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*Feb. 21, 22.

*April 2.

THE HALIFAX ELECTRIC TRAMWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

WILLIAM P. C. INGLIS (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Electric car—Excessive speed—Prompt action — Contributory negligence.

A cab driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the Tramway Company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that notwithstanding such negligence on the part of the driver the accident could have been averted by the exercise of reasonable care.

Held, affirming the judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 117) Gwynne J. dissenting, that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining the verdict for the plaintiff at the trial.

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

(1) 32 N. S. Rep. 117.

The facts of the case are sufficiently stated in the above head-note.

Harrington Q.C. and *Covert* for the appellant.

Borden Q.C. for the respondent.

The judgment of the court was delivered by :

KING J.—This is an appeal by the defendants in an action brought by a cab owner to recover damages caused by the alleged negligent running of the defendants' electric cars. The accident took place on the evening of the 20th November, 1897, while the plaintiff's vehicle was in the act of crossing the track on one of the public streets of Halifax. The jury, amongst other findings, found that there was negligence on the part of the Tramway Company in the running of their car at too high a rate of speed, and in the failure to apply the brakes and reverse the electric current in time to avert the accident, and in the opinion of the jury this could have been done had reasonable care been exercised by the motorman. They also found that there was negligence on the part of the plaintiff's driver contributing to the accident in not looking more sharply for the car. But they further found that notwithstanding such negligence of the plaintiff's driver, the defendants' servant could have averted the accident by the exercise of reasonable care. The trial took place before Mr. Justice Henry who, upon these findings, entered judgment for the plaintiff, and the Supreme Court of Nova Scotia affirmed the judgment.

No real question can arise as to there being evidence to warrant the finding that the rate of speed was excessive and unreasonable, nor (in view of the facts adduced on both sides) is there any doubt that if there

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was fault on the part of defendants in the running of the car it was the cause of the accident, subject of course, to the effect of the finding as to contributory negligence.

As to the finding of contributory negligence on the part of the plaintiff's driver in not looking more sharply for the car before attempting to cross the track; supposing (as contended by Mr. Harrington) that according to the practice of the Supreme Court of Nova Scotia the respondent is prevented from urging the manifestly unsatisfactory character of this finding by reason of not having specially moved in that court to set it aside, the observations of this court in *Rowan* v. *Toronto Railway Co.* (1), and *Toronto Railway Co.* v. *Gosnell* (2) would preclude our doing more than sending the case for a new trial in view of the fact that the plaintiff's driver did not know, and even if he had looked could not have known, that the car coming towards him was travelling at an unreasonable rate of speed, and in view of it being most probable that he could have crossed the track in entire safety (as, in fact, he very nearly succeeded in doing) if the car had been travelling only at a reasonable rate of speed at the time when, according to the jury, he might and ought to have seen it.

But it is unnecessary to further consider this, because the jury have found, upon evidence appearing to us sufficient to warrant the finding, that notwithstanding such supposed negligence the defendants' servants could, in the result, have averted the accident by the exercise of reasonable care. If this was found upon evidence warranting it, *i. e.*, upon evidence upon which the jury could reasonably find it, then of course the driver's act of negligence (if it existed at all) could no longer be considered as a con-

(1) 29 Can. S. C. R. 717. (2) 24 Can. S. C. R. 582.

tributing efficient cause, but would be reduced merely to a link in the chain of anterior circumstances without which the accident could not have happened.

The chief contention for the appellants upon this appeal was that there was an entire absence of evidence to warrant the finding that, notwithstanding negligence of the plaintiff's driver, the defendants could, in the result, by the exercise of reasonable care have avoided the accident. What is or is not reasonable care is a matter of degree and varies with circumstances. The control and management of an instrument of danger to life or limb has always been considered as calling for a higher degree of skill or care, as the measure of what is reasonable, than where no such serious consequence is to be apprehended.

Here the defendants were running their car on a dark night, in what their servants say was a dangerous place, and upon a down grade of over eleven hundred feet in length at the point of accident, and at what the jury have found to be an excessive rate of speed; it was therefore incumbent upon them to exercise a very high degree of skill and care to control and stop the car in case of imminent danger to any one upon the highway. The evidence of Townshend, the motorman, shows that he saw the carriage attempting to cross the track when he got two car lengths from it. He had two means under his control for checking and stopping the car, the brakes, and the reversing of the electric current, the latter of which is allowed by the only company to be used in case of accident, presumably on account of its effect on the car or its machinery. The motorman first put the brakes on hard. Speaking of the time when he first saw the carriage attempting to cross the track, he says:

> I put on the brake on the car then, and as I saw that I was not going to be able to stop the car with the brake I released the brake and reversed the power on the car as the last resort.

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He was then, he says, about one car length from the cab. The reversing power at once checked the speed but not sufficiently to avoid the accident, and as the result one of the hind wheels of the cab was struck as it was on the point of quitting the track. Such, however, was the power of the reversing current that the car came to a standstill within a further distance of seven or eight feet.

