

think strong evidence, of contributory negligence on plaintiff's part; and if the jury had found against him on that question I would certainly not have interfered. But while not yet laid down as matter of law that a person approaching a crossing is bound to stop, look, and listen, he is of course bound to exercise his senses, and to act with reasonable care. The plaintiff says he did look and did not see the approaching train, that he heard no warning of any kind, and he had a right to assume not merely that the ordinary statutory warnings would be given, such as ringing the bell and blowing the whistle, but that the speed of the train at the crossing in question would be a lawful speed, in which latter event he could probably have escaped from the collision, notwithstanding his own previous want of care. The whole matter was one, in my opinion, which could not have been properly withdrawn from the jury, and the appeal therefore fails.

JANUARY 26TH, 1903.

C.A.

WEBB v. OTTAWA CAR CO.

*Contract—Novation—Consideration—Collateral Promise—Oral Evidence to Alter Writing.*

Appeal by the third party Campbell from the judgment of a Divisional Court (1 O. W. R. 90) holding him liable to pay to the defendants the amount for which they were held liable to the plaintiff. The plaintiff sued and recovered judgment against the defendants for a claim for certain brick work done in and about the installation in a boiler house belonging to the defendants of certain boilers which were supplied and put in place by Campbell. The defendants, claiming that Campbell was liable to indemnify them, caused him to be brought in as a third party.

LOUNT, J., by whom the action was tried without a jury, held that Campbell was not liable to the defendants. Upon appeal the Divisional Court was of the contrary opinion. J. Bishop, Ottawa, for appellant.

W. H. Blake, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MOSS, C.J.O.—I am of opinion that the decision of the Divisional Court ought to be affirmed.

Some time before the brick work in question was done, Campbell had, under contract with the defendants, put in certain boilers spoken of as Kingsley boilers, and, these not proving satisfactory, he bound himself to the defendants to put in other boilers free of charge to them. This agreement is in writing in the form of a letter and acceptance dated the