

avoidable injury to another. If the defendant's fireman after seeing the automobile in which the plaintiff was traveling could in the exercise of reasonable care have averted the accident by causing the speed of the train to be slackened, or by causing the whistle to be sounded in short blasts as a special warning, then you would be warranted in finding that the defendant was negligent." "Ever since *Gahagan v. Railroad*, 70 N. H. 441, 443 it has been well established in this State that everything being equal, the railroad at a grade crossing has the right of way over highway travelers . . . ; and that there is no duty imposed upon the railroad to slow down or stop its train when approaching a grade crossing until such time as it becomes apparent . . . that the highway traveler is not going to stop and give the train its right of way." *Gates v. Railroad*, 93 N. H. 179, 181. Nor is there any duty to take other precautions by giving special warning on mere sight of the automobile. The employees of the railroad have the right to assume that the highway traveler will yield such right of way.

In view of the decision that the plaintiffs were guilty of contributory negligence as a matter of law the submission of the issue of Mr. Towner's care in selecting a driver is harmless. The exception thereto is of no avail.

Judgments on the verdicts.

MARBLE, C. J., was absent: the others concurred.

Grafton, } No. 3574.
June 4, 1946. }

MARY G. LEWELLYN v. GEORGE W. FOLLANSBEE.



Carr & Gifford (by brief), for the plaintiff.

Murchie & Murchie (Mr. Alexander Murchie orally), for the defendant.

KENISON, J. The assessment of the damages by the Court, without a jury or further notice to the defaulting party, was one of the discretionary methods sanctioned by our procedure. "To the three modes of assessing damages upon default enumerated by Judge *Bell* may be added a fourth; namely, where the assessment is made by the judge upon oral evidence produced before him in court. In such cases, of course, there would be no evidence to be filed, and it is therefore important that the docket or record should show the fact that the assessment was made upon oral testimony produced before the court." *Collins v. Walker*, 55 N. H. 437, 438. The pertinent statute (R. L., c. 390, s. 1) has been construed to require a jury trial when "either party makes application to the court for such a hearing" (*West v. Whitney*, 26 N. H. 314, 315) or "on motion of either party" (*McIntire v. Randolph*, 50 N. H. 94, 102), providing the request is made in due time (*Price v. Dearborn*, 34 N. H. 481, 487) and is not otherwise waived. See *Redlon Co. v. Corporation*, 91 N. H. 502, 506. The facts in this case differ from the *Collins* case, *supra*, 439, where the default judgment was vacated because entered "without any assessment of said damages by a jury, by the court, or in any way by order of, or under or by direction of, the court."

Neither the statutes nor the rules of the Superior Court require notice to a defendant in default for lack of appearance of the assessment of damages. R. L., c. 390, s. 1; Rule 6, 78 N. H. 690; Rule 8, 93 N. H. Appendix. "Where a defendant has been defaulted after he has made an appearance in the action, it is generally necessary to notify him of the hearing to make the necessary proof and assess the damages. But a defendant in default for lack of appearance is not entitled to notice of application for a judgment or the hearing to assess damages." 3 Freeman, Judgments (5th ed.) s. 1291. Cf. *Governor and Council v. Morey*, 78 N. H. 125, 130; *Hutchinson v. Railway*, 73 N. H. 271; *United &c. Ins. Co. v. Corporation*, 82 N. H. 321, 323.

It is contended that there has been an abuse of discretion by the Superior Court in refusing to strike off the default which is permitted by R. L., c. 390, s. 2 "at the discretion of the court or justice" and by Rule 8 of the Superior Court. 93 N. H. Appendix. Competing considerations are involved in such a determination. It is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial. It is likewise important that litigation be concluded finally and with reasonable dispatch and that the dilatory shall not be rewarded at the expense of the diligent. These considerations are necessarily encompassed within the touchstone of our practice—as justice may require. In view of the findings of the Court that the default was due solely to the defendant's neglect and that he had no reasonable ground for expecting notification of the hearing to assess damages by anyone, we cannot say as a matter of law that there has been an abuse of discretion in refusing to strike off the default judgment. *Lancaster Nat. Bank v. Trust Co.*, 92 N. H. 337, 339; Restatement, Judgments, s. 129, comment a; *Woodsville Fire District v. Cray*, 88 N. H. 264.

Judgment on the verdict.

MARBLE, C. J., was absent: the others concurred.

Hillsborough, } No. 3587.
June 4, 1946. }

TED ROSEDOFF *v.* CONSOLIDATED RENDERING COMPANY
doing business as MANCHESTER RENDERING COMPANY.