entitled the defendants to a nonsuit. But their counsel, although contending that the plaintiff ought to produce the ticket, does not seem to have thought enough of the point to press it as ground for a nonsuit. I have been unable to see what bearing *White* v. *Great Western Railway Co.* (1) and

(1) 2 C.B. N.S., 7.

Latham v. *Rutley* (1) have on the point. They were both cases of variance under the old system of pleading, and I am certainly not satisfied that that aspect of the pleadings was ever present to the minds of the defendants' legal adviser, or that it could have in any way affected his expectation as to the production of the ticket at the trial. The information before us leads me to the conclusion that the defendants ought to have concluded that the ticket was not in the plaintiff's possession, and that they believed it not to be in their own possession. Under these circumstances their plain duty was to be prepared to prove it by secondary evidence. It is apparent from Mr. Jameson's telegraphic reply to the inquiries of this Court that he was relying on Reynolds to give the secondary evidence. That witness had been subpœnaed by the defendants as well as the plaintiff. It is not alleged that there was any difficulty in their obtaining from him what he knew of the matter before the trial began, or that they were in any way misled into supposing that he would be able to give secondary evidence of the contents of the ticket. Yet they appeared to have subpœnaed no other witness on that point, nor do they appear to have made any preparation of their own for putting the secondary evidence before the jury. When Mrs. Sandilands gave her evidence they heard apparently for the first time of the refund made on the ticket by the Townsville office. Then followed the real surprise, namely, the discovery of the ticket in their own possession, but at so distant a place that it was impossible to have it in Court before the end of the trial if the procedure were to follow the ordinary course, the defendants being thus prevented from either producing the original document, or in strict law from giving secondary evidence of its contents. The primary cause of the difficulty was the inadvertence of one of the defendants' clerks in attaching the ticket to the wrong bundle of documents. That might not of itself disentitle them to the relief they are now seeking. But however that may be, it is to my mind clear that the plaintiff is in no way to blame for what had occurred. Under these circumstances what course ought the defendants to have pursued ? Surely, to obtain and tender in the first place secondary evidence of the

(1) 2 B. & C., 20.

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ticket. The tickets are printed in hundreds, and one cannot imagine any difficulty in obtaining such evidence from or through the defendants' office in Cairns. If the plaintiff objected, an application for a reasonable adjournment to enable the original ticket, then on its way from Brisbane, to be produced, would have naturally followed, and it is extremely improbable that it would have been refused. The defendants, however, did not take that course, but having waited until all the evidence on both sides had closed, made this one of their grounds for an application for postponement to the next Cairns Circuit Court, in other words, for a postponement of the trial for six months to enable a ticket to be produced which was then on its way to Cairns by post, or to give the secondary evidence of its contents, which might have been obtained in the course of a few hours. The learned Judge, however, with a knowledge of all the facts and a more intimate acquaintance with the surrounding circumstances than this Court can now obtain, very properly refused the application on this as well as on the other ground. The case went on. The plaintiff had a verdict, and the defendants, on substantially the same material as that which the learned Judge had before him on the application for a postponement, have made the application to the Supreme Court, which is now under consideration.

I turn now to the second ground of surprise — that the plaintiff and his witnesses unexpectedly gave evidence of permanent injury. The statement of claim did not, in my opinion, claim for permanent injuries. And although the contrary view is arguable and was indeed held by the Supreme Court, I shall assume that the defendants were justified in believing when they came into Court that on the pleadings as they stood no evidence of permanent injury could be given. The case lasted, we are told, a day and a half. The evidence of the first witness, Dr. Tyrie, was, as I have already pointed out, clearly evidence of permanent injury. No objection thereto was made by the defendants, and from that time on the Judge and both parties apparently treated the question of permanent injury, as the Supreme Court have pointed out, as one of the issues in the case. In reference to this ground also the question must be asked—Did the defendants

act reasonably when the surprise first came upon them? They requested the plaintiff apparently on the first day of the trial to permit himself to be examined by another doctor. He refused. On that the defendants' counsel appears to have suggested to the Judge that the defendants should be allowed some little time to consider the position, but he did not then make any application for postponement. The Judge intimated that the case must go on in the ordinary way. It may well be taken for granted until the contrary is shown that in a town like Cairns there were other competent medical men besides Dr. Tyrie. Yet, during the whole trial the defendants appear to have taken no steps to secure the attendance of a medical witness on their behalf, or to place before the jury any evidence of the plaintiff's condition in answer to that given by Dr. Tyrie. The only step taken by them to meet the evidence, which it is alleged took them by surprise when given by the first witness on the first day of the trial, was the application for the wholly unreasonable adjournment to which I have already referred in which this was made the other ground.

