thereon entitles the plaintiffs to speedy execution. I do not perceive that it deprives the defendant of any rights he might otherwise have exercised, and seems quite within the spirit, true intent, and meaning of the statutes.

The papers filed do not show that the judge's returns were informal or in any other respect improper, or that they were not returned and filed in the Crown-office before or at the time of the entry of the judgments. The opinion expressed upon the main objection determines that it is not necessary that they should have remained there six days before the plaintiffs acted thereon by entering judgment, having obtained sufficient certificate for speedy execution.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

JARED O. THATCHER v. THE GREAT WESTERN RAILROAD COMPANY.

Plaintiff being a passenger in one of defendants' cars, the axle of the tender broke, and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken.

At the trial, the defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared in good order. The jury having found a verdict for plaintiff upon this evidence, and with a charge favourable to defendants, the court refused to set it aside, on the ground that it was for the jury, on the evidence, to determine whether there was negligence on the part of defendants or *not*.

[1 U. C. C. P. Rep. 513.]

CASE.—Declaration states that defendants were proprietors of a railway in Upper Canada for carrying of passengers, &c., and received plaintiff as a passenger, to be carried for reward from Windsor to Niagara Falls; that it became defendants' duty to use due diligence; yet defendants, not regarding, &c., did not use due care, &c., but conducted themselves so carelessly and improperly in that behalf that by reason thereof, and improper conduct of the defendants by their servants, the railway car in which plaintiff was such passenger was thrown off the track, and thereby his right arm broken, &c.

Second count charges defendants as common carriers for reward, &c.

Pleas—1st. Not guilty to the whole.

2nd. To first count—Did not receive plaintiff as a passenger.

3rd. The second count—Did not receive plaintiff as a passenger.

At the trial it was admitted that in June last the plaintiff was conveyed in defendants' cars as stated; that when near Chatham the axle of the tender car broke, and such tender, as well as the car in which the plaintiff was, was thrown off the track, whereby plaintiff's arm was broken, &c. The plaintiff gave no further proof of negligence in the defendants.

On the defence the defendants' counsel called the engineer, who had been on the defendants' road as engine driver from the first, and who had charge of the locomotive engine on the day the tender broke down. He stated that when they left Windsor he had examined the engine and tender, that nothing went wrong with the engine; that he last examined at Chatham, two and a half miles from the place where the accident afterwards happened; that he examined the axle afterwards and found no flaw in it; that it was a new break straight through, just inside the wheel, and could not account for the accident; that it was the proper size, and he thought of wrought iron, though it might be a bad kind of it, and that it had been running for some time and constantly in use for two months, and he had no reason to think anything wrong; that they were not going more than fifteen miles an hour at the time, on a smooth road; that he examined it as usual, saw no crack in it, and could see perfectly well that part of the axle, and for all he knew it was all right when he looked. That it (the engine and tender) was built at Manchester, in the state of New York; that there was nothing more than usual in the tender, nor more than a usual train.

The learned Chief Justice, who tried the cause, told the jury the defendants could only be held liable in case of negligence: that the axle breaking threw it on the defendants to shew that due care was taken to have proper carriages, and to ascertain from time to time that all was sound; and that they were to say whether they found any want of skill or care on this occasion, or that the iron was of bad quality, and therefore failed.

The plaintiff's counsel objected that there should have been evidence given of the sufficiency of the axle-tree, and as to the probable cause of the accident; but the learned Chief Justice left to the jury the evidence of the engineer as applying to those points, observing that he could not say it was no evidence, or that other or better evidence could, or should, as a matter of legal necessity, have been given.

Read, for plaintiff, shewed cause, and contended that the accident was *primâ facie* evidence of negligence, and was not rebutted; that only one witness was called who did not prove any adequate cause to account for the injury reconcileably with the absence of any negligence or blameable insufficiency of the make on defendants' part. He cited Grote v. The Chester and Holyhead Railway Co., 2 Ex. R. 251; Christie v. Griggs, 2 Camp. 81; Carpue v. The London and Brighton Railway Co., 5 Q. B. 747; Curtis and Wife v. Drinkwater, 2 B. & Adol. 169; Grieve v. The Ontario Steamboat Co., 4 U. C. C. P. R. 387. That it was left to the jury as a question for their decision with observations favourable to the defendants, and they should abide by the result.

Galt, in reply, urged strongly that no culpability was justly imputable to the defendants; that to hold them liable is to declare them liable as of course, for every accidental breakage of any part of their works, whatever care or precautions they may have used, or however apparently secure and sufficient; that the rule of law was correctly laid down by *Alderson, J.*, in Sharp v. Greer, 9 Bing. 457; and if applied to the facts in this case, the defendants were entitled to a new trial —Witte v. Hague, 2 D. & R. 33.

MACAULAY, C. J.—I can only say that, according to the view expressed by me in the case of Grieve v. The Ontario Steamboat Company, and referring to the cases mentioned in disposing of that case a few terms ago, I think the present formed a question for the jury; that in the absence of any explanations satisfactorily accounting for the accident, but with a charge favourable to the defendants, the jury were not satisfied it was a pure accident entailing no liability on the defendant, but felt the more satisfactory conclusion to be that there was negligence on their part in relation to the premises; whether as in regard of insufficient materials, workmanship, want of vigilance, overloading, mismanagement, or how otherwise not being expressed by them. The accident having happened unaccountably and without any proximate or active cause to account for it, constituting as the cases say some evidence of negligence, it rested with the defendants to explain and reconcile it with perfect innocence on their parts; and having failed to do this to the satisfaction of the jury, I do not see sufficient ground for sending the case to a second trial when the same evidence and no more might be again submitted to another jury. If a jury must decide on this evidence, I cannot say there is not evidence for their consideration; I think it was for them to decide on the evidence, and do not see any reason for disturbing their decision. That the axle broke without any sudden cause or emergency that we see, and that the plaintiff was seriously injured in consequence, are undisputed facts; and the jury have come to the conclusion that the evidence did not exonerate the defendants from blame. The rule will therefore be discharged.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.