THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).... } APPELLANTS;

AND

JAMES FLEMING (PLAINTIFF).....RESPONDENT.

1892
*Nov. 15.

1893
*Feb. 20.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Trial by jury—Withdrawal from jury — Reference to court — Consent of parties—Railway Co.—Negligence.

On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing whereby plaintiff was struck by the engine and hurt the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of non-suit. On appeal from the decision of the full court assessing damages to plaintiff:

Held, Gwynne and Patterson JJ. dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitator and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court.

Held, further, that if the merits of the case could be entertained on appeal the judgment appealed from should be affirmed.

Held, per Gwynne and Patterson JJ., that the case was properly before the court and as the evidence showed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train the company was not liable.

APPEAL from a decision of the Supreme Court of New Brunswick in favour of the plaintiff on a sub-

*PRESENT:—Strong C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

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mission of the case to the court both on the facts and the law.

The action in this case was brought to cover compensation for injuries received by plaintiff caused by being struck by an engine of the defendant company at a crossing near the Intercolonial Railway station in the city of St. John. The particulars of the accident are not dealt with by the majority of the court but are fully detailed in the judgment of Mr. Justice Patterson. On the trial the counsel for the respective parties entered into the following agreement:

"It is agreed that the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have the power to draw inferences of fact, and if they should be of opinion upon the law and the facts that the plaintiff is entitled to recover they shall assess the damages, and that judgment be entered as the verdict of the jury. If the court shall be of opinion that the plaintiff is not entitled to recover a nonsuit shall be entered."

Pursuant to this agreement the case was considered by the Supreme Court of New Brunswick sitting *in banc* and decided in favour of the plaintiff. The defendants appealed to this court.

Skinner Q.C. for the respondent took a preliminary objection to the jurisdiction of the court contending that the case having been referred to the court by consent of parties the defendants could not appeal any more than they could if it had been referred to private arbitrators. After hearing counsel for the appellants on this objection the court reserved its judgment and heard argument on the merits of the appeal.

Weldon Q.C. for appellants cited *Cornish* v. *The Accident Insurance Co.* (1); *Rodrian* v. *New York, &c., Railway Co.* (2).

(1) 23 Q.B.D. 453.

(2) 43 Al. L. J. 301.

Skinner Q.C. for the respondent.

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THE CHIEF JUSTICE—This was an appeal from a judgment of the Supreme Court of New Brunswick in an action instituted by the respondent against the appellants to recover damages for an injury received whilst driving along a street in the city of St. John at a point where the Intercolonial Railway, over which the appellants have running powers, crosses the public highway or street on a level, the injury in question having been occasioned by an engine and tender belonging to the appellants, and which was at the time of the accident being worked by the servants of the appellants.

On the trial of the action and at the conclusion of the evidence the following agreement was come to between the respective counsel of the parties and was entered upon the minutes of the trial:—

It is agreed that the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have the power to draw inferences of fact, and if they shall be of opinion upon the law and the facts that the plaintiff is entitled to recover, they shall assess the damages and that judgment be entered as the verdict of the jury. If the court is of opinion that the plaintiff is not entitled to recover a non-suit shall be entered.

The jury were then discharged.

The court in banc accepted the functions which the parties had delegated to them and assumed the duty of ascertaining the damages, which they assessed at the sum of $300.

The preliminary objection was taken in the respondent's factum, and repeated on the appeal being opened, that there was no jurisdiction to entertain such an appeal.

I am clearly of opinion, both upon principle and authority, that this case is not a proper subject of appeal.

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According to the law and the established procedure of the province of New Brunswick all questions of fact arising in actions at common law are to be tried by a jury, by whom also damages must be assessed, and except by consent of parties the court has no power to dispense with a jury and to exceed its ordinary legal jurisdiction by taking upon itself the decisions of such questions of fact as the assessment of damages. When, therefore, the court in this case undertook to deal with the evidence, to determine the questions of fact, and to assess the damages, it took upon itself to perform the functions of a jury, for which it had no legal or any other authority save the consent and agreement of the parties The court, therefore, acted as *quasi* arbitrators.

