Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of the Great Western Railway Company of Canada v. *Fawcett, and the Great Western Railway Company of Canada* v. *Braid, from the Court of Error and Appeal of the Province of Upper Canada; delivered 21st February,* 1863.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
SIR JOHN T. COLERIDGE.

THESE cases come before us by Appeals from Judgments of the Court of Error and Appeal of Upper Canada, affirming Judgments of the Court of Common Pleas in two actions brought against the Great Western Railway Company of Canada. As the actions arose out of the same accident, and in each of them the same ground of negligence is alleged against the Company, the principal questions to be determined are the same in both. There are two points, however, which are peculiar to Braid's case, to which it may be necessary shortly to advert.

The first of these, which was properly abandoned on the argument, arose upon two pleas of the Company, which alleged in substance that Alexander Braid, the deceased, was travelling upon the Railway under circumstances which released the Company from all liability to answer for his death, and it was admitted that if the onus of the proof of their pleas rested upon the Company (of which there could be no doubt) it would be hopeless to attempt to disturb the verdict of the jury upon these issues. The other is an objection which has been urged against the right of Appeal on the ground of the damages

being of insufficient amount. This objection depends upon an Act of the Canadian Legislature (22 Vict. chap. 13, sec. 57), which enacts "that the Judgment of the Court of Error and Appeal shall be final where the matter or controversy does not exceed the sum or value of 4,000 dollars." The damages in Braid's case were exactly of this amount, but it was contended on behalf of the Appellants that the costs which were the consequence of the verdict ought to be added to the damages, and that thus the matter in controversy would exceed the limited sum or value.

As the Judgment of their Lordships will be in favour of the Respondents upon the other grounds of Appeal, they think it unnecessary to express any opinion upon this objection; but nothing which was thrown out by them in the course of the argument must be considered as any indication of their assent to the proposition that in estimating the matter in controversy the costs incurred by the losing party may be taken into account.

Having adverted to the questions which are applicable only to one of these Appeals, we now proceed to those which are common to both.

The actions were for damage alleged to have been sustained by the Plaintiffs in consequence of the deaths respectively of Thomas Fawcett and Alexander Braid, occasioned by the want of care and skill of the Company in constructing their Railway, and in repairing and maintaining the same. The part of the Railway where the accident occurred was carried over an embankment, made on the slope of a mountain, and had been in use for four or five years, without any injury having happened.

Early on the morning of the 19th March, 1859, after an unusually heavy fall of rain, the embankment gave way to the extent of 45 yards in length on the line of the track. Trains had gone over the place where the accident occurred during the preceding night, and a train with 13 cars had passed the same spot at 10 minutes past 1 on the morning of the 19th March. The train in question arrived at the part of the embankment which had given way about 2 A.M., and was immediately precipitated into the breach, the deaths of the two persons upon which the actions were brought being the unhappy consequence of this accident.

In support of the verdicts, which in both the actions were against the Company, it was insisted by the learned Counsel for the Respondents that the mere proof of the embankment having given way would have been quite sufficient to establish a case of negligence; and in support of this position he cited the cases of Carpue *v.* The London and Brighton Railway Company (5 Q. B. 747), and Skinner *v.* The London, Brighton, and South Coast Railway Company (5 Exch. 787).

There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the Company to rebut it. However, the Plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury.

It was objected by the learned Counsel for the Appellants that this evidence amounted only to theory and conjecture, and that the Jury ought not to have been permitted to act upon it. To this it may be answered, that although the circumstances which occasioned the accident were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment. But then it was said that the witnesses ascribed the accident to different causes, that their theories were conflicting and mutually destructive, and that consequently at the close of the Plaintiff's case there was nothing to go to the Jury. The difference of opinion of the witnesses, however, refers merely to the mode in which the water must have operated upon the embankment, but they speak almost with one voice as to the defective character of the drainage.

It was assumed that at the close of the Plaintiff's evidence in each case there was an application by the Defendants for a non-suit, but this seems to be a misapprehension. The notes of the learned Judge who tried the cause appear to be merely the heads of the defence set up. The first ground of defence in both cases, that the Company had always skilful engineers, and therefore could not be held to have been negligent, even if the work were not

judiciously constructed, would have been prematurely urged as matter of non-suit at that stage of the trial, as no proof had then been given of the employment of such engineers by the Company. The language of the note in Braid's case, "it being proved," must be understood "upon its being proved," and must be taken as a short mode of stating the intended defence. The other defence mentioned to have been raised in Braid's case only was clearly for the Jury, even if the unusual state of the weather had been proved in the course of the Plaintiff's case. Although no mention is made of this ground of defence in the notes in Fawcett's case, it is fair to assume that it was urged on behalf of the Company in that case also, not only from the nature of the evidence, but also from the circumstance that when, on the application for the new trial, misdirection was imputed to the learned Judge in this particular, it was never objected that no question of the kind had been raised. The defence in both cases, therefore, was substantially the same, being founded upon proof of the proper construction of the railway, of the daily inspection of the line, and of the violence of the storm of rain which carried away the embankment. As far as we can collect from the learned Judge's note of his charge to the Jury, he does not appear in Fawcett's case to have adverted to the Company's defence arising upon the extraordinary and unforeseen state of the weather immediately before the accident, nor in Braid's case to have mentioned it otherwise than in an incidental manner. In neither case does he appear to have explained to the Jury the effect which would be produced upon the question of negligence, by satisfactory proof that the storm which destroyed the embankment was of such an extraordinary description that no experience could have anticipated its occurrence. Their Lordship's think that the Jury ought to have had their minds distinctly and pointedly directed to this question, and that without some definite instruction upon the subject they were likely to have omitted it from their consideration. If, therefore, there had been any miscarriage on the part of the Jury, in consequence of this non-direction, and a verdict against the evidence had been produced by it, their Lordships would have felt themselves compelled to send the case to a

new trial. But upon a careful examination of the evidence they have come to the conclusion that the verdict ought to have been the same, even if the question of negligence had been left to the Jury, accompanied with a direction as to the circumstances under which the Company would have been exonerated from liability.

