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HON. MR. JUSTICE SUTHERLAND JUNE 12TH, 1912.

STRONG v. CROWN LIFE.
(AND THREE OTHER ACTIONS.)

3 O. W. N. 1377.

Judgment—Erroneous Recital in Judgment Settled and Entered—Motion to Vary—After Hearing of Appeal—Consolidation of Actions.

Application by defendants to strike out of formal judgment of trial Judge as settled in certain actions which had been consolidated after a great part of the evidence had been taken, a declaration that defendants had been given an opportunity to tender further evidence in the consolidated actions and had elected not to do so. Since the issuance of the order, 19 O. W. R. 901; 3 O. W. N. 481; 1 D. L. R. 111, the defendants had appealed to the Court of Appeal which had reserved judgment.

SUTHERLAND, J., refused to make any order under the circumstances.

F. E. Hodgins, K.C., for the defendants' application.

N. W. Rowell, K.C., and George Kerr, for the plaintiffs, contra.

HON. MR. JUSTICE SUTHERLAND:—Prior to the date when I handed out my written judgment herein an application was made on the part of the plaintiff for an order to consolidate each of the original actions herein with others in which the writs of summons for similar claims had been issued since the trial.

The point involved was whether the original actions were brought prematurely, and if so, what course it was proper in the circumstances to pursue under sec. 172 of the Insurance Act.

When counsel were present before me by appointment, I mentioned that if I made an order of consolidation the evidence already in would be treated as taken in the consoli-

dated actions, and if defendants desired, they could put in further evidence with reference to the matter of the amendments which plaintiffs could answer, if desired. Thereupon written arguments were put in by counsel for and against the application for consolidation.

No intimation being given to me in the argument of counsel for defendants that if the order for consolidation were made further evidence would be offered, I assumed that it was not intended to offer any. I made no further or formal direction "That the defendants be at liberty, if they so elected, to tender further evidence in the consolidated action in support of their defence," and the defendants did not formally elect "not to tender further evidence."

I accordingly proceeded to dispose of the matters and handed out my written judgment on or about the 2nd January, 1912. Shortly after doing so I was applied to on the part of the plaintiff for an appointment to consider and determine the question of whether interest should or should not be allowed on the judgment. I intimated to counsel that I would not be disposed to allow such interest, and he thereupon stated that an appointment would not be necessary. A formal judgment was thereafter settled and signed on the 17th January, 1912.

The matter was not again called to my attention until a few days ago when the defendants asked for and obtained from me an appointment for the purpose of making an application to strike out of the formal judgment as settled, the following words appearing therein: "This Court having been pleased to further direct that the defendants be at liberty, if they so elect, to tender further evidence in the consolidated action in support of their defence, and the defendants having elected not to tender further evidence."

Upon the application I was informed that meantime an appeal from my judgment had been taken to the Court of Appeal, proceeded with and argued, and judgment in connection therewith is pending.

Under these circumstances I do not think I should now make any order.

HON. SIR WM. MULOCK, C.J.Ex.D. JUNE 13TH, 1912.

STRANO v. MUTUAL LIFE ASSURANCE COMPANY.

3 O. W. N. 1372.

Insurance—Life—Application Fraudulent — Insured Suffering from Tuberculosis—Knowledge and Participation of Fraud by Beneficiary.

Action by beneficiary under a policy of insurance on his wife's life to recover $5,000, the amount of the policy. Deceased made application for the policy on Sept. 29th, 1910, stating that her health was good and that she enjoyed good health. The fact was that she had been in poor health from childhood, had suffered at various times from pneumonia, pleurisy and bronchitis, and that an attack of pneumonia in June, 1910, had brought on tuberculosis of the lungs from which she died in February, 1911. The evidence also indicated that both plaintiff and his wife were aware, at the time of the application that she was suffering from tuberculosis.

MULOCK, C.J.ExD., *held*, that the untrue statements of deceased voided the policy but that in any case plaintiff was precluded from recovery, being a party to the misrepresentation and concealment practised.

George v. *Provincial Provident Institution*, 28 S. C. R. 544, and *Von Linderlaugh* v. *Desborough*, 3 M. & Ry. 45, followed.

Action dismissed with costs.

An action brought by Domenico Strano, husband of Margaret D. Strano, to recover $5,000 under a policy of insurance effected on Mrs. Strano's life for his benefit.

W. A. Henderson, for the plaintiff.

G. H. Watson, K.C., and A. Miller, for the defendants.

HON. SIR WM. MULOCK, C.J.Ex.D.:—The application for the insurance was made by her on 29th August, 1910, and on the same day she underwent a medical examination and answered the questions upon which the examiner made his report to the company.

The policy was issued on 30th September, 1910.

On 3rd February, 1911, Mrs. Strano died of tuberculosis.

The application for the policy contained the following declaration by the deceased: "I, the applicant for the above assurance, hereby declare that to the best of my knowledge, information and belief, my health is good, my mind sound and my habits temperate; so that I usually enjoy good health and do not practice any habit or habits that tend to impair my health or shorten my life. That the statements made above are respectively full, complete, and true, and I agree that such statements with this declaration and any

statements made or to be made to the company's examining physician shall form the basis for the contract for such assurance, and if there be therein any untruth or suppression of facts material to the contract the policy shall be void and any premiums paid thereon forfeited."

The defence was that at the time of such application the applicant's health to her knowledge was not good, nor did she usually enjoy good health, in that at the time and for sometime previously thereto she had been suffering from and was affected by tuberculosis from which she afterwards died; that the statement that she usually enjoyed good health was untrue in that she was subject to and had at different times pneumonia, pleurisy and bronchitis, and that in June, 1910, she had an attack of pneumonia which affected her lungs and resulted in consumption from which she died.

In the examination of the deceased by the defendants' medical examiner, in connection with the application, the following questions were asked and answers given: Q. "Have you now or have you ever had any disease or disorder of the throat or lungs?" A. "Pneumonia one year ago, laid up ten days: fully recovered. No cough following. Has also had occasional attacks of bronchitis (mild)." Defendants said that this answer was untrue in that she had not fully recovered and did not disclose the fact that she had a serious attack of pneumonia in June, 1910.

