John MacGregor, for the plaintiff, contended that there was evidence to go to the jury of negligence on the part of the defendants in travelling at too high a rate of speed, in not keeping a proper look-out and having the car under control, in not giving warning to the plaintiff, and in not applying the brakes.

C. A. Moss, for the defendants.

CLUTE, J., referred to Commonwealth v. Temple, 14 Gray (Mass.) 69, 75; Haight v. Hamilton Street R. W. Co., 29 O. R. 279, 281; Driscoll v. West End Street R. W. Co., 159 Mass. 142, 146; Toronto R. W. Co. v. Gosnell, 24 S. C. R. 582, 587; Hegan v. Eighth Avenue R. R. Co., 15 N. Y. 380; Vallee v. Grand Trunk R. W. Co., 1 O. L. R. 224; Toronto R. W. Co. v. Mulvaney, 38 S. C. R. 327; Wright v. Grand Trunk R. W. Co., 12 O. L. R. 114; Misener v. Wabash R. W. Co., 12 O. L. R. 71, affirmed (Wabash R. R. Co. v. Misener), 38 S. C. R. 94; Peart v. Grand Trunk R. W. Co. (Jud. Com.), 10 O. L. R. 753; Brill v. Toronto R. W. Co., 13 O. W. R. 114; and said that he had not been able to find any authority directly in point; each case must be decided upon its own facts and circumstances; applying, however, the general principles laid down in the above cases, he could not say that there was no evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong and exercising more care in keeping a look-out and applying the brakes before the car struck the plaintiff.

Appeal allowed and new trial directed. As the defendants expressly took their chances of the result, the plaintiff should have the costs of the first trial and of this appeal, forthwith after taxation.

MULOCK, C.J., said that the plaintiff's explanation for not looking northerly was that he was familiar with the defendants' practice in using the siding for the purpose of enabling cars to pass each other, and he assumed that the car was standing still for the purpose of allowing a car from the south to pass it. He assumed that the car waiting on the siding was to allow another from the south to pass it at that point. Accordingly, when about to cross the track, apprehending danger from the south only, his attention was wholly turned in that direction. Was he negligent in not looking also to the north? The motorman had a clear view of the track. Was the plaintiff to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him, and that without giving any warning of its