No questions were submitted to the jury; they found in favour of the plaintiff, the finding being in writing as follows: "We find the company's servants negligent in starting the car before the plaintiff was in a position to save herself from falling; damages $1,882." Judgment for that amount was entered in favour of the plaintiff.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants.

A. E. Fripp, K.C., for the plaintiff.

GARROW, J.A.:— . . . The defendants now complain that the finding ignores and in effect denies the cause of action first put forward in the pleadings and which formed the main features of the evidence, namely, the jerk, and is based upon something entirely insufficient and in any event quite different, namely, the premature starting of the car, a subject to which their attention had in no way been directed until it was put forward so prominently in the charge.

This would, I think, have been a serious objection if the defendants had objected to the charge . . . the real cause of complaint being not so much the time at which the car was started as the mode of starting.

Another objection which might, I think, have been taken to the charge, this time by the plaintiff, was the practical withdrawal from the jury of the question of the jerk. In doing so the learned Judge evidently proceeded on the basis of the motorman's evidence being true, which was, I think, entirely a question for the jury. The evidence on the plaintiff's side . . . distinctly shewed that the car was started with a jerk of more or less violence; and the nature and violence of the plaintiff's fall, which was backward and with sufficient force to break her thigh-bone, in itself supports this evidence. . . .

I cannot understand why it was deemed advisable to divide the case into two branches. There was in fact but one incident, made up of the conduct of the conductor in giving the signal and that of the motorman in obeying it. The first, alone, would probably have been quite harmless if the car had been started properly, and the second would also probably have been harmless if a moment more had been allowed for the plaintiff to reach a seat or something to hold by. In these circumstances, the proper course, in my opinion, with deference, was to have left the whole question to the jury, and not merely that of the conduct of the conductor.