[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF RAILWAYS. . APPELLANT;
DEFENDANT,

AND

LEAHY . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 16, 17.

Griffith C.J., Barton and O'Connor JJ.

Negligence—Contributory negligence—Functions of judge and jury—Failure to whistle—Duty of defendant where plaintiff guilty of contributory negligence.

In an action for negligence, if it appears on the plaintiff's case that he has been guilty of contributory negligence, the Court should grant a nonsuit or direct judgment for the defendant, unless there is also evidence fit for the jury that, notwithstanding the plaintiff's contributory negligence, the defendant, by the exercise of reasonable care, could have averted the injury.

In an action of negligence it appeared that the plaintiff was run over by a train at a level crossing. She heard a whistle, waited until one train had passed to her left, crossed the lines immediately behind it, and was knocked down and run over by another train coming in the opposite direction. She said that after the first train had passed she looked both ways and saw only the first train. Owing to the peculiar formation of the track she must have seen the second train if she had actually looked in the direction from which it was coming. There was evidence that the second train was a special, and was travelling at an unusually fast rate of speed and did not sound a whistle.

At the trial a verdict was directed for the defendant on the ground of her contributory negligence.

The Full Court *held* that the question of contributory negligence could not be withdrawn from the jury, and that the judgment must be set aside.

Held, (*Griffith* C.J. *dubitante*,) that the nonsuit must be set aside on the ground that there was sufficient evidence to go to the jury that the defendants' servants, by the exercise of ordinary care, could have averted the accident.

Decision of the Full Court of Western Australia affirmed.

Coyle v. *Great Northern Railway Co. of Ireland*, 20 L.R., Ir., 409, followed.

APPEAL from an order of the Supreme Court of Western Australia (4th October, 1904).

An action had been brought by the respondent against the appellant for damages for injuries sustained by her under the circumstances set forth in the judgment of *Griffith* C.J. The action was tried before Mr. Commissioner Roe and a jury, and by direction a verdict was returned for the defendant, and judgment entered accordingly. On appeal, the Full Court of Western Australia ordered the judgment to be set aside and a new trial to be had between the parties on the grounds that—(1) There was evidence in support of the plaintiff's claim proper to be left to the jury, and the learned Commissioner was wrong in withdrawing the case from the jury and directing judgment for the defendant; and (2) the learned Commissioner was wrong in refusing to leave to the jury the questions:—(*a*) that if there was any contributory negligence on the part of the plaintiff the defendant could, nevertheless, by the exercise of ordinary care and precaution have avoided the injury complained of; (*b*) whether or not the plaintiff was put off her guard by reason of the negligence of the defendant or his servants, and whether or not, under the peculiar circumstances of the case, she might reasonably be excused in acting as she did, or alternatively under the said peculiar circumstances whether or not there was anything to create a sense of danger.

The facts are sufficiently stated in the judgment of the Chief Justice.

Barker for the appellant. It was admitted that there was evidence of negligence in the defendant, but not such negligence as to cause the accident. The plaintiff, if she did not actually cause the accident, at any rate so contributed to it as to be guilty of contributory negligence. She must either have looked and seen the train, or not looked at all. There is no evidence connecting the alleged negligence of the defendant or the absence of whistling with the happening of the accident. Taking the case most favourable to the plaintiff, and supposing she neglected to look, she was still guilty of contributory negligence. Nothing could be more negligent than to cross without looking when she sees in front of her the rails and a warning notice. There are not two inferences open here on which the case could be sent to the jury. She has not connected the injury with the negligence she alleges,

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viz., the great rate of speed. Notwithstanding the defendant's negligence, the accident would not have happened but for plaintiff's negligence. For the plaintiff to succeed, it is necessary to connect the defendant's negligence with the happening of the accident: *Wakelin* v. *London and South-Western Railway Co.* (1).

[GRIFFITH C.J.—Suppose the plaintiff, instead of giving the evidence she did, had said she was in a hurry and did not look to see whether there was a train coming or not.]

Still the appellant should succeed, though it would weaken his case. If she said she did not look she was guilty of the grossest negligence. Where the evidence is such that no inference of fact can be drawn, the question is for the Judge and not the jury: *Coyle* v. *Great N. Railway Co. of Ireland* (2). Failure to whistle cannot be considered an invitation to cross: *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (3). The facts here differ from those in Slattery's case. Immediately after the passenger train passed she looked, and thought it was all clear, so in point of fact she could not have been misled by the failure to whistle.