It is well settled by authority that in such cases, where a jurisdiction beyond the ordinary jurisdiction which it has by general law is conferred upon a court of justice by an arrangement between the parties, its decision is regarded as that of a private tribunal constituted by the parties, such as a board of arbitrators, and cannot be reviewed, in appeal or otherwise, as judgments pronounced in the regular course of its ordinary procedure may be reviewed and appealed from.

This principle was acted upon by the Supreme Court of New Brunswick in the case of the *Quiddy River Boom Co.* v. *Davidson* (1), and I am of opinion that that decision was entirely in accordance with many English authorities from amongst which I may select two as being directly in point. I refer to the *Attorney-General of Nova Scotia* v. *Gregory* (2), and *Shortridge* v. *Young* (3).

I think the appeal should be quashed with costs.

(1) 25 N. B. Rep. 580. (2) 11 App. Cas. 229.
(3) 12 M. & W. 5.

Apart altogether from the question of jurisdiction I should upon the merits, if I had considered them to be open, have been prepared to dismiss the appeal for the reasons stated in the judgment of Mr. Justice King.

FOURNIER J. concurred.

TASCHEREAU J.—I do not dissent on the question of jurisdiction, but if I had to decide the case on the merits I would dismiss the appeal for the reasons given by Mr. Justice King in the court below.

GWYNNE J.—I concur in the judgment prepared by Mr. Justice Patterson.

PATTERSON J.—The plaintiff, who is respondent in this appeal, brings his action to recover damages for injury to himself and to his horse and carriage from a collision with a locomotive of the appellant company on the 17th of March, 1889, charging that the accident was caused by negligence of the servants of the company.

The action was tried at St. John and, after all the evidence on both sides had been given, the following agreement was come to:

It is agreed that the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have the power to draw inferences of fact, and if they should be of opinion upon the law and the facts that the plaintiff is entitled to recover they shall assess the damages, and that judgment be entered as the verdict of the jury. If the court should be of opinion that the plaintiff is not entitled to recover a nonsuit shall be entered.

The case was heard before six judges, two of whom, viz., Mr. Justice Tuck who had presided at the trial and Mr. Justice Fraser, were of opinion that the plaintiff was not entitled to recover, and gave judgments explaining fully the grounds of their opinion. The

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other four judges thought the plaintiff entitled to recover, Mr. Justice Palmer and Mr. Justice King giving their reasons at length, and the Chief Justice and Mr. Justice Hanington expressing their concurrence, and damages were assessed at $300.

The appeal is from that judgment.

A preliminary question was raised on the part of the respondent as to the right to appeal from a judgment given in pursuance of the agreement which I have read. For the appellant it was answered that the amount of damages was not questioned, but only the right of the plaintiff to recover, or, in other words, the liability of the defendants for the negligence charged against them.

I notice that in the court below Mr. Justice Palmer who discussed the amount proper to be assessed as damages after he had dealt with the question of liability, and who suggested that it would be better if such questions as the assessment of damages were left to the jury, concluded his judgment with the following observation :

> The parties made another difficulty by leaving the case to the court by agreement, the power we are exercising is that conferred upon us by such agreement ; and not such as is so conferred by law, for in the latter of which only is there any appeal. See *Quiddy River Boom Co.* v. *Davidson* (1).

The learned judge here refers, as I understand him, to the assessment only. In the case he cites it had been agreed that the court should assess damages in place of the jury, and the parties were properly held to the amount assessed under that agreement. Setting aside this matter of the assessment, the agreement is in effect the familiar reservation of points for the court with a consent that the court shall draw inferences of fact.

The right to appeal from the decision of a common law court upon a point reserved at the trial was first

(1) 25 N. B. Rep. 580.

given in England by the Common Law Procedure Act of 1852, and in Upper Canada where there was a court of appeal it was given in 1857 (1).

