THE GREAT WESTERN RAILWAY COMPANY OF CANADA..... } APPELLANTS;

1879

*Jan. 22, 23

*April 16.

AND

JAMES HENRY BROWN..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Railway Crossing—Collision—Air-brakes.—Failure to comply with Consolidated Statutes, Chapter 66, Sections 142, 143—Negligence—Damage.

The Grand Trunk Railway crosses the Great Western Railway, about a mile east of the city of *London*, on a level crossing. On the 19th June, 1876, a Grand Trunk train, on which Plaintiff was on board as a conductor, before crossing, was brought to a stand. The signal-man who was in charge of the crossing, and in the employment of the Great Western Railway Company, dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, Appellants' train which had not been stopped, owing to the accidental bursting of a tube in *air*-brakes, ran into the Grand Trunk train and injured Plaintiff. It was shown that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way.

C. S. C., cap. 66, sec. 142, (Rev. Stats. Ont., cap. 165, sec. 90) enacts that "every Railway Company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear."

Sec. 143, enacts that "every locomotive * * * or train of cars on any railway shall, before crossing the track of any other railway on a level, be stopped for at least the space of three minutes."

---

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, and Taschereau, J. J.

1879

GREAT WESTERN RAILWAY v. BROWN.

Held,—That the Appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way.

That there was no evidence of contributory neligence on the part of the Grand Trunk Railway, as they had brought their train to a full stop, and only proceeded to cross Appellants track, when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Railway Company.

APPEAL from the decision of the Court of Appeal for *Ontario*, dismissing the appeal of the defendants (appellants) to the said Court of Appeal from the decision of the Court of Queen's Bench of the said Province, rendered on the sixth day of February, 1877, discharging the rule *nisi* whereby the plaintiff (respondent) was ordered to show cause why the verdict obtained in the said cause should not be set aside and a verdict entered for the defendants.

The declaration in this cause alleged that: "Defendants so negligently and unskilfully drove and managed an engine, and a train of carriages attached, along a certain railway which the Plaintiff was then lawfully crossing in a certain railway carriage; that the said engine and train of carriages were driven and struck against the said railway carriage in which the Plaintiff was then lawfully crossing the said railway, as aforesaid, whereby the Plaintiff was thrown down and wounded, and sustained severe spinal injuries, and was permanently disabled, and was prevented from attending to his business for a long time, and incurred expense for surgical and medical attendance."

Plea: Not guilty by statute.

The main facts of the case are as follows: The Grand Trunk Railway crosses the Great Western Railway on the level near the City of *London, Ont.* On June 19th, 1876, a Grand Trunk train, of which Plaintiff was conductor, and a Great Western train, were approaching the

crossing; the G. T. R., the plaintiffs', train stopped at the semaphore until signaled to proceed; it then advanced, and when crossing defendants' line of railway it was run into by defendants' train, on account of the accidental bursting of one of the *air brakes* which were applied from twenty to thirty yards distant from the semaphore, a distance too short to enable the driver to stop the train with the ordinary brakes, when applied. The evidence given at the trial is reviewed at length in the judgments on this appeal.

The case was tried at the *Middlesex* Fall Assizes, 1876, before *Burton*, J., without a jury, and the learned judge found a verdict for the Plaintiff, and assessed the damages at $1,000.

Mr. *Bethune*, Q. C., for Appellants:

The declaration is not framed to present, nor was the evidence at the trial directed to support or to meet, a complaint for the non-performance of statutable provisions.

It is not charged that Defendants acted contrary to an Act of Parliament, or that they acted contrary to law; the charge is negligence and unskilfulness, from both of which they claim to be acquitted. *Blamires* v. *Lancashire and Yorkshire Railway Company* (1).

Even if charged in the declaration as the foundation of the action, it does not entitle the Plaintiff to recover.

The G. T. R. train was bound by the statute to stop three minutes, and if Plaintiff, who was conductor of that train, had obeyed the law he would have been safe, and the accident would not have happened.

Winckler v. *G. W. R.* (2). *Shields* v. *G. T. R.* (3); *Graham* v. *G. W. R.* (4).

(1) L. R. 8 Ex. 283.
(2) 18 U. C. C. P. 250.
(3) 7 U. C. C. P. 111.
(4) 41 U. C. Q. B. 324.

1879

GREAT WESTERN RAILWAY v. BROWN.

It is the collision which is the cause of the action, and we say it would not have happened if you were not negligent. You have been in *pari delicto*, for you have not shown that you so behaved as not to cause the accident. The statute does not impose any penalty for negligence, it imposes a duty, and I charge you with the breach of a statutory duty which has caused the accident. The act, Appellants contend, is a complex one, and the accident results as much from the act of one railway as from the act of the other.

