

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

OSLER, J.A.—A branch or line of defendants' railway between the town of Prescott and the city of Ottawa passes through a portion of the city of Ottawa near its easterly limit. The line of the railway enters the city from the south, and in its course crosses Carling avenue, a public highway. Proceeding northward it next crosses Young street, distant about 2,000 feet from Carling avenue. To the east of the line of railway and in the tract between these two highways there is a number of residences, and there are also some streets which abut on but do not cross the line. Along the east side of the line there is a wire fence between Carling avenue and Young street. The first street to the east of the railway and running parallel to it is Preston street, on which is a number of dwelling houses, but the lots on which they stand are not fenced in the rear, so that there is a large open space of common between the rear of the houses on the west side of Preston street and the fence on the east side of the railway. Plaintiff's house is situate on the west side of Preston street about 385 feet south of Young street and 125 feet south of George street, a highway which abuts on but does not cross the railway.

On 23rd May, 1903, plaintiff's son, aged 8 years and 7 months, while engaged in play with some companions of about his own age, went with them through one of the openings in the fence of the railway, and, getting upon the line, was struck and killed by a train coming from Prescott. Plaintiff thereupon brought this action under the Fatal Injuries Act. Besides alleging negligence in the operation and management of the train, plaintiff alleged that the locality through which the train was passing at the time of the accident was a thickly peopled portion of the city of Ottawa, and that defendants' train was allowed to pass through it at a speed exceeding 6 miles an hour, although it was not fenced in manner required by the provisions of the Railway Act. Defendants admitted that the boy was struck by their train, but alleged that he was a trespasser on their private property, and that his death was occasioned by his own negligence and want of reasonable care.

At the trial it was shewn beyond reasonable doubt that for some years before and at the time of the accident the condition of the fence was such that it could not be treated as answering the requirements of sec. 194 of the Railway Act. And, having regard to the locality, unless the track was fenced as prescribed by that section, it was unlawful for