Those enactments gave a right of appeal in all cases of rules to enter a verdict or non-suit upon a point reserved at the trial. Such reservations, which could only be by consent of the litigant parties, were very commonly accompanied by a consent that the court should have power to draw inferences of fact as a jury might have done, and it never was supposed, as far as I am aware, that that consent extended only to the court of first instance. Had any such idea existed we should doubtless find it noticed in the books of practice. I believe we may look in vain for any such thing in those books, and I do not doubt that examples to the contrary abound in the reports. When the point was in discussion I happened to think of, and I mentioned, one of those examples which occurs in *Moeller* v. *Young* (2) decided in 1855, where, on a reservation of leave to move, authorizing the court to draw inferences of fact as a jury might do, the Court of Exchequer Chamber, differing from the Court of Queen's Bench as to the proper inferences of fact, reversed the decision of that court.

In the case before us there was no difference of opinion among the judges who took part in the decision concerning any of the leading facts. Those facts, by which I mean actual occurrences as distinguished from inferences of fact, are practically undisputed. From those facts a majority of the judges inferred that there was negligence for which the defendants were responsible which caused the injury to the plaintiff; a minority inferred the contrary. Under the circumstances, and having regard to the consent, we need not trouble ourselves with the inquiry whether the con-

(1) 25 V. ch. 5 s. 14.

(2) 5 E. & B. 7 and 755.

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clusion depends on inferences of fact or of law, or partly of fact and partly of law. The question is whether, in view of both the law and the facts, the defendants have been properly condemned.

The line of the Canadian Pacific Railway terminates outside of the city of St. John, and the company's trains enter the city from the west upon the track of the Intercolonial Railway. On the 17th of March, 1889, an engine of the company with its tender was proceeding backwards along the Intercolonial line towards the station for the purpose of taking out a train. The track crosses a street in St. John called Mill Street, and at that crossing the collision occurred after dark or between eight and nine o'clock. There are gates at the crossing, on each side of the railway, which are usually lowered when an engine or train is about to pass, and raised up at other times. It happened, however, that on this 17th of March the gates could not be lowered because the frost had made the machinery unworkable. That seems to have been a not unusual occurrence, and when it happened the practice was for a man to warn travellers when a train was coming, by means of a flag in the daytime and a light at night. The man whose duty it was to do this was the same man who attended to the semaphore. When an engine approaching from the west whistled for the semaphore the man would lower it by means of the apparatus in a small building at the crossing, and then station himself with his flag or his light as near as possible to the centre of the crossing. He did so on the occasion in question, and seeing the plaintiff approaching with his vehicle he swung his light and shouted to the plaintiff, but failed to attract his attention. Mr. Justice Palmer, who thought the plaintiff was entitled to recover, states his view, formed from reading the evidence, that the plaintiff did see the light but attached no importance

to it as it conveyed no meaning to him, and probably did not particularly notice it, or had forgotten it when he stated in the witness-box that he did not see it.

The plaintiff says, also, that he did not hear the bell of the locomotive ringing, but the evidence left no doubt in the mind of any of the judges that the bell was duly rung.

With great respect for the learned judges who formed the majority in the court below I think their reasoning proceeds upon a faulty principle. The tenor of it appears from the judgment of Mr. Justice King who prefaces his remarks upon the facts by quoting some general observations made by English judges in three cases, *Cliff* v. *Midland Ry. Co.* (1); *Stubley* v. *London & N. W. R. Co.* (2) and *Davey* v. *London & S. W. Ry. Co.* (3). I do not think those cases bear out the application, in circumstances like those before us, of the doctrines indicated by the passages quoted. I may allude by and by to the cases or some of them.

The learned judge then refers to some provisions of the Railway Act 51 V. ch. 29 (D.). One of these is contained in sec. 187 which empowers the Railway Committee of the Privy Council, if it appears to it expedient or necessary for the public safety, from time to time, with the sanction of the Governor in Council, to authorize or require a company whose railway crosses a street or public highway at rail level or otherwise to protect such street or highway by a watchman or by a watchman and gates or other protection. That provision is a repetition of the law contained in s. 74 of R. S. C. ch. 109. It assumed its present form in 1884 under 47 V. c. 11 s. 3, but existed in more general words—the watchman and gates not being specifically mentioned—in the Consolidated Railway Act 1879, in

(1) L. R. 5 Q. B. 258. (2) L. R. 1 Ex. 13.
(3) 12 Q. B. D. 70.