As to the question of negligence, the Appellants were provided with the best known apparatus for bringing their train to a stop, and that is all the law requires. These brakes had been used for three years, and at this crossing they had always been known to answer the purpose. The same air-brake had been used twenty-six times successfully on this very trip, and this case should be decided by the experience up to the time of the accident. The bursting of the pipe which caused the injury was not and could not be known before, for it seems to have taken place after the speed of the train had been partially slackened by the brakes, and, therefore, was an accident against which the Appellant could not, by the use of ordinary precautions, provide.

Speed is one of the objects aimed at in railway travelling, and railway companies are justified in adopting improvements which have a tendency to effect this object; and the Appellants contend that when they adopt such improvements, after they have been tested and approved by skilled persons, competent to judge and recommend after long use, they are not guilty of negligence because an accident occurs in the giving way of some parts of the machinery which they could not foresee or prevent.

The learned counsel relied on the following authorities: *Blyth* v. *The Birmingham Water Works Company*

(1); *Redhead* v. *The Midland Railway Company* (2); *Wyborn* v. *The Great Northern Railway Company* (3); *Daniel* v. *The Directors of R. M. R. Co.* (4); *Crafter* v. *The Met. R. Co.* (5); *Wharton* on negligence (6).

Mr. *Rock*, Q. C., for Respondent :—

It is contended that the declaration ot the Plaintiff is sufficient. *Anderson* v. *The Northern Railway Co.* (7) is a case in point. The failure to comply with statutable provisions is evidence of negligence. A declaration based on the general ground of negligence is sufficient. See *Shearman & Radfield* on negligence (8).

There is no evidence of contributory negligence on the part of the Plaintiff; on the contrary, there is evidence that the G. T. R. stopped, and only proceeded when signaled to proceed by the officer in charge of the semaphore.

Appellants were bound to stop the train, before passing the crossing, for at least three minutes, and not to proceed until signaled so to do; this was not done, as they did not apply the air-brakes in time. One of their own servants says that twenty-five yards west of the semaphore they were going at the rate of twenty-five miles an hour; the only reason they did not stop was because the distance was too short; in that they were guilty of negligence.

Air-brakes, such as used by Appellants on their train, do become defective, and when the Appellants found that the air-brakes had become defective, they should have applied the hand-brakes on said train, which they did not do, and had they done so immediately after the bursting of the air-brakes, as they were in duty bound

(1) 11 Ex. 781.
(2) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.
(3) 1 F. & F. 162.
(4) L. R. 5 H. L. 45.
(5) L. R. 1 C. P. 300.
(6) Secs. 32, 300, 635, 822 *et seq.*
(7) 25 U. C. C. P. 301.
(8) Sec. 16, p. 16.

1879

GREAT WESTERN RAILWAY v. BROWN.

to do, the collision whereby the Respondent was injured would have been avoided.

It was also the duty of the Appellants to use the best known and safest appliances for the stopping of their trains, and it was shown in evidence, as is the fact, that had the ordinary hand-brakes been relied upon on the occasion when the collision occurred, the accident would not have happened, but the Appellants, in trusting to the air-brakes, instead of making use of the hand-brakes, which are safer and more reliable, were guilty of negligence.

Mr. *Bethune*, Q.C., in reply.

THE CHIEF JUSTICE:

The Grand Trunk Railway crosses the Great Western Railway about a mile east of the city of *London*, on a level crossing. The facts in this case are very few, and, there are no contradictions.

At the crossing, and where this accident happened an employee of the Great Western was in charge, and whose duties (he says) "are to signal trains for both companies for the crossing, and attend to the switch." He likewise says, "my duty is, if two trains come at one time, to show the stop signal to the Trunk, the Great Western having the right of road then, but when they do not come together it is first come first served." And he further says, "the Grand Trunk train came first on that day, and it, of course, had the right to pass first. * * I signaled the conductor of the Grand Trunk to come on." He also says, "the Grand Trunk train was going at the regular and usual rate of speed in crossing that place." And *Bell*, the driver of the Great Western train, says:

> Last September I was driver of the train that ran into the Grand Trunk train. As I approached the crossing it was my duty to stop, and I endeavoured to stop by applying the air-brakes. * * *

When I put on the brakes they pulled me considerably for a little time. Then I found out the air was gone, and I reversed the engine and whistled "on brakes." I could not say whether the brakes were applied. I believe the pipe produced is the pipe of the engine that burst that day. * * * The consequence of the defect was that I could not stop my train before getting to the crossing, and I went into the Grand Trunk train. * * * We had other brakes on the train—the ordinary hand-brakes. I have regular brakesmen —the same number as if we did not have the air brakes—two on each train.

