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*Feb. 3, 4.
*March 2.

GEORGE DAYNES (PLAINTIFF) ..... APPELLANT;

AND

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Practice—Rejection of evidence—Memorandum by witness—Withdrawing case from jury—New trial—Negligence—Operation of tramway—"Block and Staff" system—Disregard of rules—Defective system.

On the trial of a case it is permissible for a witness to consult a copy of a memorandum respecting circumstances attending the occurrence of an accident, which was made by himself at the time, in order to refresh his memory. The refusal of the trial judge to permit him to do so is ground for ordering a new trial.

The trial judge is not justified in withdrawing a case from the jury on the ground that the evidence establishes contributory negligence on the part of a plaintiff unless no other conclusion can be drawn from it.

A motorman in the defendants' employ was injured in a collision with the car ahead of that upon which he was performing his work. The company's operation rules provided that cars operated in the same direction, as "double-headers," unless block signals were in use, should be kept at least five minutes apart, except in closing up at stations; also that, when the view ahead was obscured, cars should be kept under such control that they might be stopped within the range of vision, but the rule was not enforced. The plaintiff, one of the company's motormen, on a foggy night, ran his car into the rear of another car standing at the station he was entering, and sustained injuries for which he claimed damages, alleging a defective system. The defence set up contributory negligence on the part of the motorman, but made no allusion to the breach of these regulations. A judgment, entered on the verdict of the jury in favour of the plaintiff, was set aside by the Court of Appeal on the ground that the injury had resulted in consequence of the plaintiff's disregard of the rules.

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*PRESENT: — Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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Held, that as the rules had not been enforced by the defendants nor set up in their pleadings they could not be relied upon in support of the charge of contributory negligence.

Judgment appealed from (17 B.C. Rep. 498) reversed and a new trial ordered.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment entered by Hunter C.J., on the findings of the jury at the trial, and dismissing the plaintiff's action with costs.

The circumstances of the case are stated in the head-note.

S. S. Taylor K.C. for the appellant.
Ewart K.C. for the respondents.

THE CHIEF JUSTICE. — I concur in the judgment ordering a new trial.

IDINGTON J. — I think this appeal should be allowed with costs, save so far as the costs incidental to the appeal may have been increased by reason of the appeal seeking to resist the granting of a new trial. It does not seem to me a case where the rule applicable to divided success can be applied.

The rule invoked by the judgment of the learned Chief Justice of the Court of Appeal does not seem to me to have had any statutory support binding the company and its employees to observe same.

And on the evidence, the rules, which are put forward as binding the appellant do not seem to have been adopted by the company. Indeed, they seem to have been so ignored by the management of the com-

(1) 17 B.C. Rep. 498.

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Idington J.

pany in the running of the cars in question, that respondent cannot now rely on same as binding appellant and other employees.

The defence set up by the pleading and particulars given thereunder makes no allusion to the breach of any such rules by respondent. The case before us, therefore, does not permit of any such defence save in so far as the rules themselves be conformable with good practice according to the recognized system of the management of the company in running the cars in question.

The case must be tried according to the recognized system or practice of the company in that regard and the duty which the law imposes on any such company to adopt reasonable methods of safety and, upon any one occupying such a position in the service as appellant did, to take due care in avoiding negligence so far as he reasonably could in accordance with the requirements of such a service and the discharge of his duties thereunder.

It would seem from what transpired at the trial as if the company's management looked upon the exchange of staffs carried by crossing cars as a sort of block system and in itself thus excluding the application of the rule invoked.

There is evidence to support the verdict and no such clear, unconflicting evidence to sustain the charge of contributory negligence as the proximate cause of the accident as would entitle a judge to withdraw the case from the jury and dismiss the action.

However, I, with great respect, think the learned trial judge erred in rejecting the evidence tendered during the examination of the witness McCutcheon, and see no escape from directing a new trial.

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Under the circumstances I cannot say that there has been no miscarriage of justice resulting from such misdirection.

The costs of the trial should abide the event of the new trial.

