1899

*Oct. 24.

*Nov. 7.

WILLIAM DAVID WOOD (PLAINTIFF)..APPELLANT;

AND

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

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Railway company—Grass on siding.

For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employmeut.

* PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

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WOOD
v.
THE CANADIAN PACIFIC RAILWAY COMPANY.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the defendant.

The plaintiff, an employee of the defendant company, while engaged in coupling and uncoupling cars, attempted to step from between two cars when the train backed up, but his feet became entangled in the long grass and weeds which had grown over the roadbed and he was struck by the train and seriously injured. In an action against the company for damages a verdict was entered for the defendant contrary to the findings of the jury, and this verdict was sustained by the full court. The plaintiff then appealed to this court.

Joseph Martin Q.C. for the appellant, referred to *Webster* v. *Foley* (2); *Penny* v. *Wimbledon Urban District Council* (3); *Groves* v. *Wimborne* (4).

Nesbitt Q.C. for the respondent, cited *Johnson* v. *Lindsay & Co.* (5); *Williams* v. *Bartling* (6); *Williams* v. *Birmingham Battery & Metal Co.* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an action to recover damages for an injury to the appellant, the plaintiff in the action, caused as it is alleged by the respondents' negligence.

The respondents in their defence deny the negligence imputed to them, and also set up that if the appellant was injured by the negligence of any one it was by that of a fellow servant of the appellant, in the same employment.

The action was tried before Mr. Justice Irving and a special jury.

(1) 6 B. C. Rep. 561.
(2) 21 Can. S. C. R. 580.
(3) [1899] 2 Q. B. 72.
(4) [1898] 2 Q. B. 402.
(5) [1891] A. C. 371.
(6) 29 Can. S. C. R. 548.
(7) [1899] 2 Q. B. 338.

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The evidence given at the trial has not been printed and we have not been furnished with a copy of it by the appellant, as it was suggested at the hearing of the appeal that we should be. It appears, however, from the factum of both parties that the only neglect of duty imputed to the respondents was that set forth in the statement of claim, namely, "having the track in a dangerous condition from the growth of long grass and weeds" in which the appellant's foot became entangled and so led to the accident. The learned judge left several questions to the jury, who found that there was negligence on the part of the respondents, and assessed the damages at $6,500. Notwithstanding this finding, and upon the evidence which he was entitled to consider, the judge entered the judgment for the respondents. Upon appeal to the Supreme Court *en banc* this judgment was affirmed.

Although the point does not seem to have been taken either at the trial or on the appeal, it appears to us that there was no evidence of negligence upon which the jury could have reasonably found for the appellant. It was the duty of the judge to determine whether there was any evidence of negligence proper to be submitted to the jury. This involves the consideration of matters of fact, and in determining it judges are to bring to bear their common experience of such matters as jurors have to do in questions of fact left to their decision. This is so well settled by the highest authority that there can be no question of the correctness of the principle. *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (4); *Flannery* v. *Waterford and Limerick Railway Co.* (2). It is not of course every omission to do something which would have avoided an accident which constitutes negligence in law. In order that a duty should be imposed upon a

(1) 3 App. Cas. 1155. (2) Ir. Rep. 11 C. L. 30.

person the neglect of which constitutes an actionable wrong, it must be apparent that the want of care or attention is reasonably likely to endanger the safety of others. It is not sufficient that the omission did in fact cause an accident, if it was not to some extent obvious that such a consequence was likely to result from it.

This is, it is true, to a great extent a question of degree but still it is one which it is held must be dealt with by the judge in deciding the preliminary question whether there is any evidence proper to be left to the jury. *Crafter* v. *The Metropolitan Railway Co.* (1), was a case in which this rule was acted upon, and so far as I can judge from the meagre report of the case of *Smithwhite* v. *Moore* (2) it was also there applied by Mr. Justice Phillimore. Can it then be said in the present case that the permitting grass and weeds to grow on the side track was so obviously likely to result in danger to the respondents' employees that it constituted negligence? In point of fact no doubt we must assume that the accident to the appellant resulted from such growth but that, as has been said, is not conclusive. The brass facings on the stairs in the case of *Crafter* v. *The Railway Co.* (1) led to the accident in question there, but it was not held to establish negligence, nor was the broken pane of glass in the action which came before Phillimore J. I am of opinion that in the present case the not keeping down the natural growth of weeds and grass was not such an omission as could reasonably have been foreseen to be likely to endanger the safety of the railway servants working upon the track.

Upon the other point also, that of common employment, upon which the court below proceeded, the judgment is, we think, in all respects right. The

(1) L. R. 1 C. P. 300. (2) 14 Times L. R. 461.

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duty of keeping the line of railway and the side tracks in proper order was delegated to the respondents' road-master and section foreman who were shown to be properly qualified, and if there was any failure to perform a duty which the respondents owed to the appellant, it was they who were guilty of it, and as they were for the purposes of the defence of common employment fellow servants of the appellant, the action fails.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Martin & Deacon.*

Solicitors for the respondent: *Davis, Marshall & Macneill.*