And in answer to the question: "If these air-brakes are so perfect, why do you have ordinary brakesmen?" he answers:

They require brakesmen to look after the train, handle baggage, give signals, *and apply the other brakes*, if anything should go wrong with anything about the train. * * We have the same number of brakesmen and the same hand-brakes that we had before. * * We did not stop the train with the ordinary brakesmen, *because the distance was too short.* We tried. It was my duty to stop at the semaphore. I always stop at the semaphore. I tried to stop that day before I was motioned by *Mapstall.* I tried to stop before I got to the same place; I could not say at what distance from it: it might be 20 or 30 yards. When I discovered that the air was gone from the brakes, I was a little over 200 yards from the junction. I was going at 30 miles an hour when I first shut off steam. That would be about half a mile from the semaphore. I applied the brake after I shut off steam. * * I whistled "down brakes" when I was a little over 200 yards from the junction. *The train might be going 25 miles an hour then.* The only reason I can give why we did not *stop the train is that the distance was too short.*

The conductor of the Great Western Railway says: "The brakesmen did all they could and applied the brakes, but could not stop the train." And in the course of his examination the following occurs:

His Lordship: Do you consider it safe to apply the air-brakes so near the junction, when you see the result now, that the brakesmen, when called upon afterwards, were not able to prevent the collision?

Witness: We naturally supposed that the air-brake would stop the train.

Question: In point of fact, there is no security in applying the air-brake so near the junction?

1879

GREAT WESTERN RAILWAY v. BROWN.

Answer: No, not if they burst, of course, there is not.

Examination resumed: We do not expect them to give out. We used the same brakes from Suspension Bridge to Dorchester, and fetched the train up at every station; and the same brake was used twelve months before.

His Lordship: If the ordinary brake had been used in time this accident could not have occurred, but if you trust to the air-brake, and choose to put it on so near the crossing, an accident is unavoidable should the air-brakes fail.

Witness: The same accident would have occurred the other way, suppose the hand-brakes gave out. The hand-brakes are affected just in the same way as others. I have often broken the chain, brake-rods, the rims, and the dogs of the brakes, and different parts of the car connected with them. They all give out.

Question: But in that case it is only one part of the brake that gives way?

Answer: Nothing that is made but what will break and wear.

On cross-examination, he says:

* * * If we had had to depend on the ordinary brakes and brakesmen to stop the train, they would have been called sooner that day than if the air-brakes had not been there. * * If there had been no air-brakes, and the ordinary brakes had not given out, the train could have been stopped. I have known air-brakes become defective since this accident occurred. I could not say how many times. I paid no particular attention to keep an account of the different ones. When I am on a train and a defect occurs, I report it to the parties who are supposed to remedy it. I have known of one or two defects in air-brakes. It is rather an unusual occurrence. It does not occur often, but it does occur. *I have known defects occurring on the road at least as often as once a week.* I will not say oftener. I do not mean a breakage in them, *but the ordinary wear of the rubber.* And not only with regard to the rubber pipes, but to the iron pipes under the bodies of the cars. We have ordinary brakes on all trains, and on all passenger cars as well as all freight cars; *the same as we had before the air-brakes were introduced. The ordinary brakes are for the purpose of stopping the train.* If it had not been for the defect in the pipe, the train would have stopped before we reached the semaphore. I reported this affair to the proper quarter when it occurred. I have had occasion to report some defects in the air-brakes on my train since then. The trains were stopped when I discovered the defects. If the pipes

are defective and the air is applied, the brakes do not work at all.

By His Lordship: There are regulations about brakesmen being on hand to apply the brakes if called for. They are supposed to be ready on the platform.

Question: If the air-brakes were applied, as they were in this instance, so near the crossing, then, although the brakesmen were at their posts, they would not be able to prevent an accident?

Answer: No, certainly not. The engineer has to use his judgment in approaching crossings and stations.

By Mr. Beecher: I have known a similar burst to this to occur on one of my trains from the ordinary pressure. It has occurred three different times. When I speak of something going wrong once a week, I mean that the parts of the air-brake break and wear with the ordinary working of the train—not only the rubber pipes, but the iron rods, and so on. The air-brake acts upon the wheels by means of the same brakes as the hand-brakes. The ordinary brake, just like this, is liable to get out of repair.

By Mr. Rock: In cases of breakages, sometimes the outside will indicate it beforehand by rubbing and chafing, and sometimes not. I have several times known breakages take place by virtue of which the air would escape, and still there was nothing externally to indicate anything wrong. The only test in cases of that kind would be to apply the air. Here there was no escape of air twelve minutes before.

