PRIVY COUNCIL. 1914. SYME v. COMMISSIONER OF TAXES FOR VICTORIA.

is no doubt whatever that the appellant's £17,025 17s. 3d. comes from the "*Age* business" and that of the Melbourne Mansions Co., was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustees' hands till they part with it does not, in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the *cestui que trust.*

Their Lordships are accordingly of opinion that the appellant's contention is right that the question stated in the special case should have been answered in his favour, and that the judgment of the Supreme Court of Victoria should be set aside, and judgment should be entered for the now appellant for the amount paid by him under protest and in excess of his contention; and they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment as above stated should be entered for Mr. Syme.

[HIGH COURT OF AUSTRALIA.]

PRENTICE . . . . . APPELLANT;
PLAINTIFF,

AND

THE VICTORIAN RAILWAYS COMMISSIONERS . . . . . } RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1914.

MELBOURNE, *Sept.* 21, 22, 28.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Griffith C.J., Gavan Duffy, Powers and Rich JJ.

Practice—New trial—Action tried by jury—Verdict supported by evidence—Misdirection—Substantial wrong or miscarriage—County Court Rules 1891 (*Vict.*), *r.* 192.

In an action in a County Court of Victoria to recover damages for injuries caused by the negligence of the defendants' servants the question was whether the defendants' railway train in which the plaintiff was travelling stopped at a station a reasonably sufficient time for passengers to alight. The jury having found a verdict for the plaintiff, the County Court Judge ordered a new trial on the ground that the verdict was not one that could reasonably be found on the evidence, and the Supreme Court, on appeal, affirmed that order.

Held, by *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. dissenting), that there was evidence to support the verdict of the jury, and that the verdict was not perverse, and therefore that the order for a new trial should not have been made.

Rule 192 of the *County Court Rules* 1891 (Vict.) provides that "a new trial shall not be granted on the ground of misdirection . . . unless . . . in the opinion of the Court or a Judge some substantial wrong or miscarriage has been thereby occasioned."

Held, also, by *Gavan Duffy*, *Powers* and *Rich* JJ., that where the County Court Judge had in his summing up given an insufficient definition of actionable negligence, but his direction taken as a whole correctly stated the real question to be determined by the jury, there was no substantial wrong or miscarriage such as was necessary to entitle the defendants to a new trial under the above rule.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by Christina Prentice against the Victorian Railways Commissioners claiming damages for injuries alleged to have been sustained by her by reason of the negligence of the defendants' servants. In the particulars of the plaintiff's demand it was stated that a train in which the plaintiff was a passenger stopped at the Hawthorn station and while she was alighting started again without notice or warning to her, and without leaving a sufficient or reasonable time for her to alight, and that she was thereby thrown to the ground and severely injured.

The action was tried before a jury of four, who returned a verdict for the plaintiff for £350. The defendants then moved for a new trial on various grounds. The County Court Judge ordered a new trial, stating in his judgment that he strongly disapproved of the verdict, and was satisfied that there had been

H. C. OF A. 1914.

PRENTICE v. VICTORIAN RAILWAYS COMMISSIONERS.

a miscarriage, and that the verdict could not reasonably be sustained on the evidence.

From that decision the plaintiff appealed to the Full Court of the Supreme Court, but the appeal was dismissed.

The plaintiff now, by leave, appealed to the High Court.

The other material facts are stated in the judgments hereunder.

T. P. McInerney (with him *T. M. McInerney*), for the appellant.

McArthur K.C. (with him *Williams*), for the respondents.

During argument reference was made to *Metropolitan Railway Co.* v. *Wright* (1); *Cox* v. *English Scottish and Australian Bank* (2); *Middleton* v. *Melbourne Tramway and Omnibus Co. Ltd.* (3); *Council of the Municipality of Brisbane* v. *Martin* (4); *Australian Newspaper Co.* v. *Bennett* (5); *Jones* v. *Spencer* (6); *Aitken* v *McMeckan* (7); *Webster* v. *Friedeberg* (8); *Pfeiffer* v. *Midland Railway Co.* (9); *Bray* v. *Ford* (10).

