ELIZABETH NEILL (PLAINTIFF).....APPELLANT;

AND

THE TRAVELERS' INSURANCE COMPANY (DEFENDANTS)..... } RESPONDENTS.

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*May. 21.

*June 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Accident policy—Condition—Voluntary exposure to unnecessary danger—Practice—Extending time for appealing.

The plaintiff (appellant) brought an action to recover upon a policy of insurance effected by the respondents upon the life of her deceased husband, J. N., who met his death during the currency

*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Gwynne JJ.

(1) 2 Cush. 611.

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of the policy from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim the respondents amongst other defences, by their fourth plea, invoked a condtion to which the policy sued on was subject, to wit:—"No claim shall be made under this policy when the death or injury may have happened in consequence of unnecessary danger, hazard or perilous adventure." The uncontradicted evidence was that the deceased was killed by a train coming against the vehicle in which he was driving alone on a dark night in what was called a net-work of railway tracks in the company's station yard at Toronto, at a place where there was no road way for carriages.

Held, affirming the judgment of the court below, that the undisputed facts established by the plaintiff showed "that the deceased came to his death in consequence of voluntary exposure to unnecessary danger," and that therefore respondents were entitled to a non-suit.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of the Court of Common Pleas (2).

This action was brought in the Common Pleas Division of the High Court of Justice for Ontario for the recovery of moneys alleged to be due to the plaintiff by the defendants by virtue of an accident insurance policy issued to John Neill, the husband of the plaintiff.

The pleadings and the evidence so far as material are set out in the report of the case in the court below (3) and in the judgment of Mr. Justice Gwynne hereinafter given.

The action came on for trial on the 9th June, 1880, before the Hon. Mr. Justice Armour, and a jury at Toronto.

The learned judge in his charge submitted three questions to the jury:—1st. Did Mr. Neill voluntarily expose himself to unnecessary danger, hazard, or perilous adventure at the time he was killed; was he killed by reason of exposing himself to unnecessary danger

(1) 7 Ont. App. R. 570. (2) 31 U. C. C. P. 394.
(3) 31 U. C. C. P. 394.

hazard, or perilous adventure? 2nd. Was he killed while engaged in or in consequence of any unlawful act? 3rd. Did he use due diligence for his personal safety and protection at the time he was killed? His lordship directed the jury, if they found any of these issues against the plaintiff, to find a verdict for the defendants; but if they found all these issues in favor of the plaintiff to find a verdict for her. The jury found a verdict for the plaintiff for the full amount claimed. Leave was reserved to the defendants to move for a non-suit if the court should be of opinion on the evidence, that there was nothing to submit to the jury.

On 28th August, 1880, a rule *nisi* was obtained by defendants calling on plaintiff to show cause why a non-suit should not be entered, pursuant to leave reserved, and on 26th November, 1880, the rule was made absolute.

From this judgment of the Common Pleas Division the plaintiff appealed to the Court of Appeal for Ontario, and the Court of Appeal being equally divided the judgment of the Court of Common Pleas was affirmed.

Lash, Q.C., for appellant:

The policy being a contract to pay a certain sum of money in the event of death from injuries effected through external, violent and accidental means, which injuries shall have occasioned death within ninety days from the happening thereof, and the plaintiff having proved the date and cause of death, that it was the result of an accident which left on the body external signs of the injury, nothing further was required of the plaintiff to entitle her to succeed, and the burden of proving that the conditions of the policy had not been complied with was upon the defendants. *Cluff* v. *The Mutual Benefit Insurance Co.* (1); *Dublin & Wicklow Railway Co.* v. *Slattery* (2).

(1) 1 Big. 208.

(2) 3 App. Cas. 1155.

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The plaintiff having made out a *primâ facie* case, which, if there had been no other evidence offered would have entitled her to a verdict, the case was properly submitted to the jury to say whether the defendants had established any violation of the conditions of the policy, and the jury having found all the issues of the plaintiff, the court was wrong in view of the evidence and the finding of the jury thereon in directing a non-suit: Wharton on Negligence (1); May on Insurance (2); *Administrators of Stone* v. *U. S. Casualty Co.* (3).