Defendants further said that on the occasion of the examination in question the deceased was asked: "When were you last attended by a physician or when did you consult one, and for what disease?" She answered: "Cold, four weeks; cleared up in three or four days. Attended by Dr. Soday," and was further asked: "Are you now in perfect health? to which she answered "Yes." Defendants said that these answers were untrue in that at the time of such examination she was not in perfect health and that the disease for which she was being attended by Dr. Soday was tuberculosis, from which she never recovered.

Defendants said that such mis-statements and suppression of facts were material to the risk, and should have been made known to defendants upon the negotiation for the policy, and that by reason of such mis-statements and suppression of facts the policy was void.

Defendants further said that they were induced to make the policy by the fraud of plaintiff; that at the time of the application he well knew the state of his wife's health, that

she was affected at the time with tuberculosis, and that he procured her to make the application for his benefit, and for such purpose and in order to secure the issue of the policy to misrepresent the actual state of her health and to represent falsely that she was in perfect health, with intent to defraud the defendants of the insurance moneys.

(Here His Lordship set out 5 pages of evidence.)

In my opinion the evidence shews beyond reasonable doubt that the deceased was suffering from tuberculosis when Dr. Soday was called in in June, 1910, and when on the 29th August, 1910, she signed the application in question and gave answers to the company's examiner. According to her statement to Mr. McIntyre on the 5th November, 1910, she had been unhealthy from childhood up. She was afflicted with a cough during Miss McIntyre's three weeks' visit in June, 1910, and it shewed no improvement when Miss McIntyre left. Her state of health caused her to pass much of her time in bed. Her language and demeanour to Dr. Soday convinced him that she fully realised the nature of her disease; and it was impossible for her when signing the application and making the answers in question, to have believed that she was then enjoying good health or that her health was good. To her own knowledge she did not usually enjoy good health, and at the time of the application it was not good. Her statement that she was then in perfect, meaning thereby, in reasonably good health was in fact, untrue.

Thus she made material misstatements and concealed material facts from the company as to the true condition of her health. It was material that the company should have known the facts, and the misrepresentation and suppression of facts, thus found render the policy void. *George* v. *Provincial Provident Institution,* 28 S. C. R. 544; *Von Lindenlaugh* v. *Desborough,* 3 M. & Ry. 45.

I further find that the plaintiff, the beneficiary under the policy, was a party to the misrepresentations and concealments on the part of the deceased. In June, 1910, he was given to understand by Dr. Soday that his wife was then suffering from consumption, and was in such an advanced state that she would not live longer than nine months. He knew this when he took her to the insurance agent to effect the policy of insurance in question and he paid the premium for that policy with his own funds, knowing it was being effected for his benefit.

In the witness-box he pretended that the idea of effecting insurance on the wife's life originated with her and was carried out at her instance. I am unable to accept his testimony on the point. Whether or not the moral guilt attaches to both of them in equal degree is immaterial. The husband is here claiming the benefit of the policy and is affected by his own conduct as well as hers. He knew when the policy was effected that his wife was dying of consumption, and he must have been aware that if that fact were known by the company the policy would not have been issued. He allowed them to remain in ignorance of the facts and paid the premium, thereby identifying himself with the transaction. His own conduct is, I consider, sufficient to void the policy. He was a party to the fraud which procured its being issued and cannot be allowed to profit by his own wrong. I, therefore, think this action should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND. JUNE 13TH, 1912.

FEE ET AL. v. MACDONALD MFG. CO. ET AL.

3 O. W. N. 1378.

Charge on Land—Registration—Cloud on Title—Action for Removal from Registry—Damages.

Action for declaration that a certain agreement registered by the defendant company was a cloud on the title of the plaintiff, and for $200 damages for defendant company's refusal to release. Plaintiff had purchased the lands in question from one Lang, had registered the purchase agreement and partially carried out the purchase and stood ready to complete. Defendant company after the registration of this purchase agreement, sold Lang some machinery and in the agreement for its purchase, Lang purported to charge the lands in question, which he described as belonging to him, unencumbered. When Lang made default in payment, the defendant company, without searching the register, registered their agreement and refused to remove it at the plaintiff's request, causing him considerable trouble and inconvenience in respect of a loan which he was procuring on the lands.

SUTHERLAND, J., granted the declaration sought and fixed the damages at $50, either party to be at liberty to take a reference at his own risk. Costs of action to plaintiff.

A. E. H. Creswicke, K.C., for the plaintiff and defendant Lang.

J. J. Coughlin, for the defendant company.

HON. MR. JUSTICE SUTHERLAND:—David Lang in his lifetime was owner of the south half of lot No. 3 in the seventh concession of the township of Collingwood in the

county of Grey, and dies seized thereof on or about the 7th May, 1901, leaving his last will dated May 4th, 1901, containing the following provision:—

"I bequeath unto my son Henry Lang my farm, composed of 100 acres, being the south half of lot No. 3 in the 7 con. of Collingwood, together with all stock and implements, with the exceptions of one cow, which goes to his mother, and he shall remain under his mother's control, stock and implements also, until he comes 21 years of age. Henry is to keep his mother her natural life on conditions that she remains unmarried, but if she re-marries those conditions shall cease, his mother shall remain on the place if so minded and remains unmarried, it shall be her home. My son Henry is to pay $100 per year on the mortgage on farm until paid off."

At the testator's death the land was incumbered by a mortgage to the Canada Permanent Mortgage Corporation.

On 1st June, 1905, a written contract was entered into whereby the said Henry Lang agreed to sell to plaintiff, William George Ree, the said land for $4,200 payable as follows: $500 cash to be paid on the execution of the agreement, the assumption of the mortgage to the Canada Permanent Mortgage Corporation at $930.75 and interest thereon from 1st October, 1905, and balance of purchase-money to be paid on 1st April, 1906.

Margaret Lang, the widow of the testator, was made a party to the agreement, and it contained the following clause referring to her:—

"The party of the third part hereby agrees to release her claim on the said lands on the payment to her by the purchaser of the sum of $1,000 part of the said purchase price."