Gillean, a brakesman on the Great Western says:

I was a brakesman on the train that had this collision on June 19th last. I remember hearing the brakes whistled "on" when we were between the semaphore and the Grand Trunk crossing, about 40 or 50 yards west of the semaphore. I was standing between the parlor car and the coach, on the platform outside. I instantly applied the brakes. I applied one just as tight as I could, and was applying the other when we struck. I did all I could.

On cross-examination:

If we had put on the hand-brakes where he tried his air-brakes, then the train would have come to a full stop before we came to the semaphore.

Henry Childs, the car superintendent of the Great

1879

GREAT WESTERN RAILWAY v. BROWN.

Western, in answer to this question : "In coming up to a crossing this way, is it not manifestly unsafe to apply the air brakes unless it is done earlier than in this instance?" says, "It seems from this accident to be so."

On cross-examination, he says :

If the tube had not broken there was no need of the brake being applied sooner. If it had been applied, and they found anything was the matter, they could have stopped the train with the ordinary brakes.

Then follows this question :

Therefore it would have been better to have applied it sooner? *Answer :* Certainly. * * * These brakes have been in use three years—we had experimented with them about a year before that—since then we have always had brakesmen on trains, the same as before.

As to air brakes, *Bell* says :

They were quite effective when we last stopped, and held first-rate—there was nothing defective. The brakes were examined at Suspension Bridge, and also at *Hamilton*, they always are. * * * We examine the wheels at *Paris*, but not the air-brakes. * * * The air-brake has been in use for three years, and this is the first accident that has happened to it, I believe.

Cook, the fireman, says :

I was fireman on the train with the last witness (*Bell*), I heard what he said about the air-brakes on that train, and that there was nothing wrong with them all the way to *Dorchester*. That is correct. The thing that caused the trouble was a burst like that in the tube produced. There was nothing to warn us that there was anything wrong with it—we usually put the air on at the Bridge, and a man goes round to see if there is any leak of air, and if there is any he changes the pipe.

Newman, car examiner of the Great Western Railway, says he examined the air brakes at the bridge, and found their condition perfect. There was nothing, whatever, in any part of them to indicate anything wrong. "I examined every link—the link between the engine and the next car, and between every other car."

1879

GREAT WESTERN RAILWAY v. BROWN.

Haskin, car examiner at *Hamilton*, says:

I examined the train that this accident happened to. On that morning I examined the air-brake to every car. I will not be certain that the driver put on a pressure of air, but I examined the brakes, and found every one good. Nothing to indicate anything wrong.

Cross-examined by Mr. Rock: The most effective method of testing these brakes is by the air from the engine. I cannot say that they were examined that way on that morning, but as a rule they generally are. They are not always tested that way at *Hamilton*, unless there is any defect. The driver would know of any defect by the air escaping and the brake not doing its work. These brakes do get defective sometimes. They must be renewed. They will wear out. They do not frequently get defective. We renew them when they do. We will run two or three months without any defect. Sometimes it is a less time—a month or two months. I have not known a defect in less than a month. I have not frequently known them to occur at intervals of a month. We might have had two or three pipes get defective in the course of two or three months, or in the course of six months. The defects we find are where the tube has been rubbed, and where the air perforates through. It only perforates where there has been a defective part. I have known that to be the case within the last six months. They are to be always relied on, unless any of them burst. Certainly, sometimes they do burst. I have known them to burst during the last year. I cannot say how many times. I do not think half-a-dozen times. Probably as many as three or four times. They would then become inoperative and useless. The ordinary brakesmen are carried in case of accident. Nothing is perfect. My opinion is that the ordinary brakesmen are carried because these brakes are not perfect occasionally. I do not know that as a fact. I do not know anything about the stoppage of trains. I suppose trains with these brakes will sometimes run nearer a station without endeavouring to stop than with the ordinary brake. I cannot tell whereabouts on the road air-brakes have proved defective. Defects generally occur by the pipes bursting and the air escaping.

Childs, car superintendent G. W. R.: "I have known the pipes sent in to me for repairs when burst, perhaps once in six weeks or two months, not very frequently."

This evidence shows conclusively, that the Grand Trunk train was lawfully crossing the Great Western track, and was in no way whatever to blame for this

1879

GREAT WESTERN RAILWAY v. BROWN.

accident. As to any idea that the Grand Trunk train did not stop three minutes, and therefore was guilty of contributory neligence, I can only say, the evidence is, that the Grand Trunk train was brought to a full stop, and did not move till the officer in charge, a servant of the Great Western, lowered the semaphore, and invited and authorized the Grand Trunk train to proceed. I cannot find a syllable in the evidence, showing that there was not the most rigid and exact compliance with the law; so I have no hesitation in saying that, in my opinion, the Grand Trunk did not in any way contribute thereto. It was unquestionably the duty of the Great Western to come to a full stop before coming to the junction, under the common law liability, as it likewise was their statutory duty.

