

evidence that he did not hear any earlier whistle, and conclude that a warning given when a collision was imminent and practically unavoidable was not a warning within the meaning of the statute.

With regard to the finding as to the brakesman's incompetence; it seems that this was only the second occasion that Price had been with this train in Simcoe, and it does not appear that he had any definite idea where the crossing was, or that there were buildings on the south side of the highway which would interfere with persons on the highway seeing the approaching train or his seeing persons about to cross the track. The company should not, I think, have placed in the responsible position where Price was on that day a person quite unacquainted with the conditions existing near the crossing. He acted according to the best of his judgment, and the moral as well as the legal blame for the accident rests with the company for having required Price to perform duties with the nature of which he was not familiar.

There is no dispute that after Price blew the air whistle at a point about 250 feet from the crossing, he did not again blow it until too late, namely, when the accident was unavoidable. Whether the signalling appliances referred to by the jury were, or were not, adequate, the evidence shews that Price did not give such warning as is contemplated by the statute, and, if it were open to me as trial Judge, I would so find; but sec. 27 of the Judicature Act does not empower the trial Judge but only the Court of Appeal so to deal with the case.

The jury exonerated the deceased from negligence. He was a passenger only; and, therefore, the plaintiff's rights are not affected by Glenn's negligence.

Judgment will be entered for the plaintiff for \$1,000, with costs of action.

McCONNELL V. TOWNSHIP OF TORONTO—LENNOX, J., IN CHAMBERS—MARCH 8.

Jury Notice—Motion to Strike out — Discretion—Place of Trial.—Motion by the plaintiffs to strike out the defendants' jury notice. The learned Judge said that if the defendants had consented to have the trial in the city of Toronto, he would have left it to the trial Judge to say whether there should be a jury or not. It would not be advisable to have the action tried by a jury of the county of Peel; but, if it was an action which