In the agreement plaintiff Fee covenanted to pay said $2,400 and interest. The agreement was registered on 10th July, 1905. On 12th June, 1905, a deed was drawn from Henry Lang and Margaret Lang to plaintiff Fee of the land in question. The affidavit of execution was apparently sworn on 3rd August, 1905.

Fee had paid to Henry Lang $25 at the time of making the agreement, and further $150 and $325 to his solicitors on 3rd and 12th June respectively. It is said there was due at this time on the mortgage to the Canada Permanent $1,100 or thereabouts. The solicitors out of the sums so received by them paid to the Canada Permanent $146.75, said to be the amount of the then arrears. The purchaser was to assume a balance of principal money on said mortgage of $930.75 with

interest from the 1st October, 1905, and it was the duty of Lang out of his $500 to reduce it down to that amount, as the mother was to receive the balance, $1,000.

By 2nd August, 1905, as appears by written statement of said solicitors put in at the trial, all of said portion of said $500 received by them had been paid out on behalf of Henry Lang or applied on costs due from him to them. In fact they had paid out in this way a trifle more than the $475 they had received. Included in the amounts paid by them was one item of $65.65, under date of the 3rd August, paid to Margaret Lang.

Henry Lang bought, on 10th August, 1905, from the defendant company under written contract a thresher and stacker and certain attachments, etc., for $550 and agreed to pay that sum as follows: $185 on 1st January in each of the years, 1906, 7 and 8. The contract contained the following statement:—

"I own ½ interest lot No. 3 concession No. 7, township of Collingwood, County of Grey, Province of Ontario, 100 acres, valued at $2,600, total incumbrance nothing."

It also contains this clause:—

"Each of the undersigned purchasers hereby certifies that he is the owner with a good title of the real and personal property described below opposite his name, that such property is valued fairly and is unencumbered as hereunder shewn and no more, and each does hereby grant and charge his said property to said company as security for payment of the full indebtedness of the purchasers hereunder, provided that the said company on default of payment for one month may, on giving one month's notice enter on and lease or sell the said lands and other property. This agreement is made in pursuance of ch. 126 of R. S. O. (1897)."

Defendant company said that Henry Lang not having paid the instalment due to them on 1st January, 1906, under his said agreement, they began to make enquiries about him, and becoming apprehensive, on 14th April, 1906, registered their agreement.

Plaintiff Fee had applied to the Ontario Loan & Debenture Co. for a loan to enable him to pay the balance of $1,000 payable by him under his agreement to purchase, and on 23rd April, 1906, executed a mortgage on the land in question to said company for $1,800 and interest as therein provided. The deed to Fee already referred to, which had not

meantime been, was registered on 26th April, 1906, as No. 11677.

The solicitors for the loan company on searching the title and discovering that the agreement between Henry Lang and the defendant company had been registered, paid over to Fee's solicitors $600 of their proposed loan, but declined to pay the balance until said agreement was arranged in some way so as not to be a cloud upon his title. It appears that by this time Fee had also paid $100 on account of the Canada Permanent mortgage.

Correspondence then ensued between the solicitors for plaintiff Fee and defendant company about the matter, the former contending that the registration of defendant company's agreement with Henry Lang was a cloud on plaintiff's title and should be removed, the latter contending that the moneys payable under the agreement for sale of the land made between Henry Lang and plaintiff Fee should not be paid over until the claim of defendant company was satisfied.

Samuel Eagles, one of the executors of deceased testator went from Collingwood to Stratford to interview defendant company, and took with him a quit-claim deed from it to plaintiff Fee for execution by the company. In the quit-claim deed the following clause was inserted: "And it is hereby agreed by and between the parties hereto that the giving of this release shall not in any way prejudice the claim of the said company against the said Henry Lang for any moneys that may be due to them from the said Henry Lang in respect to a certain agreement made between the said Henry Lang and the parties hereto of the first party, dated 10th day of August, 1905, and registered in the Registry Office for the north riding of the county of Grey on the 14th day of April, 1906, as No. 11668, against the aforesaid lands."

In a letter from the solicitors of plaintiff Fee to the solicitors for defendant company dated June 19th, 1906, they wrote as follows:—

"It would facilitate matters if you would have your clients release or postpone whatever claim they may have against the lands in question as against the purchaser W. G. Fee and against the Ontario Loan and Debenture Company. This will enable us to close out the deal. If this is done we will retain the purchase-money in our hands for a certain length of time to enable you to decide whether or not you will take proceeding on behalf of your clients to have it declared whether they are entitled to the same or a portion thereof."

As defendant company apparently declined to adopt this suggestion, the writ in this action was finally issued on 28th March, 1912.

Plaintiffs in their statement of claim ask a declaration that the agreement registered by defendant company upon the land in question is a cloud upon the title of plaintiff Fee and that it be ordered to be discharged and a further declaration that plaintiff Margaret Lang, who in the meantime has been married again to a man named Clunis, is entitled to the balance of the purchase-money in the hands of plaintiff Fee. Plaintiffs also claim as against defendant company damages for loss and inconvenience sustained by its refusal to vacate the said agreements.

Before the registration by defendant company of their agreement with Henry Lang, the agreement for the purchase of the land by plaintiff Fee had been registered and became thereby notice to defendant company. It is apparent that by 10th August, 1905, plaintiff Fee had paid the cash payment of $500 to defendant Henry Lang or his solicitors and that the whole thereof had gone to Henry Lang or been paid out on his account. Under the terms of the agreement it is, I think, plain that the balance of $1,000 was to be payable by the purchaser to Margaret Lang. She and Henry Lang had apparently agreed before selling the land that that amount should go to her in full of her claim under the will of the testator with respect to said land. She was a young woman of about 41 or 42 years of age at that time, and Henry Lang might well assume that she had a fairly long lease of life. Henry Lang at the time appeared to have been somewhat in financial difficulties and was apparently anxious to sell the land so as to pay some of these debts. If defendant company at the time they sold their goods to the defendant Henry Lang and assumed to take a lien on the property in question through him had searched in the Registry Office they would have found the agreement for sale already registered, and of they had applied to the parties interested at that time would have learned that Henry Lang had parted with his interest therein and had been paid his share of the purchase-money.