As to the first question submitted by his lordship to the jury at the trial, no evidence was given by the defendants to support the plea that the assured voluntarily exposed himself to unnecessary danger, hazard or perilous adventure. The position was not whether the place where the accident occurred was a dangerous place, but whether the assured was voluntarily there. So long as there was in the opinion of the judge any evidence that the assured was there voluntarily, it was the province of the jury to decide upon it. And the jury having expressly found this issue in favor of the plaintiff, and it being a question of intention, their verdict was conclusive and should not have been disturbed: *Blyth* v. *Bennett* (4).

The word "voluntary" in the condition of the policy means a "doing by design," and the defendants should have proved that the assured designedly exposed himself to danger, that he must have known of the danger and with such knowledge exposed himself to it, and there was no evidence whatever to support such a defence: Wharton's Law Lexicon (5).

As to the defence that the assured was engaged in an

(1) Sec. 420.
(2) P. 667 and cases there cited.
(3) 34 N. J. (5 Vroom) 371.
(4) 22 L. J. C. P. 79.
(5) P. 772.

unlawful act at the time of the accident, viz., driving along the track of the Northern Railway, such an act has not been covered by the defence pleaded and has not been provided against by any statute or otherwise made unlawful under the conditions of the policy herein: *Fawcett* v. *York and North Midland R. W. Co.* (1).

Further, an unlawful act within the proper meaning of the conditions of the policy herein pleaded by the defendants would refer to some criminal act of assured, and none such was established in evidence.

It was established in evidence that he had the right to go there, as he did, on business, and that he was in the habit, as were other people, of going there on business, with the permission of the company, and that he was not violating the rules of the company, and the jury by their verdict so found.

As to the third question, whether the assured used due diligence for his protection and safety in accordance with the conditions of the policy, even if due diligence had not been used, the plaintiff's claim would not not have been defeated, as the policy attaches no penalty to the breach of this requirement, whereas to breaches of other requirements in the same condition, penalties are attached. *Expressio unius est exclusio alterius.* In any case the burden of proof is on the defendants, and no evidence was adduced to establish want of due diligence.

The policy being an accident policy the question of negligence or contributory negligence does not arise apart from the conditions, and the defendants have failed to establish the breach of any of the conditions of the said policy. May on Insurance (2) ; See also Bliss on Life Insurance (3), and cases there cited.

(1) 16 Q. B. 610.
(2) Pp. 601-602.
(3) 2d Ed. pp. 475-476, Sec. 411, and p. 674, note and p. 715.

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Robinson, Q.C., and *McCarthy*, Q.C., for respondents.

There was no dispute as to the facts as proved at the trial. The word "voluntary," in the conditions of the policy relied on by appellant, must be constructed as meaning "by design," that is to say, the deceased, in order to become within the terms of the conditions, must have known the danger and have designedly run the risk of it. If the appellant is right in this contention, the only case covered by the conditions is the case of an exposure to unnecessary danger permitted or brought about by insured for the express purpose of, and with no ulterior object than, trying the chances of escape or death. The respondents, however, submit that such a strained and unnatural construction cannot be put upon the condition or upon the word "voluntary." It is used as opposed to "involuntary," *i.e.*, without guidance by or control from the will. Given the position of exposure to unnecessary danger, the question is, as the respondents submit, was the taking of such position an act of volation or (to put it negatively) an act, the doing of which could have been avoided by the exercise of volition. The evidence in this case shows clearly the position of exposure, and that the taking of such position was an act of volition on the part of the deceased, and the evidence being uncontradicted the non-suit entered was right. *Mair* v. *Railway Passengers' Assurance Co.* (1); *Shilling* v. *Accidental Death Ins. Co.* (2); *Schneider* v. *Provident Life Ins. Co.* (3); *Providence Life Ins., &c., Co. of Chicago* v. *Martin* (4).

With regard to the second defence, that the insured met his death while violating the rules of a corporation or company, it was given in evidence that the act

(1) 38 L. T. N. S. 356.
(2) 1 F. & F. 116.
(3) 1 Big. 731.
(4) 2 Big. 40.

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of the deceased was in contravention of a rule of the Northern Railway binding upon all persons being upon the premises of the company; no evidence in contradiction of this was adduced, and the respondents submit the learned judge should properly have withheld the case from the jury.

