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*Nov. 14, 15.
*Dec. 6.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

MARY GRIFFITH AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Negligence—Railway company—Death from contact with train—Absence of eye witness—No warning at crossing—Findings of jury—Reasonable inferences—Balance of probabilities.*

About 5.30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found some 350 yards east of a crossing of the Grand Trunk Railway, nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing, and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train, and that his death was due to the negligence of the latter in failing to give such warnings. This finding was upheld by the Court of Appeal.

*Held*, that the jury were justified in considering the balance of probabilities and drawing the inference from the circumstances proved, that the death of G. was caused by such negligence.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiffs.

The material facts are stated in the above headnote.

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

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*D. L. McCarthy K.C.* for the appellants.

*McClemont* for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—Assuming that Griffith was run down, as found by the jury, at the level crossing on Kenilworth Avenue, he was there in the exercise of his right to cross the railway at a place made and provided by the company for that purpose. A train of cars comes to the same place with a right to cross that highway, subject, however, to the statutory duty of observing certain precautions with respect to the use of the bell and whistle. There was failure to perform that statutory duty. The bell was not rung and an accident resulting in the death of the deceased happened. There can be no doubt that, on these facts, a jury might say that negligence on the part of the company ought to be inferred. *Grand Trunk Railway Co.* v. *Hainer*(1); *North Eastern Railway Co.* v. *Wanless*(2).

The answer of the company is that the deceased was also guilty of negligence in that he failed to take the precautions which ordinary prudence suggested as he approached this admittedly dangerous place. For twenty-five yards before reaching the track, Griffith, whose duty it was in the circumstances to exercise reasonable care, was in full view of the track and could see and hear the train approaching, if he was alert as he should have been. It is quite true that the approaching train might have been seen by the deceased as he came to the track, if there was no obstruction, and the noise of the train might have given him warning if nothing interfered. But the

(1) 36 Can. S.C.R. 180. (2) L.R. 7 H.L. 12.

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train which caused the accident was, as I read the evidence, shut out from his view by a freight train going the opposite way — the track being double at this point — and the noise of the train approaching the crossing, and which admittedly caused the accident, might well be confounded with that made by the train going in the other direction and from which latter there was no danger to apprehend. Under these circumstances, the question is:—Ought the jury to infer, as they did, that the accident was caused by the absence of the statutory signal rather than by the failure, on the part of the deceased, to distinguish, in the confusion of noises caused by both trains, something to warn him of the approaching train and which warning he failed to observe? I think that in view of the opinions expressed in the *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(1) we would not be justified in interfering with the verdict. In a note referring to that case, Sir F. Pollock goes so far as to say "that Their Lordships did not conceal their opinion that the verdict was a perverse one." I do not think that such criticism might fairly be applied to the verdict in the present case.

I would dismiss the appeal with costs.

IDINGTON J.—There was such evidence of facts and circumstances tending to prove the respondents' case that they were entitled to have it submitted to the jury.

It is not necessary in any such case to have the evidence adduced demonstrate that a jury must find a verdict.

(1) 3 App. Cas. 1155.

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In the great majority of cases similar to this men may reasonably differ in regard to the conclusion to be reached.

We are asked to make a ruling in this case that would absolutely prevent recovery in any accident case unless it was supported by the evidence of eye witnesses.

I do not say that counsel presenting his case fairly as usual, in so many words asks us so to rule.

But I do say, that the logical result founded upon the various arguments put forward would be that.

No one who has heard or read many of these cases arising from some person having been killed at a railway crossing can fail to have often doubted whether or not under the given circumstances in which the deceased person was placed at the time of the accident, he or she would have heard the statutory warnings if given. It may in a small percentage of such cases be that the person killed was stone deaf or hopelessly drunk and from that or other like proof, courts and juries would be debarred from drawing the inferences they do draw in such cases.

Assuming the person killed possessed of the ordinary human faculties and of the reason and sense springing from the use of such faculties, courts and juries do infer the use thereof has been made, as a matter of self-preservation.

Given the proof that no statutory warning was given, they go a step further and infer that if such warnings had been given, the needed care would have been taken, and the accident have been averted. I may doubt in any such case if the absolute truth has been reached. However, I can see nothing wrong in law or sense in that mode of reasoning.