The above quoted passage from the evidence of the motorman is open to the reasonable construction that he at first sought to avoid the collision by the use of the brakes only, and had recourse to what he styles "the last resort" only when he found that he was not going to be able to succeed by the mere use of the brake. A jury might reasonably and properly take such meaning out of the words,

> I put on the brake, *and as I saw that I was not going to be able to stop the car with the brake I released the brake and reversed the power on the car as the last resort.*

The jury may very properly have thought that, in the circumstances, the last resort ought not to have been deferred until it was evident that the use of the brake alone would not suffice; and considering that at the time of the collision the hind wheels of the cab were about quitting the track, and that in about a second it would have cleared it entirely, the jury were not restrained from drawing their own conclusions from the motorman's account of the occurrence by his subsequently expressed opinion that he thought it would have made no difference if he had reversed the power earlier.

Another motorman of the defendant company who was with Townshend, says that the only thing that can be done to avoid a collision is to reverse the current, and his evidence tends to support the conclusion

that the reversing power ought to have been applied earlier.

It is impossible, we think, in view of Townshend's evidence to say that the defendants did all that they ought reasonably to have done to prevent damage happening from the unreasonable and excessive rate of speed at which they chose to run their car.

It is suggested that the defendants are not to be held to strict accountability for not taking the best means open to them by reason of the plaintiff having by his crossing the track put them under the necessity of acting promptly. This would be so if they had been going at a reasonable rate of speed, but it is entirely inapplicable to a case where they themselves were travelling at an unreasonable and excessive rate of speed. They deliberately tied their own hands and created for themselves the greatest difficulty they had to contend with. They ought, therefore, to have been prepared to act promptly and decisively upon an emergency such as that which arose. For these reasons we think that the appeal should be dismissed, and with costs.

GWYNNE J. (dissenting).—The plaintiff who is a cab owner doing business in the City of Halifax brings this action upon the ground as alleged in his statement of claim

> that he has suffered damage caused by the servants of the defendant company on the 20th November, 1897, so negligently controlling or managing a train or car belonging to the defendant company that the said train or car ran into and collided with a cab or carriage drawn by two horses owned by the plaintiff and driven by plaintiff's servant.

The defendants besides a general denial of the cause of action as above stated pleaded specially sec. 5 of ch. 107 of the laws of Nova Scotia of 1895, by which the defendant company are reserved in the right of

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way in the streets where their tramways are laid, and that the plaintiff's said servant

improperly and negligently drove the plaintiff's said horses and cab or carriage across the track of the defendant company directly in front of the car or tram of the defendant company, which was at the time in motion and approaching said plaintiff's horses and cab or carriage; and so close in front of the defendant company's car that it was impossible to stop said car before the plaintiff's cab or carriage was struck.

If this plea was established to be true there cannot be entertained any doubt that the plaintiff's cause of action wholly failed, and the defendants were entitled to have had judgment rendered in their favour, and in the evidence material to the determination of the issue joined in this plea there is very little if any reliable contradiction whatever.

Alfred Harvey, the driver of the plaintiff's cab, said that he left his home at 30 Grafton Street on the evening of the 20th November, 1897, at 6.30 o'clock, with the plaintiff's cab for the purpose of reaching the Intercolonial Railway Station which appeared to be on North Street, to meet a train which was due at 6.45. On his way along the Campbell road before reaching North Street which crossed the Campbell road he met or overtook a Mrs. Hines whom he took up for the purpose, as he said, of giving her a lift on her way home at a place called Richmond, which necessitated his pursuing a course different from his ordinary course to the station for he said that on his reaching North Street his horses tried to turn to go down North Street as he said they always do on reaching that street, but he drove straight on north along the Campbell road intending to take Mrs. Hines as far as the barrack gate (which by another of the plaintiff's witnesses, namely Mr. Doane, the city engineer, was proved to be 1,150 feet or about one-fifth of a mile distant from North Street), and to go

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round to the station by Water Street. He had made up his mind he said to take the lady as far as the barrack gate and to get round from thence to the station by turning across a bridge over the Intercolonial Railway, leading from the Campbell road at a point almost directly opposite the barrack gate, into Water Street, and so to get round to the station. He said that he passed North Street at twenty-three minutes to seven o'clock, as appeared by a clock which he saw in a grocery store at the corner of North Street, so that it must have been about 6.45 or the hour when the train he was to meet should be due at the station when he reached the barrack gate where, as he said, he had made up his mind to let down Mrs. Hines. He said further that he did stop and let her down just south of—a few yards south of—the barrack gates, there he bade a boy whom he had on the box with him to get down and let her out, that the boy did so, and got up on the box again after shutting the door of the cab, that as the boy got up he, Harvey, looked back south and saw no car, that he then turned his horses round to cross the bridge over the Intercolonial into Water Street, to do this he had to cross the tramway track; as he turned his horses he saw, he said, the shadow of a car right alongside, that he could not back his horses so he hit them with his whip and with that the car struck him. Upon the evidence of this witness it is established that the collision took place almost instantaneously upon Harvey turning his horses round after letting down Mrs. Hines and when he should have been already at the railway station to meet the train due at 6.45 which he had set out to meet.