Villeneuve-Smith (with him *Maxwell*) for the respondent. If any unusual circumstances arise which may throw the plaintiff off her guard, it is for the jury to say whether it was those circumstances which, in fact, did throw her off her guard, and excused her from exercising diligence. The plaintiff said: "If I had heard a whistle I should have stopped again." She had to come down an incline and had no view of the Kalgoorlie train, which had to come through a cutting. She could no doubt see as far as Hannan Street Station. That is an island station, so any train behind it could not be seen. The distance between Broad Arrow Crossing and Hannan Street Station is about 470 yards.

When in the six foot way, if she had looked she could have seen the train; therefore the driver could also have seen her and stopped the train. This is a public crossing, and it was the duty of the guard to keep a sharp look out and whistle. This was a special train, going at an unusually fast rate.

(1) 12 App. Cas., 41, *per Watson*, L.J., at p. 47.
(2) 20 L.R., Ir., 409.
(3) 3 App. Cas., 1155, *per Cairns*, L.C., at p. 1116.

[O'CONNOR J.—The duties are mutual—the railway to post notices, and the public to look up and down.]

Yes; but the question should be left to a jury: *North-Eastern Railway Co.* v. *Wanless* (1); *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2). The omission to whistle is as serious as the omission to shut gates: *North-Eastern Railway Co.* v. *Wanless* (1); and is evidence of negligence on the defendant's part: *Davey* v. *London and South-Western Railway Co.* (3); *Wright* v. *Midland Railway Co.* (4). The fact of the defendant not giving the necessary and usual warning is evidence as to whether or not the plaintiff was excused: *Brown* v. *Great Western Railway Co.* (5); *Smith* v. *South-Eastern Railway Co.* (6). Here the plaintiff knew that any train approaching the crossing must whistle when 300 yards away.

[GRIFFITH C. J.—You must put your case as high as to say that the absence of whistling is sufficient to allow the case to go to a jury.]

There are the additional facts that it was an unusual train travelling at an unusually high rate of speed. In *Coyle* v. *Great Northern Railway Co. of Ireland* (7) *Pallas* C. B., only upheld the non-suit on the ground that it was impossible to miss seeing the train. But, there is the construction that the plaintiff was misled—that she was excused for not looking up when in the six foot way: *Wakelin* v. *London and South-Western Railway Co.* (8).

The principle of all the cases is, that, if the plaintiff shows contributory negligence on his part, and gives an excuse for his negligence, it is a question for a jury, and not for a Judge, to say whether that excuse is sufficient. In Slattery's case, it was known that the train was coming. Here, the plaintiff had no idea the special was on the line.

[GRIFFITH C.J.—Ordinarily, a person crossing the line should always look up and down. The cases say that a man must look when crossing. If so, it is no use looking except when you can see.]

(1) 43 L.J., Q.B., 185; L.R., 7 H.L., 12.
(2) 3 App. Cas., 1155.
(3) 53 L.J., Q.B., 58; 11 Q.B.D., 213; 12 Q.B.D., 70.
(4) 1 T.L.R., 406.
(5) 1 T.L.R., 406, 614.
(6) (1896) 1 Q.B., 178, *per* Lord *Esher*, at p. 183.
(7) 20 L.R., Ir., 409.
(8) (1896) 1 Q.B., 189. (*in notis*).

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Even though the plaintiff were guilty of contributory negligence, she is nevertheless entitled to recover if the defendant's servants by the exercise of ordinary care and diligence might have averted the accident.

[GRIFFITH C.J.—That is clearly correct as a proposition of law.]

The expert evidence is that the driver should have kept a sharp look-out at the crossing. It was the duty of the Judge to send the case to a jury to determine whose negligence caused the accident: *Tuff* v. *Warman* (1). It is not necessary for the plaintiff to show that the accident happened solely through the defendant's negligence: *Radley* v. *London and North-Western Railway Co.* (2).

Barker in reply. The omission to whistle does not come within the principle of *North-Eastern Railway Co.* v. *Wanless* (3). The conflict of judicial opinion in the determination of *Slattery's Case* (4) shows it to be on the margin. The neglect to whistle was not the only circumstance of importance in that case. The accident happened in the night time. Here the plaintiff herself was too negligent to take ordinary precautions: *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (5). This shows that failure to whistle is not an invitation to cross in the same way as leaving open a gate. If there is any evidence at all, it is only a scintilla. Questions of fact which are capable of only one possible construction should not be left to the jury: *Ryder* v. *Wombwell* (6); *Giblin* v. *McMullen* (7); *Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand* (8). Neglect to whistle, therefore, is not evidence of such misconduct on the part of the defendant's servants as to mislead the plaintiff and throw her off her guard, or at the most it is a mere scintilla. Before leaving a question to the jury, the Judge must satisfy himself that there is evidence fit to be left to the jury on each of the propositions which it is necessary for the plaintiff to establish: *Bridges* v.