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In this case where the man killed was one who, as a matter of precaution, habitually took a longer road than he might, and thus spent daily twenty minutes more than his neighbouring fellow-workmen, in going to and returning from his work, this mode of reasoning seems peculiarly apt.

I was a member of this court when we dismissed the appeal in the *Grand Trunk Railway Co.* v. *Hainer* (1), and I certainly think this well within what was decided there.

No two cases will ever present exactly the same facts and circumstances.

The same confusion arising from coming and passing trains must have operated there as here. The unfortunates in either case might not in fact have been any better off had the law been observed.

Human insight is so limited that reaching absolute truth in regard to anything in everyday life relating to any accident is almost impossible. We must strive to reach as near as we can to the truth without being either too self-confident or bold and presuming too much or conjuring up as timid men do sometimes, more or less shadowy doubts to avoid responsibility.

This case seems to have been most fairly tried and I can see no reason to complain of the result reached.

I am glad to find from the learned trial judge's charge there was no appeal to passion or prejudice.

I agree in the mode of reasoning which the several learned judges supporting the verdict and judgment have applied to the case.

I should not indeed have added a word but for the strong argument made for appellant and for support

(1) 36 Can. S.C.R. 180

of which, I think, expressions here and there of high legal authorities can easily be found, but which are not maintained by the great general mass of authoritative decisions on the subject.

I think the appeal should be dismissed with costs.

DUFF J.—The body of the deceased James A. Griffith was found beside the railway track of the appellants, the Grand Trunk Railway Company, near Hamilton, about an hour after he left his place of work for his home on the evening of the 29th December, 1909. At the trial of the action (brought by the respondents, Griffith's widow and children) out of which the appeal arises, the jury found that he had been run down by an eastbound passenger train of the appellants at the Kenilworth Avenue crossing about 350 yards west of the place where his body was found and that the accident was due to the negligence of the appellants' servants in not giving the statutory signals as the train approached the crossing. It is not denied that Griffith's death was due to his being struck by the train in question, but the verdict is impeached in two respects: 1st, That there is no evidence properly leading to the conclusion that Griffith was at the crossing when he was struck down; and 2nd, there was none from which the jury could determine with any reasonable certainty that Griffith came into collision with the train as the result of this default on the part of the company's servants.

It will be convenient to deal first with the second ground of appeal and for the purpose of dealing with it I shall assume that the deceased was crossing the track at Kenilworth Avenue, when he met his death; and that as the east-bound train approached the high-

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way the bell of the locomotive was not ringing as the statute requires. The question arising on this topic is whether the plaintiff has shewn facts which justify the inference that Griffith's presence on the eastbound track at the moment he was struck by the train was due to the fact that the statutory signal referred to was not given?

Before examining the facts with a view to answering this question there are two general observations which I think ought to be made. The first of them is this. When a plaintiff in such a case as this proves facts justifying the conclusion that the default of the defendant has materially contributed to the accident in the sense that without that default the accident would not have happened he thereby establishes a *primâ facie* case — unless the facts disclosed fairly and reasonably viewed make it impossible in the absence of further evidence to escape the conclusion that the negligence of the injured person has also been a factor in producing the harm complained of.

I dwell upon this because I think the able and interesting argument of Mr. McCarthy did to some extent involve the fallacious assumption that the plaintiff must as a necessary element in his case exclude the hypothesis of the victim's contributory negligence. The plaintiff must fail if he cannot connect the injury complained of with the defendants' negligence without at the same time proving facts which no reasonable tribunal could hold to be consistent with the absence of contributory negligence on the part of the victim; but he is entitled to succeed if he convinces the jury on facts reasonably leading to that conclusion that the defendants' negligence has materially contributed to the mishap and if at the same time

the jury may reasonably find and do find that the defendants have failed to discharge the onus placed on them to shew that there has been such contributory negligence. This appears to me to be quite conclusively demonstrated by the judgment of Lord Watson in *Wakelin* v. *London and South Western Railway Co.*(1), in which Lord Blackburn concurred, and by the judgments in the *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(2) which Lord Watson mentions.

I will not put in my own words the second observation; but will quote the words of the Lord Chancellor in *Richard Evans & Co.* v. *Astley*(3) :—

> It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act upon a balance of probabilities.

