The case is then reduced to this: (1) no negligence found against the defendant as to speed or not ringing the gong, which, upon the charge, were referred to as original negligence on the part of the defendants; (2) negligence on the part of the plaintiff in not seeing that he had time to cross the track; (3) ultimate negligence on the part of the motorman in not applying the brakes at an earlier stage when, according to the witnesses and his own evidence, he might have stopped the car notwithstanding the negligence of the plaintiff.

The evidence is very contradictory upon almost every point. Five of the witnesses for the plaintiff swear positively that the gong did not sound. A number of witnesses for the defendants swear that it did.

The jury not having found in favour of the plaintiff upon this issue, it must be taken that the gong did sound.

In one view of the findings, they may mean that when the motorman saw the plaintiff it was too late to stop the car.

The result of the jury's findings and of what took place at the trial with reference to their answers and questions put by the learned trial Judge, leaves uncertainty, in my opinion, as to what they meant.

I think there was evidence of ultimate negligence that could not be withheld from the jury, and that they could have given no clear and sufficient answers to the questions submitted to them.

There should, therefore, be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

MULOCK, C.J., agreed with CLUTE, J.

RIDDELL, J. (dissenting), was of opinion, for reasons stated in writing, that no case was made of ultimate or causal negligence, and that the appeal should be dismissed.

New trial ordered; RIDDELL, J., *dissenting.*