This fact is also confirmed by the evidence of Mrs. Hines who was also one of the plaintiff's witnesses. She said that she got out of the cab just south of the

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barrack gate, that Harvey was just in the act of turning his cab when she bade him good night and started on her way home along the sidewalk northwards and that she had only got a few steps, just two or three steps past the barrack gate, when she heard some one hollering "whoa" whereupon she looked round and saw the car stop and the horses running down the street. Now this shout of "whoa" is shown by one of defendants' witnesses to have been uttered by Harvey himself after the accident had happened and after he had jumped or fallen down from the box and while he was following in pursuit of the horses running away. This witness was Joseph James Croft who was the conductor of the car who said that while the car was running on the down grade there under its own headway when just opposite the barrack gate he noticed the motorman twist his brake sharply and then release the brake and put on the reverse current – that witness, as soon as he heard the brake released and felt the reverse current applied, knew that there must be something wrong ahead so he instantly jumped off the tram, and just as he jumped off the collision took place and he ran to the front of the car in time to see Harvey either jump or fall off and run in pursuit of the horses running away, shouting "whoa back." He said also that from the barrack gate a car could be seen below North Street, coming up. James Whelan who was the boy with Harvey and who was also one of the plaintiff's witnesses, said that on the cab stopping at the barrack gate he got down to let the lady out and that upon letting her out he closed the door and got up on the box again with Harvey. He then said

The driver started to go to North Street station. Just as we were turning the car was right alongside of us. The car jumped into us.

He added that before the car struck them

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Harvey got out the whip and hit the horses.

Witness did not know whether he himself had jumped off or was knocked off but he saw Harvey running down Lockman Street in pursuit of the horses running away and witness followed him. It was then he said a quarter to seven o'clock as he should judge.

James Pearce, another of the plaintiff's witnesses, said that on the evening of the accident he was walking on the western sidewalk of the Campbell road going south towards North Street, that is to say he was walking towards the cab which was coming from North Street. Witness saw the cab approaching, it passed him and stopped just south of the barrack gate, when the cab stopped witness was about four or five yards distant from the place where it stopped, he just then turned round and saw the lady getting out and as he turned round and looked at the cab he saw the tram-car coming up; it was lighted up with electric lights. Witness then turned again and proceeded on his way along the sidewalk south and, as he said, he had not got any distance at all when he heard the smash of the collision.

Mr. Doane, the city engineer, who was also a witness called by the plaintiff, testified that the width of the sidewalk on the Campbell road at the barrack gate was twelve feet six inches, and the distance from the outside line of that sidewalk to the nearest rail of the tramway is seventeen feet six inches, and that the width of the railway is five feet over all.

The above contains the whole of the substance of the evidence given by the plaintiff as affecting the conduct of the driver of the cab on the occasion of the accident. However the defendants who had by their statement of defence pleaded that the collision had been occasioned by the negligence and wrongful conduct of the plaintiff's servant the driver of his cab

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gave evidence as follows: Joseph James Croft, the conductor of the tram car, gave the evidence already mentioned as having been given by him.

Samuel Townshend, the motorman on the tram car, which came into collision with the plaintiff's carriage, said that on the evening in question the car was going *north* on the Campbell road; that it was well lighted in the usual way with two side lights, head light, and four incandescent lights inside; that the lights could be seen at North Street from the barrack gate; that when it reached North Street it was 6.40 or 6.43 o'clock; that when he go topposite the nursery where the down grade increases he shut off the power as he said they always do there; that as the car proceeded he saw what, as he approached near to it and within about four car lengths (or 108 feet) of it, was a carriage on the left hand side of the road, going also north or standing he could not say which, however, just as the car got within about two lengths (or 54 feet) of it he saw the carriage instead of continuing north as its course had been start to turn round and make as it seemed to him a circle to come round and cross the track in front of the car; that was the first and only intimation the witness had of the intention of the driver to cross the track; witness immediately put on the brakes and reversed the current to check the speed of the car; that the power was reversed before the car got within a car's length (or twenty-seven feet) of the carriage, and that the speed was so effectually checked that it struck the carriage with such slight impact that the horses got away with the carriage and the car did not proceed after the collision more than seven or eight feet when it stopped wholly. Everything he said that could possibly have been done was done to stop the car after the witness had any intimation of the driver of the carriage having any intention to cross

the track, but he admitted that if he had had sooner any intimation of such intention he could of course have stopped the car sooner.

Alexander McQuinn, another motorman of the defendants, who was going home on the evening in question and was with Townshend in front upon the car confirmed Townshend's testimony in every particular, and added that when the hack turned round and proceeded to cross the track it was too late to avoid the collision, and further he said that from the road in front of the barrack gate a car could be plainly seen twenty yards south of North Street a distance of upwards of 600 feet.

Daniel Adams on the evening in question was walking down the Campbell road on the sidewalk adjoining the barracks. He saw the hack stop and let somebody out. He saw the tram car coming along while the hack was standing at the barrack gate. He saw the boy shut the door and get up on the box again. The tram car was then so near that he did not think any body would go across the track. The hack driver then turned his horses across the track to go to the station or wherever he was going, when he turned his horses across the track of the car was not more than about fifteen feet from the hack. Witness was himself walking down to the station and when the hack turned it was so close to the car that it took the lights of the car from him. The car was making the usual noise and racket which it always makes coming down the grade there. From the front of the barrack gate he could see to the nursery which is quite a piece up towards North Street. The car was running at the usual rate at which it runs at that place and at other places in the city where there is a down grade.

