

a train was passing. At the time of the accident which occurred these gates could not be lowered owing to frost, and Fleming seeing them up thought he could safely cross, and in attempting to do so was struck by a passing train and hurt. The statutory warnings had been given and the speed of the train was only five miles an hour. The Supreme Court affirmed a verdict for Fleming in an action for damages holding that as it was known that the gates were liable to be frozen up, the company was bound to take other sufficient precautions to prevent injury to travellers on the highway.

An appeal from this judgment to the Supreme Court of Canada was quashed for want of jurisdiction (22 S.C.R. 33), but three of their Lordships, constituting the majority of the court, expressly stated that if they had been called upon to decide the merits of the appeal they would have affirmed the judgment below. The two dissenting judges, Gwynne and Patterson, JJ., consistently adhered to the view expressed by the latter (and concurred in by Judge Gwynne) in *Vanwart's case*, namely, that the company having done all that the statute required owed no further duty to the public. It may be mentioned also, that two of the majority of the court took part in the *Vanwart case*.

In his judgment in the Supreme Court of New Brunswick in this case, Mr. Justice King, with whose opinion the three judges on the appeal expressly agreed, said, p. 345: "There was no breach by the defendants of any statutory obligations, and if they are to be made liable at all it must be because, having regard to all the circumstances of the case, they omitted that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger."

It is clear from these remarks that the decision was not based on the ground that the public had come to rely on the use of the gates for protection, and when they could not be used it was the duty of the company to provide an efficient substitute, but that the ratio decidendi was that a common law duty had not been performed. After that decision, therefore, *New Brunswick R. Co. v. Vanwart* no longer expressed the law on this question.

But there is still another decision of the Supreme Court of Canada by which *C.P.R. Co. v. Fleming* is in its turn overruled. That is in the case of *G.T.R. Co. v. McKay*, judgment in which