Cur. adv. vult.

Sept. 28.

The following judgments were read :—

GRIFFITH C.J. The case of *Metropolitan Railway Co.* v. *Wright* (1) is often misunderstood. The rule laid down in that case by Lord *Selborne* and repeated by Lord *Davey*, delivering the judgment of the Judicial Committee in *Cox* v. *English, Scottish and Australian Bank* (11), although of general application, must be read with reference to the matter then under consideration. In *Wright's Case* (1) there had been a conflict of evidence on questions of fact, and the jury had accepted the plaintiff's version of the facts as against that of the defendants' witnesses. The House of Lords did not lay down the principle

(1) 11 App. Cas., 152.
(2) (1905) A.C., 168.
(3) 16 C.L.R., 572.
(4) (1894) A.C., 249.
(5) (1894) A.C., 284.
(6) 77 L.T., 536.
(7) (1895) A.C., 310, at p. 314.
(8) 17 Q.B.D., 736.
(9) 18 Q.B.D., 243.
(10) (1896) A.C., 44, at p. 49.
(11) (1905) A.C., 168, at p. 170.

sometimes sought to be deduced from that case that the jury is at liberty to disregard uncontroverted and unimpeached evidence of physical facts which show that the testimony or memory of witnesses relied upon to establish a particular conclusion is inaccurate or unreliable. Nor did they lay down the principle that a verdict for the plaintiff cannot be disturbed if, regarding the evidence for the plaintiff alone, there was a case to be left to the jury. In *Cox's Case* (1) it was arguable whether there was any such evidence; but, if there was, both the Supreme Court of Queensland and the Judicial Committee thought that the verdict was against the weight of evidence.

In *Jones* v. *Spencer* (2) the House of Lords attempted to correct this misapprehension, but the attempt does not seem to have been altogether successful.

The plaintiff in the present case was a frequent passenger by a suburban train belonging to the respondents. Such trains in Melbourne, as in London, make frequent stops of very short duration. It is the practice for the guard to call out the name of the station on arrival. After a short interval, considered sufficient to enable the passengers for the station to alight and departing passengers to take their seats, an official standing at or near the front of the train gives a signal to the guard, standing at or near the rear, who thereupon signals to the engine-driver to proceed. The carriage in which the plaintiff was travelling was what is called a "Tait carriage." These carriages contain nine compartments, in each of which are sliding doors fastened by a catch which can be opened from the inside. On arrival at his destination a passenger desiring to alight must slide the door aside if it is not already open. The floor of the carriage is, as nearly as may be, level with the platform. The length of the carriage is 60 feet. The negligence alleged by the plaintiff in her plaint in the County Court was that the train, without notice or warning to her and without leaving a sufficient or reasonable time for her to alight, suddenly moved forward, whereby she was thrown down.

The defendants denied negligence, and alleged contributory negligence of the plaintiff in getting out of the train while it was

(1) (1905) A.C., 168. (2) 77 L.T., 536.

H. C. OF A. 1914.

PRENTICE v. VICTORIAN RAILWAYS COMMISSIONERS.

Griffith C.J.

in motion, and without informing herself whether the train was in motion or not.

At the time when the accident occurred it was nearly dark, and the station lamps were lit. Unless the train were very badly driven it would be difficult, if not impossible, for a passenger to know the exact moment of stopping or starting except by watching the lights. The plaintiff's story was that on the train arriving at Hawthorn, where she had to change to another train, the door of the compartment in which she was travelling was shut and latched; that she tried to lift the latch but was at first unsuccessful; that having succeeded, and having slid the door aside, she went to step out; that there was then no motion in the train; and that she did not remember anything else until she was on the rails. In cross-examination she said that she did not think "the whole thing took 5 seconds." A witness called for her said that she alighted from the train immediately on its stopping, and walked towards a seat distant about 30 feet, and that at about two-thirds of the way she heard an umbrella fall and a distressed cry, no doubt from the plaintiff.

If this witness's evidence was accurate and the plaintiff's estimate of 5 seconds was reliable, the train could have barely stopped before moving on again.