Clarence Purcell was driving a parcel wagon down the Campbell road on the night in question. It was,

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he said, not very dark, it was just about dusk. He first saw the car coming up when he was about 200 yards from the barrack gate. He did not then notice the cab. He did not notice the cab until it turned round. He was then distant from it just the space between two telegraph poles, as soon as the cab turned across the track it got struck. Witness then drove up to the place of collision and jumped off his team when he saw Harvey, the driver, running after the horses. Witness said that he could see down to North Street all right. On cross-examination he repeated that his first sight of the cab was when it crossed in front of the car, crossing the track was the first he noticed of it. He did not see any delay about it.

Now upon this evidence the first material question appears to have been whether or not the defendants had establised the defence pleaded in their statement of defence namely:

> That the plaintiff's servant improperly and negligently drove said plaintiff's horses and cab or carriage across the track of the defendant company, directly in front of the car or tram of the defendant company which was at the time in motion approaching said plaintiff's horses and cab or carriage.

Upon this question the evidence may be said to be wholly uncontradicted as to the fact of the cab having been driven across the track directly in front of an approaching car moved by electric power, and the only reasonable conclusion to be arrived at upon the evidence was, I think, that the driver of the cab being (by reason of his having gone out of his way for the purpose of giving, as he said, a lift to Mrs. Hines on her way home) late to reach the railway station so as to meet the train due at 6.40, which he set out to meet, rashly, recklessly, negligently and wrongfully drove across the track directly in front of the coming electric car, and so close to it that instantly the cab

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was struck by the car. The only excuse for this conduct which was attempted to be given was given by the driver himself who said that before turning the cab to cross the track he had looked up the road to see if there was a car coming, and that he saw no car and that he then turned. He was struck, however, almost immediately upon his getting on the track. Now the plaintiff had proved by a witness whose testimony was not questioned, that the distance from where the cab had stood to the nearest rail of the tramway was just seventeen feet six inches, so that the car was upon him as soon as he had proceeded that distance with his cab, and when he did see it then it was, as he said, lit up. Now the utter unreliability of this evidence, and the recklessness displayed by the witness in giving it, appeared upon his cross-examination, for he then said that when the boy was mounting up on the cab if the car had been within 100 yards of him he could have seen it, and he undertook to swear not only that he looked for the car, and did not see it, but that in point of fact it was not then within 100 yards of him, and that the car which struck him and which when he first saw it it was as he said about ten feet from him and must have run upwards of 100 yards while he was crossing the distance of seventeen feet six inches from the side wall to the tramway. Then as to the speed at which the car was running, he said on his examination in chief that

> he guessed from the crash that he got that the car must have been going over fifteen miles an hour, from fifteen to twenty miles an hour

(that was the only way by which he could speak of the speed of the car). Yet upon his cross-examination he admitted

> that the cab might have been hit just as hard as it was if the car had been going only at eight miles or even less than eight miles an hour.

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The evidence of this witness cannot be said with any degree of reason to be entitled to any consideration whatever by reasonable men.

Now the rule governing cases of this description is thus expressed by Lord Cairns in *Slattery's Case* (1), at page 1166.

> If a train which ought to whistle when passing through a station were to pass without whistling, and a man were in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of an advancing train and to be killed, *I think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death.*

In the application of this rule there cannot in reason be said to be any difference between "broad daylight" and a dark but clear evening between six and seven o'clock, in November, as the night in question was indisputably established to be, and when by uncontradicted evidence, as was also the case here, the tram car could have been seen 400 yards away, and was in fact seen 200 yards away from the place where the collision occurred, and which the plaintiff's driver of the injured cab admitted could have been seen over 100 yards away. Then Lord Hatherly in *Slattery's Case* (1) was of opinion that it is negligence for a man to pass over a railway at all without looking to see whether or not a train is approaching. He said, at page 1171:

> *I cannot consider it a proper question* for a judge to ask a jury whether a man's walking or running across a line of railway on which a train is expected, without looking to see whether a train is *in sight*, be an act of negligence.

And he cites with approbation the language of Willes J. pronouncing the judgment of the court in *Ryder* v. *Wombwell* (2), where he says at p. 39:

(1) 3 App. Cas. 1155. (2) L. R. 4 Ex. 32.

It was formerly considered necessary in all cases to leave the question to the jury (whether goods furnished to an infant were necessaries), if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge, (subject of course to review), is, as stated by Maule J. in *Jewell* v. *Parr* (1), not whether there is really no evidence, but whether there is some that ought reasonably to satisfy the jury that the fact sought to be proved is established.

He also cited with approbation the judgment of Mr. Justice Williams in *Toomey* v. *London and Brighton Railway Co.* (2), who enunciates the rule thus.

It is not enough to say that there was some evidence * * a scintilla of evidence * * clearly would not justify a judge in leaving the case to the jury. *There must be evidence on which they might reasonably and properly conclude that there was negligence* (which was the *causa causans* of the act complained of),

and Lord Hatherley adds:

If it be said that the jurors must draw the inference of negligence from the facts, the same might be said as to their duty in drawing the inferences in an action for goods supplied to an infant, whether they are or are not necessaries regard being had to the infant's position in life, but this was not done in *Ryder* v. *Wombwell* (3).

