

curred in September, 1910, under the permission to cross granted in April, 1908; but it is a valuable expression of the mind of the Railway Board as to the existing legal liability. . . .

This man, appointed by the one company and paid by the other, would be a person in charge of the signals at the crossing and interlocking switches, within the meaning of the Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5: *Gibbs v. Great Western R.W. Co.*, 12 Q.B.D. 208. . . .

In the evolution of the law, the old test, as to who hired and paid, is being modified, if not superseded, by the more modern method indicated in the judgment of Garrow, J.A., in *Hansford v. Grand Trunk R.W. Co.*, 13 O.W.R. 1184, at p. 1187: i.e., the whole circumstances of the employment must be looked at; and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring or paying. . . .

The common signal-man is to be regarded as the person employed by the company for which he is adjusting the points and giving the signals.

If the order of the Board . . . be regarded as a quasi-contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use, on its own line, of the common servant for the sole prosecution of its own work at the crossing of the other road. . . . *Hall v. Lees*, [1909] 2 K.B. 602.

Or, if the theory of joint service be rejected, and the signal-man, so appointed and so paid, be regarded as a servant or agent sui generis of both companies, then fairness and good sense would support the proposition that the company for which the signal-man was alone acting on the particular occasion, was the principal against which relief should be sought, if the then agent of that road was guilty of misconduct by which an employee of the road was injured.

The proper conclusion in this case is, that the damages agreed upon be paid by the defendant the Canadian Pacific Railway Company, with costs of action. As to the other defendant, the action is dismissed, without costs, as the precise question involved now arises for the first time in the Courts.