The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.

A. B. Aylesworth, K.C., for appellant township corporation.

I. F. Hellmuth, K.C., and D. W. Saunders, for appellant railway company.

W. R. Riddell, K.C., for plaintiffs.

Judgment was reserved as to the appeal of the township corporation.

Judgment was given at the close of the argument on the appeal of the railway company.

Moss, C.J.O.—I think we are all agreed that no negligence has been shewn against the railway company. The company was doing its ordinary business in a perfectly legitimate way. In order not to obstruct public travel on the highway, the engine and cars were drawn up to the north of the highway, so as to leave an ample space for the passage of vehicles along the road, and it was a proper act on the part of the railway company to clear the highway in this manner, and then signal the plaintiffs to proceed. That signal was only an invitation in this sense, that it was notice to the plaintiffs that the road was clear, and that they would not be run into by the cars while making the crossing. There was evidence given that there was some noise just as the plaintiffs' vehicle cleared the crossing. If there was such a noise (and if it proceeded from the train) the noise was not an unusual one. I can see no evidence of negligence on the part of the company; their appeal must be allowed, and the action as against them must be dismissed with costs.

Osler, J.A.—The plaintiffs' difficulty is that they have not come up to their pleading. Their pleading is all right—they charge that the company's servants "by negligently moving their cars so frightened the plaintiffs' horse," etc. If the evidence had borne out this allegation, and if they had proved that the defendants had negligently moved their cars, or had done something likely to frighten their horse, they would have been entitled to succeed, but they failed to prove this.

This case is not like Stott v. Grand Trunk R. W. Co., 24 C. P. 347, where there was evidence of a wilful act in blowing the whistle, nor is it like Manchester R. W. Co. v. Fullerton, 14 C. B. N. S., where the company unnecessarily blew off steam from the mud-cocks. In both these cases there was