The third defence was established by the plaintiff's evidence in support of her case, which showed that the action of the deceased in which he was engaged when he met his death was an unlawful act—being a misdemeanor under "The Consolidated Railway Act, 1879," sec. 27, sub-sec. 4, and a violation of sec. 16, sub-sec 5 of the same Act, and therefore on both grounds *contra leges.*

There being no contradiction as to the facts, the question was one for the judge and not for the jury. *Dublin, &c. R. W. Co.* v. *Slattery* (1).

Sir W. J. RITCHIE C.J.—I think this appeal should be dismissed. On the undisputed facts as between the railway company and the deceased, the accident was not caused by the negligence of the railway company, the act of the plaintiff himself being the sole cause of the accident. There is nothing whatever disclosed by the evidence to justify or excuse the deceased being in the position he was on the track of the railway when struck by the shunting car. I think there was nothing to leave to the jury in this case, the undisputed facts established by the plaintiff show that the deceased came to his death in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure by driving into a railway shunting yard, through, over and among the numerous railway tracks, in all some twenty, if not more, and at a place where there was no provision for the passage of a carriage, and in so ex-

(1) 3 App. Cas. 1155, 1166.

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posing himself he acted contrary to the rules of the Northern Railway. There being no contradiction or dispute then as to the facts there was nothing to leave to the jury. These uncontradicted facts on which the plaintiff rested her case clearly, and beyond all doubt, established that the deceased unnecessarily and improperly drove his horse and carriage after dark where he had no right to go, and where no man could drive with propriety or safety, or without exposing himself to almost inevitable accident, and that such most unwarrantable voluntary exposure and want of reasonable caution was the sole cause of the accident. The evidence of the plaintiff in attempting to establish her case having shown that the deceased by his voluntary exposure to unnecessary danger caused the damage, her case entirely fails, and as was said by Denman J. in *Davey* v. *The London & S. W. R. Co.* (1), the undisputed facts of this case show that this accident was unquestionably due to the plaintiff's own folly and recklessness, and nothing else, and it is therefore, in my opinion, a clear case for a non-suit.

The latest case that I am aware of on the question is *Davey* v. *The London & South-Western Railway Company.*

STRONG J.:—The fourth plea sets out the condition to which the policy is subject, one of the provisions of which is, that no claim shall be made under it when the death or injury may have happened in consequence of voluntary exposure to necessary danger—at the close of the plaintiff's case, a non-suit was moved for, on the ground that it appeared that "the deceased met his death by voluntary exposure to unnecessary danger, hazard or perilous adventure," and upon other grounds the learned judge overruled the objection, but reserved leave to the defendants to move to enter a non-suit. It

(1) 11 Q. B. D. 213.

appears to me that there was no room to doubt that the place which the deceased was killed, was a dangerous place for anyone to be driving in a vehicle as the deceased was, that there was really no question to leave to a jury upon that head, as there could be no reasonable doubt about the facts or the proper conclusion from the facts, and that the case is brought within the principle of *Ryder* v. *Wombwell* (1), and is a much stronger instance for the application of the doctrine of that decision than the facts there actually in question presented. I understand *Ryder* v. *Wombwell* to have been decided, that when the plaintiff's case is such, that but one reasonable inference can be drawn from the evidence, and that conclusion is adverse to the plaintiff the judge may non-suit. Then of the two remaining facts making up this issue on the 3rd plea the burden of which was on the plaintiff, there was not even a scintilla of evidence. It being once admitted that the locality at which the accident occurred was a dangerous one, and that being there was an exposure to danger, it was not shewn that the plaintiff was there otherwise than of his own will, and he must therefore be taken to have been there voluntarily, as every act of man must be presumed to be voluntary until the contrary is proved. Again it was also for the plaintiff to have proved that the presence of the deceased at this dangerous spot, was caused by some reasonable necessity if she relied in the fact that the deceased had exposed himself to this danger for some necessary purpose—but of this also there is an entire failure of proof—I am therefore entirely of accord with the Chief Justice of the Queen's Bench, and Mr. Justice Cameron in the reasons which they give for the judgment of the Court of Appeal, which I think ought to be affirmed and this appeal dismissed.