For the defendants several witnesses were called, whose evidence was not controverted, and was not challenged by cross-examination or otherwise. According to this evidence the regulation time for the train to stop at Hawthorn was 20 seconds. A commercial traveller named Coleman, who had travelled in the last carriage of the five of which the train consisted, sitting in a compartment nearer to the rear than the front of the carriage, said that he got out of the train and walked towards the engine at a medium pace, not being in a hurry. He did not notice anyone then on the platform. He had walked forward as far as the further end of the carriage in front of that in which he had travelled, which would be a distance of about 100 feet or 33 yards, when the train started. Supposing that he walked as fast as at the rate of 3 miles an hour, *i.e.*, 88 yards a minute, this must have occupied more than 20 seconds. The train then slowly moved ahead, passing him as he still walked

on, and when half the length of the first carriage to the front of which he had walked had gone past him he saw a lady get out of a carriage nearer the engine, and fall. As the train overtook him, it must have been going faster than he, but some seconds must have elapsed before it could have overtaken him by half a carriage length, 30 feet. If this evidence can be relied on, it follows that the plaintiff's guess of 5 seconds as the duration of the stoppage is mistaken, as also the evidence of the witness called for her, who, if the rest of her story is accurate, could not have left the train immediately on its stopping. It follows also that the train must have remained at the station for more than 20 seconds, and had already moved forward about 30 feet when the plaintiff alighted.

Coleman saw the lady (who was the plaintiff) fall on the platform with her head towards the engine, and roll towards the moving train. He went up to her, found that her clothing was caught somewhere on the train, took her arm and held it. She was dragged a few feet by the train, when the attachment gave way, and he held her till it had passed. Another eyewitness, MacDonald, deposed that he saw the plaintiff first in a sitting position, and then flat on the platform.

If this evidence can be relied on, it shows that at the moment when the plaintiff put her foot upon the platform her body had already acquired from the moving train a momentum which was sufficient to throw the upper part of her body forward when the lower part of it was arrested by the contact between her foot and the platform. It also shows that when she alighted the train was already in motion, and that she must have alighted with her face to the rear, since otherwise she would have fallen on her face or side. It necessarily follows that her statement that there was no motion in the train when she alighted is incorrect. If, on the other hand, the train had, as alleged in the plaint, but not alleged in her evidence, suddenly started just as she stepped out, and before her body had acquired a forward momentum, her feet would have been carried forward by the sudden jerk, and she would have fallen with her head towards the rear of the train. The engine-driver said that the start was not sudden but gradual.

H. C. OF A. 1914.

PRENTICE v. VICTORIAN RAILWAYS COMMISSIONERS.

Griffith C.J.

This evidence is supported by the further evidence of MacDonald, and the evidence of the guard, each of whom says that before giving the signal for departure he looked along the train, one from the front and the other from the rear, and did not see anyone alighting. It is, indeed, inconceivable that if either of them had seen her the signal would have been given.

There was other evidence as to the length of the stay of the train in the station. The guard deposed that he watched from 25 to 30 passengers alight, and that the train stayed for about 30 seconds. The fireman who communicated the guard's signal to the engine-driver gave the same time for the length of stoppage. The officer whose duty it was to observe and record the length of stoppage said that he recorded it as 30 seconds. It is suggested that these estimates of time are mere guesses. But when the time necessarily taken up by the alighting of 25 or 30 passengers, the giving of the signal by MacDonald, the repeating of it by the guard, the communication of it by the fireman to the engine-driver, all before steam was put on, is appreciated, it is, if possible, still more manifest that the plaintiff's evidence as to the duration of the stoppage is unreliable and indeed negligible.

It appears, then, upon uncontroverted evidence, that the duration of the train's stop was actually more than 20 seconds, and that the train had actually started before the plaintiff attempted to alight. It was not suggested that 20 seconds, the regulation time for stopping, was too short. In my opinion it is the duty of a passenger travelling in such a train on such a line to satisfy himself before alighting that the train is not in motion. The only means of doing so in the dark, especially for a person who, like the plaintiff, was hard of hearing, was by observation of the lights. A failure to take this precaution is, in my opinion, conclusive evidence of negligence, unless it can be excused by showing that the stoppage was so short that the passenger might reasonably assume that it had not ended. The proved facts, therefore, both negatived the negligence alleged and established the plaintiff's contributory negligence, if the defendants' negligence had been proved.