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sec. 48, and in the same section as re-enacted in 1883 by 46 V. c. 24, s. 4; but, as the learned judge remarks, it did not apply to the Intercolonial Railway. He also refers to section 256 of 51 V. ch. 29 which embodies the long standing and familiar provision for the ringing of the bell or sounding of the whistle, which provision is also contained in the Government Railways Act, R. S. C. ch. 38, s. 36; and to s. 259 which, like s. 28 of the Government Railways Act, limits the speed at which an engine may pass through a thickly peopled neighbourhood to six miles an hour, and sec. 260, another old provision corresponding to sec. 29 of the Government Railways Act, and requiring that whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, a person shall be stationed on the last car in the train who shall warn persons standing on or crossing the track of such railway of the approach of such train.

This last mentioned provision applies only to a train of cars, and the six miles an hour mandate was not violated by the engine that struck the plaintiff, as its speed was not over five miles an hour.

The learned judge then remarks :—

> There was therefore no breach by the defendants of any statutory obligations; and if they are to be made liable at all it must be because, having regard to all the circumstances of the case, they omitted that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger.

I should not myself deduce from the considerations set out by Mr. Justice King and by Mr. Justice Palmer the conclusion that there was want of reasonable care on the part of the company. The reasoning by which they reach that conclusion seems to me to cast on the railway company the duty of absolutely averting all risks from the most careless of wayfarers, and to make the occurrence of an accident proof that some duty was neglected by the company. Still, the conclusion being

a conclusion of fact founded to a great extent on opinion, I should be slow to interfere with it were it not that it seems to me to err in applying to our railway companies the same rules that govern in England, without sufficient regard to the differences created by our legislation.

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The English Railway Clauses Consolidation Act (1) requires the erection of gates at level crossings of turnpike and carriage roads, which as a rule are to be kept shut except when required to be opened to let horses, &c., pass along the highway, and provision is also made for gates at footpaths which cross the railway; but the questions of duty and negligence in the mode of running trains have to be dealt with on general principles, without any such statutory guide as we have in the enactments which prescribe the precautions to be observed with moving trains.

Those enactments define the duty of the railway company, and, in such situations as a level crossing of a highway, inform the public what signals of danger may be expected.

The position in England is stated in a few words by Lord Justice Bowen in his judgment in *Davey* v. *London and South-western Railway Company* (2) :—

> There is no statute law, he says, as regards the obligations of a railway company with respect to a level crossing, so far as I know, and the learned counsel for the appellant admitted as much. It seems to me that whether a railway company has or has not taken the proper precautions with regard to the speed at which, and the warning accompanied by which, their trains pass on a level crossing must be in each case a question of fact. A level crossing in a prairie where you see twenty or thirty miles on each side is very different from a level crossing outside the mouth of a tunnel, or a level crossing in a street, and you must look at each case, and all the facts of the case, before you make up your mind what the railway company ought to do.

(1) 8 & 9 V. c. 20. ss. 45 & 61. (2) 12 Q. B. D. 70, 76.

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The difference under our system is very marked. The obligations of the company are defined by statute law. They are framed for all cases, and are not, as in England, a question of fact in each case. Our rule may prescribe more than may, in supposable cases, be absolutely required, as in the instance of a prairie where, as put by the Lord Justice, one can see from afar if there is any one to be warned by the whistle or the bell, while in other situations, as *e.g.* at the crossing of Mill Street in St. John, the rule provides for an effective warning and one which is intended as a sufficient protection to travellers who use ordinary vigilance in approaching the railway.

It is the duty of the traveller to exercise such ordinary vigilance. Many decisions illustrate that proposition and none more clearly than that in *Davey* v. *London and South-western Railway Co.* (1) where the servants of the railway company negligently omitted to give warning of the approach of the train by either sounding the whistle or displaying a flag which was provided for the purpose, but the plaintiff was nonsuited because with ordinary vigilance he ought to have seen the train.