On the whole, however, it seems to be fairly well established that at the time Henry Lang purchased the machinery from defendant company, he no longer had any interest in the land in question, on which he could give any lien to defendant company. I think there must be judgment for plain-

tiffs as asked, declaring that the agreement registered by defendant company is a cloud upon the title and must be removed. There will be a declaration accordingly.

The attitude of defendant company seems to have been an obstinate one in the matter, and the course they pursued must have occasioned plaintiffs some loss and expense. It is difficult to say from any evidence offered at trial what would be an appropriate amount to allow to them for this. I have come to the conclusion that perhaps under all the circumstances $50 would be fair. If either party is dissatisfied with this, a reference may be had at the risk of such party. Plaintiffs will have their costs of suit as against defendant company.

HON. MR. JUSTICE BRITTON. JUNE 14TH, 1912.

CANADIAN ELECTRIC CO. v. PERTH.

3 O. W. N.

Municipal Corporations — Contracts — Supply of Water to Municipality—Action to Recover for.

Action for $3,000 and interest for use of hydrants in supplying defendant corporation with water, under an agreement dated Feb. 1st, 1897, of which plaintiffs were assignees. Defence set up was that plaintiffs had failed to carry out their part of the contract, and defendants counterclaimed in damages for such failure.

BRITTON, J., gave judgment in favour of plaintiffs for $3,527.50 with costs, and dismissed defendant's counterclaim, with costs.

An action to recover $3,000 and interest for the use of hydrants in supplying defendants with water, for the years 1905, 1906, and 1907.

Two other actions are pending—No. 2 is for the use of hydrants for the years 1908, 1909, and 1910. No. 3 is for the use of hydrants for 1911.

The three actions were not consolidated, but by consent were tried together.

The actions were brought—and the defence was raised under an agreement entered into between the defendant corporation, and one Alphonse Charlebois, dated 1st February, 1897. On 14th June, 1898, Charlebois assigned his agreement to Perth Water Works Co. Ltd. Then, to the knowledge of defendants and apparently with their sanction and approval, plaintiff company was formed for the express "purpose of supplying the municipality of the town of Perth with

electricity for light, heat, and power, and with a water supply for domestic, fire, and other purposes."

On 14th June, 1898, plaintiff company bought the assets of the Perth Water Works Co. Ltd.

The agreement with Charlebois, the assignment by Charlebois to the Perth Water Works Co. Ltd., and the sale by the latter company to plaintiffs, were all ratified and confirmed by 62 Vict. (O) ch. 70—where in schedules A and B the agreement and assignments are set out in full. This Act was assented to 1st April, 1899.

G. H. Watson, K.C., and J. A. Stewart, for the plaintiffs.

G. F. Henderson, K.C., and J. A. Hutchinson, K.C., for the defendants.

HON. MR. JUSTICE BRITTON:—The plaintiffs have established the use by the defendants of these 40 hydrants. By the agreement the price was fixed at $35 for the first 5 years —for each hydrant for each year—and $25 for each year thereafter—and the amount became due and payable on the 15th December each year for the then current year.

The defence is that the plaintiffs have utterly failed to comply with the agreement mentioned. I need not consider this long and carefully prepared agreement other than as to the clause upon which defendants rely.

7. The company will construct, complete, and maintain for 25 years, a first-class system of water works . . . water to be taken from Tay river . . . intake pipe to be sufficient, etc., etc.

8. The system of water works shall be such as will give a first-class service for the population of Perth, and as will give for fire purposes, such a pressure as will at all times during the said franchise satisfy the underwriters association for class C. in the underwriters classification.

11. Describes what the pumping power, pumps and all accessories shall be and what pressure shall be maintained, etc.

29. By this the plaintiffs or their predecessors are required to complete the system in the month of November, 1897, or in case of default—"except for stated reasons which do not bear upon this case" the powers and authorities and privileges granted to the plaintiffs should be forfeited.

Dealing with 29, I may say that there was a special remedy provided—namely the payment of $2,000 as liquidated damages—in addition to forfeiture of privileges, etc.

The defendants, however, do not now rely upon anything in clause 29—and by a formal agreement between the parties—made in June, 1911 (by law passed 19th June, 1911), no question of forfeiture is to be raised.

The works were not completed within the time, but Mr. Henderson stated that time was extended.

The agreement between defendants and Mr. Charlebois, was duly authorized by by-law No. 745, passed 12th December, 1896.

The object of the defendants was not only to get sufficient fire protection, but all the other benefits resulting from the establishment of a system of water works, which would be reasonably sufficient for the town of Perth.

The agreement with Charlebois was made on the 1st February, 1897. On the 27th March, 1897, a resolution was adopted by the council of Perth, authorizing the water-works committee "to engage an engineer to superintend on behalf of the corporation, the putting in of a system of water works." In pursuance of that resolution C. H. Keefer was appointed for the town. Mr. Keefer made his report on the 18th July, 1898, and called special attention to certain things required—and upon these being furnished and complete, the work would be satisfactory and should be accepted as sufficient. There was a man resident near the works under Mr. Keefer, who had supervision of the work as it progressed and Mr. Keefer relied upon him to see that the work—which was reported by Mr. Keefer as required—was supplied.

On the 10th March, 1899, W. A. Allen, the secretary of the company, made a declaration of cost of the works pursuant to sec. 26 of the agreement. The entire cost, exclusive of about $5,000 then in dispute was $73,832.40. Then the defendants proceeded to settle as to certain items in dispute—the amount was fixed at $600, which the defendants agreed to accept, and passed the resolution (exhibit 10) which is as follows:—

"That this council accept from the Perth Water Works Company the sum of $600, in full satisfaction of all claims this corporation may have against the said company in respect to restoring the streets of the town as required by the water works by-law—and that upon payment of said sum of $600, the hydrant rental according to the terms of the water works by-law, shall be payable to the said company from the 1st of May, 1898, and in the event of any breaks in the

future or any future disturbance of the streets of the town, it is a condition of this resolution, that the said company will restore the said streets to the condition in which they may be previous to such further disturbance."

