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RIDDELL, J. JULY 13TH, 1907.

WEEKLY COURT.

RE SHAFER.

Life Insurance—Benefit Certificate—Direction of Assured as to Disposition of Fund—Construction of Policy—Division among Wife and Children—Income—Corpus—Vested Interests — Application of Doctrine in Regard to Wills—Conflict of Authority—Following Known Decision—Judicature Act, sec. 81 (2)—"Deem"—Costs.

Application by Daniel L. Shafer for an order directing that his share of the moneys arising from a policy upon the life of George Alfred Shafer, deceased, be paid over forthwith.

W. E. Middleton, for the applicant.

J. M. Ferguson, for the widow of George Alfred Shafer.

E. G. Long, for the Toronto General Trusts Corporation, trustees.

M. C. Cameron, for the infants.

RIDDELL, J.:—The late George Alfred Shafer was insured in the Ancient Order of United Workmen for $2,000, the form of the certificate being as follows: "Two thousand dollars, which sum shall, at his death, be paid to his executors, to be put at interest. Interest to be paid to his wife Mary Jane Shafer, for benefit of herself and children. In the event of his wife marrying again or in case of her death, interest to be paid to his children until the youngest

become of age, when principal is to be equally divided among them." He died in 1894, intestate, leaving him surviving the said Mary Jane Shafer and 5 children, all of whom are still living, 2 being still under the age of 21 years. Letters of administration were granted to the Toronto General Trusts Corporation, and in the capacity of administrators they received the said sum of $2,000. Ever since they have been paying interest on this sum at 4 per cent. to the widow.

. . .

This application is to be decided upon the strict rights of the parties, independent of any transfer or agreement.

The application is by Daniel L. Shafer, the eldest child, and is substantially for "an order directing that the proportionate share of the above-named Daniel L. Shafer in the sum of $2,000 held by the Toronto General Trusts Corporation, as administrators of the estate of . . George Alfred Shafer, deceased, be paid over forthwith unto the said Daniel L. Shafer." This is opposed by the widow and the official guardian acting for the infants. The other adult children do not seem to have been served; at all events they were not represented by counsel.

Were it a question of interpreting a will, as at present advised I think that the application should, upon certain terms as to costs, etc., succeed. The provisions of this policy, were they contained in a will, would have the effect of a direction to divide the interest equally among the widow and her 5 children. . . .

[Reference to Jubber v. Jubber, 9 Sim. 503; Re Hart's Trusts, 3 De G. & J. 195.]

Had this, then, been the case of a will, I think that each of the 5 children would have a vested interest in the income to the extent of one-sixth and in the corpus to the extent of one-fifth. Then the rule of Saunders v. Vautier, Cr. & Ph. 240, 4 Beav. 115, would probably be found to apply (see Re Yuart, ante p. 373), and the applicant would be held entitled to receive the one-sixth of the corpus now and one-thirtieth upon the death or marriage of his mother.

But that result flows from two principles (which in essence are in reality only one): (1) that the interest in the corpus is vested; and (2) that a legatee is not bound to wait for the expiration of the period to which the payment of the corpus of his legacy is postponed, if he has an absolute inde-

feasible interest in the legacy: see per Lord Langdale, M.R., in 4 Beav. at p. 116, and compare what is said by the same learned Judge in Curtis v. Lukin, 5 Beav. 155. And this is because the legacy is actually given to the legatee, and the direction as to payment is merely directory as to the management of the gift: see per Shadwell, V.-C., in Josselyn v. Josselyn, 9 Sim. at p. 66. It will be seen that the rule in Saunders v. Vautier flows from the doctrine of vesting of legacies.

I do not stop to inquire as to the difference in the rules governing the vesting of legacies of personalty, based as they are on the common law, and ultimately on the civil law—or as to the rules governing the vesting of a devise of land, or of legacies payable out of the proceeds of land, based upon the common law. The difference in these rules is just part of the difference of the law of personal property and the law of real property, due to the claims of the Church in the early history of England, "which has had the effect of splitting our English law of property into two halves" . . . : Pollock and Maitland, History of English Law before the Time of Eward I., vol. 1, pp. 107, 108.

