of a Divisional Court directing a new trial, which order this Court affirmed: see 21 O.L.R. 421. The case has since been tried a second time. . . .

[The learned Judge then set out the findings of the jury at the second trial, and referred to the reasons for the judgments of RIDDELL, J., and of the Divisional Court, now in appeal.]

The real difficulty in the case is, in my opinion, due not to any doubt about the law, which is fairly well settled as to both classes of negligence, but about the facts.

The plaintiff, by his pleadings, alleged two and only two acts of negligence, namely, excessive speed and failure to warn, both of which were negatived by the findings of the jury, and quite properly so, on the evidence.

There was no specific allegation of any act of negligence occurring after the plaintiff had shewn that he intended to cross the track; but the learned trial Judge, without objection, submitted that question also to the jury, in these words: "Was there anything which the railway could have done, notwithstanding the carelessness on the part of the plaintiff, if he was careless, to have prevented the accident?" Having previously pointed out that it was the duty of the motorman to keep a look-out, in these words: "It is the duty of the motorman to keep a look-out, a reasonable look-out . . . A motorman seeing a person approaching a track has a right to believe that the man will use ordinary prudence, and if there is nothing to indicate that the man is going to cross the track in the face of his car, then you will ask yourselves whether the motorman is called upon, in the exercise of reasonable care, to suppose that that man is going to be fool enough to walk in front of his car. And is there any evidence here that this motorman ought to have seen that this man was going to walk in front of his car?" And it is evidently to this phase of the case—in other words, to the secondary rather than to the primary negligence, which they negatived—that the jury intended their second and sixth answers to apply. I, therefore, agree with the view of the learned Chancellor in the Divisional Court, that, if the plaintiff is entitled to recover at all, it can only be in respect of negligent acts occurring after the plaintiff's own negligence became apparent.

These answers (2nd and 6th) contain three elements: (1) the motorman should have seen the plaintiff sooner; (2) he should have stopped the car sooner; and (3) he should have rung the gong continuously.