The defendants were paid this amount on the 31st May, 1898. All went well—excepting minor complaints and bickerings until the end of 1904. The defendants paid to the plaintiffs in December, 1898, $959.83, including with other items, on both sides of the account, the hydrant rent as an item payable by the town.

December	1899	$1,448 88
"	1900	1,400 00
"	1901	1,400 00
"	1902	1,400 00
"	1903	1,133 34
"	1904	1,000 00

By clause 21 of the agreement the rate was $35 per year for each hydrant—for first 5 years and $25 for each year thereafter for each hydrant.

I am of opinion upon the evidence that the contract, as to construction of the water works system was reasonably complied with. I accept the evidence of Mr. Keefer on that branch of the case.

In addition to his report of 18th July, 1898, he visited the property on the 4th October, 1910, and states that he found the works in a satisfactory condition, and that the recommendations he had made on their completion in 1898, had been carried out. He said further—that as a result of that examination on—that is 4th October, 1910—he found that the water works system was in better condition than it was on completion of the work in 1898.

The other evidence is in favour of the plaintiffs' contention as to sustantial compliance with the contract.

The evidence is overwhelming that there was an acceptance of the work. The work did not belong to the town of course, and there was no acceptance of it in the sense of acceptance as owners; but there was an acceptance of it as a compliance with the contract as to building, pumps, engines, and all the plant, and apparatus necessary to do the work required of plaintiffs.

Then the defendants say—that whatever may have been the condition in prior years it was such on the 9th May, 1905, that they had the right to complain—and to deduct $25 for each day plaintiffs were in default after the expira-

tion of three days from the giving of notice under clause 25. The defendants hardly dispute that the plaintiffs have, recently, as defendants say, so improved the plant and work of maintenance and operation, as reasonably to comply with the agreement, but the contention is that the default continued so long as at least to completely wipe out plaintiffs' claim as sued for.

The defendants counterclaim for damages generally and for the *per diem* liquidated damages as above stated. What the plaintiffs are required to do, before becoming liable to what is in fact, a penalty, called liquidated damages in clause 25, is not the same as is called for by the contract in clauses 7, 8, and 11. The defendants have not the right to serve the notice and deduct the $25 for each day, unless the plaintiffs make default in so maintaining the system as to give the best results for fire purposes.

That clause must be interpreted, having regard to plant satisfactory at time of installation, having regard to the population of the town, the size—particularly the height—of buildings, the fire brigade, the length and strength of hose supplied by the town, and other conditions disclosed in the evidence. An ex-chief of the Perth fire brigade—thought that as early as 1903, the working of the pumps began to go bad—no complaint to the company was made. In the early part of 1905 complaint was made, and it was mainly in regard to alleged want of pressure and want of water at fires.

Prior to 2nd May, 1905, the fire committee of the council of Perth, employed Ross and Holgate, consulting and supervising engineers of Montreal. They handed the matter to a Mr. Henry, who visited Perth and made an inspection on 2nd May, 1905. Henry reported to Ross and Holgate and they in turn reported to the defendants. The report states that he (Henry) "witnessed test of water works system, made in order to ascertain whether the Canadian Electric and Water Power Company were in a position to give a fire service to the town as required by the contract; more particularly with reference to clauses 9 and 11 of the contract."

The report does not mention specifically clause 25, but, after giving a full description of the plant, deals with "pressure." A pressure was obtained as high as 140 lbs. at station, and 100 lbs. registered on town hall hydrant. The report, which on the whole is unfavourable to the plaintiffs on the points considered, sums up as follows:—

"From the results obtained from this test, and from inspection made of this plant, we consider that under present conditions of operation, it is not able to maintain service stipulated in contract, or to qualify for requirements of fire underwriters."

Clause 8 requires that the system will give, for fire purposes, such a pressure as will at all times during the franchise satisfy the Underwriters Association for class C. in the Underwriters Insurance Classification.

Clause 11, while it mentions pressure and other things, stipulates that it is to meet all the requirements of the Underwriters Association for class C. It was not shewn that any such organization as the Underwriters Association had any class C. in 1905—or since. Nothing in this action can turn upon the system not being sufficient for the alleged requirements of such an association.

Mr. Norman Smith, an engineer in the employ of Ross and Holgate, made an inspection in August, 1908. He states that he made it to ascertain if the conditions imposed by clause 11 had been met. This report states what was wanting, and made suggestions as to improvements, but did not deal with the matter as to clause 25. The evidence given on behalf of plaintiffs by Mr. Keefer, by Mr. Smith, the manager, by Mr. Shanley, Mr. S. George, and Mr. Brown, is weighty in favour of the system being reasonably sufficient to give the best results for fire purposes. Brown is not an engineer but knows a good deal about pumps. Then as to pressure, the Chief of the fire brigade did not ask for greater pressure than from 75 to 80 lbs. The best work was done, considering all things, if only such a pressure was maintained.

The evidence as to insufficiency of the system and of the different fires was not very satisfactory—Perth had been fortunate in not having many fires since the end of 1903, but evidence was given as to several, and I am not able to say, speaking of any one fire, or considering the evidence as cumulative and applying it to all, that it establishes, or goes any considerable way towards establishing, that the system was not such as to give the best results for fire purposes. Good work at fires depends not only upon water and pumping, but upon the length and quality and handling of hose. The expenditure by defendants, down to 1911, for hose, would indicate that the town allowed the supply to run down. Leaky joints in the mains were complained of by defendants,

and that condition was attributed to the mains being improperly laid. The evidence on that point was weak, and the objection loses its force when made only after seven years service.

Tests were made as to pressure, without previous notice to plaintiffs—but to know the value of the result of such tests, all conditions as to mains—hose hydrants must be accurately known. On one occasion a valve at one hydrant was only partly open. On another occasion the valve in the coupling on the hose was partly closed. A condition at one minute —then changed—of course would not necessarily establish a general condition.

