killed. The trial Judge held that there was no case of negligence for the jury on the undisputed facts, and that, by reason of deceased having been a member of an insurance and provident society to the funds of which defendants contributed, and being bound by defendants' rules and contracts, he could not have maintained an action for his injuries had he survived, and no more could plaintiff for his death.

G. Lynch-Staunton, K.C., for plaintiff.

W. Cassels, K.C., and W. Nesbitt, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

OSLER, J.A. (after stating the facts and evidence at length):—The plaintiff's case is that the proximate cause of the accident was the negligence of the defendants in not having the switch points spiked over or otherwise properly secured. The defendants, while not denying that they were not in fact secured as they ought to have been, contend that the accident is to be attributed to the unfortunate engine-driver's own breach of duty in neglecting rules of the company which he was bound to observe, and running his train on to the crossing when the signals were in such a condition as to be a warning to him not to proceed with his train until he was signalled that the line was safe.

There would, in my opinion, be no difficulty in holding that, if the signals displayed had been such as to have warranted the deceased in running through the crossing, or if the signal man had flagged him to proceed, there was ample evidence of negligence in the condition of the switch to have justified a verdict for the plaintiff under sub.sec. 1 of sec. 3 of the Workmen's Compensation Act. There was a plain defect in the condition of the way which was the immediate cause of the derailment of the engine.

In actions of this nature, however, under the Fatal Accidents Act, the plaintiff, as administratrix of the deceased, can only recover if the deceased could himself, had he lived, have maintained an action against the defendants for the alleged negligence: Senior v. Ward, 1 E. & E. 385. And if the injury happened in consequence of the deceased's own neglect of orders or other breach of duty, it is clear that, had it been one falling short of causing his death, he could not have sued, being himself the author of the wrong complained of.

It appears to me that this is one of the plaintiff's difficulties in the present case.

The rules under which the deceased was working, and to which he was bound to conform, at the time of the accident, were those which came into force and were relative to