So likewise upon the same principle it is for the court as matter of law to say whether there is or is not sufficient evidence to submit to the jury on a question of reasonable and probable cause in an action for malicious arrest.

Then again in *Slattery's Case* (4) Lord Coleridge pronounced it to be the duty of the judge to withdraw a case from the jury if by the plaintiff's own evidence at the end of the plaintiff's case or by the unanswered and undisputed evidence on both sides at the end of the whole case it is proved either that there is no negligence of the defendants *which caused the injury*, or that there was negligence of the plaintiff which did, and he cites with approbation *Skelton* v. *London & North Western Railway Co.* (5). In that case the plaintiff in an

(1) 13 C. B. at p. 916.
(2) 3 C. B. N. S. 150.
(3) L. R. 4 Ex. 32.
(4) 3 App. Cas. 1155.
(5) L. R. 2 C. P. 631.

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action brought under Lord Campbell's Act for the death of a person killed when crossing the railway at a level crossing, was nonsuited, and the nonsuit was upheld by the Court of Exchequer upon the ground that the deceased when he reached the first line of rails could have seen up and down the line for 300 yards, but he did not look either to the right or left, but walked on and was killed crossing the second line of rails.

Lord Blackburn in *Slattery's Case* (1). at page 1216 made use of the following language, which seems to be exceedingly pertinent in the present case.

> My Lords, it seems to me if we were to say that judges cannot know that it is rash to cross the railway on foot on which it was known that trains were running; without taking some precaution to ascertain that no train was coming, and therefore that a judge cannot rule that, in the absence of evidence of something to excuse it, the person so crossing cannot recover for a collision; *we should in effect say that the question for the jury was whether it was not shabby in the Railway Company not to give something to the widow and orphans of the deceased. I fear too often that is the question really considered by the jury, but* I think it clear it ought not to be so.

Lord Gordon in the same case (1), at page 1217 referred to *The Metropolitan Railway* v. *Jackson* (2) as settling the rule that it is for the court to determine whether there is or not *reasonable evidence of negligence occasioning the injury* to be submitted to the jury and that if there be not evidence *from which such negligence can reasonably be inferred* the case should be withdrawn from the jury, and to this effect is the judgment of the Exchequer Chamber in *Siner* v. *Great Western Railway Co.* (3). In *Davey* v. *London & South Western Railway Co.* (4), Huddleston B. nonsuited a plaintiff who was injured by a train while crossing a railway of the defendants at a level crossing upon the ground that it appeared by the plaintiff's own evidence he crossed

(1) 3 App. Cas. 1155.
(2) 3 App. Cas. 193.
(3) L. R. 4 Ex. 117.
(4) 11 Q. B. D. 213.

the line without looking to see whether there was a train approaching which he must have seen had he looked. This nonsuit was upheld by the Queen's Bench Division. Upon counsel for the plaintiff arguing that the defendants in the discharge of their duty to use ordinary and reasonable care were bound to give to the plaintiff warning of the approaching train which they did not do and by omitting to do so he was misled into a confidence that it was safe to cross, Lord Coleridge interposed the observation :

Is it not using ordinary care to presume that where there is no obstacle to vision people will look to see if a train is coming?

And in giving judgment he cited at length Lord Cairns's judgment in *Slattery's case* (1) at page 1166 terminating with the sentence :

the jury could not be allowed to connect the carelessness in not whistling with the accident to a man who rushed with his eyes open on his own destruction

and he held there was really no evidence proper to be submitted to the jury. Lord Dennan concurring with Lord Coleridge said :

I think that the undisputed facts of this case shew that this accident was palpably and unquestionably due to the plaintiff's own folly and recklessness and nothing else.

And again :

It seems to me that it is no answer to the contention that the accident resulted from his own folly, that there was no whistle for I do not see that the absence of a whistle *played any material part in causing the accident* :

And again :

It *appears to me that the plaintiff brought his injuries upon himself by his own act as much as if seeing the train coming he had tried to cross in front of it.*

On appeal this judgment was upheld by the Court of Appeal (2). The Master of the Rolls pronouncing his

(1) 3 App. Cas. 1155. (2) 12 Q. B. D. 70.

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judgment as to the contention that the plaintiff having been misled into a false confidence said that it was incumbent upon the plaintiff.

to show that reasonable persons of ordinary care would have been misled under the same circumstances,

and he held that there was no evidence proper to be submitted to a jury. Lord Justice Bowen held that there was nothing in the evidence from which any reasonable mind could draw the inference that the accident was caused by anything except the negligence of the plaintiff himself, and as to the suggestion that he had been misled by the defendants he said :

Now what was there to mislead any reasonable person ? Is there, in other words, any evidence from which the jury *would have a right to consider* that the plaintiff taking his own story to have been true ought to have been misled ?

And finally he was of opinion *that the evidence did not leave open two views which could reasonably* be taken of the plaintiff's conduct, and so the nonsuit was affirmed. It is true that in *Wright* v. *The Midland Railway Co.* (1) reported at the foot of *Brown* v. *Great Western Railway Co.* (1) the Master of the Rolls is reported to have said (at pages 409-410).