Revised Statutes of *Ontario*, Cap. 165, page 1539, sec. 90:—

> Every railway company shall station an officer at every point on their line crossed on a level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof that the way is clear.—C. S. C., Cap. 66, s. 142.
>
> Sec. 91:—Every locomotive, or railway engine, or train of cars on any railway shall, before it crosses the track of any other railway on a level, be *stopped* for *at least* the space of three minutes.—C. S. C., Cap. 66, s. 143.

They did not do so. The air-brakes gave out, and when the hand-brakes were whistled on, the distance was too short for the hand-brakes to pull the train up, and they ran into the Grand Trunk. The simple question is, was there anything to justify or excuse the Great Western in not stopping? Had they stopped, of course there would have been no collision. Were they, then, prevented from stopping, and so discharging their common law and statutory duty by *vis major*, or inevitable or unavoidable accident? or could they, by providing suitable means, or by the proper use of means within their control and at their disposal, have accom-

plished what it was their duty to do, and was the accident the result of such means not being provided or used? The Great Western was supplied with air-brakes and hand-brakes, and brakesmen to work the brakes, being all the brakeage power, as far as the evidence shows, or that I can assume, used on railway cars, and so no blame can attach to them for not providing the necessary means of coming to a full stop. If the collision took place by *vis major*, or by reason of an accident happening to that power which could not have been foreseen, and against which no reasonable care, skill, or foresight, could have provided, then the case would, no doubt, free the Great Western from legal liability for the consequences of such an inevitable and unavoidable accident. But that cannot be called an unavoidable accident which might have been avoided by more caution. While the evidence very clearly shows, on the one hand, that the air brake apparatus is a most useful and valuable invention, and a most powerful and effective means of controlling and bringing up quickly a train, it is, on the other hand, very liable to become defective, and does frequently burst and become useless, and that, too, without the fault of those in charge, and notwithstanding constant and rigid examination, from latent defects not externally visible or capable of detection, as well as from chafing or other causes which may be visible and capable of detection. And in this very case, the car superintendent says he could not perceive, on examination of the burst tube, any flaw at the hole which would indicate a weakness; and though he cut a slit in it to see if there was anything rotten or defective, he found nothing; and says that one of these pipes bursting would prevent the stopping of the whole train, so that the train would then necessarily be

1879

GREAT WESTERN RAILWAY v. BROWN.

entirely out of all human control, unless, indeed, there were other means which could be resorted to.

It does appear to me it would be simple madness to run a train, under ordinary circumstances, without reference to any exceptional case such as this, dependent alone on the air apparatus; and that this is so is best evidenced by the fact that, notwithstanding the power and value of these air-brakes and the great expense at which they are attached, the ordinary hand-brakes and brakesmen are retained as before the introduction of the air-brake, and stringent rules are made requiring the brakesmen to be at their posts on the platform ready in case of necessity; that is, I presume, in the event of the air-brakes giving out to supply its place by the use of the hand-brake. But of what possible advantage could it be to have the ordinary brakes, or rules requiring brakesmen to be ready to work them, if, when called into requisition, the rate of speed is so great, or the distance so short, that they cannot be worked effectively. It is hardly possible to conceive a point on a railway requiring greater care and caution in approaching it than when two railways cross and trains are continually running on both.

It was the imperative duty of the driver of the Great Western to bring his train to a full stop, and, knowing how great a risk there was of a disastrous collision, and knowing, as he ought to have known, how liable air-brakes are to get out of order, from latent and other defects, he was bound to have taken every precaution which care and foresight could dictate, and to have relied on all his resources, and have resorted to them, and placed himself and his train at a sufficiently early period, in a position to make them available in case of an emergency. He should, in my opinion, have acted on the assumption that when he came to the crossing a train would be passing on the other track, for he could

not know that this would not be the case, and he should, therefore, have exercised a degree of care, precaution and diligence proportioned to the probable, or even possible, impending danger.

In view of the double means of stopping the train with which it was provided, and in view of the liability of air-brakes to burst and become useless, the Great Western train, in my opinion, should not have run so close to the semaphore, and at such a rate of speed that, if one of the means available failed, the other would be practically useless, but that the speed of the train should have been slackened and the air-brakes applied, more particularly at such a dangerous spot, at such a distance from the semaphore, as, in the event of their failing, would have enabled recourse to have been had to the hand-brakes; and that running the train so fast and so close to the semaphore as to render inoperative any stopping power which might have been obtained from the hand-brakes, before taking any steps to put the train under control, was negligence, wholly independent of any statute.