It is quite unnecessary, doubtless, to say so — but if it should be supposed that the principle thus stated by the Lord Chancellor involves any new departure all doubts on that point may be allayed by referring of Lord Cairns's judgment in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(2), at pages 1166 and 1167, Lord Selborne's judgment in the same case, at pages 1190 and 1191, and Lord O'Hagan's judgment at page 1184; to the judgments of Lord Esher, and Lopes and Kay L.JJ., *Smith* v. *South Eastern Railway Co.*(4), at pages 183, 185 and 188, Lord Her-

(1) 12 App. Cas. 41, at p. 46.
(2) 3 App. Cas. 1155.
(3) [1911] A.C. 674, at p. 678.
(4) [1896] 1 Q.B. 178.

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schell, in *Peart* v. *Grand Trunk Railway Co.*(1), as well as to the judgments of the Judicial Committee of the Privy Council in *McArthur* v. *Dominion Cartridge Co.*(2) (Lord Macnaghten) at page 76, and in *Toronto Railway Co.* v. *King*(3) (Lord Atkinson) at pages 264 *et seq.*

In this case the relevant facts in evidence are — I am proceeding on the assumption above mentioned — that there were two tracks at the crossing in question; that at the time the accident occurred, about 5 o'clock of a December evening, two trains were approaching the crossing, one eastbound on the south track, and the other westbound on the north track and these trains met and passed each other almost immediately after the eastbound train had cleared the crossing; on the train approaching from the east the bell was ringing, on the other the bell was not ringing. It is important to add that as Griffith walking south came to the railway line his view towards the west would be cut off by a high fence until he reached a point twenty-five yards north of the line and that after reaching that point his vision towards both the right and the left was unobstructed. The first question we have to decide is whether from this state of facts the conclusion could fairly be deduced that the accident would not have happened if the bell had been rung.

I think the jury might properly consider that as Griffith approached the crossing he would see the west-bound freight train and hear its bell and that until he passed the fence on his right he could not see the eastbound passenger train; and that hearing no

(1) 10 Ont. L.R. 753. (2) [1905] A.C. 72.
(3) [1908] A.C. 260.

bell from the west he would be thrown off his guard in respect of trains approaching from that side and would naturally give his attention exclusively to the train he both saw and heard on his left.

It is clear that if after Griffith had passed the fence which was on his right he had glanced along the line westward from that side of the crossing he must have seen the eastbound train; and on the hypothesis that he did so, it is equally clear it would be impossible to justify the conclusion that the failure to ring the bell had anything to do with his death. If the deceased saw the passenger train and either rashly attempted to cross in front of it or was led to attempt to cross by his own error in miscalculating the position or speed of the train — in either case there could be no ground for connecting the failure to ring the bell with the accident; and the important question appears to be whether the jury could properly infer that the eastbound train was not observed by the deceased until at all events it was too late to enable him to save himself. I think they might do so. I think they might properly consider that in the circumstances hearing no bell from the east and having his vision in that direction obstructed by the fence on that side while the freight train at the same time was in full view west of the crossing, he not unnaturally might and probably did proceed without thought of possible danger from the opposite direction.

The other hypothesis — that seeing the eastbound train he was led into attempting to cross by an error of judgment as to the position or speed of the train might no doubt, considered in itself, be a possible explanation of what occurred. But I do not think the examination of these two rival hypotheses could

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properly be withdrawn from the jury. They presented a question for the jury in my opinion for this reason. The first proceeds upon the theory that that happened which in the ordinary course of events would be likely to happen as the result of the failure to ring the bell assuming Griffith to have acted in a way in which according to common experience the jury might reasonably consider it unlikely that an ordinary person having experience of the railway practice respecting signals for highway crossings would act. The other involves the assumption that Griffith acted in a way in which the jury might properly think only a very rash man would act. I think the plaintiff having thus connected the accident with the fault of the defendants by proving such negligence on their part as was calculated according to the common course of experience to result in just such an eventuality as that which happened in fact it was for the jury to consider the weight of any suggestion that the victim brought disaster upon himself by an attempt to do something in itself extraordinary or something which in the particular circumstances the jury would be entitled to think an ordinary person would be unlikely to do. The plaintiff's case appears to be in that position and that I think is sufficient to bring it within the principle stated by the Lord Chancellor and already quoted.

