

of BRITTON, J., by providing that the appellants should be in the same position as if they had entered a conditional appearance as to the claim made in the reply if and so far as it set up a claim different from that originally made by the plaintiff. Costs in the cause.

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HIGH COURT DIVISION.

MIDDLETON, J.

APRIL 22ND, 1914.

OCEAN-ACCIDENT AND GUARANTEE CORPORATION  
v. GILMORE.

*Fraud and Misrepresentation—Action to Recover Moneys Paid by Insurance Company on Fraudulent Claim—Evidence—Discredited Witnesses—Inference from Admitted Facts—Duty of Trial Judge.*

Action to recover \$800 paid by the plaintiffs to the defendant for an automobile insured by the plaintiffs, and destroyed in the circumstances mentioned in the judgment, the plaintiffs alleging fraud on the part of the defendant.

The action was tried without a jury at Toronto.

M. K. Cowan, K.C., for the plaintiffs.

J. M. Godfrey, for the defendant.

MIDDLETON, J.:—The action is brought to recover the amount paid by the plaintiffs to the defendant under a policy upon an automobile destroyed by being run down by a Grand Trunk train, the ground being that the payment was procured by the fraud of the defendant, who, it is said, placed the automobile upon the railway track for the purpose of bringing about its destruction, and that he falsely and fraudulently asserted that an accident had taken place.

The evidence in this case is extremely unsatisfactory.

On the evening of Sunday the 2nd November, 1913, at eight o'clock, Gilmore left his place in West Toronto, in company with Cochrane, a half brother of his brother-in-law, in the automobile, for the purpose of having Cochrane's assistance in the adjustment of the carburetor, which, it is said, was not working satis-