

Privy Council Appeal No. 23 of 1915.

The King - - - - - *Appellant,*

v.

Catherine Lena Broad - - - - - *Respondent.*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY 1915.

Present at the Hearing.

VISCOUNT HALDANE.

LORD PARKER OF WADDINGTON.

LORD SUMNER.

[*Delivered by* LORD SUMNER.]

This appeal raises two questions, first, whether there was evidence to support the jury's verdict of negligence on the part of the railway authority, and, second, whether on the undisputed facts a verdict that the deceased met his death wholly or partly by his own default and not otherwise was not inevitable.

Apart from the effect of the Public Works Act, 1908, section 191, subsections (2) and (3), the position is this. The jury having visited the *locus in quo* found, in terms which admit of no doubt, though they are not very precise, that, although the engine driver was not personally in fault, since he gave the whistle

signal prescribed by Regulation 117, there was negligence on the part of the railway authority, because a more effectual whistle and one better adapted to the particular level crossing ought to have been prescribed for this place. It was within the jury's competence to take this view. Whatever weight attaches to compliance with regular practice as evidence of the reasonableness of particular conduct on a given occasion, it was reduced to a minimum in this case by the fact that this regular practice was itself but compliance with a universal rule applicable to all level crossings at all times, no matter how various the circumstances might be. The power to make regulations, given by the Government Railways Act, 1900, and the Government Railways Department Classification Act, 1901, is a mere power, and there is no provision that compliance with regulations made thereunder shall be deemed to be sufficient care in all circumstances. Accordingly, the making of general regulations and the particular compliance with them still left those in charge of the working of the traffic bound to exercise whatever measure of care might in law be their appropriate duty upon the occasion in question.

In itself the position of the cyclist, Broad, on the one hand, and of the engine driver on the other, was that of persons using a highway in common, who come swiftly and unexpectedly upon one another at a point where, in a greater or less degree, each may expect to meet other persons and must therefore use reasonable care to announce his approach and to keep out of their way. The fact that one ran upon rails while the other used the ordinary road surface, and that one

was only crossing the highway transversely instead of proceeding along it lengthwise, cannot make the position a different one in point of law. Section 191, subsection (2), enacts as follows :—

“ Where a road or street crosses a railway on a level,
 “ the public right of way at such crossing shall cease
 “ whenever any engine or carriage on the railway is
 “ approaching and within a distance of half a mile from such
 “ crossing and shall at all other times extend only to the
 “ right of crossing the line of railway with all convenient
 “ speed, but not to stopping or continuing thereon.”

There can be no doubt that this section was framed with the intention of diminishing the rights of the public and consequently the obligation of the railway authority, when a train is approaching within half a mile, but the right affected is not in terms the right to have some appropriate measure of care observed by those directing the train. The right affected is the right of way, and the Legislature forebore, no doubt advisedly, to say that in such proximity to a train persons using the highroad must cross at their peril and without any right to have any degree of care exercised towards them, while remaining under some duty to use care themselves in order to avoid injury to the train.

The language of the subsection is amply satisfied by holding that on the specified approach of a train the public's absolute right to pass is suspended, leaving unaffected the question of other rights, if nevertheless persons do pass. Where a highway is crossed at right angles as of right priority of passage belongs to the first comer ; he has a right to be on the crossing, and, so long as he is crossing with all convenient speed, the second comer cannot disregard or object to his presence, but must

wait his turn, if he cannot pass clear. Such a suspensory provision may be of considerable importance to the working of a railway; otherwise, for example, a flock of sheep might be driven on to the crossing as of right, when a train, though in sight and near at hand, could still pull up, and then the train would have to wait till the flock had crossed, with all convenient speed no doubt but far too slowly for the passengers' patience. There are many instances in which delay might be caused to trains at level crossings, which such a section as this tends to prevent, without inflicting real hardships on the public or imperilling its safety. The inconvenience is no more than is involved in waiting at level-crossing gates, when they are closed to road traffic on the approach of a train. The latter part of the section, which expresses the common law rule, is similar in its object, namely, the clearing of the road, so as to prevent the delay of a train. To use a colloquialism common in America the train has "the right of way."