DUFF J.—I think Mr. Taylor has succeeded in establishing his contention that rule 91 which was so much relied upon in the court below, was not observed by the company in the operation of the line in question. The rule in its nature seems to be one impossible to apply in its entirety to a line operated as this was. Rule 210 shews that this system required, and, indeed, it is the very basis of the system, that all trains shall move either by time-table or pursuant to special written orders. Admittedly there was no time-table, and if there were written orders they were apparently exceptional. The defence based upon the rule was obviously an afterthought. It was not set up in the pleadings and appears to have occurred to nobody until counsel for the respondents began to examine the book of rules which was put in evidence by counsel for the appellant. The question of substance appears to be whether the jury could reasonably reject the defence set up in the pleadings, and insisted on at the trial, viz., that the appellant cannot be acquitted of contributory negligence in approaching Strathcona Station without having his car under better control. I have carefully considered all the circumstances bearing upon this point. The point is a doubtful one, but on the whole I think the view of the learned Chief Justice, before whom the case was tried, is the better view, and that it was proper that the jury should be asked to pass upon the question.

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Duff J.

I do not enter into the evidence in detail because I concur with the opinion expressed by two of the learned judges of the Court of Appeal that the evidence of McCutcheon was improperly rejected and that on that ground there ought to be a new trial. As to the costs I think the appellant is entitled to the costs in this court, and the respondents should be entitled to the costs of the appeal to the Court of Appeal. The costs of the former trial should abide the result of the new trial.

ANGLIN J.—The jury was fully justified in finding that the defendants were guilty of gross negligence because of their defective system, or utter lack of system, in the operation of their railway. With great respect, the earlier part of rule 91, for breach of which the majority of the learned judges of the Court of Appeal have found the plaintiff to have been guilty of contributory negligence, cannot, in my opinion, be invoked by the defendants. The particulars of contributory negligence delivered by them make no allusion to this breach of rules. The evidence shews that rule 91 was not enforced in the practice of the company. Indeed, the methods adopted in operating their railway would seem to have made it impracticable to carry out that rule in so far as it relates to keeping trains five minutes apart. The necessary means were not provided. I rather think that if disposing of this case as a trial judge sitting without a jury I would not improbably take the view of the learned Chief Justice of the Court of Appeal that the proximate cause of the accident in which the plaintiff was injured was his own failure to have his car, when coming into Strathcona Station, under proper control,

having regard to his expectation that the preceding car, the "Cloverdale," might still be stopping at that station, to the fact that the night was dark and foggy, the range of vision being only from eight to twenty feet at the point in question, and to the requirement of rule 91 (which, though not capable of being enforced in practice in other respects, is, in this particular merely an expression of an obligation entailed by common prudence in entering a station where it is not unlikely that another car is standing) that

> when the view is obscured by curves, fog, storms or other causes, they (trains) must be kept under such control that they may be stopped within the range of vision.

But in so dealing with the case I would be discharging the functions of a jury. I cannot say that the evidence bearing on the issue of contributory negligence is not susceptible of another view, or that any other conclusion than that reached by the learned Chief Justice would be so clearly unreasonable that it would be perverse. I am, therefore, unable to agree in the judgment of the Court of Appeal dismissing this action, which was necessarily based on the opinion that it should have been withdrawn by the trial judge from the jury. *Primâ facie* an issue of contributory negligence is for the jury and the case must be very clear when a trial judge is justified in taking it from them on the ground that contributory negligence has been so conclusively established that no jury could reasonably find otherwise.

But the verdict cannot be reinstated. I agree with Martin and Irving JJ.A., that the evidence of McCutcheon was improperly rejected. In order to refresh his memory he was entitled to look at the copy

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of his notes, which he was prepared to verify as having been made by himself from the original which was a transcript of his stenographic report of the interview between the plaintiff and the defendant's superintendent. His evidence would have borne directly on the main issues and it is impossible to say that its rejection did not materially affect the determination of those issues. There must be a new trial.

BRODEUR J.—I concur in the opinion of my brother Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor, Harvey, Grant, Stocton & Smith.*

Solicitors for the respondents: *McPhillips & Wood.*