(1) 27 L.J., C.P., 322.
(2) 46 L.J., Ex., 573; 1 App. Cas., 754.
(3) L.R., 7 H.L., 12.
(4) 3 App. Cas., 1155.
(5) 3 App. Cas., 1155, *per Hatherley*, L.J., at p. 1172.
(6) L.R., 4 Ex., 32, at p. 39.
(7) 5 Moo. P.C.C. (N.S.), 434, at p. 458.
(8) 1896 A.C., 372.

North London Railway Co. (1); *Wright* v. *Midland Railway Co.* (2). As to the contention of the plaintiff that, notwithstanding contributory negligence, if it could be shown that the defendant, by the exercise of ordinary care, could have averted the accident, the onus is on the plaintiff, and, before it can be left to the jury, there must be evidence to support it. Here there is none. The expert evidence on this is mere conjecture and should not be left to the jury. The mere failure to perform a self-imposed duty is not actionable negligence: *Skelton* v. *London and North-Western Railway Co.* (3).

October 17.

GRIFFITH C.J. This is an appeal from the decision of the Supreme Court of Western Australia setting aside a judgment for the defendant in an action heard before Mr. Commissioner Roe and a jury at Kalgoorlie, in which the learned Commissioner directed the jury to return a verdict for the defendant. The action was brought by the plaintiff against the Commissioner of Railways for damages for injuries sustained by her by reason of the alleged negligence of the defendant's servants. In the first instance it was set up on behalf of the defendant that the plaintiff was guilty of negligence which contributed to the injury, and at the trial an amendment was made in the pleadings setting out that, if the plaintiff was guilty of that negligence, the defendant could notwithstanding, by the exercise of reasonable care, have avoided the injuries complained of. The facts are in an extremely small compass. They give rise to a question of law which is in one sense of considerable difficulty, although the difficulty is not so much as to principles of law as of the application of the settled principles to the facts. The plaintiff was run down by a train at a level crossing near Kalgoorlie. The *locus in quo* was situated at the middle of the arc of a somewhat sharp curve, at a point where there is a double line of rails which runs from Kalgoorlie to Boulder. Approaching the crossing from the convex side Kalgoorlie is to the right; trains therefore coming from Kalgoorlie where they pass the crossing go on a curve receding to the left hand, trains coming from Boulder go on a curve receding to the

(1) L.R. 7 H.L., 213, at p. 233. (2) 1 T.L.R., 406.
(3) L.R., 2 C.P., 631.

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right hand. At that place the line is perfectly free and open, and is fenced up to the level crossing, where there are cattle pits to prevent cattle straying on to the line. The plaintiff was coming down the road towards the level crossing from the convex side of the curve about ten o'clock in the morning. As she approached the railway she heard the whistle of a train to her right, coming from Kalgoorlie. She waited and saw a train pass the level crossing, passing to her left. When the train had passed she approached close to the rails, and she said that when she was near the crossing she looked up the line to the left and right and saw no other train. Now, it appears from what happened afterwards that there was another train to her left, coming from Boulder, and it must at that moment have been hidden from her view by the passing train from Kalgoorlie going towards Boulder. The curve of the line would cause that train to obstruct her view of the line for a considerable distance—about three hundred yards from where she must have been standing at the crossing. As soon as the train had passed she started to go across the line. She says that, as soon as she got into the six foot way, the space between the two lines of railway, she looked both to the right and to the left and saw no train, and heard no whistle. At that point, however, she had a clear view to the left for at least three hundred yards. She walked on, and having walked about six feet, or at most nine feet, she was struck by the engine of the train coming from Boulder towards Kalgoorlie. Now, from the fact that she says, and insists, that she saw no train, whereas it is undoubted that a train was there, and that there was a clear view for three hundred yards, it is obvious that she either saw the train and walked into it, which is an absurd proposition, or that she did not look. I think it is obvious that she did not look. So that, on the one hand we have evidence to go to the jury that the defendant's train, which was a special train, did not whistle, which is some evidence of negligence, and on the other the fact established upon her own evidence, although not admitted by her, that she did not look and see the train coming upon her from the left. There can be no doubt that, in a level crossing like that, in broad daylight, it is the duty of everyone to look and see if a train is coming. That would be so, even if