The learned Judge's reasons for refusing the application refer to both grounds, and they commend themselves to me as being entirely supported by the investigation which the circumstances of the trial have since undergone in the Supreme Court and in this Court. An adjournment for the few days necessary to ensure the production of the original ticket would have given ample time for a full presentation of the defendants' case, both as to the conditions under which the plaintiff was carried and as to the nature of his injuries. No tangible reason to the contrary has been advanced. But the defendants applied for something more than was reasonable, and there appears to have been no suggestion on their part that any shorter adjournment than that asked for would satisfy their requirements. They have therefore no one but themselves to blame for the present position. Under these circumstances I entirely concur in the views expressed by the Supreme Court as to the grounds of surprise. It is difficult to see how any other view of the facts could be taken in fairness to the plaintiff. At the time of the original trial, when both parties and their witnesses were present, a reasonable adjourn-

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ment would have enabled the defendants to present their full case to the jury without any disadvantage to the plaintiff which could not be adjusted by an order for costs. But it would now be impossible to so adjust the disadvantage to the plaintiff in having to prepare his case anew for another trial. He must in his crippled condition find work where he can, temporary or permanent as it is available. To put him now in the position of having to so order his employment and living so as to be ready with his witnesses and legal advisers for another trial in some months time would be to alter his position in a way for which no order as to costs could be an adequate compensation. Having in view all these considerations I agree with the conclusions of the Supreme Court on the grounds of surprise, and on the whole case I am of opinion that the appeal must be allowed and the order of the Supreme Court granting a new trial set aside.

ISAACS J. The Supreme Court of Queensland granted a new trial upon one ground only, namely, that the presiding Judge directed the jury to assess the damages on the footing that permanent injury had been proved; that although everyone in any way connected with the case inferred that was correct, yet the inference was in fact inaccurate; and that the jury were thereby misled as to the proper measure of damages. The Court held on the authority of *Miles* v. *Commercial Banking Co. of Sydney* (1) that, although no exception was taken to the direction given by the learned Judge to the jury, the verdict must nevertheless be set aside.

Although the only ground for disturbing the verdict related to the question of damages, the Court ordered a further issue to be tried, namely, as to liability under the conditions printed on the ticket, which I think would be reasonable if a new trial were awarded at all, since that issue had not been determined by the jury.

The plaintiff challenged the reasons given by the learned Judges of the Supreme Court for granting a new trial. I am of opinion the plaintiff's contention is sound, and on two grounds.

The first is this: that evidence of a very distinct character was

(1) 1 C.L.R., 470, at p. 478.

in fact given of permanent injury. The plaintiff himself said "Not done any work since the accident. Not likely to. I am permanently lame." Dr. Tyrie, after describing the injuries as observable on the night of the accident, 16th March 1907, stated that he examined the plaintiff on 21st September 1908, three days before the trial and 18 months after the occurrence. He then found the knee fixed and not bendable either way to full extent, a stiff ankle joint and some paralysis in the muscles of the foot. He also deposed that the medical authorities concur in saying that where a man suffered such an injury his general value is depreciated as a qualified engine driver, he would have to pick his work, that he *might* be able to drive a mining or stationary engine, but not with safety in an emergency.

Some of that evidence expressly pointed to, and all of it naturally and reasonably supported a case of a permanent injury.

But the case for the plaintiff does not rest there.