Each of the cases referred to above affords an illustration of this method of dealing with such questions. In Slattery's case the victim had been killed while attempting to pass in front of a train which he could not have failed to see if he had looked in the direction from which it was approaching. Nobody knew whether he saw the train or not. There was evidence from which the jury might have inferred

that he knew it was the practice of trains before passing the locality in question to give warning of their approach by whistling and there was evidence that at the moment of crossing he was in a preoccupied state of mind. The majority of the Law Lords held it to be a question for the jury whether he was put off his guard by the failure of the train to whistle or whether on the other hand he saw the train but rashly or through excusable error of judgment attempted to pass before it. In *Smith* v. *South Eastern Railway Co.*(1) nobody knew whether the victim had or had not seen the train which ran him down; but the practice was (as the man who was killed might be supposed to know) that when a train was approaching the crossing at which the accident occurred the gate-keeper stood there and informed the driver by signal whether or not the line was clear; and the train which caused the death of the victim passed the crossing immediately after he had left the gate-keeper sitting in his cottage. It was considered by the Court of Appeal that from these circumstances the jury might infer that the victim had been led into a sense of security by his knowledge that the gate-keeper was not at his accustomed post when a train was about to pass and that he had not seen the train until it was too late to escape. In *Toronto Railway Co.* v. *King*(2) there is another example of a similar mode of reasoning. In *Dominion Cartridge Co.* v. *McArthur*(3) the injury complained of arose from an explosion in a cartridge factory. One of the machines had defects which might have been expected to lead to such an explosion, notwithstanding the absence of any

(1) [1896] 1 Q.B. 178. (2) [1908] A.C. 260.
(3) [1905] A.C. 72.

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carelessness on the part of the victim who at the time of the explosion was engaged in working it. There was no suggestion of negligence on his part, and it was held to be a proper inference that the explosion arose from the defects proved. I may add that in *Crouch* v. *Père Marquette,* recently decided in this court, (where it was shewn that the signals given by a train approaching a highway were calculated to mislead and that the signpost had been removed from the crossing), it was held that the jury might infer that the death of the victim, a traveller on the highway, was due to his being misled by the signals or deceived as to the point at which the track crossed the highway; and that it was for them to say whether the rival suggestion that the victim's horse had taken fright when approaching the railway line was to be accepted or rejected.

If the jury considered the weight of probability to favour the conclusion that Griffith did not see the passenger train in time to escape it, then it seems clear that the question of contributory negligence could not be withdrawn from the jury. The considerations to which the majority of the Law Lords give effect in Slattery's case and which prevailed in *Smith* v. *South Eastern Railway Co.*(1), and in *Toronto Railway Co.* v. *King*(2), appear to be entirely applicable.

I quote *in extenso* two passages from the judgments in *Smith* v. *South Eastern Railway Co.*(1). At pages 185 and 186 Lopes L.J. says:—

> Then it was said that this case fell within the authority of *Wakelin* v. *London and South Western Railway Co.*(3), because the circum-

(1) [1896] 1 Q.B. 178. (2) [1908] A.C. 260.
(3) 12 App. Cas. 41.

stances under which the deceased came by his death were not known, and that the evidence given for the plaintiff was at the best equally consistent with the death of the plaintiff's husband having been caused by his own negligence as with its having been caused by the defendants' negligence. It was said that the train carried lights, that it could be seen more than 600 yards off, and that the driver sounded his whistle; and, therefore, that the deceased man must have been guilty of contributory negligence by reason of the reckless way in which he crossed the line. Of course, if that could be established, the argument which the defendants' counsel based upon *Wakelin* v. *London and South Western Railway Co.*(1) might be sustained. The question is whether on this point the case could have been withdrawn from the jury. Can it be said that the evidence was equally consistent with the view that the death of the plaintiff's husband was caused by his own negligence as with the view that it was caused by the defendants' negligence ? I have felt some difficulty on this point; but on consideration the case strikes me in this way. The deceased appears to have known the crossing and the practice there with regard to the signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting at his lodge and was making no attempt to signal any approaching train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistle of a train ? On consideration I have come to the conclusion that on this question there was evidence for the jury, and, if I had been trying the case, I do not think I could have withdrawn it from them.

