

which intersect the railway ; but until that has been done the principles and maxims of the common law must prevail in such cases as in others."

In 1886 the Court of Appeal referred to this case and affirmed the principle on which it was decided, *Hurd v. G.T.R. Co.*, 15 O.A.R. 58, though the company was held not liable as having taken all necessary precautions.

Spragge, C.J.O., says in *Rosenberger v. G.T.R. Co.*, 8 O.A.R. 488: "The duty of giving warning was a common law duty, and those who suffered injury by neglect of that duty had a common law right of action against the wrong-doers. The statute only defined how that duty should be performed and annexed a penalty, besides compensation, for its non performance in the way prescribed. It in no way abridged the duty ; its purport was to define it. There is not a word in it that points to an abridging of the common law right of those suffering injury through a neglect of duty, or taking away the right of any one who, at common law, was entitled to a remedy." This, it is true, was only *obiter*, as the case was decided on another ground, and the Chief Justice expressly stated that he only spoke for himself, but it presents the view of an able jurist with which, practically, all the Ontario judges have always been in accord.

In *McKay v. G.T.R. Co.*, 5 O.L.R. 313, the Court of Appeal acted on the same principle. This case will be referred to later.

In Nova Scotia the same view of this question seems to prevail : see *Smith v. C.P.R. Co.*, 34 N.S. Rep. 22. In New Brunswick also: *Fleming v. C.P.R. Co.*, 31 N.B. Rep. 318. And in Manitoba: *McMillan v. Man. & N.W. R. Co.*, 4 Man. L.R. 220.

The Supreme Court of British Columbia in *Madden v. Nelson & Fort Sheppard R. Co.*, 5 B.C. Rep. 541, held that the common law remained except where expressly altered by the statute.

Having considered the view taken by the Courts of the several Provinces on this question, it is now necessary to examine the decisions of the Supreme Court of Canada and ascertain if possible how the law stands by the adjudication of the court of final resort in this Dominion.

In the case of *New Brunswick R. Co. v. Vanwart*, 17 S.C.R. 35, Mr. Justice Patterson, in giving the judgment of the court, laid down a distinct rule of jurisprudence, namely, that where the