Learned counsel on both sides fought the case on the basis that the evidence was directed to establish, and was susceptible to the inference of, permanent injury. It was indicated by plaintiff's counsel in his opening address that he would direct evidence to prove the plaintiff was permanently disabled. No objection was made to this, no suggestion offered that it took the defendants by surprise, and it is admitted that even after the trial defendants' counsel so understood the testimony of the doctor. It is undoubtedly the duty of the presiding Judge to properly direct the jury as to the true measure of damages, but that is quite a distinct question from telling them that evidence of a certain fact has been given. The first is a matter of law as to which the jury need instruction, whether the point is taken or not: *Knight* v. *Egerton* (1); the second is a matter of fact simply, and if the learned Judge with the deliberate concurrence or acquiescence of a party states a certain view of the facts as indicated by the evidence, and everyone proceeds upon the assumption that that view correctly represents the truth, it is, after verdict given, too late for the party so concurring or acquiescing to draw back, and demand a new trial on the ground of his own mistake. The observations of the learned Chief Justice in *Miles* v. *Commercial*

(1) 7 Ex., 407.

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Banking Co. of Sydney (1) were plainly directed to a matter of law, namely, the proper measure of damages, not the evidence actually given on that issue.

There are possible exceptions to every rule, and if what Lord *Morris* in *Seaton* v. *Burnand* (2) calls "some extraordinary miscarriage of justice" takes place, the Court would doubtless endeavour to find some way of avoiding it, by providing such compensation as was possible without creating the risk of some other miscarriage of justice. But it is a sound general principle, leading not only to the maintenance of fair play, but also to the repression of unnecessary litigation, that parties must be bound by the course they deliberately adopt at the trial. Besides *Seaton's Case* (3), the House of Lords has more than once insisted on the observance of the rule, as in *Nevill's Case* (4) and *Browne* v. *Dunn* (5). In the latter case Lord *Halsbury* makes some observations so apposite to this and another branch of this appeal and of such general application that I quote them freely :—"My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions, I think it raises a question as to the conduct of the trial itself, and the position in which people are placed, when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined, they come afterwards and strive to raise totally different questions, because, upon the evidence, it might have been open to the parties to raise those other questions.

"My Lords, it is one of the most familiar principles in the conduct of causes at *nisi prius*, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think Dr. *Blake Odgers* has, with great candour, produced the authority of *Martin* v. *Great Northern Railway* (6), which lays down what appears

(1) 1 C.L.R., 470.
(2) (1900) A.C., 135, at p. 145.
(3) (1900) A.C., 135.
(4) (1897) A.C., 68, at p. 76.
(5) 6 R., 67, at p. 75.
(6) 16 C.B., 179.

to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you on the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it."

Now here the defendants did not ask the jury to say that the proper inference from the evidence was that the injuries were not permanent, or contend that such an inference was impossible from the facts deposed to, or that the issue was not open. Any one of those objections might, and probably would have been met either by a corrected direction if the direction needed correction, or by an amendment of the pleadings, or by recalling a witness there and then if any ambiguity were thought to exist in his testimony. But none of these courses was taken, and the ordinary consequence insisted on in the cases I have referred to must follow, that the defendants must abide by the result of their own action or inaction at the proper time.

As far then as the ground taken up by the Supreme Court is concerned it appears to me untenable. Mr. *Lukin* then endeavoured to retain his grant of a new trial upon other grounds. I feel compelled to say that he presented his arguments on this part of the case in a manner which left untouched no possible phase that could be of advantage to his client. Nevertheless I am of opinion the defendants have failed to make good the position.

The contentions may be succinctly stated as being, in effect, that the learned presiding Judge wrongly exercised his discretion in refusing an adjournment to enable the defendants to procure evidence as to the ticket and as to permanency of the plaintiff's injuries; and next that the damages were excessive.

As to the first, the Supreme Court came to a conclusion adverse to Mr. *Lukin's* clients. The learned Chief Justice said (1): "We are disposed to think that the application at that late stage of the proceedings to have the trial on circuit adjourned to enable evidence to be procured of the terms printed on the ticket was unreasonable, and that the learned Judge was justified in refusing it." And later his Honor said: "We think that the application

(1) 1909 St. R. Qd., 1, at pp. 14, 15.

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for an adjournment of the trial for the purpose of enabling the defendants to obtain further evidence as to the nature and extent of the plaintiff's injuries was rightly refused."

As to the damages being excessive, their Honors upon the whole, but for the ground already adverted to upon which they rested their decision, stated that they would have felt great difficulty in holding that the verdict was such as no jury could have reasonably given.

So that the defendants come to this Court to review a determination upon a question of discretion, exercised by the Judge at the trial and supported by the Full Court, and to declare improper the amount of damages found by the jury, of which there is no exact measure, and as to which the Full Court is on the whole against the defendants. Now the task is on the face of it a very heavy one—not impossible, but extremely onerous.

