

operation of the plaintiffs' railway, or that it unduly increases the burden of the easement created by the agreement of 1894.

The plaintiffs sought to show that the traffic over this portion of their line was very heavy, their train master being called to state that 70 trains a day passed the crossing. But of these so called trains only 14 to 16 are passenger or freight trains, the rest being light engines and principally yard engines. Many of these trains run at night, when, of course, the crossing is not in use by the defendants. The crossing is within the city of Hamilton. The evidence is that about 10 waggons per day—one-half loaded, one-half empty—are driven over it. Except in a couple of instances in 1904, there is no evidence of any obstruction or delay of the plaintiff's trains by the use made of the crossing. Since that time there has been no report of trouble. There apparently has been none since the defendants became lessees of the premises. There is not in this case evidence such as was before the Court in *Great Northern R. W. Co. v. McAllister*, [1897] 1 I. R. 58; that a use is being made of the crossing for which it is unsuitable in construction, or that it is being used in any extraordinary manner, or for cumbrous vehicles, such, for instance, as a traction engine. The plaintiffs have not shewn that the use made by the defendants of the crossing has seriously incommoded or inconvenienced them, if indeed mere inconvenience, short of obstruction to traffic creating a condition of danger inconsistent with the use of the railway, would suffice: they certainly have not established that it prevents or unduly interferes with or obstructs the working of the railway.

The premises now leased by the defendants had been in use as a brick yard for 25 years before the railway was built. The land is unsuited for agricultural purposes, and it must have been in the contemplation of the plaintiffs that its use as a brick-yard might and probably would be resumed. As stated in the *McAllister* case, "Every physical circumstance may be taken into consideration in determining now what was in the minds of the parties as to the future use of the crossing." The defendants are merely carrying on, perhaps on a somewhat more extensive scale, a business for which the premises were used before the railway was constructed. They have not, as was the case in *Great Northern R. W. Co. v. Talbot*, [1902] 2 Ch. 759, sought to use the crossing for conveying goods and traffic not originating