It is somewhat surprising that although there was the denial of liability on the part of the defendants, by their notice served on 9th May, 1905, the plaintiffs took no action to enforce their claim until the 8th December, 1908, when the writ in this action, No. 1, was issued, and the defendants took no action by applying for mandamus or by action for specific performance or otherwise. The defendants continued to use the water supplied by plaintiffs for municipal purposes and for fires—defective as they claimed the service to be—and defendants levied for amount of plaintiffs' claim for at least three years.

The fire committee was authorized by resolution of the council to take action in addition to serving notice—but the committee, apparently, did not deem further action than stopping payment necessary.

I find that the clauses in the contract as to maintaining the water system, create conditions subsequent to the acceptance by the defendants of the construction and installation work, and the covenant of the plaintiffs is a continuing one, protecting the town from payment of hydrant rents, if the plaintiffs make default under clause 25, according to the proper construction of that clause.

I find that the plaintiffs were not, on the 9th day of May, 1905, in default in maintaining the system so as to give reasonably the best results for fire purposes. I find that there was, on the part of the plaintiffs, a substantial compliance with the contract.

The plaintiffs are entitled to recover. There seems no reason why the plaintiffs refrained so long from taking action, and in any view of the case, the matter should have been

brought to a conclusion sooner than it was. I think interest should be allowed at 5% per annum in No. 1, from the date of issuing the writ.

3 years, 1905, 1906, and 1907	$3,000 00
Interest on $3,000 at 5% per annum from 8th December, 1908, 3 years, 6 months, and 6 days..	527 50
Making in all, in action No. 1	$3,527 50

for which there will be judgment for the plaintiffs.

That part of the statement of defence asking for forfeiture of plaintiffs' rights and franchise will be struck out pursuant to agreement, and the residue of the counterclaim of the defendants as to damages will be dismissed with costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JUNE 4TH, 1912.

TORONTO v. WHEELER.

3 O. W. N.

Municipal Corporations — By-law — Building Restrictions—Motion to Restrain Erection of Garage.

By section 10 of the Municipal Act (1912), 2 Geo. V., c. 40, assented to April 16th, 1912, cities are given the power "to prohibit, regulate and control the location on certain streets to be named in the by-law, of garages to be used for hire or gain. On May 13th, 1912, the plaintiff corporation passed a by-law in the terms of the statute. This was a motion for an injunction turned by consent into a motion for judgment to restrain the defendant from erecting a garage on a street named in the by-law. Prior to the passage of the by-law, the defendant had purchased the land intending to erect thereon a garage, had filed his plans with the city, and received from it a building permit, had let his contracts and commenced excavation.

MIDDLETON, J., *held*, that the statute could not be construed as to take away vested rights, and that the defendant, having proceeded in good faith on the strength of the building permit, should not be restrained therefrom.

Semble, that word "location" in the statute does not embrace "erection and use."

Motion dismissed with costs.

Motion by the city for an injunction restraining the erection by the defendant of a building intended to be erected and used as a garage for hire or gain. By consent of counsel the motion was turned into a motion for judgment in the action.

H. Howitt, for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—By sec. 10 of the Municipal Act (1912), 2 Geo. V., ch. 40, sec. 541a of the Municipal Act as amended by 4 Edw. VII., ch. 22, sec. 19, was further amended by conferring upon cities the power "to prohibit, regulate, and control the location on certain streets, to be named in the by-law of . . . garages to be used for hire or gain." This statute was assented to on the 16th of April.

A by-law in the terms of the statute was passed on the 13th of May. Prior to the coming in force of the statute the defendant, desiring to erect a garage upon one of the streets subsequently included in the by-law, entered into treaty with the owner of the lands in question, and, contemporaneously, plans of his proposed building were prepared and submitted to the City Architect for his approval, under the requirements of the building by-law. On the 17th April the defendant received a building-permit, authorising the construction of the building in accordance with the plans and specifications submitted. He thereupon completed his purchase of the land and proceeded to make contracts for the erection of the buildings, and at the present time has the excavation well under way.

The sole question is whether the municipality can at this stage interfere with what was sanctioned by the permit issued on the 17th of April.

With reference to legislation of this kind, it is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment.

The language here used is by no means free from difficulty and ambiguity. What is prohibited is not, as in sec. (b), the "location, erection, and use of buildings," for the objectionable purpose, but the "location" only; and I think it may fairly be said that what had been done previous to the enactment of the by-law in question constituted a complete location of the garage. The context indicates that "location" is used in some sense differing from "erection and use."

It would be manifestly most unfair to so construe the statute as to leave the defendant in the position in which he would find himself, if on the faith of the municipal assent indicated by the building permit, he had purchased the lands and entered into contracts for the erection of his building,

and was then enjoined from the completion of the work already entered into upon the ground.

For this reason, I think, the action, fails, and must be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. JUNE 14TH, 1912.

TORONTO v. FOSS.

3 O. W. N. .

Municipal Corporation — By-laws — Building Restrictions — Using Building for Store — Injunction to Restrain — Granted — 6 Months' Stay.

Motion by plaintiffs for an injunction restraining defendant from using certain premises on Avenue road, as a "store or manufactory" contrary to the provisions of a by-law of the plaintiff. Defendant carried on business as a ladies' tailor in his residence, making up suits from stock or from suit lengths, purchased from retail stores, to suit his customers' taste. The premises, formerly used exclusively as a residence, were not structurally altered, and defendant's few assistants used a room in the building as a sewing-room.

MIDDLETON, J., *held*, defendant's premises were being used as a "store," but not a "manufactory."

Injunction granted, six months' stay. No costs of action.

Motion for an injunction restraining the use by the defendant of certain premises upon Avenue road, Toronto, as a ladies' tailoring establishment. By consent of counsel, the motion was turned into a motion for judgment.

C. M. Colquhoun, for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—Section 541a of the Municipal Act, as amended by 4 Edw. VII., ch. 22, sec. 19, empowers the city "to prevent, regulate, and control the location, erection, and use of buildings for laundries, butcher's shops, stores, and manufactories."