In *In re Martin* ; *Hunt* v. *Chambers* (1), *Cotton* L.J. said : " The Court of Appeal should be exceedingly slow to interfere with the exercise of discretion by the Judge in the Court below ; not that the exercise of discretion is not appealable, but that when the discretion has been exercised on proper lines, that is, exercised in accordance with the rule laid down as to the exercise of discretion either by Act of Parliament or by the orders—when discretion has been exercised in that way, the Court of Appeal is very slow to interfere." If a case is presented where interference is plainly necessary to prevent a clear injustice, and nothing is shown to countervail it, a Court of Appeal would not hesitate to intervene even though the necessity is caused by the inadvertence of the party invoking the intervention. But nothing of that kind appears to me to exist here.

The form of the pleadings has been referred to both with regard to the ticket and the evidence as to permanency of injury.

The statement of claim alleged in paragraph 3 that the plaintiff was a passenger for reward on the steamship " Aramac " : and in paragraph 4 that while a passenger as aforesaid the defendants' servants negligently left open and unguarded one of the hatches whereby the plaintiff fell into the hold and suffered personal injuries. Paragraph 5 stated by reason of the said personal

(1) 20 Ch. D., 365, at p. 373.

injuries the plaintiff suffered great pain, and was for a long time incapacitated from work. The defendants admit paragraph 3 so that no evidence at all was necessary on the plaintiff's part to establish the relation of carrier and passenger for reward. He was not called upon, so far as the pleadings were concerned, to prove any contract, and his allegations are consistent with either an ordinary or a special contract of carriage. Nor were the defendants at liberty contrary to their express admission to substantively deny that a contract of carriage existed. I can see no concession on the defendants' part at the trial in not asking for a nonsuit, which would have been wrong. From the facts admitted on the pleadings the law implied an obligation to use all reasonable care in carrying the plaintiff unless the defendants succeeded in proving the contrary. All that the plaintiff on his own case had to do was to prove negligence and damage. The defendants, however, besides putting these in issue, set up affirmatively two allegations either of which if true would disentitle the plaintiff to succeed, first contributory negligence (which is now immaterial), and next that the contract included a special condition of exemption from liability. The burden of proving that special condition of the agreement of course rested on the defendants, and in view of the admissions on the pleadings the defendants were bound to be prepared with the necessary evidence either by way of admission or regular proof in order to get rid of the legal presumption otherwise arising. This was elementary, and was fully appreciated by the solicitors of the defendants.

One circumstance must be remembered in favour of the defendants. Some of the evidence, explanatory of the defendants' omission to sufficiently prepare for the necessary proof, was not before the learned primary Judge, and so the Full Court had additional means of reconsidering the position. But that tribunal, giving full weight to all the circumstances, nevertheless indicated its opinion as already stated. We have nothing new to guide us. The material facts as to this portion of the case are that on 11th September, nearly a fortnight before the trial, notice to produce the original ticket was given by defendants' solicitors to plaintiff's solicitors, and on the same day a separate notice to admit a orm of ticket was given. Defendants apparently went into Court

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prepared with notice to produce the original, if plaintiff still had it; and with proof of unavailing search if they had had it and lost it, and a form of ticket as secondary evidence. So far as it went, this was admirable. But circumstances rendered it impossible to adduce secondary evidence. Before the defendants' case was opened there was proof that the original was the subject of a refund by the defendants, and was probably or possibly in a department yet unexamined. Its loss, therefore, was not then provable. But the plaintiff was not to blame for the defendants' omission to search in that department. He had, as he swears, actually given up the ticket to the fore-cabin steward of the "Aramac" when he went on board, and had never seen it afterwards. This was on 16th March. Mr. Barnett's affidavit of 5th October 1908, as to the surrender of the ticket on 13th May, appears to be based on inaccurate information. On 13th May a refund was allowed in respect of the unused portion, Townsville to Gladstone, upon a written request of the plaintiff, but the ticket was not then surrendered. Mrs. Sandilands says:—"There was a refund made to the plaintiff on his ticket. I got the money in Townsville at defendants' office on plaintiff's order, £1 15s. Plaintiff did not give me any ticket to give them. I got the money seven weeks afterwards on my return from Rosedale. They did not ask for the ticket." So that it had been surrendered nearly two months before the refund; in all probability returned to the Brisbane office, and put away in its ordinary place (see Mr. Johnson's affidavit). Then says Mr. Stahlschmidt it was—and apparently shortly after 13th May—inadvertently put away in the accountant's department, instead of being handed over to him as the officer in charge of the personal accident correspondence. This at once suggests—rightly or wrongly—that at the time the ticket was put away, the head office had some knowledge that the purchaser of the ticket had sustained an accident. This was by no means improbable, and the order of the plaintiff dated 13th May upon which the refund was made described him in an illiterate way as still being in the hospital, so that a claim was not unlikely. The inference I draw from Mr. Stahlschmidt's affidavit is that with the knowledge then in the company's possession the ticket ought in the