I cannot help declaring that, in view of the risk and danger attendant on a train crossing a railway track when not entitled to do so, and the probable consequences of a collision so dreadful to contemplate, I think it was most rash and hazardous, and, in view of the law, a most unjustifiable act for the driver of the Great Western train to approach within half a mile of such a crossing at the rate of thirty miles an hour, and not attempt to obtain control of his train till within twenty or thirty yards, or sixty, or ninety, from the semaphore where it was his duty to stop, and that his train should be going twenty-five miles an hour when he was only a little over two hundred yards from the junction and whistled "down brakes." This very fact of the conductor whistling on brakes shows that it was to the

1879

GREAT WESTERN RAILWAY v. BROWN.

hand-brakes he looked in the event of the air-brakes not working; but what possible use was his calling for help from the hand-brakes when his rate of speed was so great, and he had allowed his train to be in such close contiguity to the crossing that they were powerless to respond to his call? Instead of taking every possible care and precaution that judgment, skill and foresight could suggest to comply with the law, they appear to have taken the least possible precaution, or rather no extra precaution at all. They did not put themselves out of the way in the least to obey the law; on the contrary, having two means of fulfilling their duty and bringing their train to a stand, they approach so near the junction and at such a rate of speed, that their primary means failing, their auxiliary means are useless, and they are helpless to fulfil either the common law or their statutory duty, but appear to have shaved as close as it was possible to do if they had had the most absolute certainty that the air-brakes could not give out.

It cannot be denied that the requirements of the law could have been complied with, simply at the expense of delay, and that, too, but trifling. Defendants had provided the means necessary to enable them to do as the law directed, but they chose to put it out of their power to use them. The statute imposed on Appellants the duty to stop, if it were possible, and stop they were bound to do, regardless of delay or inconvenience; they cannot be allowed to say, or to act, as if they said: "We'll try to stop if it does not delay us beyond the shortest possible time, or inconvenience us too much."

It is as well, once for all, to let railway people know that, however desirable speed may be, speed must give way to safety in all cases where speed and safety are incompatible, and that every provision which the law has made for the safety and security of life and pro-

perty must be respected and complied with, irrespective of delay, inconvenience or expense.

If courts of law should countenance so reckless a disregard of available precautions and means for avoiding collisions as existed in this case, and thereby sanction such a disregard of so wise, and wholesome, and necessary a statutory provision, for the protection of life and property, they would, not only set themselves in opposition to the wise policy of the law, but would encourage speed at the risk of safety, and recklessness and carelessness, where the public safety demands the utmost care and caution. While we ought to be careful not to impose any undue burdens or duties on railway companies, we are bound to see that those imposed by Act of Parliament are respected and fulfilled, and that there be no breach of any statutory duty.

I do not think authorities are required to support the view I have taken of this case, but as there are several which, I think, bear directly on the case, I will cite them: *Blamires v. Lanc. & Yorkshire Ry. Co.* (1) shows that in an action for negligence it is right to use the statute as evidence of what should have been done.

In *Williams v. Gt. Western Railway Co.* (2):

The defendants' line crossed a public foot-path on the level, but the defendants had not erected any gate or stile, as provided by 8 and 9 *Vic.*, cap. 20 sec. 61.

The plaintiff, a child, four years and a-half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train.

Held, that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to fence.

The ground taken here was that this was an unexplained accident.

On the other side it was contended, that there was ample evidence of negligence, none of the precautions

(1) L. R. 8 Ex. 283. (2) L. R. 9 Ex. 157.

1879

GREAT WESTERN RAILWAY v. BROWN.

prescribed by 8 and 9 *Vic.*, cap. 20, s.s. 47, 61, and 26 and 27 *Vic.*, cap. 92, sec. 6, having been observed; that the only question was whether that negligence could be reasonably connected with the accident.

Kelly, C. B., adopted that view. He says:

The questions are, first, whether there was any negligence on the part of the defendants which could have contributed to the accident; secondly, whether such negligence was the cause of the accident. As to the first point it is impossible to imagine a case where negligence is more clearly made out or more inexcusable. There was a clear statutory duty to have gates on both sides of the carriage way * * * and it was equally required for the protection of the public, that a gate or stile should be placed at each side of the railway. Both those duties were left unperformed; this was clearly negligence.