The legislature having prescribed the precautions to be taken at level crossings, we have no right to hold those precautions insufficient and to throw it open to the jury on every trial to find, *ex post facto*, that something more ought to have been done in the case that for the moment excites their sympathy. Whatever is proper for the court to do in this case, under the consent, would of course have been proper for the jury to do if the case had been left to them. A remark of Pigott B. in *Stubley* v. *London and North-western Railway Co.* (2) that there would be no limit to the liability of railway companies if it were left loosely to juries

(1) 12 Q.B.D. 70.

(2) L.R. 1 Ex. 13, 20.

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in every case to say whether further precautions ought to have been taken is as true in this Dominion as in England.

The accident in Stubley's case occurred on a public footpath which was crossed on a level by the railway. In obedience to the Railway Clauses Consolidation Act, 1845, the company had a swing gate at the crossing on each side of the line, placed at some distance from the rails. A woman who was about to cross the line waited until a train passed, and then, crossing the line, was killed by a train on the further track which she had not perceived. Mr. Justice Blackburn, before whom the action was tried, reserved leave to the defendants to move to enter a nonsuit, and subject to that leave, he told the jury to assume for the purposes of the day, and only for that purpose, that the law casts upon the company the duty of taking all reasonable precautions for the purpose of protecting the passengers from risk, including that of keeping a watchman to warn passengers of the approach of a train if, from the nature of the traffic at that place, that was a reasonable practice; and he left to the jury the questions: Was there negligence on the part of the company? And could the deceased with reasonable care on her part have avoided the accident? Under that direction the jury found a verdict for the plaintiff, adding that they were of opinion that at that crossing there ought to be reasonable precautions taken by the company beyond what they had taken. Against the motion for a nonsuit on leave reserved it was contended that it was open to the jury to consider that further precautions, such as having a watchman at the crossing, ought to have been taken by the company, the peculiar features of the crossing being of course dwelt upon, chiefly that sixty trains a day passed there, and that a person at the gate through which the deceased had come was prevented by a bridge

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from seeing a train more than thirty yards off in one direction, though, when still nine feet from the line, he could see 300 yards each way. The court, consisting of Pollock C.B. and Bramwell, Channell and Pigott BB. unanimously held that there was no case for the jury, and a nonsuit was accordingly entered.

The case of *Stapley* v. *London, Brighton & South Coast Railway Co.* (1) was tried shortly before Stubley's case before Pollock C.B. whose charge was relied on for the plaintiff at the trial in Stubley's case, and it was argued and decided a week later than Stubley's case by the same judges, Bramwell B. excepted. The railway there crossed a carriage way, and the statutory duty was to have gates across the road and to keep them shut. There were proper gates, and there was also a turnstyle for foot passengers. It happened, however, that from a temporary derangement of the service, partly arising from the death of the man who had charge of the gates, one of the gates was left open and without an attendant. While this was so a foot passenger walked on to the line and was killed by a train. The neglect of the statutory duty to keep the carriage gate shut was held to justify a verdict against the company. The rules of the company provided that before opening the gates the gateman was to satisfy himself that no train was in sight, and the fact that the gate was open and no gateman there was held to be an intimation to the foot passenger that no train was in sight. Channel B., giving the judgment of himself and of Pigott B., said :—

The case depends upon the principle of *Bilbee* v. *London, Brighton and South Coast Railway Co.* (2)—(which case had been held not to govern *Stubley* v. *London & North-western Railway Co.*)—We adopt the opinion there expressed by Erle C.J., that we ought not to impose any undue burdens on railway companies that are not imposed on them by Act of Parliament, and we do not say that a railway company must keep

(1) L. R. 1 Ex. 21. (2) 18 C. B. (N. S.) 584.

servants at every crossing. At the same time we concur in the view presented to us by Mr. Manisty, that the company are not to be exempt from using due and ordinary care, although their statute gives them the right of crossing public ways on a level.

This last observation brings us back to our immediate point that, with us, the statute which permits the railway to cross a highway at the level expressly declares what shall be done to give warning of the approach of a train. That is just what in the Stapley case would in all probability have been held to be all that could reasonably be required. It is in that case stated as a fact that "the engine driver of the train sounded no whistle until the accident was actually taking place."

It is said, and the judgment of the court below proceeds on the idea, that some level crossings may be peculiarly dangerous, and that at them the statutory signals may be insufficient.

That is, in my opinion, a consideration for the legislature, and not, under our system, for the court or jury To hold otherwise would be to give a right to the jury in every case, even when the statutory signals are put beyond denial, but the traveller pays no more attention to them than the plaintiff in this case did to the bell that was rung or to the signalman's lantern, to say that the crossing was peculiarly dangerous and more ought to have been done; saying that, perhaps, on evidence which, as put by Bramwell L.J. in *Jackson* v. *Metropolitan Railway Co.* (1) would not be allowed to make any body or person liable but a railway, or perhaps a tramway, or may be a steam-boat company.

But this subject of the peculiar character of some crossings, and the necessity for special protection at such places for travellers on the highway, has not been overlooked by our legislature, as the jurisdiction given to the railway committee of the Privy Council proves.

(1) 2 C. P. D. 125, 133.

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If the ordinary safeguards are deemed insufficient in a particular locality, the means are thus provided for super-adding a further duty to that cast on companies by the general rules.

The remark of Lopez J. in *Brown* v. *Great Western Railway Co.* (1) that—

> the law with regard to negligence has somehow or the other got into a lamentable state of confusion,

though well founded in view of English decisions touching accidents at level crossings, ought not to have so much force under our more definite system; but it is to be feared that the confusion will become worse confounded if a jury may always say that, though the statute or the order of the railway committee was faithfully obeyed, yet something more ought to have been done.

The opinions on which the judgment in review is based turned a good deal on reasonings from the fact that there were gates at the crossing, and the other fact that they would not work that night. It does not appear that the gates were put there under any statutory obligation. It is not suggested that the defendant company put them there. Even if the railway had been the property of that company no obligation to protect the street by gates could be recognized without proof of an order of the railway committee, nor could it be said that such an order had been disobeyed unless its terms were in evidence.

The gates were no doubt put there by the Minister of Railways in connection with the Intercolonial Railway, and they were in charge of the officials of that railway and not of the defendant company. They were even not put there under any statutable obligation. The duty to maintain and use them was a self imposed duty. I do not know that a railway company exercis-

(1) 52 L.T. (N.S.) 622.

ing running powers over the line of another company is liable for an injury to a stranger caused by the default of the company owning the railway, as it might be liable on a contract to carry. *Thomas* v. *Rhymney Railway Co.* (1); *Great Western Railway Co.* v. *Blake* (2). But if by any process of reasoning, the duty assumed by the government with regard to the gates at the crossing could be attributed to the defendant company, it would still be in the character of a self imposed duty, and on the principle on which the case of *Skelton* v. *London and North-western Railway Co.* (3) was decided, the neglect of it would give no ground of action.

In that case the railway company had, in obedience to the statute, placed swing gates on each side of the railway across a public footpath. The statute did not require that those gates should be fastened, but they were usually fastened by rings attached to the gate posts and it was the duty of the signalman who was stationed near to let down the rings by means of a lever, and so fasten the gates whenever a train was approaching. One morning one gate was, through the neglect of the signalman or from the ring failing to catch the gate, left unfastened, and a man passed through and was killed by a train which he had not perceived. The action was under Lord Campbell's Act, and the plaintiff was nonsuited. I shall read one or two short passages from the judgments, which bear on the points made in the present case concerning the gates and touch also a suggestion that the defendant company ought to have adopted special precautions because a high fence made it somewhat difficult to see an engine approaching Mill Street from the west until one was very near the railway.

(1) L.R. 6 Q.B. 266. (2) 7 H. & N. 987.
(3) L.R. 2 C.P. 631.

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Bovill C.J. said :

If the crossing was rendered dangerous by obstructions to the view, it only made more incumbent upon him to take due care. There is no evidence, however, that the deceased took any care or caution whatever, and it was owing to this want of caution on his part that the accident occurred. It is upon precisely similar grounds that Bramwell B. bases his judgment in *Stubley* v. *London and North-western Railway Co.* (1).