ordinary course to have been handed to him to be kept in connection with the accident papers, but by inadvertence was wrongly sent to the accountant's branch. That was error number one. The plaintiff, having personally delivered up the ticket before the accident, cannot be brought into the defendants' difficulty. Mr. Wilson's statement to Mr. Barnett was perfectly true, and in no way misleading. Mr. Wilson was under no obligation to do more; he was not even requested to. His case did not require production of the ticket, and both parties knew that. His reply therefore ought, if anything, to have stimulated the defendants' advisers to require an affidavit of discovery, which would have tested the plaintiff's personal possession of the ticket, and have, at all events, compelled him to state what he had done with it. This is the very object of the provision for that affidavit, and although such a document is sometimes unnecessarily required, this was manifestly a case in which the expedient might have been most advantageously adopted, and would have avoided the whole difficulty. That was error number two.

It was moreover an error which brings the case within the decision of *Turnbull & Co.* v. *Duval* (1). There the Privy Council said:—"A new trial ought never to be lightly granted. No case of fraud or surprise is made out. Inability to obtain knowledge of the document before the trial is negatived by the fact that Mrs. Duval or her solicitor had it, or a copy of it, and no application for discovery was made by the appellants."

Similarly here, as already observed, inability to obtain knowledge of the document before the trial is negatived by the fact that the plaintiff, if an affidavit of documents had been required, would have put the defendants on the proper track, and at once have led them to their own accountant's department. Fraud is not in question. "Surprise" has been suggested, but not surprise in the sense accepted for the purpose. As *Palles* C.B. said in *Dillon* v. *City of Cork Co.* (2):—"To constitute 'surprise,' a case must be made which the opposite party could not reasonably have been expected to meet." Here the existence of the condition was the case raised by the defendants themselves, and although their legal advisers may have been in a sense surprised at hear-

(1) (1902) A.C., 429, at p. 436. (2) 9 I.R., C.L., 118, at p. 122.

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ing the evidence as to return of the ticket that was not "surprise" in the sense necessary for a new trial.

There was no fact unexpectedly contested either as a principal or a subsidiary issue, it was merely the unlooked for appearance of a circumstance which the defendants ought to have provided for, and but for their own "inadvertence" would in the ordinary course have guarded against. A case presenting some features of similarity is *Austin* v. *Evans* (1), where a clerk in a public office was served with a subpœna *duces tecum* to produce a document. No information was given that it would not be produced, but the plaintiff had omitted to apply to the head of the office for permission to produce the document, and it was not produced. Having been nonsuited the plaintiff applied for a new trial on the ground of surprise. It was refused, *Tindal* C.J. saying:—"Upon the ground of surprise, the plaintiffs are not entitled to be relieved against the nonsuit recorded against them, inasmuch as they do not show that all necessary care was taken by them to secure the production of the accounts."

When the facts sworn to at the trial traced the ticket to the defendants' possession, and the defendants had not searched in the accountant's department, it was impossible, without further unavailing search, and the presence of the searcher in Court, to prove the loss of the document. No copy of the ticket was tendered and no request was made at the trial to admit a copy by consent. The witness Reynold's inability to prove the verbal identity of the form produced and the ticket issued appears to have paralysed the arrangements of the defence. Reynolds was subpœnaed by both sides, but does not seem to have been definitely asked as to this before going into the box, and so in this respect, as well as with regard to the production of the original ticket, too much trust was reposed on the chance of events which—perhaps unfortunately for the defendants—did not happen as the probabilities suggested. That, however, was the defendants' responsibility. Accepting the most favourable suggestion made on their behalf as to the course taken by the defendants' counsel at the trial, he urged that in view of Reynold's evidence, the plaintiff's counsel should prove the con-