The question whether the same rules as to vesting apply in the case of a deed as in the case of a will has received some attention in the Courts of England and Ireland. . . .

[Reference to Hubert v. Parsons, 2 Ves. Sr. 261, 263.]

This case is mainly of importance in deciding that the rules which govern vesting in cases under a will are not applicable in cases under a deed. . . .

[Reference to and quotations from Burges v. Mawby, 10 Ves. 319; Campbell v. Prescott, 15 Ves. 500; Stephens v. Frost, 2 Y. & C. Ex. 297, 309; In re Orme (1851), 1 Ir. Ch. R. 175; Mostyn v. Brunton (1866), 17 Ir. Ch. R. 153, 158, 161; Howard's Trusts (1858), 7 Ir. Ch. R. 344.]

I have referred thus at length to these cases in order to discover, if possible, whether the same rules as to vesting apply to the case of an instrument which derives its force from the common law, such as a deed, as in an instrument which ultimately depends upon the ecclesiastical law, as a will. It will be seen that the Courts have laid down diametrically opposite rules, and the question is far from being free from difficulty.

But in the particular case in hand we have a decision in our own Courts.

In In re McKellar, 21 C. L. T. Occ. N. 381, the Chancellor held that it is not "desirable to incorporate the somewhat technical and not always satisfactory doctrine as to the vesting of legacies into these policies of insurance." That case, it is true, is not quite the same as the present; but the principle upon which it is decided is plainly stated.

The statute, Ontario Judicature Act, sec. 81 (2), says: "It shall not be competent for the High Court or any Judge thereof in any case . . to disregard or depart from a prior known decision of any Court or Judge of co-ordinate authority on any question of law . . without the concurrence of the . . Judge who gave the decision; but if a Court or Judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher Court, such Court or Judge may refer the question to such higher Court."

"Deem the decision to be wrong" does not mean "have a suspicion that the decision may be wrong." "Deem" must mean something in the nature of a doom or judgment, and, in view of the cases in Chancery in England, I cannot, notwithstanding the persuasive reasoning of the Irish Master of the Rolls, say that my mind is so clearly convinced as to the law to deem, doom, or adjudge the decision in In re McKellar to be wrong. Such being the state of my mind, I am bound by this decision, and I follow it.

The plain intention of the deceased, as expressed in the policy of insurance, is: (1) that the fund shall be invested so as to produce a revenue; (2) that until the death or marriage of his wife the interest shall be given to the wife for the benefit of herself and her children; (3) that upon the death or marriage of his wife the interest is to be divided among the children, the corpus being kept invested until the youngest is of full age; and (4) that the corpus shall be divided equally among his children.

If there were any doubt that the beneficiaries are to receive equally, that is settled by the Insurance Act, R. S. O. 1897 ch. 203, sec. 159 (7).

How, in the case of the death of any of the children, the interest, or, at the time for distribution, the corpus of the estate, is to be divided, are matters which the deceased did not consider—at all events he has made no express provision for that event. This will, of course, depend upon the interest taken by each child of the deceased. As a not dis-

similar inquiry in Jubber v. Jubber, so here such an inquiry is premature; it may be pursued when the exigency arises.

The matter now to be decided is as to the present right of the applicant. All that I decide is that under the existing state of affairs the applicant is entitled to one-sixth of the income from year to year, and that he is not entitled to be paid now any part of the corpus.

The applicant will pay the costs of all parties; and these until paid will be a lien upon the money (interest or principal), to which he may be or become entitled from this policy. Had the application been granted, I think I should have directed him to pay the costs—it is for his advantage alone.

JUNE 28TH, 1907.

C.A.

MOIR v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to and Consequent Death of Person Attempting to Cross Track—Negligence—Failure to Give Warning of Approach of Train—Findings of Jury—Admission of Deceased that he Ran into Train—Contributory Negligence—Action by Father and Administrator—Failure to Prove Pecuniary Loss—Nonsuit.