(1) L. R. 4 Ex. 32.

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FOURNIER J. concurred.

HENRY J.—I consider this case so very plain that it requires but few words to express my view. The insured in this case undertook not to violate the rules of the company, and he unnecessarily exposed himself to danger. It was not shown that there was any necessity for his being on this net-work of tracks, and although it is alleged that he might have been under the influence of liquor, no person, I think, can read the evidence without coming to the conclusion that the unfortunate man was not right in his mind. I am of opinion that the appeal should be dismissed.

GWYNNE J.—This is an action brought by the plaintiff, as the widow of one John Neill, deceased, upon an accident policy executed by the defendants in favor of the deceased in his life time, who came to his death by having been run over by a train of the Northern Railway Company while the deceased was driving with a horse and buggy across a net-work of tracks laid in the yard of the Northern Railway at Toronto, at a place where there was no horse road or footpath, and where the rules of the company forbid any person not in the service of the company to be, and where, consequently, the deceased had no right whatever to be, much less to be driving with a horse and buggy. At the trial the case was submitted to the jury who rendered a verdict for the plaintiff; leave, however, was reserved to the defendants to move to enter a new suit. The Common Pleas division of the Supreme Court of Justice for Ontario granted after argument a rule absolute for entering a non-suit. Upon appeal from this rule the Court of Appeal at Toronto was equally divided. The sole question upon this appeal now before is, should the non-suit have been granted, and I am clearly of opinion that it should. By the policy sued upon in this case the

defendants promised and agreed to pay the sum of $5,000 in gold to the plaintiff, who, at the time of the time of the making of the policy was the wife of the said John Neill, or to the legal personal representative of the said John Neill, within ninety days after sufficient proof that the said John Neill should, at any time during the continuance of the policy, have sustained bodily injury effected through external means within the intent and meaning of the contract and the conditions thereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof. The policy then stated, among other conditions upon and subject to which it was issued, the following which are all that for the purposes of this appeal there seems to be any occasion to refer to, namely: "provided always that no claim shall be made under this "policy when the death or injury may have happened "in consequence of voluntary exposure to unnecessary "danger, hazard or perilous adventure, or in consequence "of violating the rules of any company or corporation."

In an action upon a policy of this nature prior to the Common Law Procedure Act the declaration would have been open to objection upon special demurrer if the declaration did not contain an express affirmation of the happening of each and every thing necessary to happen within the terms and conditions of the policy to entitle the plaintiff to recover, and a negation of the happening of anything, the happening of which, by the terms and conditions of the policy, disentitled the plaintiff to recover. The burthen of proving everything, the happening of which was made a condition precedent to the plaintiff's right to recover, and the absence of the occurence of anything, the occurrence of which disentitled the plaintiff to recover, lay upon the plaintiff. For the purpose of dispensing with the necessity of this prolix form of pleading, with-

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out any variation in the substance, the Common Law Procedure Act enacted that a plaintiff or defendant in any action may aver performance of conditions precedent generally, but that the opposite party should not deny such performance generally, but should specify in his pleading the condition or conditions precedent, the performance of which he intends to contend. The effect of this enactment was that a defendant, instead of denying generally the happening of the several conditions entitling the plaintiff to recover, is confined to the denial of the happening of some particular condition or conditions, the occurrence of which is necessary to entitle the plaintiff to recover, each and every of the conditions, which before the Act were necessary to have been alleged in the declaration, being still since the passing of the Act regarded as contained in the declaration under the averment of general performance of conditions authorized by the Act; so that a plea relying upon a condition broken as disentitling a plaintiff to recover, is in substance still a plea in denial, equally as before the passing of the Act, and the burthen of proving everything necessary to establish the liability of the defendants within the precise conditions to which the policy is made subject, lies upon the plaintiff equally as it did before the passing of the Act. Accordingly the plaintiff in the present action in accordance with the form of pleading in use since the passing of the C. L. P. Act declares upon the policy, and the promise therein contained in the words of the policy, and avers that while the policy continued in force and while the plaintiff was the wife of the said John Neill, "he, the said John Neill, sus-"tained bodily injuries effected through external, violent "and accidental means within the intent and meaning "of the said contract, and the conditions thereunto "annexed, and such injuries alone occasioned death

"within ninety days from the happening thereof, to wit, "instantaneously, and all conditions were fulfilled and "all things happened, and all times elapsed necessary to "entitle the plaintiff to maintain this action for the "breach hereafter alleged, and nothing happened or was "done to prevent her from maintaining the same; yet "the plaintiff has not been paid the sum of $5,000, and "the same is wholly due and unpaid."

