

The learned Chief Justice who tried the case has put himself upon record in more than one reported judgment as to the imperative duty of the Judge at *nisi prius* to enter a nonsuit in a proper case, and not to expose the defendants to the peril of something being developed in their own case or in the reply to strengthen the case originally put forward by the plaintiff. So that it may be taken for granted that the Judge here was clearly of opinion that there was a case which could not be withdrawn from, but must be submitted to, the jury.

A careful perusal of the evidence, with the assistance of the plan which was not before us at the argument, satisfies me that the Chief Justice could not have withdrawn the case from the jury. There was abundant evidence on the question of the speed of the car. As to the sounding of the whistle, the Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 155, has no application. This car was not approaching a highway, it was travelling along a highway; but there is a duty imposed on a railway company to give a warning under conditions when such warning would be necessary. On both these points the jury found in favour of the plaintiff.

As to the question of contributory negligence on the part of the plaintiff, that was a matter for the jury, who found that he could not, by the exercise of ordinary care, have avoided the injury.

In view of this finding, the last question as to the ultimate negligence of the driver of the car became unnecessary, but that question also has been answered in favour of the plaintiff.

The appeal must be dismissed with costs.

JANUARY 25TH, 1915.

*PRICE v. FORBES.

Building Contract—Architect's Certificate—Claim of Building Owner for Bad Material and Improper Performance of Work — Finding of Referee that Amount Paid Exceeds Value of Work Done — Collusion between Builder and Architect—Construction of Contract—Specifications—Appeal from Findings of Referee—Costs.

Appeal by the plaintiff from the judgment of J. A. C. Cameron, an Official Referee, dismissing an action or proceeding to recover the amount due for work done under a building contract, and to enforce a mechanic's lien.

*To be reported in the Ontario Law Reports.