A by-law was passed on the 4th January, 1905, prohibiting the location of stores and manufactories upon Avenue road.

The sole question is whether the defendant is using the house in question as a store or manufactory within the meaning of this by-law.

In January last the defendant rented the premises in question, which theretofore had been constructed for and

used as a residence. He therein carries on a ladies tailoring business, in the course of which he purchases suit lengths of cloth, sells them if approved by customers, and makes them into suits. If the goods produced do not meet the taste of the customers, he purchases goods from retail stores and makes these up. He also makes up goods brought in to him by his customers.

The building has not been structurally altered, and is used by the defendant as his residence as well as for the purposes of his business. Those employed by him to assist him in his business use a room in the building as a sewing-room.

I do not think that this use of the building constitutes it a manufactory within the meaning of the statute. It is true that the word "manufactory" or "factory" has a dictionary meaning wide enough to cover the case; but I think that the word as used by the Legislature contemplates operations on a larger scale than this, and that the use of a room in a dwelling-house by three or four persons as a sewing-room falls short of what is required.

I am, however, of opinion that what is done does constitute the premises a "store" within the meaning of the statute.

Counsel agreed upon the argument that the word "store" was here used as equivalent to the word "shop." It is a place where goods and merchandise are bought and sold; and when the object of the statute is borne in mind, I think, this is the thing which is intended to be prohibited. Slightly modified meanings are given to the word in different contexts. The cases may be found collected in Words and Phrases Judicially Defined, vol. 7, p. 6672. I do not see that any good purpose would be served by reviewing and attempting to classify cases here.

It is said that the city has not enforced the by-law in similar cases. I do not think that this really affects the matter; but the circumstances I think justify my direction that the injunction shall not become operative for a period of six months, so as to enable the defendant to make other arrangements.

Judgment will, therefore, be for the injunction, with the stay indicated. I do not think it a case in which costs should be awarded.

HON. MR. JUSTICE TEETZEL. JUNE 14TH, 1912.

BINKLEY v. STEWART.

3 O. W. N.

Insurance—Fire—Insurance Brokers—Failure to Effect Insurance—Action for Negligence.

Action by a storekeeper against insurance brokers for damages for negligence in not effecting an insurance on plaintiff's stock in violation of an alleged undertaking or agreement by defendants to effect such insurance.

TEETZEL, J., *held*, that upon the facts, the defendants were not guilty of negligence. Action dismissed with costs.

An action for damages charging the defendant with negligence in not affecting an insurance on plaintiff's stock in violation of an alleged undertaking or agreement by the defendant to effect such insurance.

On 10th July, 1911, the plaintiff applied to defendant, an incorporated company carrying on business as insurance agents at New Liskeard, for $1,000 insurance on his stock of goods in his store at Cochrane. The insurance was not effected and the stock was destroyed on July 11th.

The action was tried without a jury at Toronto, on March 4th and May 7th last.

C. H. Gamble, K.C., and F. L. Smiley, for the plaintiff.

R. McKay, K.C., and D. T. K. McEwen, for the defendant.

HON. MR. JUSTICE TEETZEL:—Upon the evidence I find the following additional facts (1) That the defendant did not unconditionally agree to place or effect the insurance; (2) that the defendant agreed only to submit an application for such insurance; (3) that the defendant did submit such application, and in connection therewith was not guilty of any negligence; and (4) that it does not appear that the defendant had any authority from any insurance company to bind it by an interim receipt or otherwise in respect of property in Cochrane unless approved by the company.

Upon these facts the case is excluded from the application of such authorities as *Baxter* v. *Jones* (1903), 6 O. L. R. 360, and *Rudd* v. *Rice* (1911), 19 O. W. R. 747, cited by Mr. Gamble.

The action must be dismissed with costs. Thirty days' stay.

BOARD OF RAILWAY COMMISSIONERS.

NOVEMBER 25TH, 1911.

RIDDELL v. GRAND TRUNK Rw. CO.

13 Can. Ry. Cas. 216.

Railway—Farm Crossing—Cost of to be Paid by Railway Company —Railway Act, ss. 252, 253.

Applicant was owner of 72 acres, which was a sub-division of a larger farm, which had been provided with a farm crossing. DOM. RW. BD., ordered Grand Trunk Rw. Co. to construct a farm crossing for the applicant upon the dividing line between his land and that of his neighbour.

An application disposed of on the material filed with the Board the facts of which are fully set out in the judgment of MILLS, COMR.

MILLS, COMR:—Mr. Riddell has a farm of seventy-two acres, fifty acres north and twenty-five acres south of the Grand Trunk railway; and he has asked for a farm crossing over the railway.

There is no doubt that Mr. Riddell needs a crossing "for the proper enjoyment of his land on the north side of the railway;" and the language of the Railway Act regarding farm crossings (sections 252 and 253) is that

"Every company shall make crossings for persons across whose land the railway is carried, convenient and proper for the crossing of the railway for farm purposes," and that wherever the Board considers a farm crossing necessary, it may "order and direct how, when, where, by whom, and upon what terms and conditions such farm crossing shall be constructed and maintained."

It appears that when the Grand Trunk Railway was constructed (in 1854), the land in question, with half a lot immediately west thereof, was owned by Henry W. Bowen, and that the railway gave Mr. Bowen a crossing which he accepted as sufficient for his farm. Subsequently, however, 72 acres of Mr. Bowen's farm (the east half of the west half of lot 35) was sold two or three times; and it happened that the purchasers rented the 50 acres of it lying north of the railway to owners of adjoining land already provided with crossings; so no separate crossing for these 72 acres was necessary, until it was purchased by Mr. Riddell to be

worked as a separate farm; and the only peculiarity about it is that it is the result of a division of a larger farm which was originally provided with a crossing.

The practice of the Board regarding farm crossings required because of this division of larger farms into smaller ones, has not been uniform. Sometimes such a crossing has been made at the expense of the applicant farmer; sometimes the cost has been divided between the farmer and the railway company; and not unfrequently, especially in Eastern Ontario and the Province of Quebec, the entire cost has been imposed upon the railway company—the facts and circumstances, especially the size of the farms resulting from the division, being considered in each case.