Whatever may have been the objects which the framers of this section had in mind, it ought not to be interpreted so as to bear hardly on public rights unless its language expresses such a diminution. The argument of counsel for the appellant contends for an extreme interpretation of the first part though the second is merely declaratory of the existing law. Without actually calling the deceased a trespasser, they claim the same immunities towards him, as if he had tortiously entered upon private property of the railway authority instead of being a lawful user of a public highway. They argue that at most the obligation of the railway authority was not to lay a trap for him, and deny that there was any

trap, since he saw and was familiar with the crossing, and could have seen the train if he had taken enough pains to do so.

Their Lordships have been unable to discover upon what legal foundation this construction rests. The surface of the level crossing is not vested in the railway authority. By section 153 of the Municipal Corporations Act, 1908, the soil of the highway is, as such, vested in the municipal corporation of the borough, and that the crossing of the highway by a railway on the level does not divest the property in the soil at the crossing is shown by the contrast between sub-sections (1) and (2) of section 191, nor does section 43 of the Government Railways Act, 1908, affect anything but the obligation to metal and maintain the surface of the crossing. Considerations which attach to trespass *quere clausum fregit* are inapplicable here.

The argument expressly assumed that the high road had been dedicated to the public before the railway was made. The case was put as one of occupation of premises, where, to the deceased's knowledge, the railway authority carried on a dangerous business, and his position and rights, if any, were likened to those of a person, who, without leave or at most with bare leave, enters upon such premises and gets hurt thereon. Again, their Lordships think that occupation by the railway authority, which is the foundation of this argument, is not made out. The railway line is laid across the high road under such legal right that its presence on the surface of the highway is not, as it would otherwise be, a public nuisance, and so that no authority but the Legislature can require its removal. True also, by section 43 of the same Act, the maintenance of the road at the level crossing has been for reasons of

administrative convenience imposed on the minister instead of on the local authority having charge of the road. All this is far from such occupation as is the foundation of the principles applied both in *Gautret v. Egerton* (L.R. 2 C.P. 371), and in *Indermaur v. Dames* (L.R. 2 C.P. 311).

Where premises are in private and exclusive occupation and the party injured has entered under circumstances which show that he knew that he was entering, not as of right but either wrongfully or upon terms, it is intelligible that the law should be strict as to the duty of the occupier and the risk of the visitor if he is injured by some source of danger which is patent and manifest. It is intelligible that the law should be stricter still to a person who comes not only without right, but without consent and wrongfully. In such case the party injured knows where he stands. In the present case the most that can be said is that the level crossing is for most part of the day and night in the occupation of neither party, and long stretches of time, when it is simply a somewhat inconvenient section of a high road, are with little, if any, warning diversified by flashes of statutory occupation as transient as they are sudden. To such a case, when the passer-by may be quite unable to tell whether his status is, on the appellant's construction of the subsection, that of public right or private wrong or precarious toleration, it seems to their Lordships that it would be unreasonable to apply rules which belong to totally different cases. The argument would apply the limited duty of care incidental to exclusive occupation to the peculiar position created by a subsection, which does not name or imply occupation of any kind. On the contrary, the subsection appears to be concerned

with conflicting priorities of passage between persons actually using a public highway, and not with questions of mutual care between persons using it in equal right though in highly dissimilar circumstances. It may be that the railway authority has a rateable occupation of the railway track, but their Lordships are unable to regard this as a relevant matter. The fact is that members of the public have just as good a right, and in principle the same species of right, to the use of the roadway at the level crossing as the railway authority has, except in so far as a modification is introduced by section 191 on the approach of a train. This modification is at all times a passing one; in many places it operates only at long intervals and for the briefest time.

The subsection contains no provision requiring the railway authority to inform the wayfaring public of the precise proximity or even of the presence of the train. It appears to apply whether or not the passer-by does or can know of it. The shape of the ground, the curve of the line, the position of trees or houses, the occurrence of fog, snow, or darkness, all or any of these things may effectually screen the train's approach from the most wary; yet it seems they must discern or divine its approach for themselves, and decide as best they can whether it approaches in order to cross or only with the intention of stopping short and shunting back again. Upon these things their rights, it appears, depend; if the train is somewhere within the distance of half a mile, driven with the intention of approaching and crossing the road, then the crossing is in the exclusive occupation of the railway authority and the public come perilously near to trespass. They must draw the line for themselves

between a wrongful and hazardous crossing and a crossing as of full right by their judgment of the distance of a possibly invisible train and of the practice of engine-drivers at a spot they may never have seen before. These are cogent reasons for thinking that the subsection was framed *alio intuitu*. Their Lordships think that so rigorous a ruling is more than should be extracted by bare interpretation from a subsection which does not appear to be concerned at all with the conduct of persons who meet *de facto* upon a public highway, and they agree with the judgment of the majority of the Supreme Court of New Zealand, that section 191 (2) is no answer to the finding of the jury that the railway authority was guilty of negligence causing the death of Broad.