Willes J. said :—

I should be prepared to decide this case on the grounds stated by my lord had I not a still clearer opinion on the other part of the case. Actionable negligence must consist in the breach of some duty. Here it is not pretended that the defendants had acted improperly in the management of the trains, and the gates fulfilled all the requirements of the statute, so that the plaintiff has to rely on the self-imposed duty, as it is called, or precaution, as I should call it, of keeping the gates shut when trains were passing * * The precaution must have been wholly voluntary, and it would be much to be deplored if the defendants' liability were increased by their taking additional precautions, whether from motives of humanity or discretion. Such, however, is not the case. If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in *Coggs* v. *Bernard* (2).

Montague Smith J. :—

"The first question is whether there is any duty which the defendants discharged negligently. It is conceded that there is no such statutable duty, since the gate was a proper one. * * But it is said that the defendants voluntarily took upon themselves to fasten the gate when a train was approaching, and that its being open, therefore, amounted to an invitation to the deceased to cross the line. I think, however, that that is not the true inference to be drawn from the evidence. It was not proved that the gate was invariably fastened when there was danger, and therefore, putting it at the highest, it amounts to this, that when the gate was unfastened there was probably no train passing. That was not sufficient to absolve a foot passenger from the duty of taking the ordinary care which he would otherwise be bound to do, and it was the want of care on the part of the deceased which was the cause of his death, and not any default on the part of the defendants."

(1) L.R. 1 Ex. 13.

(2) 1 Sm. L. C. 6th ed. 177.

But although the defendants were not responsible for the closing of the gates, there is another way of stating the charge against them, and that is that their engine was driven across the highway without due precautions being taken for the safety of travellers. Put in other words it amounts to this: the crossing was dangerous unless the gates were down; grant that it was the duty of the Intercolonial Railway people to lower the gates, still you should not have crossed, knowing as you did that the gates were up, without seeing that adequate protection was substituted. This is, after all, a change only in the form and not in the substance of the charge, and in this shape it is answered by what I have said. The precautions taken by the man who signalled with his lantern and by shouting, were, in my judgment, a sufficient warning had the plaintiff, who knew he was approaching the railway, been on the alert as a man of reasonable intelligence and prudence would have been. There was no duty towards him to have the gates closed or to substitute any other method of protecting him against his own imprudence. The only obligation on the defendants was to ring the bell and to keep down the speed of the engine to under six miles an hour, and that duty they fulfilled

I have not referred to American decisions, and I do not think we should gain much certainty with regard to the principles I have discussed from doing so.

In the excellent and useful treatise on Railway Accident Law by Mr. Patterson of Philadelphia (1), the author notes several decisions of the courts of Illinois and New York as authorities for the proposition that when the railway has followed the statutory directions as to giving signals, &c., it has discharged its whole duty in the premises, and other decisions in

(1) Patterson on Railway Accident Law p. 162 s. 164.

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New York and Massachusetts where the doctrine is held that compliance with such statutory regulations does not necessarily relieve the railway from the necessity of taking such additional precautions as are essential to the safety of passengers on the highway. The learned author thinks the latter the sounder doctrine.

I am not familiar enough with the railway legislation of the different states of the Union to know how far the railway committee of our Privy Council resembles in its power and its functions any tribunal there existing. The power which it possesses cannot, as I have endeavoured to maintain, be left out of consideration as an important datum in the present controversy, and whether the statutory duties of a railway company in the particular in discussion are simply those defined by the general rule, or whether they are supplemented by an order of the committee, I am satisfied that no principle properly deducible from the current of English decisions requires us to hold that, in this Dominion, the question of duty in the premises is in every case an open question for the jury.

We are dealing, as it is scarcely necessary to say, only with the precautions for the safety of the public in general, to be observed at all local crossings or at particular crossings where special precautions have been enjoined by the constituted authority, and not with the different subject of duty towards an individual who is seen to be in a position of peril like the donkey in *Davies* v. *Mann* (1). The rule acted on in that case of course applies to railway companies, but it does not come in question upon the facts before us.

In my opinion we should allow the appeal.

Appeal quashed with costs.

Solicitors for appellants: *Weldon & McLean.*

Solicitor for respondent: *Geo. A. Davis*

(1) 10 M. & W. 546.