negligence of the deceased, if any, could the motorman on the car, by the exercise of ordinary care, have avoided the accident?" To this the jury answered, "Yes"—though this was evidently intended not to be answered if the jury found that the deceased had not been negligent.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants.

J. MacGregor, for the plaintiffs.

GARROW, J.A.:—In view of the other questions and answers, which were quite sufficient to dispose of the issues, the last question and answer should, I think, be disregarded.

What remains is the simple case of negligence alleged and found against the defendants in respect of the excessive speed, and contributory negligence on the part of the deceased alleged by the defendants, but denied by the jury.

Both questions were, in my opinion, proper for the jury. There was evidence, if believed, of improper speed, as the jury say, "at that particular point." The motorman upon the west-bound car must have seen the east-bound car standing, and at least one passenger from it, Dr. Hincks, cross the north track towards the hospital; even if he did not see Dr. Hincks after crossing waving his hands towards the deceased in an effort to prevent him from making the attempt to cross. And there is no evidence that he slackened speed, which speed a jury might well regard as unreasonable and excessive under the circumstances.

There was also, in my opinion, clear evidence of contributory negligence on the part of the deceased, who came out from the rear end of the east-bound car, and apparently proceeded to cross without looking to see if he might do so safely. And, if he had looked, he must have seen the west-bound car in plenty of time to have kept out of danger.

It is not my purpose further to comment upon the evidence of contributory negligence, except to say that, in my opinion, the decided weight of evidence is against the finding of the jury, for which reason it seems to me that justice requires that there should be a new trial.

I would, therefore, allow the appeal and direct a new trial; the costs of the last trial and of this appeal to be costs in the cause to the successful party.