there was no notice; but it appears that there is a notice at this particular spot, warning people to "Look out for the train." So we have these two facts, on the one hand evidence of negligence on the part of the defendant, on the other hand evidence that the plaintiff did not look. It is true she said she looked, and no doubt she did look while the view was obstructed by the other train; but the obligation to look, involves, to my mind, the obligation to look at a time when you can see. Seeing that there was negligence on the part of the defendant in not whistling, and also on the part of the plaintiff in not looking, what then is to be the consequence? The learned Commissioner was asked to direct judgment for the defendant, and he did so, and gave his reasons, holding that contributory negligence had been proved in the plaintiff's case, and that, therefore, he was justified in withdrawing the case from the jury. On the case going to the Supreme Court the learned Judges appear to have been of the opinion that, in a case where contributory negligence is set up, the case cannot be withdrawn from the jury. A great number of authorities were referred to in the very able argument which has been addressed to us; but the only opinion I have been able to find to the effect that contributory negligence cannot be withdrawn from the jury, is the opinion of Lord *Penzance* in *Slattery's Case* (1). I will mention one or two cases which have been referred to. One is the case of *Brown* v. *The Great Western Railway* (2). In that case Lord Justice *Bowen* said: "Whenever facts which are not in conflict admit of two reasonable constructions, one in favour of the plaintiff, the other in favour of the defendant, it is for the jury and not for the Judge to draw the inference. On the other hand, where the facts admit of but one reasonable construction, it is for the Judge to decide the case upon the only ground on which it can be decided by any reasonable man. To apply that principle, in *Davey* v. *London and South-Western Railway Co.* the facts showed only one possible view—viz., that the plaintiff himself was responsible for the accident, and therefore the Judge was bound to non-suit. So in *Wakelin* v. *London and South-Western Railway* the facts were not in dispute, and the only possible view was that no one could tell how the accident happened. The same

(1) 3 App. Cas., 1155, at p. 1175. (2) 1 T.L.R., 614.

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principle is to be applied in this case. It is clear that two reasonable views may be taken, or, at all events, that there is a reasonable view consistent with the plaintiff's right to recover. Therefore the learned Judge could not draw his own inference of fact." So that, if there are two reasonable views to be taken on the evidence, or if there is any inference to be drawn from the evidence, the case is one for the jury; but if not, it is for the Judge to withdraw the case from the jury. The whole matter was very fully discussed in the judgment of Chief Baron *Palles* in the case of *Coyle* v. *Great Northern Railway Co. of Ireland* (1). The learned Judge, after reviewing the whole of the cases on the subject, said (p. 418): "I have anxiously considered the cases cited, and many others, with a view to form an opinion satisfactory to my own mind upon the subject; and I venture to think it will be found that the following proposition is correct in point of law, and consistent with, if not established by, all the authorities:—that, to justify the Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either *per se*, or having regard to the conduct of the defendants inducing or affecting it), a question of fact; or, secondly, the circumstances must be such as to render reasonable an inference of fact, that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence. If the case be so clear that the determination of those two questions involves no inference of fact, it is for the Judge and not for the jury." I accept that as laying down the law correctly on the subject. I have already pointed out that in this case the conduct of the plaintiff in not looking is *primâ facie* negligence. She says she looked, therefore she was not put off from looking by the omission of the defendant's engine driver to whistle. I will proceed to apply these two tests, and first inquire whether her act in not looking was negligent either *per se* or having regard to the conduct of the defendant inducing or affecting it. There is no evidence that her negligence was induced or

(1) 20 L.R., Ir., 409.

affected by any act of the defendant, so that, if that was all there is in the case, the duty of the learned Commissioner was either to grant a non-suit or to enter judgment for the defendant, as the case might be. The other question is whether, the plaintiff having been guilty of the negligence of not looking, and of walking in front of the train, the driver could, by the exercise of reasonable care, have obviated the effect of her negligence. It was suggested that this was possible in two ways: He might have pulled up his train before he got to her. The facts as to that are that, after she reached the place where she could have seen the train if she had looked, she had walked seven, eight, or, at most, nine feet, before she was struck by the train. On the other hand, the driver of the approaching train might have seen her while she was walking part of that distance. As to whether the engine driver could have pulled up in the time, that seems to me to be a difficult question. The suggestion is that he ought to have whistled, and, that if he had done so, it would have avoided the accident. Mr. Barker contends that the onus of proof of that is on the plaintiff, and there is no doubt that that is so. The question is whether, the facts being as I have stated, and the precise distance not being exactly known, and it being a matter of a few seconds only, there was evidence to leave to the jury from which they would have been justified in finding that the defendant could have avoided the accident by the exercise of reasonable care. I confess I have very great difficulty in coming to the conclusion that there was enough evidence to leave to the jury on that point; but as my learned brothers think that there was, I am not prepared to dissent from them. On the other points I agree with them.