If it pleases any body to hear it I have doubted ever since I gave that judgment (*re Davey* v. *London & South Western Railway Co.* (2) whether my brother Baggallay and my brother Manisty were not more right than we were. I have doubted whether even in that case we ought to have taken it from the jury.

But his doubt did not detract from the rule of law as laid down in that case but in its application as to the facts of the case ; his doubt being whether upon the evidence it was not open to the jury reasonably to hold that the conduct of the defendants excused the plaintiff "from taking the precaution which he otherwise should and would have taken." He premises the above observation by saying :—

(1) 1 Times L. R. 406. (2) 12 Q. B. D. 70.

There was no dispute about the law in the matter, the only difference being as to what was the conclusion of fact, and we thought the man ought to have seen. My brother Baggalay and my brother Manisty thought he should have been excused for not looking.

By which I understand the learned Master of the Rolls that they thought it was a question proper to be submitted to the jury whether he was not to be so excused. It was upon this question of fact alone that the Master of the Rolls changed his mind as to the propriety of withdrawing the case from the jury, and that change of mind cannot I think in the slightest degree affect our minds in the present case. In the case of *Wright* v. *The Midland Railway Co.* (1) there did appear to be open upon the evidence the two views referred to by Lord Justice Bowen in *Davey* v *London & South Western Railway Co.* (2) as necessary to justify submission of the question to the jury. The Master of the Rolls on the appeal in *Wright* v. *Midland Railway Co.* (1) adopts the language of Field J. in that case when in the Queen's Bench Division (3). The Master of the Rolls has no doubt as to the rule of law, giving judgment he says at page 407

I am not going to attempt to lay down what the law on this matter is again because it seems to me to have been laid down in the clearest language many times and as Mr. Justice Lopes says (and I am sure I will not gainsay it) beautifully laid down by Mr. Justice Field in this case. All I can say is that I do not think Mr. Justice Field in this case has added one single word as a legal proposition to what everybody had agreed to years before. Let me see what Mr. Justice Field's proposition is—"I say I may take it into my own hands when no reasonable jury acting fairly and impartially between the plaintiff and the defendant ought to draw or would draw any but one conclusion and that conclusion is conclusive against the plaintiff."

It is apparent then that upon the rule of law there was no difference of opinion whatever between the Master of the Rolls and Mr. Justice Field. They differed only as to the application of the rule to the

(1) 1 Times L. R. 406. (2) 11 Q. B. D. 213.
(3) 51 L. T. (N. S.) 539.

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facts in evidence in the case before them. Mr. Justice Field in a very full and exhaustive review of the evidence concludes by saying (1)

> Now I have not the faintest doubt in this case. I think that the case, at the end of the plaintiff's evidence, disclosed such a want of care on the part of the deceased as to disentitle the plaintiff to recover.

Mr. Justice Manisty who differed from the Master of the Rolls in *Davey* v. *London & South Western Railway Co.* (2) concurred with the judgment of Mr. Justice Field, he expressed himself of opinion that the evidence disclosed no evidence whatsoever of any negligence of the defendants which caused the death of Wright, the deceased. Lord Justice Lopes in the strongest terms expressed his concurrence in the judgment of Mr. Justice Field, and said (3)

> I doubt very much whether a more able and exhaustive judgment, with regard to what is "contributory negligence" and to the question when negligence or contributory negligence ought to be left to or withdrawn from the jury, exists in any of the books, than that which has just been delivered by my learned brother Field,

and the rule was made absolute for judgment for the defendants although the trial judge had submitted the case to the jury who had rendered a verdict for the plaintiff. The Master of the Rolls then in his judgment in *Wright* v. *The Midland Railway Co.* (4) proceeded to point out several points in the evidence as to negligence both on the part of the defendants and of the deceased which appeared to him to present two views upon which reasonable men might, in his opinion, differ as to the cause of the accident which caused the death of the deceased. Lord Justice Baggalay concurred with the Master of the Rolls and so the appeal was allowed. Lord Justice Lindley who concurred in the judgment of Mr. Justice Field upon the facts dissenting.

(1) 51 L. T. N. S. at p. 544.
(2) 12 Q. B. D. 70.
(3) P. 545.
(4) 1 Times L. R. 406.

Brown v. *Great Western Railway Co.* (1), was a similar case and proceeded ultimately upon the authority of the above case of *Wright* v. *The Midland Railway Co.* (2) in appeal. Then there is the case of *Coyle* v. *Great Northern Railway Co.* (3) in the Irish Exchequer Court in 1887 which is very much in point and in which Chief Baron Pallas reviewed all of the above cases including the judgment of the Master of the Rolls in *Wright* v. *The Midland Railway Co.* (2). It was an action under Lord Campbell's Act for the death of a person killed when crossing the Great Northern Railway Company where carriages were at the time being shunted. It appears from the evidence of the plaintiff's witnesses that the view from the place where the deceased was standing to the point from which the carriages began to retrograde was unobstructed; that they were visible during the shunting to any person standing at the place where the deceased was; that they were retrograding in the direction of the deceased when he started to cross the line, and that he must have seen them moving had he looked towards them; and that there was nothing unusual in what took place that morning in the mode of shunting; and it was held that the judge at the trial ought to have directed a verdict for the defendants as the undisputed facts shewed that the deceased in crossing the track acted negligently and that his negligence if not the sole, was at least a contributory cause of the accident. Pallas C.B. delivering his judgment pointed out the unquestionable and apparent fact that the accident could not have happened but for the deceased being there, and that his negligence in being there was at least a *causa sine quâ non* of his death. There was nothing he said amounting to a statement by the company that the deceased

(1) 1 Times L. R. 406. (2) 1 Times R. L. 406, *n.*
(3) L. R. Ir. 20 C. L. 409.