Appeal by defendants from order of a Divisional Court (9 O. W. R. 22) dismissing a motion to set aside the verdict and judgment for plaintiff for $2,000 in an action by Forbes Moir to recover damages for the death of his son Byron by the alleged negligence of defendants in running one of their trains across a farm belonging to plaintiff in the twnship of Garafraxa. The jury found that defendants were guilty of negligence by not giving proper warning on approaching the crossing, and the Divisional Court (MACMAHON, J., dissenting), held that there was evidence sufficient to sustain the verdict. The deceased was a lad of 18 working on his father's farm; he was running down a hill towards the crossing when the train ran over him or he ran into the train. MACMAHON, J., was of opinion that on the admission made by the deceased (after the injury which

caused his death) that he heard the train coming and did not stop or could not stop, and as a consequence ran into the train, there was nothing to leave to the jury, and the motion for a nonsuit should have prevailed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

G. T. Blackstock, K.C., and Angus MacMurchy, for defendants.

M. J. O'Reilly, Hamilton, for plaintiff.

MEREDITH, J.A.:—As I view this case, there are now just 3 questions involved in it, namely: (1) whether there is any reasonable evidence to support the finding of the jury that the neglect to ring the bell and sound the whistle was the cause of the accident; (2) whether there was any such evidence to support their finding that the injured youth was not guilty of contributory negligence; and (3) whether there was any such evidence of any pecuniary loss to plaintiff.

It may be, and must be, very difficult for many persons to think that one who did not hear the sound of a swift passing train, within a few feet of him, on a still morning, with no other sounds interfering, would have heard the sound of the whistle at least 80 rods away, or the ringing of the bell whilst swiftly passing that distance. The roar of a train under such circumstances, is, as every one knows, so great that it is extremely difficult, if not quite impossible, to believe that any one having the sense of hearing, and exercising it with a view to self-preservation at a railway crossing, could fail to hear it. But one's mind may be so abstracted as to fail to observe it, and yet the shrill sound of the whistle, or even the sound of the bell, might possibly awaken such a mind to a sense of danger from the on-coming train. It cannot, therefore, be said that the case ought not to have gone to the jury at all, that plaintiff ought to have been nonsuited on this ground.

But I cannot think there was any sort of reasonable evidence upon which the jury could find that there was not contributory negligence. A youth—19 years of age—in possession of all his facilities, ran into a passing train in the day time, and was almost necessarily seriously wounded. The one circumstance in his favour was that it was a misty

morning; but not so misty as to prevent plaintiff from seeing the train pass, although he was about 25 yards away from it. The density of the mist is made pretty plain by his testimony that an object—apparently such an object as a telegraph pole—could be distinguished at the distance of about half of 75 yards. The mist was no excuse for not seeing, or hearing, the train when very much nearer than 75 yards, or one-half of 75 yards, only, away from it. Indeed it was a reason for approaching the crossing with more care, depending the more upon hearing, when sight was thus dimmed. The train was a little later than usual, and the youth was apparently under a mistaken impression that it must have passed. But his mistake was no excuse for any recklessness or for want of ordinary care; nor was the fact that on this morning—of a holiday—the train was a little later in passing this spot than usual. However the youth's action is looked at and accounted for, there is no escape from the fact that by the exercise of ordinary care, in going into this place of danger, he might have avoided his injury. It cannot be contended that he was not bound to take any care, and it seems like a parody of prudence to say that it was enough to inquire the time of day, and to be informed by his father that he thought the train must have passed, and to have imagined that he heard the whistle of a train which had passed; what need of all or any of these things if he kept his ears open when approaching the crossing? It is not as if he were even driving, and there were the sounds of the moving horses and vehicle, as well as the need for his mind being in some degree taken up in the management of them. Upon this question, in my opinion, the action failed, and should have been dismissed.