The second question turns upon the validity and effect of Railway Byelaw No. 38. Apart from this byelaw, the evidence clearly raised an issue as to contributory negligence, on which the jury might find one way or the other. It is true that Broad approached a blind corner at the level crossing at a speed of some 15 miles an hour along a road where, according to evidence which the jury must be taken to have accepted in finding negligence against the railway authority, the height of the hedge on the near side prevented the rider of a motor-cycle from seeing an approaching train till he was too close to the crossing to pull up for it. On the other hand, there was evidence that would justify the jury in finding that Broad had reason to believe that the only train which could obstruct his passage had passed. True, the stationmaster said that the train started six minutes late, and said, "On Wednesday she is always six minutes late," the day of the accident being a Wednesday, but it was for the

jury to judge of his truthfulness and to estimate exactly what he meant. They clearly did not believe his evidence about the visibility of an approaching train from any point on the road. They may equally have disbelieved his story of the punctual unpunctuality of this train once a week, or, as the Supreme Court thought, have taken it to be "a mere general assertion, " and not to be evidence of an established and " recognised practice." In these circumstances, on the facts proved and apart from the byelaw, it was for the jury to say whether there was contributory negligence on Broad's part or not, and if they thought that he reasonably believed, as a resident daily using the crossing, that the train had already passed, their verdict that he was not "guilty of negligence that led to the " collision " must stand, since, as is not now disputed, they were fully and correctly directed on the point by the learned Chief Justice, who tried the case.

Accordingly, this matter turns on the effect of the byelaw. It may be noticed that in the pleading only that part of the byelaw was relied on which affected Broad's speed at the crossing—the contention that, under the byelaw, he ought to have stopped at the crossing does not appear till the motion for judgment was made at the end of the plaintiff's case.

The byelaw in question was made in exercise of the power given by section 10 (e) (ix) of the Government Railway Act, 1908, which enables the Minister of Railways to make byelaws in respect of railways or of any specified railway or any part thereof, "regulating the public or " private traffic of persons, vehicles, or goods " on roads that cross any railway on the level " thereof." Further, by section 11 (d) it is provided that "any byelaw may apply to rail-

“ ways generally or to any particular railway
 “ or part of a railway.”

The byelaw is in the following terms:—

“ No person shall drive or attempt to drive any vehicle
 “ or animal on any part of a public road, where the same
 “ crosses over or upon a railway on the same level, other-
 “ wise than at a walking pace, and every person shall,
 “ before crossing the lines of rail, comply with the direc-
 “ tions upon the notice-boards, ‘ Stop ; look out for the
 “ engine.”

This is byelaw No. 38; the next, No. 39, deals with private roads crossing a railway on the level and in this connection merely requires that:—

“ every person before attempting to enter or to drive any
 “ vehicle or animal thereon shall first ascertain that no
 “ approaching train is within half a mile.”

Finally, byelaw No. 62 punishes any breach of any of these byelaws by a penalty not exceeding 10*l.* for each such breach, though, if the offender is not a member of the public, but employed about the railway, the maximum penalty in his case is 1*l.* only.

Upon the facts of the case it can hardly be doubted that, if Broad had come to a standstill at the level crossing and had looked up the line, while still clear of the rails, he must have seen the approaching train and would have gone scatheless. If it was his legal duty to have “ stopped ” in this sense, and if, by voluntarily going on without stopping, he met his death, he would be no less the author of his own injury than if his breach of duty had been breach of a common-law duty to do whatever was reasonably careful and not breach of a prescribed duty to do a particular thing. What then does this byelaw enjoin and what is its validity and force in law?

In its terms the byelaw is of general application; it is not, as it might have been, specially

framed to suit this spot. The photographs, which were proved in evidence, showed that the notice-board at the crossing in question, and, as their Lordships were informed, at level crossings in New Zealand generally, was of the following description. On the offside of the road to those approaching the crossing in each direction a tall pole is erected. It has on its top a board bearing the word "Stop" in large letters, and some feet below, about the middle of the post, a smaller board bearing in smaller letters, "Look out for the engine." This, or one of these, is the notice-board with the "directions" of which the passer-by is required to comply in terms of the byelaw.