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might safely cross; there was no evidence of any negligence of the defendants but for which the consequences to the deceased could have been obviated and that therefore the judge was bound to withdraw the case from the jury upon proof of the negligence of the deceased. Douse J. concurring with the Chief Baron's judgment said

there was no evidence from which a jury might or might not infer that the deceased was guilty of contributory negligence—the evidence was all one way—the deceased could and should have seen the train and thus have escaped injury.

Then there is the case of *Allen* v. *The North Metropolitan Tramways Co.* (1). The material facts in that case as appearing in the plaintiff's evidence were that on a snowy night in December, about 11 o'clock, the plaintiff was on the Stratford highway on the Bow and Stratford bridge. He was about to cross the road and had gone about two and one half paces into the roadway when he was knocked down and run over by one of the defendants tram-cars proceeding from Stratford to London, his legs broken and he received other injuries and for these he brought his action for damages by negligence. At the trial before Mr. Baron Hudderston it appeared in the plaintiff's case that he was not looking in the direction from which the tram came, and if he had looked he must have seen it; the plaintiff however said that it was usual for the tram-car to stop on the bridge and that he expected this tram-car would do the same. Upon this evidence Mr. Baron Huddleston withdrew the case from the jury and nonsuited the plaintiff. The Divisional Court was of opinion that there was some evidence to go to the jury and set aside the nonsuit and made an order for a new trial. On an appeal to the Court of Appeal Lord Justice Lindley pronounced the unanimous judgment of the

(1) 4 Times L. R. 561.

court and said that they had all come to the conclusion that the nonsuit was right.

There was, he said, some evidence that the car was going fast and there was evidence that the plaintiff did not hear the car coming owing perhaps to the ground being covered with snow. It was clear from these facts that the plaintiff had only himself to blame for the accident. In the first place the court could hardly go to the length of saying that there was no evidence of negligence in the driver of the car, though that evidence was of the slightest possible character. *On the other hand there was clear evidence that the plaintiff's conduct caused the accident;* he walked into the tram-car when if he had looked he must have seen it. Then even though the plaintiff was negligent could the driver have avoided the accident by the exercise of reasonable care. *They could find no evidence that the driver could have avoided the accident.*

The appeal was therefore allowed and judgment rendered for the defendants in the action. Then there is the case in the Privy Council, also in 1887, on appeal from the Supreme Court of New South Wales, *Commissioner for Railways* v. *Brown* (1). I extract a portion of the judgment of the Privy Council which was pronounced by Lord Fitzgerald to shew the rationale upon which the judgment proceeded. He says at p. 135.

What really took place seems to have probably been that the plaintiff was driving down Elizabeth street and his horse got into an excited state from the noise of children. One of the witnesses says that when the plaintiff could have seen the motor coming he rose in his seat and commenced slashing his horse. The object of that was that having a spirited horse he thought that spirited horse would have carried him clear of the motor by being a little accelerated and then he commenced accelerating the pace of the horse so as to rush past the motor. *He had no business to do that.* When he saw there was danger of collision his duty was at once to have held his horse in. It was a matter of seconds. The delay of a few seconds would have prevented the calamity, but he chose to make a rush across, and in fact instead of the motor running into him he ran into the motor.

This latter language is emphatically applicable to the evidence of what occurred in the present case

(1) 13 App. Cas. 133.

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The decisions in the Ontario courts proceed on the same principle; *Danger* v. *London Street Railway Co.* (1); and I do not of course cite this case as an authority binding in any sense upon this court, but because I entirely concur in the judgment pronounced in it. The action was against a street railway company for negligence. It appeared that an electric car of the defendants was being run at a very rapid rate, and that the gong was not sounded as the car approached a certain street at the junction of which the plaintiff who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails when a wheel of the vehicle was struck by the car and he was injured. It also appeared that he did not before turning look or listen to ascertain the position of the car although he knew it was coming. The learned trial judge upon this evidence nonsuited the plaintiff. Upon a motion to set aside that nonsuit and for a new trial the Divisional Court affirmed the nonsuit.

Then there is *Follet* v. *The Toronto Street Railway Co.* (2) which proceeded upon the express authority of *Allen* v. *North Metropolitan Tramway Co.* (3). The case there was left to the jury who rendered a verdict for the plaintiff; a divisional court refused to set aside that verdict, but on appeal the majority of the court being of opinion that there was no evidence of the defendants' negligence which was proper to be left to the jury, that is to say, none from which a jury could reasonably find a verdict against the defendants for negligence, set aside the judgment and ordered judgment to be entered for the defendants, Osler J. dissenting upon the point only that he thought there

(1) 30 O. R. 493.
(2) 15 Ont. App. R. 346.
(3) 4 Times L. R. 561.

was evidence from which a jury might fairly find a verdict against the defendants.

