

passes, and other facilities for owners of land divided thereby, is a duty created and imposed by statute; and where sufficient fences, with suitable gates or bars for the convenience of the owner of the land, have been erected, nothing further is required but to keep such fences, gates, and bars in suitable repair. The language of the statute is, "The proprietors of every railroad shall erect and maintain a sufficient fence," &c. Gen. St., c. 148, s. 1. The word *maintain*, in the statute, clearly means "keep in repair," or "keep in the same condition." They are to erect a sufficient fence, and keep it sufficient. They are to make gates, crossings, and other facilities for the land-owner, and keep them in proper condition for use. And when the proprietors of a railroad have done this, they have done all that the law requires them to do, and owe no further duty, in relation to fences, to the adjoining land-owner.

Gates and bars are constructed for the accommodation of the land-owner, to be opened and closed to suit his convenience. The proprietors of the railroad have no control over them. They have no right to keep them open continually, thereby leaving the land uninclosed, nor to keep them closed continually, thereby depriving the land-owner of their use; and to hold that they are guilty of negligence unless they close the gates or bars whenever the land-owner or his servants choose to leave them open, would be equivalent to holding that it is their duty to keep a servant at hand, ready to close the gates or replace the bars whenever the land-owner or his servants may choose to open them, which would be unreasonable. Shearman & Redfield on Negligence, s. 472; 1 Redf. on Railways, *495; *ib.* *467; 1 Addison on Torts 221; *Waldron v. P. S. & P. Railroad*, 35 Me. 422; *Eames v. Railway*, 14 Allen 151.

The admission that the fence and bars were sufficient, and that there was no negligence in the management of the train at the time of the accident, was an admission that the defendants were not in fault for the accident. If the defendants were not in fault, it is immaterial whether the plaintiff was in the exercise of ordinary care or not. The instructions asked for by the defendants should have been given. The court might properly have directed a verdict for the defendants.

Verdict set aside.

STANLEY, J., did not sit.

BAKER v. SAVAGE.

The finding of the facts upon which a motion for an amendment is decided at the trial term is not subject to exception.

MOTION to amend an officer's return of an attachment denied, subject to the plaintiff's exception.

Eastman and *Wheeler*, for the plaintiff.

Small, for a subsequent attaching creditor.

STANLEY, J. The case shows no error in law, and the finding of the facts on which the motion was denied is not subject to exception.

Exception overruled.

FOSTER, J., did not sit.

GRAY v. ROLLINSFORD.

Selectmen are agents of the town when no other agents are chosen.

An unqualified offer by the selectmen to pay for damages from a defective highway is competent but not conclusive evidence upon the question of the liability of the town.

CASE, for personal injuries from a defective highway. Subject to the defendants' exception, the plaintiff testified that two of the selectmen of the defendant town came to see him four or five days after the accident; that they said they had come to see him in regard to his getting hurt; that they did not propose to pay him for what suffering he had to endure, but for loss of time and damage they were willing to pay him; and when he got so he could set the damage they would pay it, or leave it out to some disinterested parties to say what the damage was. Verdict for the plaintiff, and motion for a new trial.

Copeland, for the defendants.

Smith and *Hobbs*, for the plaintiff.

CLARK, J. The question in this case is, whether the declarations and admissions of the selectmen to the plaintiff, as to the liability of the town, were competent evidence to be submitted to the jury under proper instructions.

A corporation may admit its liability through its officers or agents. *Perkins v. Railroad*, 44 N. H. 223. Selectmen, in addition to their powers and duties as selectmen, have conferred upon them the authority of agents of the town, when no other agents are chosen. Gen. St. c. 37, s. 4. The acts and doings of selectmen, touching any of the matters falling within the scope of their official duty, may be proved

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