"(3) Was the plaintiff's driver guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No."

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

S. F. Washington, K.C., for the appellant company.

George Lynch-Staunton, K.C., and G. C. Thomson, for the plaintiff company, respondent.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts, he said that the evidence as to the position of the gates was conflicting. According to the testimony of Ince and of Oscar Smith, who was with Ince in the truck, both the gates were up when the truck reached the railway track. The evidence contradicting this was to the effect that the north gate was coming down when the truck reached it and made a dash to go through before the gate had quite descended, and that the gateman had begun to raise the south gate to let the truck through, when the truck was struck.

In view of the evidence, the meaning to be given to the jury's answer to the second question was, that they were unable to find that the south gate was up, but that they found that the north gate was not lowered when the truck reached it, and that this was an intimation to the driver that he might safely cross the tracks; and it could not be said that there was not evidence to support this finding. The jury acquitted Ince of contributory negligence, and must therefore have come to the conclusion that he was not negligent in not noticing the condition of the south gate.

It was impossible to say that, as a matter of law, the condition in which the south gate was, prevented the condition of the north gate from being taken to have been an intimation to the driver that he might safely cross the tracks, or that the driver was negligent in failing to observe that the south gate was down. These were matters for the consideration of the jury; and the Court could not say that their findings as to them were such that a jury might not reasonably have made them.

Reference to North Eastern R.W. Co. v. Wanless (1874), L.R. 7 H.L. 12, and Smith v. South Eastern R.W. Co., [1896] 1 Q.B. 178.

Appeal dismissed with costs.