

therein mentioned is the design produced by the appellants and sworn to by Ramsay as the one selected by the defendant.

I have not overlooked the argument that to allow the appeal is to overrule the findings of the trial Judge upon conflicting testimony. I have already shewn that there are no specific findings upon the material questions in issue between the parties. But the rule invoked has no application save where there is a direct conflict of testimony on some material point, and there are no circumstances one way or the other. This was pointed out in *Morrison v. Robinson*, 19 Gr. 480, by the present Chief Justice of Canada, then Vice-Chancellor Strong, at p. 487. See, also, *Coghlan v. Cumberland*, [1898] 1 Ch. 704. In the present case there are circumstances which, in my judgment, are quite sufficient to outweigh the statements of the defendant and his witnesses where they are in conflict with the documents and the testimony of the appellants' witnesses.

I would allow the appeal.

SEPTEMBER 19TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Indemnity—Contract—Construction of Works for Municipal Corporation—Liability for Injuries to Persons—Provisions of Contract—Agreement with Another Contractor—Want of Privity—Costs of Defending Action—Third Party.

An appeal by one Crang, a third party, from the judgment of MACMAHON, J., at the trial, was heard at the same time as the defendants' appeal, the result of which is reported ante 440.

The plaintiff sued defendants for negligently allowing a certain street in their municipality to be out of repair by leaving an open or uncovered pit or excavation therein, into which one Levi Gaby, the plaintiff's husband, while lawfully using the street, fell, and thereby met with the injury which caused his death. The defendants brought the appellant, James Crang, into the action as a third party in the usual way, alleging that the disrepair of the street was occasioned by his negligence, and that they were by statute or by the terms of some contract between them entitled to be indemnified by him against any damages the plaintiff might recover in the action. The action against the city corporation and the claim against the third party were tried at the same