Pollock, B., after saying no doubt there was a non-performance of what was enjoined by the Act of Parliament, says:

It is not for us to speculate on what was the precise intention of the Legislature when they required that there should be a gate or stile on a foot-path crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment.

Amphlett, B., says:

We start with the fact that the defendants have failed to comply with the express provisions of the statute, and this is an act of gross negligence.

Cockburn, C. J., in *Stokes v. Eastern Railway Company* (1), says:

Lastly, even assuming that the accident was not *caused* by negligence of the company's servants, might it have been prevented or mitigated by a better use of brake-power? It is not to be disputed, because the universal practice of railway companies is an acknowledgment of its necessity, as a matter of proper caution and care, that brake-power ought to be used. Are you of opinion that the absence of a second brake-van, or the not putting the single one in the rear, was negligence on the part of the company? You must consider the questions as practical men; and if you think there was a neglect of what might fairly and reasonably have been expected

(1) 2 F. & G. 691; quoted by Mellor, J., in *Redhead v. Midland Railway Company*, L. R. 2 Q. B. 429.

from the railway company for the protection of a train, that would be negligence.

Fry, J., in *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St. Katherine Docks Company* (1), says:

Therefore, I think that if the case had stood simply on the common law liability of the defendants for negligence, I should have had great difficulty in concluding that there was any such liability. The flood of November, 1875, being, in my judgment, what, in the contemplation of law, is called an act of God.

But I do not think that this case is to be determined upon the defendant's common law liability; and for this reason: The defendants did not choose to rely on their common law right to use their land as they might think fit. They chose to go to Parliament for powers to authorize them to some extent, apparently, to do what they might have done without those powers. They take a power to construct and to maintain a dock upon their land, and taking that power and acting upon it, they must, in my judgment, subject themselves to the conditions which Parliament has imposed upon the exercise of that power. They cannot afterwards fall back upon the question of what was reasonable care, if Parliament have in any particular respect laid down what they are to do. The question, therefore, which I have to determine, comes, in my opinion, to this: have Parliament laid down anything which takes the place of the common law liability to use reasonable care? have they, in short, defined the height at which the bank of the dock is to be maintained? If they have, I do not think that the Defendants can say, we will be judged by our own common law liability, or by our statutory liability, as we may think fit. To allow them to do so would obviously be unfair, for this reason, that if they perform their statutory obligation, they are harmless in all cases, even if that liability is less than the common law liability, whereas if they perform even less than the statutory obligation, they might contend that, if the common law obligation reached to a less extent, they would be harmless also. I think they must stand or fall by their statutory liability. In some cases, this will enure to their benefit; in other cases, it will enure to their injury. But, whether it be for or against them, it becomes, in my opinion, the rule by which their negligence or care is to be tried. * * * I hold therefore, that the statute imposed on the defendant company, an obligation to maintain the upper surface of the bank, which was to retain the water in their dock at a level of four feet above trinity high-

(1) L. R. 9 Ch. D. 503.

1879

GREAT WESTERN RAILWAY v. BROWN.

water mark. It is conceded that they did not so maintain it. The result in my opinion, is, that there has been negligence on their part in not fulfilling their statutory obligation, and that they are responsible for that negligence.

HENRY, J.:

This is an action brought by the Respondent to recover damages from the Appellant company, for injuries received by him, arising from a collision between a train of that company with one of the Grand Trunk Railway, of which he was then conductor.

It is a special action on the case for negligence of the servant or servants of the Respondents, and, as such, is alleged in the declaration.

The defence, by the only plea of the Respondent, is "not guilty."

At the time of the collision, the train of the Grand Trunk Company was in motion on the crossing, about a mile east of *London*. The crossing of the two lines of railway at that point is a level one. The question of contributory negligence was raised by the allegation that the Plaintiff's train should have waited longer at the semaphore before running upon the crossing. The Appellant, however, failed to prove that such was the case, and, by all the statements in evidence, we are to conclude that the Respondent waited there the prescribed time. The semaphore is regulated and controlled by an employee of the Appellant, and the signal to proceed was given to the Respondent before he advanced his train. His train was therefore legally in the position it occupied when the collision occurred.

Redfield on Railways (1) says:

The subject of railway crossings on a level with the highway has been before alluded to, as one demanding the grave consideration of the legislatures of the several states. It always causes a most pain ful sense of peril, especially where there is any considerable travel

(1.) 1 Vol., p. 566.

on the highway, and is followed by many painful scenes of mutilation and death, under circumstances more distressing, if possible, than even accidents, so destructive sometimes of railway passengers.