Since this byelaw is of universal application and since, as it appears, level crossings are the rule in New Zealand, it is quite plain that if it requires all passers-by to stop—that is come to a standstill—and in that posture to look out for the engine at every level crossing and then go on, using, of course, the same proper care as would have been incumbent without any byelaw, it must in a multitude of cases require persons, who lawfully use the highway, to go through an idle and irritating ritual on pain of an accumulation of convictions and a burden of penalties, which only the good sense and clemency of justices can save from being crushing. The whole Supreme Court (for on this part of the case Denniston, J., expressed no dissent) with a plenitude of local knowledge which has much assisted their Lordships, seem to have recognised fully the grave public inconvenience that such a requirement must occasion. Many level crossings, it seems, are so constructed that coming to a stand and then crossing at a walking pace creates a danger otherwise avoidable, for if the

approaching train be invisible and the road on the other side ascends from the line of rails, there is every chance for a train to appear at close quarters while a motor car or a waggon is being got into motion again and is slowly proceeding uphill clear of the metals. If, on the other hand, the view is clear for miles and either no train is in sight or none within a distance which can be traversed in less than several minutes, to what purpose is this waste of time and energy? If the passenger knows that no train is due for hours, or that no train can approach, since he has just seen a train pass on a single line in the other direction, which he knows cannot reach a siding for several minutes, what is the point of requiring him to halt on the edge of the rails? If the conduct of the railway servants has reasonably led him to believe that the line is clear, again, why must he arrest his progress? Why is the immutable formality of stopping imposed in the case of a public road, when in the case of a private road it is enough to attend to the practical point and "first ascertain that no approaching train is within half-a-mile"?

If this act is made of universal obligation it might, at any rate, have been expected that language would have been employed of quite unambiguous meaning. The requirement is not to stop, but to comply with the directions upon a notice-board, which, moreover, the byelaws do not require anyone to erect or maintain. According to the experience of the Supreme Court the public in New Zealand does not stop at every level crossing, and, indeed, rarely stops at all, probably only when it is reasonably needful. This must not be attributed to a universal contumacy, which, indeed, could have no legal effect, or to a general clemency on the

part of prosecuting authorities which would probably be a dereliction of their duty, but to a general opinion, right or wrong, that the directions are "complied with," if the engine is "looked out for," where there is not reasonable ground for believing that there is no engine to be seen, however long it be looked for. Whether, as a matter of interpretation, this be right or wrong, it is at least ground for saying that in the minds of those most concerned this byelaw does not bear the interpretation contended for by counsel for the appellant, and that is proof that the byelaw fails by reason of its ambiguity to give adequate information as to the duties of those who are to obey it (*Nash v. Finlay*, 85 L.T. 682).

Again, it is clear from the terms in which the power to make byelaws is conferred that the object of the byelaws, and therefore the limit of the power, is the safety, convenience, and due management of the railway traffic. Where that is not and cannot be affected the Minister of Railways has no concern with traffic on the roads. To what purpose then are members of the public required to come to a stand, except when trains are or presently may be approaching so that if the line be crossed before they have passed a collision may occur or the train be delayed?