It appears to me that if the jury had taken these matters into consideration they could not have found a verdict for the plain-

tiff. The conflict was not between contradictory evidence, but between the evidence of eyewitnesses supplemented by necessary inferences from known laws of nature, on the one side, and the plaintiff's conjecture that the train did not stop for more than 5 seconds and the belief of her witness that she alighted as soon as it stopped, on the other. These two classes of evidence run, as Lord *Morris* said in *Aitken* v. *McMeckan* (1), on different planes. *Jones* v. *Spencer* (2) is another instance of the same kind of conflict.

This, however, is not the only objection to the verdict. It appeared that MacDonald, who gave the first signal, was only 17 years of age. The jury sought to add to their verdict the following rider :—" The jury are of opinion that placing youths in charge of platforms of important stations is not conducive to public safety." The age of MacDonald was obviously irrelevant to his capacity to see whether anyone was getting out of the train when he gave the signal.

The learned County Court Judge in his direction to the jury told them that if the defendants were wanting in or failed to reach " that standard which you (the jury) consider to be the proper amount of care " it was called negligence, but that if the conduct of the defendants' servants had reached " your standard " they were not guilty of negligence. This is objected to as a misdirection. The true standard is, of course, such care as a reasonable man should take under the circumstances.

Upon the whole case it seems to me that it is demonstrated, as far as such a thing is capable of demonstration in such a case, that the jury either altogether disregarded the evidence for the defendants and the necessary inferences to be drawn from the physical facts established by that evidence, or thought that the defendants should be punished for allowing so young a man as MacDonald to give the first signal for departure, or thought that they were at liberty to give a verdict for the plaintiff or defendants at their uncontrolled discretion, or possibly made all three mistakes. In my opinion the verdict is one that reasonable men, appreciating the real question that they had to determine, and appreciating the relevant facts of the case, could not find.

(1) (1895) A.C., 310, at p. 314. (2) 77 L.T., 536.

H. C. OF A. 1914.

PRENTICE v. VICTORIAN RAILWAYS COMMISSIONERS.

Gavan Duffy J.

For these reasons I agree with the learned County Court Judge and the three learned Judges of the Supreme Court that the verdict cannot stand, and that a new trial should be granted.

GAVAN DUFFY J. I entirely agree with what has been said by the Chief Justice as to the duty of the Court in granting new trials of actions already tried by a jury; and, if I could accept his view of the evidence and the proper inferences to be drawn from it, I should be disposed to say that there ought to be a new trial in this case. But I think that there was ample evidence to justify the jury in finding as they did, and I see nothing to indicate that they have gone astray either perversely or ignorantly with respect to the issues which it was their duty to consider and determine.

With respect to the alleged misdirection I think that the learned Judge's summing up contained an insufficient definition of actionable negligence, but I also think that the direction, taken as a whole, sufficiently stated the real question to be determined by the jury. The learned counsel for the defendants were apparently of the same opinion, for they heard what the Judge said and did not make any application for a new or amended direction. If there was any misdirection there was no substantial wrong or miscarriage such as would be necessary to entitle the defendants to a new trial under the provisions of rule 192 of the *County Court Rules* 1891. In my opinion the appeal should be allowed, the order for a new trial should be set aside, and judgment should be entered for the plaintiff in accordance with the verdict of the jury.

POWERS J. The members of this Court differ as to the facts in this case and the weight to be attached to evidence tendered in the Court below, but I hold that the only question for this Court to consider is whether the verdict is one that reasonable men might have given on the evidence. If the jury really considered the question at issue and exercised the duty cast upon them as a jury, and they *might*, as reasonable men, have come to the decision they did on the evidence, this Court ought not to grant a new trial.

