

Justice in ruling that it had caused the accident, and that the case must be withdrawn from the jury. . . . At all events, it was—as the learned Chief Justice subsequently instructed the jury—a matter for them to consider whether, under all the circumstances, the failure to look or listen amounted to such want of care as to disentitle him to recover.

The defendants further contended that the answers are contrary to the evidence and the weight of evidence, and that the evidence on the plaintiff's behalf was insufficient to sustain the findings. Undoubtedly there was a very considerable body of testimony which might well have led the jury to a conclusion adverse to the plaintiff. Three witnesses, the watchman and two others, testified that, as the plaintiff approached the point where the gates are, they were coming down, and that the plaintiff lowered his head or "ducked," and passed under in that way. . . . In reply there was the testimony of one Thorne, which tended to support the plaintiff's version as to the position of the gates.

The whole testimony was very fully and carefully laid before the jury by the learned Chief Justice, in a charge to which no exception was taken

The jury had the evidence and the conclusions to which they might come upon it fairly presented to them. It was for them to judge between the plaintiff's testimony—supported to the extent it was by that of Thorne—and the testimony given on behalf of the defendants. No misconduct is imputed to them, and it is not suggested that they wilfully disregarded the evidence or the charge. It cannot be said that there was not evidence upon which they might reasonably find as they did.

It was strongly urged that the omission of the plaintiff to return to the witness-box at the conclusion of the testimony for the defence and expressly deny that he had "ducked" under the gates, was an admission of the truth of the statements to that effect, or that it tended to shew that truthfulness of the witnesses who so deposed. But this does not seem to follow. The plaintiff's statement that he rode past the gates when they were up and were not being lowered was a positive statement that he did not "duck" to avoid them. . . . Before the jury the defendants had the full benefit of the circumstance, for the learned Chief Justice commented upon it and intimated that it would have been better if the plaintiff had returned to the witness-box. The jury were left free to draw their own inferences . . . from the omission. . . . There was evidence on both sides to go to them. They were fully and properly instructed and assisted by the learned Chief Justice, and their findings should not been interfered with: