

Kay and the injury to plaintiff were caused by the negligence of the defendants in running too fast, and by reason of the want of a flagman or gates; that no sufficient warning was given to plaintiff in time to have enabled him to have avoided the accident; and that plaintiff was not guilty of contributory negligence; and they assessed the damages at \$1,300 in all, namely, \$800 for the death of the wife, \$400 for plaintiff's own injuries, and \$100 for the horse and buggy.

W. R. Riddell, K.C., for appellants.

I. L. Hellmuth, K.C., for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

GARROW, J.A.—Counsel for the defendants objected, not so much to the charge as to one of the questions, as follows: "Mr. Riddell . . . Then I object to the question of the rate of speed being a dangerous rate for the locality. I object to that being put to the jury. I do not know that it will have any great effect on the verdict one way or the other, but I submit that is a question that they should not be asked." His Lordship: "How would you frame it?" Mr. Riddell: "I would not ask it at all. It is not the phraseology I object to. However, that is a question probably more of law than of fact."

I can see no force in the objection thus rather faintly urged; on the contrary, the question was, I think, a perfectly proper one to submit to the jury; and in any event if it is, as the learned counsel seemed to think, matter of law rather than of fact, it cannot have affected the result. The main question of this appeal arises upon the contention of the defendants' counsel that where the railway track is fenced in accordance with the statute, the maximum speed is not limited to six miles an hour at such crossing as the one in question; and that no fence according to the statute is simply to fence to the cattle guard at the side of the crossing, and to turn in the fence to such cattle guard, leaving the sides of the track where it crosses the highway wholly open, unprotected, and free of access by any one passing along the highway, and that any additional restriction upon the rate of speed must be secured by an application to and an order by the Railway Committee of the Privy Council under the Railway Act.

The statutory provisions seem to be as follows. By the Railway Act, 1888, 51 Vict. ch. 9, sec. 197, it was provided that at every public road crossing a railway at the level, the crossing is to be sufficiently fenced on both sides, so as to allow the safe passage of trains. By 55 & 56 Vict. ch. 27,