Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Grand Trunk Railway Company of Canada v. *Peart from the Court of Appeal for Ontario; delivered March 3rd,* 1886.

Present:

THE LORD CHANCELLOR.
LORD BLACKBURN.
SIR RICHARD COUCH.

THEIR Lordships do not think it necessary to call upon the counsel for the Respondents.

It is not necessary at all for their Lordships to express any opinion further than on the question whether the verdict was against the weight of evidence. Of course if there was no evidence at all there should be a non-suit. Their Lordships will not attempt to define, when on a question of contributory negligence, it is within the province of the Judge to non-suit, and they do not think it would be right to discuss it further; for if there was evidence here at all to go to the jury upon the important issues in the case, and that evidence was such as to make the verdict found for the Plaintiff not against the weight of evidence, it follows of course that this was not a case in which the Judge should have taken upon himself to have directed a non-suit.

The first question that is raised is, whether there was sufficient proof of negligence of the company in not giving the statutable signals, and whether the negligence in not doing that which was undoubtedly intended by the statute to be a duty cast upon the railway company for the purpose of protecting those who were using

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the crossing in question, was the occasion of the accident, in so far that the collision which took place when the deceased man was crossing arose from that. So far as that is concerned there does not seem to their Lordships to be any ground at all for an appeal. The evidence, in the opinion of their Lordships, was very strong that the signals were not given. There was no doubt evidence, and strong evidence, the other way, but that made a question for the jury; it was left to them, and the jury have found for the Plaintiff. The Judge who summed up the case is satisfied, and of all the Judges in Canada who heard the appeal in the Court below, there is not one who differed on that point. As far as regards the question of whether or no there was proper evidence of the original negligence, no more need be said.

But then comes the question which has been the most argued and upon which there is one of the Judges, Chief Justice Cameron, who differed from the rest of the Judges in the Court below. The learned Judge who tried the case originally, when he had given his direction (and there seems to be no ground whatever for saying that it was wrong) proceeds to say this: "If you find that "there was negligence on the part of the Defen- "dants, it does not follow that you find a verdict "for the Plaintiff. You have then to consider "whether the Plaintiff was guilty of contributory "negligence, because if a man chooses to run "into danger without taking proper precautions "to protect himself, he is not entitled to recover. "If a man, seeing the train approaching, chooses "to take the risk of crossing, no jury would be "justified, or think themselves justified, in finding "a verdict in his favour." Then he says: "does the evidence amount to this?" and he leaves it to the jury.

Now there have been some comments and remarks made upon different parts of this direction to

the effect of what the Judge did leave to the jury, but at the end it is made quite clear. At the end of the case, when the Judge has summed up to the jury in that way, Mr. Bethune says "that "his Lordship should tell the jury the Plaintiff "is bound to prove the absence of signals." Then the Judge says to the jury, "of course you "understand that in all cases when the Plaintiff "comes into Court, the onus is upon him. He "has to satisfy you that there was negligence on "the part of the Defendants, and he can only do "that by satisfying you that the signals were "not given." Then Mr. Bethune says that his Lordship "should have told the jury that the "deceased knew he was going on the track, and "it was his duty to look out for the approaching "train. That all the evidence shows that if he "had looked he could have seen it and so have "avoided the accident. Should have told the "jury, as a fact, to say whether he acted pru-"dently in not looking out for the train." Upon that the Judge tells the jury this: "Whether a "person driving in the position the Plaintiff was "should look"—that is to say should prudently look—"in the direction, you have to decide in "point of fact." That is answering and completely complying with what has been said to him. "You have to say whether under those "circumstances the deceased was chargeable "with want of ordinary care and prudence in "not seeing the train." Then the jury ask a question as to what ordinary diligence was, and the Judge says: "ordinary diligence is that care "which an ordinary prudent man would observe "under the same circumstances, having the "knowledge this party had. Do you think, "under the circumstances here, the deceased was "guilty of negligence? Would an ordinary "prudent man, under the same circumstances, "have looked and seen the train?" Then he

asks two express questions, and they are the sixth and seventh. The sixth question is, "Could the "deceased, if he had used ordinary diligence, "have seen the engine in time to avoid the "collision? (*A.*) No." Then the seventh is, "Was the deceased in your opinion guilty of any "want of ordinary care and diligence which con- "tributed to the accident, if so, state in what "respect? (*A.*) No."

Now the answer to those two questions is clear, and the question is, is there ground for saying that in this case there was no evidence upon which the jury could properly have so found; or rather is the evidence such, or so scanty, that the jury ought not to have so found, and that the verdict ought at least to be set aside on the ground that it was against the weight of evidence? Their Lordships cannot say that they think it is so. Their Lordships assume, of course, that the jury are quite correct in their verdict when they found that the whistle was sounded at Lossings Crossing, but was not sounded afterwards, and they assume it to be proved that when the whistle was sounded at Lossings Crossing the deceased man, Peart, was driving along in his buggy cart at a place very near to where the witnesses Taggart afterwards saw him: he might or might not, at that place, have heard the whistle sounded at Lossings Crossing. Whether he did hear it or not, cannot now be made perfectly clear, as the man is dead, and could not be asked. But he might have heard it. If he heard it, it does not necessarily follow that he would have con- cluded, hearing the whistle and nothing else, that there was a train coming along that line. He might have done so, but whether he did so or not it is impossible to tell. The jury might have found this either way.

As he drove along in that direction, as long as he had no reason to suppose that a train

was coming from the west, he, looking between his horse's ears, and seeing the way to get his horse forward, going towards the east, would not see anything behind him, and would not see the light. But if he heard the whistle at Lossings, or if he heard behind him a rumbling such as to tell him an engine was coming along the line, then it might have been a natural and a reasonable thing for him to turn his head round to look and see, in which case he would probably have seen the light coming, and then he would have had warning so as to know that it was not safe to cross. But all these things are matters of evidence which have more or less weight. At the trial there does not seem to have been so much weight attached to the fact that the engine would make the rumbling noise that has been urged so much before their Lordships. That apparently was not much relied upon; but if it had been so, still all this would have amounted to some evidence on which the jury might think that a prudent man, knowing what the deceased knew, in the deceased's circumstances, would have known there might be a train behind him, and would have looked before he went across.

Then on the other hand it is to be remembered that although the deceased knew perfectly well there was a crossing, and knew that some train might be coming along there, he also knew that if a train was coming, and if the duty of the company was performed there must have been from Lossings Crossing and those other crossings a continuous whistling which he could not fail to hear, and that might, as the learned Judge pointed out to the jury it was a fair thing for them to consider, deprive him of all suspicion that a train could be coming. He might think that he could safely drive over the crossing, for if there was a train coming behind from the west

he must inevitably have heard the noise. Their Lordships do not say that the evidence was conclusive at all to show that the deceased was not guilty of contributory negligence, but it shows that it was a fair and proper case for the jury to consider whether or not he was guilty of contributory negligence ; and the jury have found that he was not, and the learned Judge who heard the case not being dissatisfied, and the great majority of the Judges in the Court of Appeal having thought the verdict was right, it certainly seems to their Lordships that it would not be right to reverse it. The consequence is that their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and the Appellant will pay the costs.