In the construction of works of a permanent character such as a railway, the amount of precaution which ought to be taken to guard against any external violence to which it may be exposed cannot be the subject of any precise rule, but must necessarily vary according to the varying local circumstances of each case. The difficulty of extracting any principle from decided cases which may be applied with certainty to questions of this description, is strongly exemplified by two Judgments of the Court of Exchequer which were delivered within three weeks of each other. In Withers *v.* The North Kent Railway Compay (27 L. J. N. S. Exch. 417), which was an action against the Railway Company for an injury occasioned by their keeping and maintaining their railway in an insecure state, it appeared that the railway had been constructed five years, and ran through a marshy country subject to floods; that it was constructed on a low embankment composed of a sandy sort of soil likely to be washed away by water, and that the culverts were insufficient to carry off the water. Evidence was given that on the day of the accident an extraordinary storm occurred, accompanied for sixteen hours with very violent rain, and that in consequence of this a stream, near to the spot at which the accident had occurred, had been swollen to a torrent and washed away a bridge, and poured down with great force upon the line; that the water had by midnight worn the earth away under the sleepers on some places, leaving the rails unsupported and exposed. A verdict was given for the Plaintiff, but the Court set it aside and granted a new trial; Pollock, C.B., saying that the Company was not bound to have a line constructed so as to meet such extraordinary floods, and Bramwell, B., observing that "the very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence which was set up." There is some difficulty in reconciling this remark with the

language used by the same learned Judge in the other case of Ruck *v.* Williams (27 L. J. N. S. Exch. 357). That was an action against Commissioners of Sewers for negligence in constructing a sewer in a defective and improper manner, and keeping it in that state, whereby it burst and damaged the Plaintiff's premises. It appeared that the sewer was constructed in April 1853. In the year 1855 two severe storms occurred, one on the 13th July, which occasioned the bursting of the sewer, and another on the 26th July before the repair of the sewer was completed, at which time the injury was done to the Plaintiff. It was stated in the Report of the Commissioners' Surveyor that the storm of the 26th July was without precedent for its violence. The Court held that the Plaintiff was entitled to recover. Bramwell, B., in answer to the argument for the defence of the Commissioners arising out of the extraordinary violence of the storm, which occasioned the damage, said "he called it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen:" and he added, "therefore, it seems to me that the Commissioners who ought to have put down a flap or penstock of a permanent character, in order to guard against a thing likely to occur, not only in a short time, but at all times, may well be said to be guilty of negligence relatively to the probable event of a storm happening in fifty years."

Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purpose of their Judgment in these cases to say that the Railway Company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur. Now the evidence fairly considered shows nothing beyond this in the character and degree of the storm which destroyed the embankment. The night of the accident is described by various witnesses to have been "very severe;" one says it was a "bad night, very bad;" another, in the usual style of exaggeration, that "it was the worst night he ever saw;" it is stated by others that the rain "washed away bridges and

portions of the road;" and two of the Plaintiff's witnesses describe the storm, one as being "a very unusual one," the other "an extraordinary storm." In the whole of this evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur. It must also be borne in mind that although the embankment had stood firm for five years, and had possibly not been exposed to any storm of equal violence to that before which it gave way, yet it was evidently not constructed, or at least not maintained, in a manner to enable it to resist any unusual pressure. It appears that there was a ditch made for the purpose of carrying off the water that came down from the hill, but it was either imperfectly constructed from the first, and of insufficient dimensions, or it was suffered to be obstructed and choked up, so that when an unusual quantity of water flowed into it it was unequal to the occasion. The Company's engineer says in his Report, "It appears from the levels that there is a depression of two feet in one place. The ditch is an imperfect one. If that depression of two feet had been filled in, I question whether that accident would have occurred." And afterwards, "The cause of this accident can be overcome, and must be, to prevent the recurrence of such an accident again." It is true that he adds, "No engineer could possibly have foreseen such an accident as this." But whether he means that it was impossible to have anticipated such a storm as occurred, or that from the manner in which the embankment was constructed, it could not have been expected to give way, it is not easy to determine. Whatever his meaning may be, it is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence, was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions. Even supposing, then, that the learned Judge omitted to explain to the Jury what amount of *vis major* would exonerate the Company from the charge of

negligence, yet their Lordships are of opinion that had this direction been given, and had the Jury been led by it to find for the Company, their verdict would have been wrong, and they adopt the language of the Court of Exchequer in Ford *v.* Levy (30 L. J. N. S. Exch. 352), that "non-direction is only a ground for granting a new trial where it produces a verdict against the evidence;" and they will therefore humbly recommend to Her Majesty that the Judgments in these cases be affirmed, with costs.