(1) 2 M. & G., 430, at p. 432.

tract by producing the ticket—a contention quite unsupportable upon the pleadings. He also said on the first day he might make an application for an adjournment—apparently to give him time to consider what to do—and eventually he decided to make a formal application for a postponement of the trial for six months. This latter was the only one that the learned Judge had to deal with, whatever had previously taken place this was the real application on behalf of the defendants. There were two grounds on which it was asked, both of which appear to have determined the defendants' counsel, after full consideration, to require the six months *postponement*—not a temporary adjournment. One ground was to produce the ticket or give evidence of loss and secondary evidence ; Mr. Jamieson's telegram of 4th May 1909 produced to the Court stated :—" I applied for postponement trial in order to produce ticket or give secondary evidence in event of it being lost or destroyed." Although it was conceded in argument before us that at some point or other of the trial the learned Judge was told the ticket had been found, defendants' counsel preferred in making the informal application not to assume that absolutely. The other reason was to obtain evidence—that is to search for evidence—as to the nature and extent of the plaintiff's injury complained of. It is observable that no suggestion of surprise as to permanency of injury was made, merely a recognized deficiency or weakness of evidence. The learned Judge refused to " postpone " the trial. That would have involved discharging the jury after all the evidence was closed, when not merely the plaintiff's brief, but his mind and the minds of his witnesses had been probed, and when one avowed object, necessitating probably more than a slight adjournment, and requiring, as the defendants thought and proposed, a lengthened postponement, namely, to look for evidence as to the plaintiff's injuries " complained of," an expression inconsistent with surprise. It would have meant compelling the plaintiff to remain at Cairns until the next sittings, or to return to Cairns, however circumstances may have otherwise led him elsewhere, and it would have required the whole trial to be repeated before another jury. The defendants were asking the learned Judge for the concession to overcome the result of their own errors, having already had the

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fullest opportunity of meeting every issue created by the plaintiff, and of establishing the issues raised by themselves. The concession would certainly have afforded them an advantage not to be compensated for in costs.

I do not think it would have been quite fair play to the plaintiff to accede to the defendants' request at that stage. It was unreasonable, and it was the only request made, nothing narrower was pressed for.

The Court, I apprehend, has no function to remodel a party's request. It is not like relief to which the party is entitled as of right, and if he asks for more, the excess demanded does not affect the actual lawful right. But this application for a postponement was entire, and the defendants must stand or fall by what they ask for as a favour. The defendants cannot be allowed to challenge the actual decision by urging that if they had asked for something less it would not have been so unreasonable. If they erred in asking for more than they could fairly and reasonably have expected, it was only another in a series of errors on their part.

Then the defendants say the learned Judge was wrong in refusing the postponement, because, as the pleadings stood and still stand formally, evidence of permanent injury or disablement was not admissible ; and although some evidence from which the inference is deducible was in fact given, it ought to be disregarded for that purpose, at all events unless an adjournment is granted as requested. Now, as to the construction of the statement of claim it is by no means clear to me that its only meaning even when strictly interpreted is to exclude permanency of injury. The Full Court did not agree with Mr. *Lukin's* argument as to this. I am inclined to agree with the Full Court's view. The parties at the trial both evidently were of the same opinion. But whatever might have been the case had an objection been raised at the trial and insisted upon, it is altogether too late now. Learned counsel at the trial not only raised no such objection, and asked for no condition upon the reception of the evidence, but his request for postponement necessarily supposed that the evidence was lawfully though unconditionally admitted. This leaves unarguable the view that the pleading was unambiguously

exclusive of permanent injury. If ambiguous it is too late now to rely on the ambiguity. In *Emmens* v. *Elderton* (1), Lord *Truro* said:—It is a clear rule of law, that if a declaration contains allegations capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will not, after verdict it must be construed in the sense which will sustain the action."

This principle is enough to determine the matter, but I am prepared to hold that even if the pleading were incapable of including a claim for permanent damage, yet, as the case was conducted on specific lines until the close of all the evidence given on both sides, the cases of *Seaton* v. *Barnard* (2), *Nevill's Case* (3), and *Browne* v. *Dunn* (4) already referred to are sufficient to conclude the defendants.

