

FERGUSON, J.A., read a judgment in which, after stating the facts and examining the evidence and referring to many cases, he cited Pollock on Torts, 10th ed., p. 500, as shewing, on the authority of Clayards *v.* Dethick (1848), 12 Q.B. 439, that the defendants could not, by creating a dangerous obstruction, take away the right of the deceased to come out of the gate; but, while the deceased was entitled to use the dangerous gate, he could not disregard the obstruction; he must use extra care commensurate with the danger; and the question to be decided, in such circumstances, is, whether or not, in using the gateway with knowledge of the danger, he used common prudence in making the attempt in the manner he did. The deceased was not bound to refrain altogether from the use of the gateway; but, had he used care or prudence commensurate with the danger, the accident could not have happened from the cause found—loss of control of the horses which he was driving from the top of the load on a farm-waggon. He could have had his waggon more securely equipped and his rack more securely fastened; he might have driven from a sitting position on the load; he could have built the load lower, or have so built it as to leave himself a place to stand while driving under the wires; he could have walked and driven or led the horses. He could even have abated the nuisance. He was not forced to take the risk he did. Although he was not obliged to do the wisest thing, he was obliged to act as a prudent man would have acted in the circumstances; and he did not act according to that standard.

The plaintiffs had failed to make out that the accident occurred solely by reason of the negligence of the defendants and without negligence on the part of the deceased.

The appeal should be allowed with costs and the action dismissed with costs.

MAGEE, J.A., agreed with FERGUSON, J.A.

HODGINS, J.A., was of opinion, for reasons stated in writing, that there was such a lack of certainty in arriving at the right conclusion as to the proximate cause, that the Court was justified in saying that the plaintiffs had failed to prove negligence in the defendants, and that the appeal should succeed and the action be dismissed.

MEREDITH, C.J.O., was of opinion, for reasons stated in writing, that the trial Judge's finding that the obstruction caused by the wires was the proximate cause of the accident was based on a