The observations of Lord Esher at pages 183 and 184, are to the same effect:—

The deceased man lived in the neighbourhood, and had been at the crossing on previous occasions. I think there was evidence from which the jury might infer that he knew that Judges had to perform the services which I have mentioned for the company, whenever a train was passing over the crossing; and, that being so, they might on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to presume that, as Judges remained in his house, no train was coming, and, therefore, he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary. If that be so, there was evidence for the jury upon the question whether there was any want of reasonable care on his part. In saying this, I think I am acting on the view expressed by Lord Cairns in the case of *Dublin, Wicklow*

(1) 12 App. Cas. 41.

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*and Wexford Railway Co.* v. *Slattery*(1). He seems in that case to have thought that, if a man had a right to suppose from his knowledge of the practice at the station that an approaching train would whistle, the jury might come to the conclusion that the absence of whistling had thrown him off his guard, and had produced in him a state of mind in which he might not unreasonably suppose that it was unnecessary for him to look out before crossing to see whether a train was coming. So here, I think, in the case of a man who knew the practice at the crossing, the jury might say that the fact that the signalman remained in his house produced in his mind a sense of security which would prevent its being a want of reasonable care not to look up and down the line to see whether a train was coming. Therefore, without entering into all the questions which have been discussed during the argument, I think the considerations which I have mentioned are sufficient to determine this case, and to entitle the judge at the trial to decline to withdraw the case from the jury.

The remaining question stands thus. There was evidence from which the jury might conclude that Griffith habitually avoided the railway. There is no reason for supposing that on the occasion in question he did not follow his usual practice except the fact that his body was found a considerable distance from the crossing. I think the question whether the situation of the body was so inconsistent with the supposition that he was on the crossing when he was struck as to lead to the inference that he was killed while walking on the track or to leave the whole matter too doubtful to justify any conclusion upon it was a question of fact which could not be withdrawn from the jury; and I think it is quite impossible to say that their verdict on this point was an unreasonable one.

ANGLIN J.—The defendants appeal from the judgment of the Court of Appeal for Ontario upholding a verdict against them for damages for the death of the

(1) 3 App. Cas. 1155.

plaintiff's husband. The plaintiff's case is that, while lawfully crossing the defendants' railway track on Kenilworth Avenue in the City of Hamilton in returning from his work to his home on the evening of the 29th December, 1909, her husband was struck and killed by a train of the defendant company which had failed to give the requisite statutory warning of its approach, and that this omission of duty was the cause of the accident.

At the trial and in the Court of Appeal the defendants contended that it was not established by the evidence whether the deceased had been killed by the train in question or by a train which had gone over the crossing shortly before, as to which no proof of breach of statutory duty had been given. The jury found against the appellants upon this point; the Court of Appeal confirmed the finding; and it was expressly accepted by counsel for the appellants at bar in this court.

In support of their appeal the defendants now take two grounds: first, that there was no evidence to sustain the finding that the deceased when struck by the train was on the highway crossing; and secondly, that, although the omission of the statutory signal had been proved, upon the evidence it was a mere surmise or conjecture and not a legitimate inference that this was the cause of the accident.

There was no eye witness of the accident. The train which must now be taken to have struck the deceased was travelling in an easterly direction. His body was found some 350 yards to the east of Kenilworth Avenue crossing; his dinner can and a mitten were picked up some fifty yards farther west than the body, and at the latter point there were also found

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traces of blood and hair upon the rails. There is no evidence of any indicia of the accident nearer to the crossing. Several of the plaintiff's fellow-workmen testified that it was his habit in returning to his home not to walk along the railway as other workmen did, but to cross it at Kenilworth Avenue. He was never known to have followed the railway track in going home. There was some evidence by two of his fellow-workmen, who, on the night in question, were walking home along the railway track, that, at a point about 110 yards to the west of Kenilworth Avenue, they were overtaken by the train which killed the deceased, and that looking up the track they did not see any person on the railway right of way either at the crossing or beyond it. The plaintiff also stated in evidence that she had warned her husband of the danger of walking upon the track and that he had assured her that he never did so. I, however, exclude this latter piece of evidence from consideration, as I think its admissibility very doubtful.