The only other question is that of excessive damages. The damages properly obtainable may be roughly but conveniently divided for the purpose of this case under three heads: 1. Past pecuniary loss; 2. Personal injury, including pain during recovery and altered physical condition after all possible recovery; and 3. Future pecuniary loss.

The uncontradicted evidence as to the first head shows that prior to the accident plaintiff could earn £3 10s. a week as engine driver; and had always constant work, and had earned nothing since the accident. If the jury awarded him under this head, say £250 for the 18 months up to trial, its validity could not, I apprehend, have been successfully challenged.

The plaintiff was severely hurt; he sustained a fall of 25 to 30 feet, he thought his back was broken, sustained a severe shock, had a fractured thigh, underwent an operation, and was many weeks in hospital. He has suffered ever since, and even up to the trial was never free of pain. He now has, as must be assumed for this purpose, a knee more or less permanently fixed, a stiff ankle joint, and some paralysis of the muscles of the foot. It is hardly conceivable that his general condition could remain wholly unaffected, having regard to these specific defects. He has to go

(1) 4 H.L.C., 624, at p. 678.
(2) (1900) A.C., 135, at p. 145.
(3) (1897) A.C., 68, at p. 76.
(4) 6 R., 67.

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through life with a diminished capacity for its enjoyment, and with the personal inconvenience of his maimed limb.

Can it be fairly said to be beyond all reason for the jury—the constitutional tribunal for that purpose,—as men of the world, to view his past and continued suffering and altered condition as entitling him, say, to £750, not as a perfect compensation, but as a fair consolation? I do not think so. They may have done so for all that appears. That leaves £750 for all his future pecuniary loss. His earning capacity is diminished. He can hardly work at his trade. He would have to pick his work. The extracts from the evidence I have already quoted afford some guide, and assuming the jury were properly instructed—and there is no suggestion they were not—I fail to see how £750 or even £1,000, the former sum representing approximately 4 and the latter 6 years gross income though the latter sum would certainly be generous, could be considered as within the rule of Court control. But the defendants in order to succeed must demonstrate the total unreasonableness of the verdict. They must satisfy the Court that the amount awarded—taking into consideration all the elements I have named—is such as no reasonable men could have awarded, if acting upon a proper direction from the Court. The principle enunciated in *Metropolitan Railway Co.* v. *Wright* (1) and *Praed* v. *Graham* (2), and acted on by the Privy Council in *Cox* v. *English, Scottish and Australian Bank Ltd.* (3), must govern this question, and must, as I think, lead us to repel the argument that the damages are excessive. As an instructive instance of refusal to disturb a verdict of this kind for excessive damages see *Saunders* v. *London and North Western Railway Co.* (4), where arguments very like those advanced here by the defendants were rejected.

In the result the appeal should, in my opinion, be allowed and the verdict restored. The defendants had every possible opportunity. They had all the advantages which competent advisers, clerical assistance, systematic business operations, confidential agents and unrestricted means can bestow: no trickery or unfairness can be imputed to the plaintiff or his representatives, the

(1) 11 App. Cas., 152.
(2) 24 Q.B.D., 53.
(3) (1905) A.C., 168, at p. 175.
(4) 2 L.T.N.S., 153.

issues were fairly fought, and if the defendants came unprepared in respect to any of them, especially the very issue they themselves raised, they cannot in justice cast the burden of their self-induced misfortune on the plaintiff's shoulders. They have no right to complain that their own carelessness is not to be made the reason for compelling the plaintiff, innocent of any participation in their oversight, to fight again in circumstances which, apart from any difficulties he might encounter in facing a second trial, would give the defendants unlooked for advantages greater than they ever would have had if they had been careful, advantages not capable of compensation in costs and altogether beyond the just claim of any litigant with regard to his adversary. Such a course would, in my opinion, be oppressive and unjust.

Appeal allowed. Order granting new trial set aside.

Solicitors, for the appellant, *Nicol Robinson, Fox & Edward* for *Lilley & Murray*, Cairns.

Solicitors, for the respondents, *Chambers McNab & McNab* for *Robert Lea & Barnett*, Townsville.

H. V. J.