Now upon the evidence as it stood at the close of the whole case I cannot entertain a doubt that the only conclusion which reasonable men could fairly deduce from the evidence was that the driver of the plaintiff's cab by his own rash, reckless and wrongful conduct into which he was not misled by any conduct of the defendants, was the sole cause of the accident which occurred, the case was one, to use the language of Lord Fitzgerald in 13 App. Cas. 135, of the cab driver running into the motor instead of the motor running into him. But we need not dwell upon this, for the learned trial judge submitted the case to the jury, who have expressly found that the cab driver, to say the least, did by negligent and improper conduct in attempting to cross the railway as he did just in front of the coming motor contribute to the causing of the accident and the injury suffered. That finding is conclusive, and upon it and upon the authority of all the cases upon the principle governing cases of this kind the learned trial judge should have entered judgment for the defendants, for there was not a shadow of evidence upon which reasonable men could fairly say that the motorman was guilty of negligence in omitting to do something which he could and should have done, and which, if done, would have obviated the consequences of the cab driver's wrongful conduct. Nothing of the kind was attempted to be proved at the trial; the only intimation which the motorman had of the cab driver having any intention to cross the track was his turning from the sidewalk where the cab had been standing and making straight for the railway. Now the evidence of the defendant's witnesses, and there was no contradiction whatever of that evidence, was that instantaneously upon the cab

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driver so exhibiting an intention to cross the track the motorman put on his brakes hard, and reversed the electric current, which latter was completely effected before the car got within a car's length, or twenty-seven feet of the place where the collision occurred. There was, I say, no contradiction whatever of these statements, but what counsel for the plaintiff attempted to do was to extract from the motorman on cross-examination whether, if he had applied the brakes and reversed the current sooner than he did, the car might not have been stopped before it reached the place where the collision took place. To this the motorman naturally replied that if he had any intimation of the intention of the cab driver to cross in front of him he could have stopped the car sooner than it was stopped, but there was not a particle of evidence that he did not do all that he possibly could do the moment he had any intimation of the cab driver's intention to cross the railway, that is to say the moment he turned from the sidewalk where he had been standing, just seventeen feet six inches distant from the rail upon which the cab was struck. Now it does not require the authority of any decided case to shew that the motorman having done nothing to stop the car before he had any intimation of the intention of the cab driver to cross the track, could not by any reasonable man or in law be held to be negligence contributing to an accident which could not have taken place if the plaintiff's driver had not negligently and wrongfully placed himself in a position to bring upon himself the danger of the collision which did take place.

It was argued before us that the speed at which it was suggested that the motor was running, namely at, as was suggested from fifteen to twenty miles an hour, excused the plaintiff's conduct If the motor was running at such a rate of speed the attempt of

the cab driver to cross in front of it was only the more culpable and could not affect the question whether after the cab driver had wrongfully attempted to cross the track the motorman omitted to do something which he could and should have done, which if done would have avoided the consequences of the cab driver's wrongful act. But in truth there was not anything said at the trial as to the speed of the motor which reasonable men could fairly regard as entitled to any consideration whatever as contradictory of the evidence given by the defendants upon that point, that the motor was going at its ordinary rate not exceeding about eight miles an hour, and in fact at the particular place in question it was going down a descending grade under its own headway and at the ordinary rate it always runs there and at all other places in the city at similar down grades. I have shewn how utterly valueless was the opinion of Harvey, the cab driver on the question of speed; the only other witness who said anything upon the question of speed of the motor was Pearce, who ventured to say that he judged that the motor was going at the rate of from fifteen to twenty miles an hour, but on cross-examination he said that while he was walking along for a distance of about forty yards the motor had just moved the distance of what he called 100 yards, thus showing the rate of speed of the motor to be just about what the defendants' witness stated, whose testimony was confirmed by the rapidity with which the car was stopped, and the short distance it continued to run after the brakes were applied. But the speed at which the car was going being only an item of consideration upon the question of the defendants' negligence, and as it is quite immaterial whether the defendants had been guilty of any negligence prior to the wrongful conduct of the cab driver to cross in front of the car,

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it is unnecessary to dwell upon this point. The defendants were clearly entitled to judgment upon the finding of the jury as no reasonable men could find otherwise than that the wrongful conduct of the plaintiff's cab driver contributed at least to the accident, and there was not a particle of evidence that the defendants were guilty of any negligence in omitting to do anything which if done would have obviated the consequences of the defendant's misconduct. The answer of the jury to the third question submitted to them is utterly unsupported by any evidence, and can, I think, be attributed solely to some such motive as that suggested by Lord Blackburn in *Slattery's Case* (1) as too often influencing juries to render verdicts in cases of this kind against the evidence. I cannot entertain any doubt that the appeal should be allowed with costs and judgment be ordered to be entered for the defendants in the action with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. H. Covert.*

Solicitor for the respondent: *H. C. Borden,*

(1) 3 App. Cas. 1155.