In a case which he cites, *Bradly v. The Boston and Maine Railway* (1), where the plaintiff was injured at a railway crossing by collision with an engine, it was held that "where the statute required at such points certain specified signals, the compliance with the requirements of the statute will not excuse the company from the use of care and prudence in other respects." And he says:

> But when the statute requires certain precautions against accidents, and its requirements are disregarded, the party suffering damage is not entitled to recover, if he was himself guilty of negligence which contributed to the damage.

This position, as a general proposition, no one will doubt. He proceeds thus:

> If the wrong on the part of the Defendant is so wanton and gross as to imply a willingness to inflict the injury, Plaintiff may recover, notwithstanding his own ordinary neglect. And this is always to be attributed to Defendant, if he might have avoided injuring Plaintiff, notwithstanding his own negligence.

The application of the doctrine last quoted to this case amounts to this, that if the Respondent's train, when the collision took place, was even wrongfully on the crossing, the Appellants' conductor or driver might have avoided the collision, by using the ordinary and necessary care and prudence, but which, from the evidence, I hold, he did not use.

Wharton, in his treatise on negligence (2), says:

> Where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in the latter's favor against the former, even though the statute gives no special remedy. In this case applies the maxim *ubi jus ibi remedium.*

It is in evidence, that the two trains pass the crossing about the same time—sometimes one, at other times the

(1) 2 Cushing 529. (2) S. 443.

1879

GREAT WESTERN RAILWAY v. BROWN.

other train crosses first, according to the time of arrival at the point, as regulated between the two companies. There is therefore greater danger of loss to life and property by a collision than when a train passes a public road, and more care and circumspection are required to be used by the conductors of each train. Both trains appear to have been three or four minutes behind time, and there was therefore the more necessity for each to beware of the consequences of a collision by running into the one which happened to be ahead and then on the crossing. The conductor of the Appellants' train should therefore have approached the crossing with the greatest care and caution, instead of which he approached the semaphore, at which he was required to stop, within a few yards, at the rate of twenty-five or thirty miles an hour, trusting alone to the air-brakes, without any provision made for the use of the hand-brakes, in case of an accident to the air-brake. It was therefore such reckless management as, under the circumstances, should subject the Appellants to make good any resulting damage. The hand-brake men were not at their posts, and so much time elapsed after the breaking of the air-brake before even one of them put on the brake that the train was not stopped in time to prevent the collision, although, from the evidence, we are justified in concluding that, had the hand-brakes been instantly applied when the air-brake gave out, the train might have been stopped in time to prevent the collision.

It was contended on the argument, that as the air brake, when in good order, is superior in its action to hand brakes, and more promptly efficient, the accident occurring to it, preventing its use at a critical time, by which the train runs on unchecked, and an injury thereby occasioned, the company would not be responsible therefor. The ruling principle in such cases is of universal application; and that is, that the company

must use all the well-known and recognized appliances to prevent the occurrence of injuries, and if they trust to one only where others are as commonly used and considered necessary for safety, and damage results, the company is responsible for it. It appears from the evidence, that although air-brakes are more prompt, and even more effective in every way, they cannot be at all times solely relied on. They are useful, no doubt, in the general working of a train, but it would be wrong to trust to them alone when approaching the crossing of another train due there about the same time, at the rate of twenty-five or thirty miles an hour. It is proved that the pipes or tubes often burst ; and there is no absolute security to be felt in them from even a recent test of those some time in use—the material of which they are made wears out by use, and the pressure they will bear depends upon the strength of their weakest part. In use they are, I presume, liable to injury of different kinds, which, at a given point, may weaken them, and experience of such tubes shows that no mere inspection can be relied on. They may have been recently tested, but that seems to afford little or no security, as they may become weakened by the very means used to test them. Whether the reasons I advance be sound or not we have evidence of the fact that they often give out when least expected. I think, therefore, that trusting to them alone, at a juncture such as in the present case, was wholly unjustifiable, and that when the conductor takes the responsibility of trusting to them alone, his company should have the responsibility of making good any resulting damage. There are many other facts proved that show culpable negligence, but it is unnecessary to refer more particularly to what the evidence discloses. The declaration is for negligence, generally, and the breach of statutory provisions, as shown in this case, in consequence of which

1879

GREAT WESTERN RAILWAY v. BROWN.

injury or damage ensues, is sufficient to entitle the Respondent to recover. There is no question as to the amount of damages. I have no doubt that the Respondent is entitled to our judgment. I think, therefore, the appeal should be dismissed, and the judgment below affirmed with costs.

STRONG, FOURNIER and TASCHEREAU, J. J., concurred.

Appeal dismissed with costs.

Solicitor for appellants: *Samuel Barker.*

Solicitor for respondent: *Warren Rock.*