And I am of opinion that it failed on the third question also. Plaintiff can recover only for pecuniary loss. The action should have been dismissed if none were proved. It is not a case in which nominal damages may be awarded when no actual loss is proved. And plaintiff's evidence not only failed to prove any pecuniary loss, but shewed that none such had been, or shall be, sustained by him. The story is not merely that his son had been working for him and was a capable farmer, but was that there was a clearly understood agreement between them that the son was to have the 200-acre farm at the father's death, and that in the meantime they were to be partners, and that the son was to get what he needed out of the common fund. Such a bargain

made with a stranger would surely be much in favour of the stranger. It would be a very easy thing to get full grown and experienced farmers to enter into such a bargain; so that, looked at purely from a money point of view, on plaintiff's own shewing, he has sustained no loss; he can, doubtless, make much better terms with more competent men; but, of course, he would not make the like terms with them; it was only because it was his own son that he gave him such an advantage.

On these two grounds, I would allow the appeal and dismiss the action.

MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 28TH, 1907.

C.A.

McKAY v. WABASH R. R. CO.

Railway—Injury to and Consequent Death of Engine-Driver—Intersecting Railway Lines—Collision of Trains—Negligence of Servants of Railway Company—Disregard of Rules—Signals—Findings of Jury—Judge's Charge—Contributory Negligence—Action under Fatal Accidents Act—Damages.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiffs, for the recovery of $10,000 damages, upon the findings of a jury, in an action by the widow of one John McKay, brought on her own behalf and on behalf of her two infant children, to recover from defendants, under the Fatal Accidents Act, damages for the death of her husband.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. E. Rose, for defendants.

T. C. Robinette, K. C., and J. M. Godfrey, for plaintiff.

Moss, C.J.O.:—John McKay was an engine-driver in the employ of the Canadian Pacific Railway Company. On 24th August, 1906, a collision occurred between a train belonging to the defendants and a train belonging to the Canadian Pacific Railway Company, of which the deceased was the engine-driver, resulting in his death. The accident occurred at a place near the city of St. Thomas where one of the lines of the Grand Trunk Railway Company, over which the defendants have running privileges, and the line of the Canadian Pacific Railway Company cross each other at rail level. In the vicinity of the crossing in question the direction of the line of the Grand Trunk is approximately east and west, and that of the Canadian Pacific is approximately north and south.

On the morning of the accident the defendants' train was proceeding westerly from the Niagara river to St. Thomas, and the Canadian Pacific train was proceeding from St. Thomas northerly to Woodstock. By sec. 225 of the Railway Act, 3 Edw. VII. ch. 58 (now sec. 277 of R. S. C. 1906 ch. 37) it was enacted that "no train or engine or electric car shall pass over any crossing where two main lines of railway or the main tracks of any branch lines cross each other at rail level . . . until a proper signal has been received by the conductor or engineer in charge of such train or engine, from a competent person or watchman in charge of such crossing, that the way is clear." And by sec. 226 (now sec. 278 of R. S. C. 1906 ch. 37) it was enacted that "every engine, train, or electric car shall before it passes over any such crossing as in the last preceding section mentioned be brought to a full stop: provided that whenever there is in use at any such crossing an interlocking switch and signal system or other device which . . . . renders it safe. . . ."

In this case there was no interlocking system or device, and the proviso does not apply. On the Canadian Pacific line there were two semaphores, called distance semaphores, situate one on each side of the crossing, the one nearest to St. Thomas being about 815 feet to the south of the crossing, and the one to the north being about 936 feet from the crossing; about 415 feet from the semaphore to the south of and about 400 feet from the coping was a post with a board with the word "stop" painted upon it, spoken of in the evidence as the "stop post." Almost immediately at the

point where the two railway lines cross was a semaphore called the home semaphore.

On the Grand Trunk line were also two distance semaphores protecting the crossing, one on each side of it, that to the east being about 893 feet from the crossing, that to the west being about 703 feet from the crossing. No stop posts intervened between these semaphores and the crossing. All these semaphores were operated by a signal man in the employ of the Grand Trunk Railway Company. It is his duty to see that no train on either line passes the crossing unless the line is clear, and the distance semaphores upon the other line are set against the movement of trains upon it. When the distance semaphore is lowered on either line, a train may move forward towards the crossing, but it may not pass it unless the home signal is lowered. When a train on one line is passing the crossing, the distance and home semaphores are set against trains on the other line. The plaintiff in this action alleged that while the Canadian Pacific train of which the deceased was the engine-driver was passing the crossing, the signals being in its favour, the defendants' employees in charge of the defendants' train, disregarding the signals of the distance and home semaphores which were set against them, neglected and failed to bring the train to a stop, and on the contrary negligently allowed it to proceed, thereby coming into collision with the Canadian Pacific train and causing the injuries to the deceased which resulted in his death.