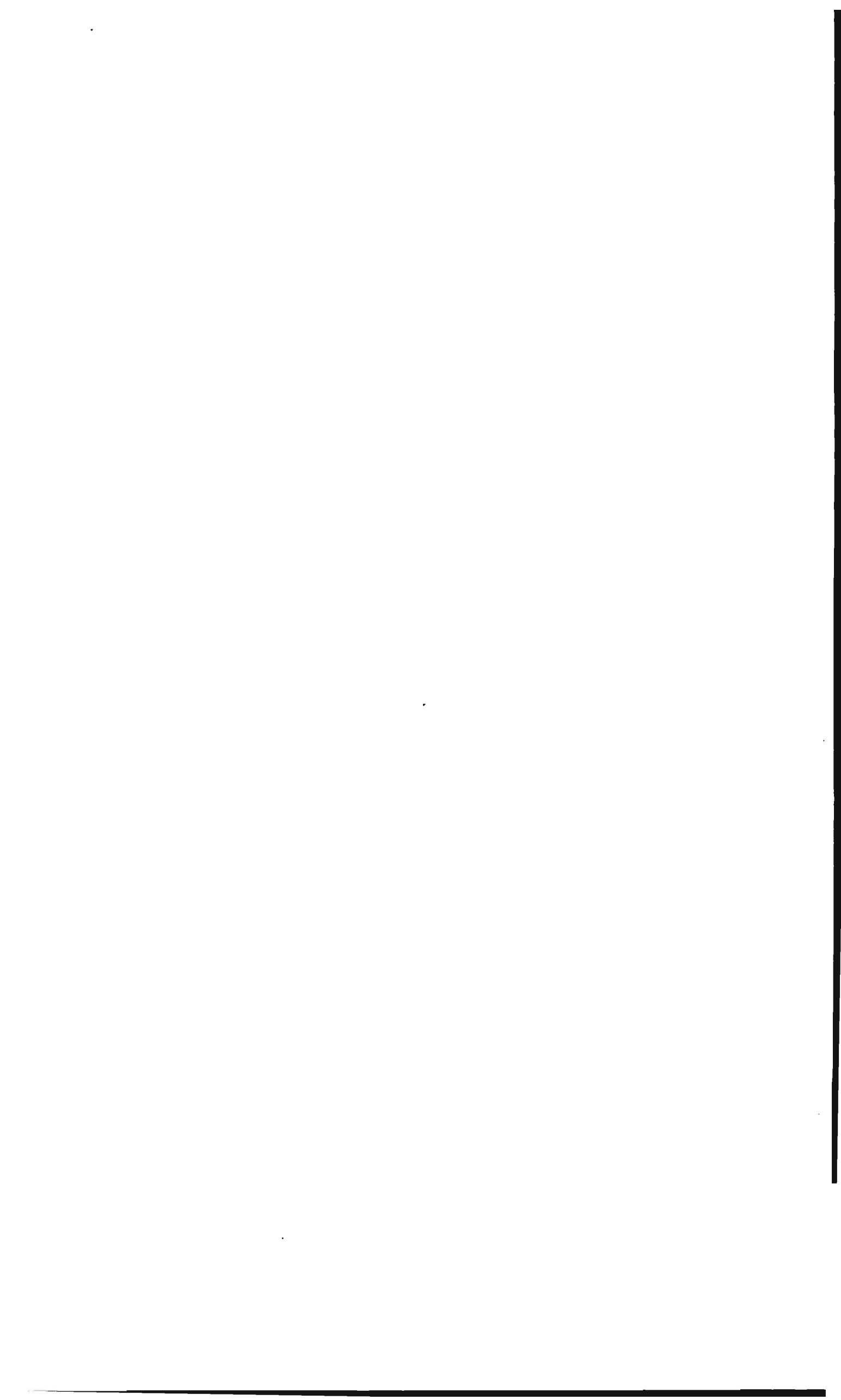
Their Lordships, of course, cannot revise this byelaw merely because they possibly would not have made it, if they had been invested with what is the function of the Minister of Railways alone. The rule is well established that if byelaws "involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men; the Court might well say—'Parliament never intended to give

“ ‘ authority to make such rules ’ ” (per Lord Russell of Killowen, L.C.J., in *Kruse v. Johnson*, 1898, 2 Q.B., 99). Furthermore, in the present case, on the evidence given and the view which the jury took of it, the conduct of the servants of the railway authority itself led Broad to believe that no train was or could be approaching, and he was prevented from knowing the truth by the want of adequate signals in view of the configuration of the ground. Can it be said that a byelaw, which made him liable to conviction for acting in accordance with that belief, and thereby disregarding a useless and cumbersome ceremony, was an exercise of a power of regulating public traffic on the road for the protection of the railway? The answer to such questions must be “ No.”

On all these grounds their Lordships agree with the judgment appealed from, and think that the byelaw cannot be sustained.

The view thus arrived at makes it unnecessary to deal either with the effect of sections 25 and 43 of the Government Railways Act, 1908, or with section 10 of the Government Railways Amendment Act, 1913. The terms of section 25 limit its effect to the creation of a liability to be fined, and the Minister's obligation as to metalling the road was, for the purposes of this case, only relied on as an alternative head of negligence on the part of the railway authority.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.



In the Privy Council.

THE KING

v.

CATHERINE LENA BROAD.

DELIVERED BY LORD SUMNER.

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