Having regard to the other evidence to which I have alluded and to the fact that it should not be assumed that an illegal act, such as trespassing upon the railway right of way would have been, was committed by the deceased, would a jury be justified in inferring that he was on the crossing when struck by the train; or does the mere fact of his body being found 350 yards east of the crossing preclude that inference? Had the body been found only a few yards from the crossing the jury's finding could not, I think, have been questioned. That the deceased was carried some distance by the engine is manifest from the fact that his can and mitten were found 50 yards nearer to the crossing than his body. That the bodies

of men and of animals struck by railway engines are sometimes carried by them for considerable distances is well known. There was no evidence given of anything in the condition of the body or in its position with regard to the railway tracks when found which would indicate whether it had or had not been carried any considerable distance. In these circumstances it was, I think, for the jury to determine what weight should be given to the fact that the body was found where it was. It was for them to say whether, it being clear that the body had been carried for some distance, it was reasonable in the circumstances to infer that it had been carried the whole 350 yards. It was within their province to decide whether the inference that the deceased had followed his usual course in returning home on the night in question and that he had, therefore, been struck on the crossing was rendered unsafe and improper because of the distance from it at which the body of the unfortunate man was found. The jury having drawn this inference, although the case is certainly a very close one, I am not prepared to say that their finding, affirmed by the provincial Court of Appeal, should now be set aside.

Upon the second question two considerations are pressed on behalf of the defendants; first, that a person coming towards the crossing, as the deceased did, could have a clear and unobstructed view of an approaching train for 25 yards before he reached the rails and that, had he looked when at that distance, or at any time thereafter before he crossed the tracks, Griffith could not have failed to see the train; it is, therefore, urged that his death should be ascribed rather to his failure to take ordinary care than to the defendants' omission of their statutory duty; in

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the second place, it is said that the train, when approaching the crossing, was ascending a grade, and that in doing so the engine made so much noise that, as the plaintiff herself says, it was audible to her standing in her doorway half a mile east of the crossing; and she adds that she also saw the light from the fire-box reflected on the escaping smoke and steam. The appellants maintain that it is, therefore, a pure conjecture that Griffith would have heard the omitted signal, had it been given.

In support of his contention that the case should have been withdrawn from the jury Mr. McCarthy urged that the fact that the accident might be attributed to failure of the deceased to look or listen before crossing the railway rendered it impossible for the jury to find, except as a mere guess or surmise, that breach of duty on the part of the defendants was the cause of the accident. The conduct of the deceased is primarily of importance upon the issue of contributory negligence. With that issue the jury must deal, the burden of proof being upon the defendants. It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all circumstances be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. That the deceased might have been in a flurried state of mind owing to anxiety to procure a ticket for a friend was deemed a consideration which could not have been withdrawn from the jury in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(1). In the present

(1) 3 App. Cas. 1155, at p. 1167.

instance the evidence establishes that when Griffith reached the Kenilworth Avenue crossing, assuming him to have been struck on that crossing as found by the jury, there was a freight train approaching from the east. This train, it is proved, gave the statutory signals for the crossing, and it is quite possible that his attention may have been so absorbed by it that, for that reason, he failed to hear or observe the train coming in the opposite direction. It is for the jury to determine whether, in these circumstances, his failure to look to the west when about to cross the tracks amounted to contributory negligence.

Then it is urged that, having regard to the presence of the freight train and to the fact that the deceased presumably failed to hear the great noise made by the engine of the passenger train which struck him, it must be the veriest conjecture or surmise to say that if the latter train had given the statutory signals they would have attracted the attention of the deceased and prevented the accident. This method of presenting the defendants' case is certainly captivating. We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think,

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always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident. The moment the decision is reached that the statutory signals, if given, might have prevented the accident and there is evidence of their omission, it is not proper for the trial judge to withdraw the case from the jury, (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it) and if, upon the case being submitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an appellate court to disturb that conclusion. Had I been trying this case without a jury I am by no means satisfied that I should have reached the conclusion at which the jury arrived. But, as has been pointed out time and again an appellate judge should not, for that reason, interfere.

I would dismiss this appeal with costs.

BRODEUR J.—The appeal should be dismissed. I agree with the opinion given by the Chief Justice.

*Appeal dismissed with costs.*

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *W. M. McClemont.*