To this declaration the defendants plead several pleas in which they specify the particular conditions subject to which the policy was issued, which they deny the fulfilment of so as to entitle the plaintiff to recover; to two of which pleas only, namely, the 4th and 5th, is it, in my opinion, at all necessary to refer. In the fourth plea after setting out the several conditions, subject to which the policy was issued, including those above stated, they say that the death of the said John Neill happened in consequence of his having, in violation of the said condition, voluntarily exposed himself to unnecessary danger and hazard, in placing himself in the way of a locomotive engine, on one of the railway tracks of the Northern Railway Company of Canada.

And in their 5th plea they allege that the death of the said John Neill, who was not then an employee of the Northern Railway Company of Canada, happened in consequence of his having in further violation of the condition set forth in the last plea violated one of the rules of the Northern Railway Company of Canada, under which all persons not being in the employ of the said company were forbidden to walk or drive on any of the tracks of the said company. Now, upon these pleas it cannot, I think, admit of a doubt that to entitle the plaintiff to recover it was necessary for her to establish that the death of John Neill happened under such circumstances as within the true intent and meaning of the conditions, subject to

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which the policy was issued, entitled her to recover, that is to say, that it happened not only from external violence, but from violence inflicted otherwise than in consequence of voluntary exposure by the deceased to unnecessary danger, hazard, or perilous adventure, and otherwise than in consequence of his having, in violation of one of the rules of the company, been driving at the time of the accident on the railway tracks of the company at a place where he had no right to be; and if in showing, as it was necessary for her to show, the circumstances attending the occurrence of the accident which caused the death, the uncontradicted evidence showed it to have happened in violation of either of the conditions, the breach of which the defendants relied upon, the case should have been withdrawn from the jury and the plaintiff non-suited. It is unnecessary to enter into the evidence further than to say that the deceased was killed by a locomotive engine and train when he was driving his horse and buggy across a network of railway tracks in the yard of the Northern Railway Company, where trains are being constantly shunted backwards and forwards where the deceased was, in violation of the rules of the company, and where he had no right to be, and whither he went in disregard of an express warning given to him by a person on foot, who saw the danger into which he was going, and who told him that if he persisted in going on he would be killed as he, in fact, was within a couple of minutes after receiving the warning.

A suggestion that was made that notwithstanding this evidence and the absence of any evidence to qualify it in the slightest degree, it was, nevertheless, a question open for the jury to say that they were not satisfied that the deceased was there voluntarily, and that in truth he might have been there quite involuntarily, savors of too much subtilty, as it appears to me,

to be seriously entertained.

It has, however, been contended that the judgment of the House of Lords, in *Slattery* v. *The Dublin and Wicklow Railway Co.*, (1) is an express authority to the effect that upon the defendants was cast the burthen of proving that the deceased was voluntarily in the place where he was killed, and that as there was not sufficient in the evidence to show that he was not there involuntarily it was open for the jury to say whether, in their opinion, he was there voluntarily or unvoluntarily, and that therefore the case could not have been withdrawn from them; and that, although their finding him to have been there involuntarily may be against the weight of evidence, that raises a point not open on the question of non-suit. This contention involves in my judgment a misconception of the judgment of the learned law lords who constituted the majority in the case of *Slattery* v. *The Dublin and Wicklow Railway Company*, and a misapplication of that judgment. In that case the question was whether in view of the circumstances appearing in evidence pointing to negligence on the part of the defendants leading to the collision by which the plaintiff's husband lost his life, and the facts also appearing tending to show contributory negligence upon the part of the deceased, the case should or not have been withdrawn from the jury. The learned law lords who constituted the majority which held that, under the circumstances appearing in evidence, the case could not have been withdrawn from the jury, did not dispute the correctness of the rule as stated by Lords Hatherby, Coleridge and Blackburn, who were of opinion that the case should have been withdrawn from the jury. Lord Hatherley, concurring with Chief Baron Palles of the Irish judiciary, states the rule thus:

(1) 3 App. Cas, 1155.