The defendants pleaded the general issue, vouching sec. 242 of the Railway Act, 1903, 3 Edw. VII. ch. 58, and at the trial contended, among other defences, that the death of the deceased was caused by or was owing to a breach on his part of sec. 226 of the Act and of a rule of the Canadian Pacific Railway Co. requiring him to stop his train at the stop post, and also that he was guilty of contributory negligence apart from the Act and the Canadian Pacific Railway Co.'s rule. The evidence at the trial shewed that the Canadian Pacific train left the St. Thomas station at 8.15 in the forenoon, and, after some delay or partial stoppage at a semaphore called the yard limit signal, it proceeded towards the distance semaphore situate 815 feet south of the crossing in question.

There was a conflict of testimony as to whether the train came to a full stop at this semaphore. The conductor, fireman, and brakesman of the train swore positively that the

train stopped, and they were corroborated to some extent by the express messenger, who was in the baggage car. Against this there was the testimony of two male and two female passengers on the train and two lads who were engaged in digging and gathering potatoes in a field between the two lines of railway at a point to the west of and between 400 and 500 feet distant from the distance semaphore.

The two men swore that the train made no stop between St. Thomas and the crossing, but one of them remembered hearing a whistle for the distance semaphore, and that the steam was shut off and the brakes applied as the train reached it. The testimony of the young ladies went no further than that they could not recollect the train stopping. The two lads stated that the train did not stop, but one of them admitted that as it approached the distance semaphore it slowed down until it was going just as slowly as a train could go and still be moving. Hare, the signal man at the crossing who lowered the distance and home semaphores, shewing that the line was open for the Canadian Pacific train to proceed, said that looking up the line towards the train he thought it was moving. All this evidence for the defence, which, together with a few additional incidental circumstances, was fully presented to the jury by the trial Judge, was not sufficient to displace the plain definite testimony of the train hands and the express messenger, all of whom were more or less directly interested in the movements of the train.

There was on the whole a fair preponderance of testimony that the train did stop at the distance semaphore. Upon the lowering of the semaphores the train proceeded towards the crossing, the line being clear according to the signals. At the same time both the distance and home semaphores on the line used by the defendants' trains were plainly set against the approach of any train to the crossing. And the evidence is conclusive that there was an entire disregard, by those in charge of the defendants' train, which came into collision with the Canadian Pacific train, of the statutory injunction. The train running at a high rate of speed passed the distance semaphore without stopping, and the two trains came together at the crossing. Considerable time was devoted to endeavouring to ascertain whether the defendants' train struck the Canadian Pacific train or was struck by it. In view of the negligence of the defendants' employees, which was clearly established against the defen-

dants, it does not appear to be very material one way or the other, except perhaps as bearing to some slight extent on the defendants' contention with regard to the alleged breach by the deceased of the Canadian Pacific Railway Company's rules.

There was no doubt that the deceased met his death through the trains coming into collision, and the question was, to whose negligence was the accident attributable? There were proved at the trial and put in copies of the rules of the Canadian Pacific Railway Company and of certain circulars issued to the men. Among the rules are the following:—

"98 (c) Unless there is an interlocking plant in operation, trains must stop and receive proceed signals from signalman before passing over a drawbridge or a railway crossing at grade. The back view of a fixed signal at such a point does not govern the movement of a train."

"98 (d) Passenger trains must not exceed a speed of 12 miles, and other trains a speed of 8 miles, per hour, over railway crossings at grade and drawbridges."

Among the directions contained in a circular issued on 1st May, 1905, the following occurs: "The following instructions concerning standard stop post and slow posts are issued for the guidance of all concerned: Standard stop posts placed 400 feet from railway crossings at grade and drawbridges where interlocking plants are not in operation are indications of points at which trains are required to come to a stop and be governed by rule (98 c)."