BARTON J. In this case the plaintiff, in her statement of claim, alleges that when she was injured she was walking across the railway line between Kalgoorlie and Boulder, at a level crossing known as the Broad Arrow Crossing, where the defendant's railway line intersected a public thoroughfare. Of this there is of course no question. It is also alleged that the defendant had not erected or had not kept up any fences, gates, or other protection to his said railway line at the place. That contention was

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dropped. Another paragraph says that "It was the duty of the defendant's engine driver, or other servant to blow a whistle, or do some other act, to notify or to warn persons lawfully crossing the said railway line at the said place of the approach of an engine on his said line. Alternatively, it was the duty of the defendant to take reasonable precautions to make the said crossing reasonably safe for persons using the same." And then she says that, "on the 9th of August, 1903, and in breach of his said duties, an engine coming from Boulder, rushed at a fast pace over the crossing, no whistle having been blown, or other warning given." And, the last paragraph states that "by reason of the matters aforesaid the plaintiff was struck and run over by the engine, both her legs being so injured that they were subsequently amputated, and her body severely bruised internally. Against that statement of claim, a defence is entered in which all material facts are denied, and then the defendant alleges that the train by which the plaintiff was injured on the occasion alleged approached and passed over the crossing at a moderate and reasonable pace, and after the whistle on the engine had been blown twice." Further, that "the plaintiff's injuries were not caused as alleged, but by the plaintiff's recklessly, and negligently, and without keeping a proper look out while she was crossing the railway line, stepping in front of an approaching train and from behind one proceeding in an opposite direction on a line of railway parallel to that on which the train by which the plaintiff was knocked down was moving." And that, "in any event, if the defendant or his servants were guilty of any breach of duty or negligence (which is denied), the plaintiff's conduct contributed to bring about her injuries, and the injuries and accident would not have happened but for her negligence in stepping in front of an approaching train in the manner alleged." Negligence connected with the accident on the part of the defendant appears to be admitted, I mean admitted for the purpose of this argument. The gravamen of the defendant's contention is the contributory negligence of the plaintiff. On the statement of defence the plaintiff joined issue on the question of contributory negligence, and she was afterwards allowed to make a further allegation by way of amendment, that, if there was any contributory negligence,

the defendant could notwithstanding by the exercise of ordinary care have avoided the accident. Now, it appears that the plaintiff, was, with some friends about to cross the line at the Broad Arrow Road crossing. Her friends went on and crossed the line, but she, remembering that she had left something behind her, went back for it and returned after her friends. She says in her evidence, "I saw my companions had crossed the line, as I got to the line—I heard a train whistle, coming from Kalgoorlie to Boulder —I waited and looked both ways as the train was coming up to me—I could see nothing else—I waited until the tail of the passenger train had cleared the signal post—I looked after it, and looked again both ways before I proceeded to cross—I heard nothing—I had crossed there many times—There was no whistle after the passenger train had passed—If a train had whistled I would have heard it—I crossed the passenger train lines and had got between the other two rails when the accident occurred—Up to that moment I had not seen or heard the other train": that is, a special train coming in the opposite direction, from Boulder to Kalgoorlie. In cross-examination the plaintiff said : "You have an uninterrupted view up to Hannan's Street after you cross the first line, there was nothing to obstruct my view—I looked, and did not see any train." There are other witnesses to corroborate the plaintiff, and what appears is this, taking the evidence altogether, the passing of the passenger train and the coming up of the special train were within a very short space of time. She said in another portion of her evidence that she had always heard trains whistle approaching that crossing, and that the passenger train, which was approaching the crossing, whistled either just before or just after she saw it. It does not appear to be very material which, because it was the whistling which apparently caused her to pause. That train passed, and it is true, I think, that at the time that train passed, as she looked down Hannan Street, her view of Hannan Street Station and of the train approaching thence, *i.e.*, from Boulder towards Kalgoorlie, would be to some extent obstructed by the receding train. Upon the evidence we have to consider, the engine driver of the special train, who, according to regulations, should have whistled three hundred yards from the crossing, did not whistle at all. Other facts in