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When there is proved as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which, *per se*, amounts to negligence, and when it appears that such act caused, or directly contributed to, the injury, the defendant is entitled to have the case withdrawn from the jury.

Again he says:

If contributory negligence be proved by the plaintiffs witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide.

He then proceeds to show how in his opinion the evidence showed contributory negligence on the part of the deceased.

Lord Coleridge in his opinion says:

There has been a difference in the form in which the defence arising from the negligence of the plaintiff has been usually pleaded in actions of this sort in Ireland and England; but the difference in form makes no difference in principle, the onus on the plaintiff is the same in both countries, and the plaintiff may fail in Ireland as well as here to prove his cause of action by proving his own negligence, as well as by not proving that of the defendant. It is therefore, I think, the duty of the judge to withdraw the 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 was no negligence of the defendant which caused the injury, or that there was negligence of the plaintiff which did.

Lord Blackburn states the rule thus:

Where there is no dispute between the parties as to the truth of any particular fact, or the accuracy of any particular witness, there is no need to ask the opinion of the jury. If there is some further inference of fact which may be drawn from the undisputed facts, it is still for the jurymen to say whether they will draw that inference; it is for the judge to say whether they can draw it.

The point in which the learned law lords differed was not in the terms or effect of the rule, but in the view which they took of the evidence, which, in the view of the majority, was sufficiently contradictory and conflicting as to lead to the conclusion that it could not have been withdrawn from the jury. Lord Chancellor Cairns, in his judgment, makes this appear very clearly (1). He says:

(1) At p. 1166.

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The appellants contend that even assuming that there was negligence on their part in not whistling, still that, on the facts which were not in controversy the judge should have ordered the verdict to be entered for them, because the deceased either did see or might have seen the advancing train, and it was therefore his carelessness, and not that of the appellant's, which caused the accident. I should by no means wish to say that a case in which such a course should be taken might not arise, and indeed had the facts in the present case been only slightly different from what they are, I should have been disposed to accede to the appellant's argument. If a railway train, which ought to whistle when passing through a station, were to pass through 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 the advancing train and to be killed, I should 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. This would be an example of what was spoken of in this House in the case of *Jackson v. The Metropolitan Ry Co.*, an *incuria* but not an *incuria dans locum injuriae.* The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed with his eyes open to his own destruction.

He then proceeds to show that, in his opinion, the facts were materially different in the case then before their lordships, and that there was such conflict in the evidence that the case could not be withdrawn from the jury, who, and not the judge, should say whether the absence of whistling on the part of the train or the want of reasonable care on the part of the deceased was the *causa causans* of the accident.

Lord Selborne is no less clear. At p. 1187 he says:

It seems to me impossible to deny that the evidence of persons who, standing in a position where whistling must have been audible, say they heard none, was proper to be left to a jury on the issue whether there was whistling or not, however strong the affirmative evidence might be by which it was not. If the deceased had been a mere trespasser on some part of the line where there was no crossing, it would have been entirely his own fault that he was in the way of danger, and as the defendant would have been under no obligation to give any special warning of the approach of their trains to persons whose presence on their line they had no just cause to

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anticipate, the omission to give such notice by whistling under these circumstances would not have been negligence on their part.

Lord Gordon is equally explicit. At p. 1217 he says: Where there is no evidence to go to the jury it is proper for the judge to direct a non-suit. That is the course which this House considered ought to have been followed in the recent case of *Metropolitan Ry. Co.* v. *Jackson* (1). But in my view this case is very different from the case of Jackson. I think there was evidence in this case upon both the points raised, and that the judge did right in leaving the case to the jury.

Now in the case before us there was no dispute as to the facts. The undisputed evidence showed that the deceased drove himself across the tracks of the Northern Railway, where a person with a horse and buggy had no right whatever to be, into a place of manifest danger from locomotives shunting backwards and forwards, and where the risk was so imminent that death ensued almost instantaneously after a person who was there on foot warned him that it would occur if he should persist in proceeding further. It seems to me to be trifling with common sense to say that upon this evidence there was anything which left it open to a jury to say that the deceased was not voluntarily in this place, or that this was not exposure to unnecessary danger within the terms of the condition to which the policy was subject.