At the conclusion of the plaintiff's case and again at the close of the whole case, a motion was made on behalf of the defendants to dismiss the action, on the ground that it appeared that the deceased did not stop the Canadian Pacific train before coming to the crossing, and it was submitted that, even if the train was stopped at the distance semaphore, the rules and directions of the circular required the deceased to again stop his train at the stop post, and his breach of duty in that regard was the cause of the accident.

The trial Judge overruled the motion, and the case was submitted to the jury on questions, which, with the answers thereto, are as follows:—

"(1) Did the Canadian Pacific train stop at the semaphore before proceeding to cross the Grand Trunk track at the diamond? A. Yes.

"(2) Was the distance semaphore signal and the semaphore signal at the diamond lowered for the Canadian Pacific train to cross the Grand Trunk track? A. Yes.

"(3) At what speed did the Canadian Pacific train travel from the distance semaphore to the Grand Trunk crossing? A. 10 to 12 miles per hour."

"(4) Was the distance semaphore signal on the Grand Trunk line and the semaphore signal at the crossing against the Wabash train as it came down the grade? A. Yes.

"(5) At what rate of speed was the Wabash train running at the distance semaphore? At the distance semaphore 45, and 8 to 9 miles per hour at the diamond.

"(6) Did the engine of the Wabash train strike the Canadian Pacific engine or did the Canadian Pacific engine strike the Wabash train? A. Wabash struck the Canadian Pacific engine.

"(7) Was the injury to John McKay from which he died caused by such collision? A. Yes.

"(8) If the Wabash train had stopped at the semaphore, would the collision have occurred? A. No.

"(9) If the defendants the Wabash Railroad Company are liable, at what sum do you assess the damages? A. Damages $10,000, $5,000 to plaintiff Ada McKay, $3,000 to Royden McKay, $2,000 to Harold McKay."

Judgment was entered for the plaintiff in accordance with these findings.

Upon the appeal it was contended for the defendants: (1) that the findings of the jury were against the evidence and the weight of evidence; (2) that the trial Judge's charge to the jury was inaccurate in its references to the evidence and likely to mislead them; (3) that the deceased was guilty of a breach of sec. 226 of the Railway Act of 1903, or of the rules of the Canadian Pacific Railway Company, or of both, and that there was misdirection on this point; (4) that, apart from that, he was guilty of contributory negligence; and (5) that the damages were excessive.

The first objection was mainly directed to the question whether the Canadian Pacific train stopped at the distance semaphore and of its speed when approaching the crossing. As already stated, the fair preponderance of evidence is in favour of the jury's finding on the question of stopping.

And if it be established that the train did stop, there is abundant evidence that it could not develope a speed of more

than 10 or 12 miles an hour in the 815 feet between the semaphore and the crossing.

As to the second objection; notwithstanding the close criticism to which Mr. Rose subjected the charge, nothing objectionable has been made to appear. Nothing was said or omitted to which serious objection can be taken. At the request of counsel for the defendants, the Judge supplemented his observations to the jury, and made some explanations, in order to make clear the bearing of references which he had made to the testimony of some of the witnesses, and it was quite open to him to comment to the jury as he did upon the testimony.

Throughout he manifested an earnest desire to instruct the jury fully and fairly as to the issues presented for their decision. And in afterwards considering his charge it is well not to forget Lord Hatherley's observation, which is as appropriate to-day as when made 30 years ago, that it is not fair to criticize every line and letter of a summing up which has been delivered by a Judge in trying a case.

The 3rd and 4th objections are more serious and important, and were quite properly most earnestly pressed on our attention.

The evidence shews that the long distance semaphores protecting the crossing on the line of railway used by the defendants' trains were situate the one to the east 893 feet and the one to the west 703 feet, from the crossing, and that these with the home semaphore at the crossing were the only guards in use. The distance semaphores were the points at which the trains on that line did stop before moving on to the crossing.