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relation to the whistling may appear if the case goes to another trial: but taking the case as it stands there was no whistle at three hundred yards or at all. From that point on the case is not an extremely clear one; but this seems clear, that a few moments before, the plaintiff had been warned by a whistle, she had taken that warning, and had acted with the ordinary degree of prudence which would be expected from a reasonable person. Afterwards she went upon the line and the engine of a special train, which had not whistled, struck her. It has been contended at the bar that it was not possible in the time left to him for the engine-driver to have pulled up his train. He was first of all in fault for not whistling, and in the next place, I am not clear that he could not have pulled up his train, and I am by no means clear that he could not have so decreased the speed of his train as to have given the plaintiff a chance to cross the line. Ordinarily speaking, the action of a reasonable person would have been to step back immediately the warning of the approach of a train was given, as the plaintiff stepped back on the approach of the first train. In the case of the second train the opportunity to step back was not given, though I admit that there does seem to be evidence of contributory negligence on the part of the plaintiff, who might, if she had looked more carefully, have seen the approach of the train. But the ordinary method of warning was not taken. It was adopted in the one case and neglected in the other by this defendant. One question is whether the plaintiff might have expected another train to follow so closely after the passing of the other. Now as to the question of contributory negligence, or any negligence at all, we must recollect that this was not an ordinary train. It was a special train, not on the time table, and one which those who were accustomed to the running of the trains at that spot, which is a place of considerable traffic, would have no reason to expect to appear. A whistle, therefore, one would suppose, if it was an ordinary method of warning to the plaintiff with respect to other trains, would be a method of warning which would attract her attention, more especially even than in the case of a train which she knew was running every day. She did not get that warning, and I admit it is a most difficult thing to say whether this case comes under

the rule so clearly stated by Chief Baron *Palles* in the case of *Coyle* v. *Great Northern Railway Co. of Ireland* (1): "Whether it was a *causa causans* depends on this—Was there a neglect on the part of the defendants of anything, whereby the consequences of the plaintiff's negligence might have been prevented." And then again (2)—"To justify the Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either *per se*, or having regard to the conduct of the defendants inducing or affecting it), a question of fact; or secondly, the circumstances must be such as to render reasonable an inference of fact, that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence. If the case be so clear that the determination of these two questions involves no inference of fact, it is for the Judge, and not for the jury." Now, was the question, whether the plaintiff's act in going on was negligent, either by itself, or having regard to the conduct of the defendant's inducing or affecting it, a question of fact? I think it was. I think, on the whole it was a question for a jury to weigh the respective facts and inferences, so as to say which was the *causa causans*, the act of the plaintiff or the act of the defendant, whether the contributory negligence of the plaintiff, of which there is some evidence, was such that, notwithstanding any conduct of the defendant, the accident would have happened, or whether on the other hand, the accident would have happened notwithstanding any conduct of the plaintiff. I find that a difficult question to decide, and I think I ought to be clear that, the plaintiff's conduct manifestly was the *causa causans*, before I say that the learned Commissioner was right in withdrawing the case from the jury. So there are, at least, two questions to be determined, and one must be clear upon the determination of them that there is no evidence of fact for the jury. I must confess I am not clear on that point. I am not clear that the plaintiff has not shown that the defendant, by using greater care

(1) 20 L.R., Ir., 409, at p. 417. (2) 20 L.R., Ir., at p. 418.

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than he did, could have obviated what otherwise would have been the consequences of the plaintiff's negligence. I may refer to the remarks of Lord *Watson* in the case of *Wakelin* v. *The London and South-Western Railway Co.* (1). Lord *Watson* said: "I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour. That opinion was expressed by Lord *Hatherley* and Lord *Penzance* in the *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2). I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on a plea of 'not guilty,' or is made the subject of a counter issue, it is substantially a matter of defence, and I do not find that the other noble Lords, who took part in the decision of *Slattery's case*, said anything to the contrary. In expressing my own opinion, I have added the words 'in the first instance,' because in the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendants' favour to which they would not otherwise have been entitled. The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well nigh impossible for the plaintiff to lay his evidence before a jury or the Court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient *per se* to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion. Of course,

(1) 12 App. Cas., 41., at pp. 47 and 48.
(2) 3 App. Cas., 1169, 1180.

a plaintiff who comes into Court with an unfounded action may have to submit to the inconvenience of having his adversary's defence proved by his own witnesses; but that cannot affect the question upon whom the onus lies in the first instance. As Lord *Hatherley* said in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*: 'If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact.'" The contributory negligence there dealt with is negligence on the part of the plaintiff without which, on a review of the whole facts, the injury would not have taken place.

Following the reasons of Lord *Watson* it cannot be doubted that he aptly concludes with that quotation from Lord *Hatherly*, and for myself I think that presents a reasonable and satisfactory explanation. Was contributory negligence admitted by the plaintiff or proved by the plaintiff's witnesses? If so, and if it was a class of contributory negligence which deprives the plaintiff of her right of action, nobody can doubt that there was nothing left for the jury to decide, and that the Commissioner would have been right in directing a verdict for the defendant. In *Radley's Case* (1), Lord *Penzance* puts the matter this way (2): "The remaining question is, whether the learned Judge properly directed the jury in point of law. The law in these cases of negligence is perfectly settled, and is beyond dispute. The first proposition is a general one to this effect—that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to the cause of the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that although the plaintiff might have been guilty of negligence, and although that negligence might have in fact contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence would not excuse him."