I adopt the decision of this Court in *Middleton* v. *Melbourne Tramway and Omnibus Co. Ltd.* (1), which is in accord with previous decisions given by the Privy Council. The Acting Chief Justice in that case said (2):—"It is not for a Court of appeal to say whether the verdict was right or wrong in the sense that the Court itself would or would not have given it. The real question is whether it was such a verdict as reasonable men *might* have given. If it is, we have no right to say that they have ignored the duty cast upon them. There was a considerable body of evidence before the jury on both sides, and while there does not appear to have been much contest as to veracity, the question largely turned upon the credence which the jury would give to this witness or that on the score of reliability. As to positions and distances the estimates were very various, and the extreme ones probably mere guesses. There was ample cross-examination, and the jury had the fullest opportunity of arriving at a just selection of the evidence upon which it was safe to place reliance. This is an opportunity denied alike to the learned Judges of the Supreme Court and to ourselves." The words used about the evidence in that case can fairly be applied to the evidence in this case. My brother *Isaacs* said (3):—"Where there is a jury, it is the jury, and the jury alone, that have the jurisdiction to determine the issues of fact upon the evidence. The Court has so far control that it must see that the jury do their duty properly. Beyond that the Court cannot go. And if the jury have, in the opinion of the Court, found a verdict which reasonable men *might* have found upon the evidence before them, the Court is not at liberty to look further and set that verdict aside as being against the weight of evidence. If the finding is unreasonable, in the sense that the jury could not have really performed the judicial duty cast upon them, but must have been guided or moved by considerations other than the value and weight to be given to the evidence—considerations that ought not to have been entertained, and which vitiate the finding, because, as Lord *Herschell* phrases it in *Jones* v. *Spencer* (4), it cannot be said

(1) 16 C.L.R., 572.
(2) 16 C.L.R., 572, at p. 579.
(3) 16 C.L.R., 572, at p. 583.
(4) 77 L.T., 536, at p. 538.

H. C. OF A. 1914.

PRENTICE v. VICTORIAN RAILWAYS COMMISSIONERS.

Powers J.

'the jury have found their verdict upon the evidence,'—then there is, as that learned Lord and also Lord *Shand* there both say, 'a miscarriage,' and the finding is, in the requisite sense, 'against the weight of evidence,' and the verdict may be set aside."

That decision ought to be binding on this Court until it is shown to be clearly wrong.

As the learned Chief Justice has given reasons why he considers that reasonable men could not have found the verdict they did on the evidence in this case, I shall shortly give the reasons why I arrive at a different conclusion, and why I think the jury might reasonably on the evidence have found the verdict they did.

The carriage in question was a "Tait carriage," namely, one with sliding doors. In some compartments, on the journey in question, some of the doors were closed, and secured by a latch; in others, the doors were open while the train travelled and when it arrived at the station. The plaintiff was in a compartment where the door was closed, and she could not at the first attempt make the door slide so as to enable her to get out. The other witnesses, Margaret Neville and John Coleman, travelled in compartments where the doors were open, and stepped out immediately the train stopped. In Tait carriages it is not necessary to close doors before the train starts. In an ordinary train the guard would have seen the door open outwards when the plaintiff was stepping out, but not with a Tait carriage. The station-master said the regulation time for the train to stop at Hawthorn was 20 seconds.

I see nothing inconsistent in the evidence of the plaintiff and the disinterested witness Margaret Neville, a fellow passenger who was called by the plaintiff. Margaret Neville carries on business on her own account in Flinders Lane, Melbourne, and I see no reason why the jury could not believe her evidence where it disagreed with that of John Coleman.

If Margaret Neville's evidence is true, or if the plaintiff's evidence is true, the train did not stop 20 seconds. That is for the jury to say—not this Court. The jury evidently believed one or both of these witnesses, after hearing all the evidence and seeing the witnesses under examination and cross-examination.

If the evidence of the only other disinterested witness, John Coleman (called by the defendants), as to the time is true, the train did not wait 30 to 35 seconds, because he (Coleman) says he got out of the carriage door—open when the train stopped—and he thought it took him 20 seconds to walk from where he had alighted to where he saw plaintiff get out of the train.

Against that evidence as to time, the jury had the statements of the officials. One said the train stayed about 35 seconds, one 30 seconds, one over 30 seconds, and two about half a minute. None of them had checked the time; it was all guess-work. One of them, the signalman who had a clock without a second-hand, said the train stopped about half a minute. If it was his duty to record the number of seconds that each train stopped, the Railways Commissioners would, in my opinion, have supplied him with a clock with a second-hand, to enable him to do his duty. That, like the other statements as to time, could, under the circumstances, fairly be accepted by the jury as a guess, and not to be depended upon to outweigh the evidence of the disinterested witnesses.

In my opinion serious doubt was cast on this general evidence of the officials by the evidence of Coleman and of the plaintiff and Mrs. Neville, and it is for the jury to say which they believed to be the more accurate, not for this Court. Their attention was specially drawn to the necessity for considering the evidence of the officials by his Honor, who in his summing up said:—"The witnesses for the defendants swear that only the ordinary course was followed; the train was stopped and not started until the signal was given, and the people in the train had got out. And if you believe the story that is told by all those employees, you will probably then say to yourselves: 'They have done all they could, and the defendants are not guilty of negligence.'"

The jury also knew that the train was 1½ minutes late in arriving at Hawthorn on the occasion in question, and may have taken that into consideration when considering the evidence of the officials. They may not have believed a train 1½ minutes late at a busy suburban station like Hawthorn would wait even the regulation time of 20 seconds. They may also have considered that the staff were not altogether disinterested witnesses,

H. C. OF A. 1914.

PRENTICE v. VICTORIAN RAILWAYS COMMISSIONERS.

Powers J.

as the plaintiff could only succeed by proving negligence on the part of one or more of them.

It was contended that the jury had by their rider evidently considered only the question that it was a lad of 17 years of age who gave the signal to the guard to start, and that he was too young to be entrusted with such important duties; but I think it is clear that they must have first found on the evidence, that he had given the signal too soon, before any such comment by any jury was probable.

The fact remains that MacDonald, a youth of 17 years of age, gave the signal to the guard to start. The guard gave the signal to the fireman, and the fireman told the driver. The fault, if any, they may have found was MacDonald's. The signals were given by green lights to the guard and to the fireman, because it was too dark to signal otherwise, and it was probably too dark for MacDonald at the front part of the train to see the plaintiff in the act of getting out of the third carriage from the other end of the train.

Mr. *McArthur* contended that the fact that some persons, who got out of the train opposite the small gate shown in the plan, were through the gate before the train started was sufficient to prove the train stopped over 20 seconds. Counsel for the plaintiff pointed out that the gate was only a few feet off, and that many passengers in Tait trains are off before the train really stops, and could be out of the gate before the plaintiff could open the door and get out. That, however, was before the jury to be weighed by them.

As to the position of the plaintiff.—The jury may reasonably have concluded that the position of the plaintiff when she fell, namely, with her head towards the engine, was caused by holding on to the side of the door, as elderly women usually do when they step out of a train.

As to misdirection by the learned Judge.—I entirely agree with what my brother *Gavan Duffy* has said in the judgment just delivered.

I fail to see anything to warrant this Court in holding that the verdict was perverse; and I think any reasonable men might

on the evidence have found the verdict they did, and that the jury did perform the duty cast upon them.

I am of opinion that the appeal against the order for a new trial should be allowed.

RICH J. I consider that the verdict was neither perverse nor unreasonable. There being evidence both ways, I must not usurp the functions of the jury and decide the case according to my view of the facts. It is not for me to say whether I concur in the verdict.

Assuming without deciding that there was the misdirection contended for by the respondents, that misdirection is covered by *County Court Rules* 1891, r. 192.

I agree that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Appeal from County Court allowed with costs. Motion for new trial dismissed with costs. Judgment for the plaintiff with costs. Respondents to pay costs of appeal.

Solicitors, for the appellant, *McInerney, McInerney & Wingrove.*

Solicitor, for the respondents, *Guinness,* Crown Solicitor for Victoria.

B. L.