It is not improper therefore to conclude that the points at which they were placed were reasonable distances at which trains were to stop in compliance with sec. 226 of the Railway Act. On the Canadian Pacific line the distance semaphore to the south of the crossing was 815 feet, and that to the north was 936 feet from the crossing, and there is no reason for saying that a stop at these points would not be a reasonable compliance with sec. 226. The jury found that the train on which the deceased was did stop at the distance semaphore about 815 feet from the crossing. For what reason should it stop again before making the crossing, provided the signals were in its favour? It is argued that rule 98 (c) and the directions of the circular make it obligatory to stop again at the stop post. But they do not

say so. Rule 98 (c) is nothing more than a paraphrase of the language of sec. 226. It says, as in effect the statute does, that when there is no interlocking system trains must stop and receive a proceed signal from the signalman before passing over a railway crossing at grade. The meaning is that trains must stop before attempting to pass the crossing, and they must remain at a standstill; they must not proceed until they receive a proceed signal from the signalman. The signal is the lowering of the semaphores. Both semaphores being lowered, they are at liberty to proceed. The direction of the circular is to be observed in the absence of a stop at the distance semaphores, and of a proceed signal enabling them to proceed from that point of stoppage to the crossing. They are obliged to stop once, but not more than once, if after having stopped they receive a proceed signal. If they have not stopped at the distance semaphore, and received a proceed signal, the stop posts are indications of points at which they are to stop until they receive a proceed signal under rule 98 (c). In that case they are to come to a stop and be governed by the rule. But if, after stopping at the distance semaphore, they receive a proceed signal, there is nothing requiring them to stop again while the proceed signal continues. This reading appears to be in harmony with the practice which prevailed, and affords all the protection which sec. 226 calls for, and that is all that is necessary.

The jury found that the train stopped at the distance semaphore 815 feet from the crossing. It there received a proceed signal from the signalman. The requirements of sec. 226 were thus complied with, and there was no obligation to stop again, unless, in the meantime, the home semaphore was turned against it. But that did not happen. The proceed signal was continued. The signalman expected the train to come on and pass the crossing without further delay, and to all appearance there was no reason why it should not come on at the statutory speed and make the crossing. The deceased was guilty of no contravention of the statute or breach of the rules. In acting as he did he was observing the statute, and also abiding by the rules. There was no evidence to go to the jury of contributory negligence in the ordinary sense of the term.

The sole cause of the accident was the reckless disregard of the statute by the defendants' employees in charge of

their train, and the jury have in effect so found, upon evidence which fully justifies their conclusions.

With regard to the damages; at first sight the amount appears large, but the evidence on this branch of the case is fuller and more satisfactory than is commonly found in cases under the Fatal Injuries Act. The deceased was a young man in the prime of life, in good health, vigorous, industrious, and provident. He was in receipt of good wages, with a prospect of improving for some years, and, apart from the dangerous nature of his occupation, likely to continue in their receipt for a good number of years. The jury were cautioned by the trial Judge against accepting the full measure of the actuarial computations as to the loss estimated with reference to the evidence as to the deceased's age, state of health, earning power, and prospects, and it is quite apparent that they took heed of the warning, otherwise their award would have been much greater. They were fully directed as to the basis on which alone the damages were to be estimated, and cautioned to make allowance for nothing but what appeared to be actual pecuniary loss. And finally their attention was pointedly called to the fact of the receipt by the plaintiff Ada MacKay of the proceeds of insurance policies to the amount of $4,250, and they were directed to take that fact into consideration and make allowance for it. In these respects the charge followed the rules and principles enunciated in Grand Trunk R. W. Co. v. Jennings, 13 App. Cas. 800.

Having regard to the whole evidence bearing on this branch of the case, and considering what would have been the deceased's reasonable prospects of life, work, and remuneration, and how far these, if realized, would have conduced to the benefit of his widow and children, it cannot fairly be said that the jury have taken into consideration topics which they ought not to have taken into consideration, or have been influenced by any improper considerations, or have miscalculated, or that the amount they have awarded is at all so out of proportion to the circumstances as shewn by the evidence as to make it proper to interfere with their award.

The appeal should be dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented.