

Mr. McCarthy admitted that it was necessary for him to maintain that the finding amounted to an absolute finding of contributory negligence. Apart from the cases I could no so construe its language, for the reasons which I have given; but in addition it seems to fall within the rule indicated by Sir Henry Strong, C.J., in *Rowan v. Toronto Street Railway Company*, 29 S. C. R. 718, at p. 719, where that very learned Judge says that to disentitle a plaintiff to recover, upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him.

There is in my opinion, no such distinct finding in the present case. But as the jury evidently intended to make a finding of some kind, not entirely in exoneration of the plaintiff, upon the subject of contributory negligence, I think the Divisional Court exercised a wise and entirely proper discretion in granting a new trial.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MEREDITH:—I agree with the learned Chief Justice of the Divisional Court in his conclusions that there is nothing in this case sufficient to support a judgment in the plaintiff's favour on the ground of "ultimate negligence;" and that the findings of the jury on the question of contributory negligence are so uncertain that a new trial must be had before justice can be done between the parties.

There is no evidence, nor any finding, of any negligence on the part of the defendants except in the excessive speed of the car, failure to sound the gong so as to give proper warning of its approach, and failure to see the danger and avoid the injury; and there is no ultimate negligence in these things; they are all things which would be offset by contributory negligence of the plaintiff.

There is no evidence, nor any finding, that the motorman did see the danger and might then in the exercise of ordinary care in the circumstances, have avoided the injury; that would be what is commonly called "ultimate negligence;" it would give rise to a later and new duty in the defendants towards the plaintiff—the duty, notwithstanding his negligence, to avoid injuring him, if any reasonable means that could then be done.

But to find that the motorman ought to have seen the man's peril and to have averted it, is to find original negli-