In a recent case decided in the Court of Appeals in England, *Wakelin* v. *The London & S. W. Ry. Co.*, wherein the points in issue were precisely those in issue in *Slattery* v. *The Dublin & Wicklow Ry. Co.*, it was held that in actions of this nature a plaintiff cannot recover at all, but must be non-suited unless some evidence be given by the plaintiff of the circumstances attending the occurrence of the accident which causes death, for in the absence of such evidence *non constet* but that the negligence of the deceased was the *causa*

(1) 3 App. Cas. 193.

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causans of the accident. This case seems to me to throw doubt upon much that was said by Lord Penzance in *Slattery* v. *The Dublin & Wicklow Ry. Co.*, which was not, however, essential to the determination of that case.

Wakelin v. *The London and South-Western Railway Co.* (1):

This case raised an important question as to the evidence in actions of negligence. The action was under Lord Campbell's Act, by a widow to recover damages for the death of her husband, alleged to have been caused by the defendants' negligence. It appeared that the man was found dead on a level crossing of the defendants, and it was admitted that he had been run over by a down train at night, but there was no evidence of how the accident occurred. The defendants' watchman at the crossing was withdrawn at 8 p.m., and at the spot in question on a clear night the light of an engine could be seen for nearly half a mile on each side, but there was no evidence of the state of the weather on the particular night. The down train did not whistle or slacken speed on passing the crossing. On these facts, proved at the trial, Mr. Justice Manisty refused to withdraw the case from the jury, and they found a verdict for the plaintiff for £800. His Lordship left the parties to move for judgment. A Divisional Court, consisting of Mr. Justice Grove, Mr. Baron Huddleston, and Mr. Justice Hawkins, found that there was no evidence to go to the jury, and that there was evidence of contributory negligence on the part of the deceased. Judgment was, therefore, entered for the defendants. The plaintiff appealed. The main question was whether, in such an action as the one in question, it is for the plaintiff to negative contributory negligence (which, in the circumstances of the case, it was impossible for her to do,) or whether it is for the defendants to prove such negligence affirmatively. The case was argued yesterday, when their Lordships reserved judgment.

Mr. *Jelf* Q.C., Mr. *T. C. Jarvis* and Mr. *Harmsworth*, were for the plaintiff; Mr. *Murphy* Q.C., and Mr. *Arbuthnot*, for the defendants.

Their Lordships dismissed the appeal.

The Master of the Rolls said that the first question was as to what was the cause of action. According to English law, the cause of action in such a case was not that the accident was caused by the negligence of the defendant, for if the plaintiff was guilty of contributory negligence there was no cause of action. The cause of action was that, as between

(1) Times of 17th May, 1884. Master of the Rolls and Lords Court of Appeal. Before the Justices Bowen and Fry.

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the plaintiff and defendant, the accident was caused solely by the negligence of the defendant, without any contributory negligence of the plaintiff. It was for the plaintiff to give *primâ facie* evidence of his cause of action, and if he omitted to give evidence of any material part of it he must be nonsuited. He must, therefore, negative contributory negligence on his part. But in the present case the plaintiff was unable to give any evidence of the circumstances of the accident, and therefore there was nothing from which any one could say whether there was or was not contributory negligence of the deceased. Upon that ground alone the non-suit must be upheld. In his view there was evidence for the jury of negligence by the defendants, but the plaintiff, having failed to give any evidence of the circumstances of the accident, had failed to give evidence of a necessary part of her *primâ facie* case, and therefore his Lordship was sorry to say that the relatives of the deceased had no remedy.

Lord Justice Bowen said that even if the law were not (though he did not say it was not) completely expressed by the Master of the Rolls, still the plaintiff must fail owing to the absence of evidence.

Lord Justice Fry said he would not express an opinion whether it was for the plaintiff to prove that the defendants' negligence was the sole cause of the accident, for there was no evidence that it was.

In the case before us I entertain no doubt that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Watson, Thorne & Smellie.*

Solicitors for respondents: *McCarthy, Osler, Hoskin & Creelman.*