escaping steam was "very heavy and sharp, making a loud report," as one of the employees described it (p. 31). One of the plaintiff's witnesses heard this at a distance of half a mile "as plain as if he was beside it." Others heard the rumble of the train at a still greater distance.

There was the usual discrepancy in the evidence as to the sounding of the whistle and ringing the bell. The learned judge by whom the case was tried without a jury, entered judgment for the plaintiff, finding that the injury was caused by the negligence of the defendants, and that there was no contributory negligence on the plaintiff's part. The question we have to decide is whether these findings are justified by the evidence.

There was some slight difference of opinion between the witnesses as to the rate at which the train was going, and the distance it could be seen from, or while approaching the crossing. In the absence of any finding or expression of opinion by the learned judge on those points, they should be taken to be as I have stated them.

Our principal difficulty arises from the learned judge's finding on the question of contributory negligence.

In the case of *Wanless* v. *The North Eastern Ry.*, L. R., 6 Q. B. 481, 7 E. & I. App. 12, it appeared that the gates on the down side of the defendants' line being open, the plaintiff entered on the railway grounds at a time when a train on the up side was passing, intending to cross as soon as it had passed. While there, another train on the down side, which he could have seen if he had looked, knocked him down and injured him. In an action against the Company for negligence, it was held that there was some evidence for the jury, inasmuch as the statutory duty of the defendants was to keep the gates closed when trains were approaching, and the fact of their being open on the down side was an intimation to the plaintiff that the down line was safe. The question whether the plaintiff had been guilty of contributory negligence was not raised. Kelly, C. B., observed that the evidence showed that if the plaintiff before, or even after he had entered on the railway, had looked on either side of him as far as he could, he would have been enabled to see that the train which inflicted the injury was about to pass along the railway, and so could have avoided the accident. He adds, "I am far from saying that these circumstances were not evidence of contributory negligence, for I cannot say that anyone crossing a railway, though it might have been intimated to him that he might cross in safety, still, when he is upon the railway, ought not to look upon one side and upon the other, to see whether a train is approaching. But," he adds, "we are not called upon to determine any question of contributory negligence."

That question does arise here, and conceding that there was evidence of negligence on the part of the defendants in omitting to give the statutory warning, we must, nevertheless, see whether the plaintiff could not, by the exercise of reasonable care, have avoided the consequence of the defendants' want of it. I see nothing to the contrary of this actually decided in the case of *Peart* v. *The Grand Trunk Railway Co.*, 8 A. R., and it accords with what has been determined in *Johnston* v. *Northern Railway*, 34 U. C. R. 432. See also *Miller* v. *G. T. R.*, 25 C. P. 389 and *Boggs* v. *G. W. R.*, 23 C. P. 573.

Now I certainly do not mean to lay it down that it is the duty of a traveller on approaching a railway crossing to stop, and to get out of his vehicle and examine the line before crossing it. If that was the law, he could hardly ever cross, except at his own risk, for by the time he had made one examination and was ready to proceed, it would be said he ought not to cross until he had made another, and so ad infinitum. But I think he is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to attempt to cross the track in front of it, merely because the warning required by law has not been given. The defendants, no doubt, in a case like that, assume the onus of making out that there was contributory negligence, and this is a question to be determined by the judge or jury, as the case may be, upon a