(1 46 L.J. Ex., 573. (2) 46 L.J., Ex., at p. 575.

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Reviewing then together the passages I have read, which are perfectly consistent with each other, the question here is this: Could the defendant, notwithstanding the negligence of the plaintiff contributing to the accident, by the exercise of ordinary care and diligence have avoided the mischief which happened? If so, the plaintiff's negligence will not excuse the defendant. In this case I think it was for the jury to answer that question. Now, as in the event of this case going down to a second trial, we shall exercise a wise discretion by not making any reference to the facts which might be unduly used at that second trial, I feel myself compelled to go no further in applying the law to the facts than I have done. If a jury came to the conclusion on these facts that by precautions, not extraordinary, but ordinarily well-known, and applied, not necessarily easily, it may be with some difficulty, but such as he could apply, have prevented this train from knocking down and inflicting injury upon the plaintiff, and if they come to the conclusion that it would have been possible for the defendant to have prevented the accident, notwithstanding the plaintiff's negligence, then the question I should have put to myself would be: Can I say that such a verdict was one which any reasonable man could have properly given? Well, I do not feel myself prepared to answer that question by saying that such a verdict would be in that sense one which no reasonable man could have found. I think that in this case, coming before us at such a stage, I am bound to express the opinion that the jury should have had an opportunity of finding upon these facts. That is all I do say, and for that reason I think the decision of the Commissioner should be set aside and that the case should go down for a new trial.

O'CONNOR J. I agree in the statement of law made by my learned brothers, particularly that adopted from the report of *Coyle* v. *The Great Northern Railway Co. of Ireland* (1). The plaintiff, in an action of this kind, must prove two things before he can succeed. He must prove in the first place some act of negligence on the part of the defendant, and he must prove in the second place that it was that negligence which produced the injury. If it appears in the course of the case, whether it is in

(1) 20 L.R., Ir., 409.

the plaintiff's own case or in the evidence for the defendant, that it was not the defendant's negligence, but the plaintiff's own negligence that caused the injury, then the plaintiff cannot succeed, and if this latter set of facts appear in the plaintiff's own case then a Judge would have no option but to withdraw the case from the jury. Negligence is always a question of fact; but as in the case of all other facts a jury cannot be called upon to decide unless there is a certain amount of evidence of that fact to go to a jury. One set of circumstances in which the case ought to be withdrawn from a jury is stated in the case of *Wright* v. *Midland Railway Co.* (1). I think it would be useful if I quote the remarks of the Master of the Rolls, afterwards Lord *Esher*, who says (2): "When ought a Judge to take a case out of the hands of a jury? When is he entitled to do so? Let us see what Mr. Justice *Field* says:—'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; then I must take the case into my own hands.'" In applying that principle, a Judge cannot take the decision of the facts into his own hands, and refuse to allow the jury to decide upon them, unless in regard to those facts there is only one conclusion which reasonable men can draw, and that is a conclusion against the plaintiff. The whole of the main case really depends upon the defence of contributory negligence. As I take it there is, at all events, evidence to go to the jury that, considering the situation of this level crossing, there was negligence on the part of the defendant in failing to whistle on approaching the level crossing. As has already been observed by my learned brothers, we are dealing now only with the case as it was proved for the plaintiff. When the case goes down for a new trial there will probably be other facts given in evidence for the defendant, and possibly a new complexion will be given to things; but I think it appears clear upon the facts proved in the plaintiff's case, that *primâ facie* the plaintiff herself was guilty of contributory negligence in not looking to see whether the line was clear before she attempted to cross. Mr. Smith made two answers to that case of contributory negligence. He said in the first place

(1) 1 T.L.R., 406 (*n.*). (2) 1 T.L.R., at p. 407.

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that, to use the words of Chief Baron *Palles* in *Coyle's Case* (1): "The case, treated in that way, comes within the same class as *Wanless' Case* (2), in which an act of the plaintiff, which *primâ facie*, and judged by itself, irrespective of the defendant's conduct, would in law be negligence—that is, crossing the line without looking—may lose its character of negligence, by reason of its being induced by the conduct of the company in stating in effect 'there is no necessity to look, for the train is not coming,'" and his contention is that as the plaintiff had a right to expect a warning by a whistle, the absence of whistling was an intimation that there was no necessity to look because the train was not coming. It seems to me that there is one effective answer to that, and it is, that the plaintiff was not thrown off her guard by the defendant's conduct, because she herself says she did look up and down the line, and that she saw nothing. It seems to me hardly possible for this Court to set up for the plaintiff an answer to her contributory negligence which she did not think of setting up herself—namely, the defence that she was lulled into security by the conduct of the defendants, and for that reason did not look to see whether the train was coming. She herself says she did look. But there is another answer raised by Mr. Smith to the defence of contributory negligence, which is well worthy of consideration; that is that, although the plaintiff may have been guilty of contributory negligence, yet the injury to the plaintiff might have been obviated if the defendant, on his part, had used ordinary care. He applies that answer to the case in this way. He says that, even assuming that the plaintiff was guilty of contributory negligence in not looking down the line when she had passed behind the passenger train, the defendant was to blame in not blowing his whistle so as to give her warning before she got on to the line. Now I have very much difficulty in saying, as the case stands, what the facts were from which we are asked to draw that inference, and I think Mr. Barker is quite right in saying that is an issue the onus of which is upon the plaintiff. The plaintiff must show that the defendant has omitted some precaution which would have got rid of the consequences of the

(1) 20 L.R., Ir. 409, at p. 422.

(2) L.R., 7 H.L., 12.

plaintiff's negligence. The real difficulty in this case is whether the plaintiff has given such evidence of that particular negligence on the defendant's part as is sufficient to go to a jury. Now, the whole of the evidence as to that part of the case really amounts to this—the plaintiff says, and some of her witnesses support her her in this—that she did not move from the position which she occupied while the passenger train was passing until after it had passed the signal post which is just twenty yards away from the crossing, and at that time she was some eight or nine feet from the line which the passenger train had crossed—she described the crossing as the length of the room, away from her, but we are told that it was something like eight or nine feet. She said when the passenger train had got twenty yards away from the crossing, she walked across the line; so that she had to move from where she was standing, to cross the first line, and to cross the six feet way before she got on to the line on which there was danger. Now, according to the evidence of the plaintiff, it seems to be clear enough that the defendant's engine driver could, if he had been on the look-out, have seen the plaintiff, at all events, from the time when she cleared the passenger train; and as the passenger train went on towards Hannan Street, it was opening up more and more the view for the driver of the special. I think we may fairly infer that, at all events, he could have seen the plaintiff after she had crossed the line of rails on which the passenger train was running, and when she got to the six feet way. It is alleged that, when he saw her there, it was his duty to whistle. The plaintiff says that, if she had heard the whistle she would have stopped, and I think that is a reasonable inference. It is said that the defendant's engine driver failed in his duty in this respect, that when he saw the plaintiff come up to the line, and about to cross it, even if there was some six or seven feet between her and the rails, he ought to have whistled, and that, if he had done so, she would not have stepped on to the rails. The question is whether on those facts there is sufficient evidence to go to the jury of negligence by the defendant of some precaution which a reasonable man under the circumstances would have taken to avert the consequences of the plaintiff's negligence. I must admit that the case is very near the line. It

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is a very difficult matter to say what the jury would do under the circumstances; but before I can say that this case ought not to go to the jury in order to have that question determined, I must be satisfied myself that it would be impossible for a jury of reasonable men to come to the conclusion that this precaution under the circumstances ought not to have been taken, and, if taken that it could not have been effectual. In other words, if the case had gone to the jury, would the Court have been entitled to set aside a verdict for the plaintiff on that issue on the ground that it was one which reasonable men could not have arrived at. I find it impossible to come to the conclusion that the Court would have set aside such a verdict under those circumstances, and, that being so, it appears to me that the case, by reason of these facts appearing in the plaintiff's own case, ought not to have been withdrawn from the jury. For that reason the case ought to go down for a second trial.

Mr. Smith. I ask for costs.

GRIFFITH, C.J. We think the costs should abide the event

Solicitor for appellant, *W. F. Sayer.*
Solicitor for defendant, *C. Lyhane.*

H. E. M.

[HIGH COURT OF AUSTRALIA.]

BRICKWOOD . . . . . APPELLANT;

AND

YOUNG AND OTHERS, AND THE MINISTER FOR PUBLIC WORKS OF NEW SOUTH WALES . . RESPONDENTS.

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SYDNEY, *Nov.* 28.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Time for setting down appeal for hearing—Delay—Appeal Rules, sec. III., r. 12, of 22nd August, 1904—Costs.

Where an appellant has a substantial ground of appeal, and has shown his *bonâ fides* by promptly giving security and taking all other necessary steps in the prosecution of his appeal, the mere failure to set the appeal down for