The standard farm in central and western Ontario is 100 acres; the farms in portions of eastern Ontario and in the Province of Quebec are often much smaller; so if a 300-acre or a 200-acre farm, each served by only one farm crossing, is divided into 100-acre farms to be occupied and worked separately, it seems that, under section 252, the railway company should, at its own expense, provide a crossing for each of the resultant farms. There must, of course, be a limit to the installation of farm crossings resulting from the division of farm land; and I think that, generally speaking, the only plot of land which is entitled to a farm crossing at the expense of a railway company, is one which is occupied and worked separately as a farm for the support of a man and his family, whatever it may be.

In size, Mr. Riddell's farm is between the standard of Quebec and that of central and western Ontario: so it would appear that he is entitled to a separate crossing, wholly on his own land; but he has consented to accept a crossing on the line between him and his neighbour, Mr. Dicks.

Therefore, my opinion is that the Grand Trunk Railway Company should be directed to construct, not later than the 20th of April, 1912, a joint crossing on the line between the farms of Mr. Riddell and Mr. Dicks, as shewn on plan "A" prepared by the Chief Engineer of the Board,—using, as far as it may think proper, the material in the crossing on Mr. Dicks's farm, a few feet east of the dividing line between him and Mr. Riddell.

The ASSISTANT CHIEF COMMISSIONER concurred.

SUPREME COURT OF CANADA.

APRIL 9TH, 1910.

CROUCH v. PERE MARQUETTE Rw. CO.

13 Can. Ry. Cas. 247.

Railway Crossing—Accident at—Husband and Daughter Killed—No Sign Board—Evidence to Justify Jury's Findings—Railway Act, ss. 242, 243, 274.

Plaintiff, the widow of Samuel Crouch, brought action claiming unstated damages for the death of her husband and daughter, who were killed while driving across the defendants' line of railway about seven o'clock on evening of January 11th, 1908, through the alleged negligence of defendants. At the trial it was proved: (1) that defendants had omitted to place any signboard at the crossing; (2) excessive grade in highway approaching the crossing. The jury found the above to be negligence, and also found that defendants failed to give statutory signals and negatived contributory negligence.

TEETZEL, J., entered judgment for plaintiff for $1,200 damages, awarded by the jury.

DIVISIONAL COURT dismissed defendants' appeal.

COURT OF APPEAL *held*, 15 O. W. R. 694; 1 O. W. N. 637, that there was evidence which could not have been withdrawn from the jury, and dismissed defendants' appeal. MEREDITH, J.A., dissenting.

SUPREME COURT OF CANADA affirmed above judgments.

Per GIROUARD & IDINGTON, JJ., the absence of the signboard was the cause of the accident.

Per DUFF J.—The failure to give the statutory signals caused the accident.

Per DAVIES & ANGLIN, JJ. (*dissenting*).—As no one saw the accident, the proximate cause thereof was a guess or conjecture.

An appeal by the defendants from a judgment of the Court of Appeal for Ontario, 15 O. W. R. 694; 1 O. W. N. 637, affirming a judgment of Divisional Court affirming a judgment of HON. MR. JUSTICE TEETZEL, at the trial in favour of the plaintiff, and directing judgment to be entered for the plaintiff upon the findings of a jury.

The facts are fully set out by HON. SIR WM. MEREDITH, C.J.C.P., in delivering the judgment of the Divisional Court.

Stone, Gundy & Brackin, for the appellants.

L. J. Reycraft, for the respondent.

HON. SIR WM. MEREDITH, C.J.C.P. (24th September, 1909):—This is an appeal by the defendants from the judgment pronounced by Mr. Justice Teetzel on the 7th May last, after the trial of the action before him, sitting with a jury, on the 6th and 7th days of that month.

It is a crossing accident case in which a farmer by the name of Crouch was killed, and the action is brought to recover damages for his death, on the ground that it was due to the negligence of the appellant company.

Three acts of negligence were found by the jury, to which they attributed the accident. They found, first, that the signboard which the statute requires a railway company to erect at every place where the railway crosses a highway, for the purpose of indicating that the railway is there, was absent; it had been there, but for some reason had been removed. They found, also, that the grade of the highway leading up to the track was a heavier grade than by the statute the railway company was permitted to have. And that there was an omission to sound the whistle or to ring the bell, as required by the Railway Act.

With regard to the second ground, that as to the condition of the highway, we think there was no evidence to go to the jury that that in any way caused or contributed to the happening of the accident.

With regard to the first ground, the absence of the warning board, it was very strenuously argued by Mr. Stone that that could not have caused or contributed to the happening of the accident. The accident happened about 7 o'clock in the evening of a winter's day and it was said that it was somewhat dark and it was argued that the signboard if there would not have been seen by the deceased or those who were with him in the wagon—there were two other persons, I think, in the wagon, and he was simply a passenger—and it was also argued that as the deceased and those who were in the wagon knew the locality well, they were not entitled to the same consideration as a stranger unacquainted with the locality.

We think that the jury were justified in inferring, if they thought that was upon the facts of the case the proper inference, that the absence of the warning board caused or contributed to the happening of the accident. For all that appears, some of the persons in the vehicle might have seen the warning board, and seeing it have stopped in time to have avoided the accident which unfortunately happened. The fact that they were well acquainted with the locality is only a circumstance to be considered by the jury, and not at all conclusive against the inference that they were led into the position of danger by the absence of the warning board. Just as in the case of the ringing of the bell and the sounding

of the whistle, as has been more than once pointed out by Courts, one of the purposes of this requirement is to warn people, whose attention is called away for the moment, the Court recognizing that people are not always alert, and the Legislature also recognising that casts upon railway companies this duty for the protection of the public.

We think, therefore, as I have said, that the jury might draw from this evidence the conclusion that the absence of the warning board either caused or contributed to the happening of the accident and that with it the accident would not have happened.

The third ground of negligence which the jury found would give us a good deal of difficulty, if the determination of the case depended upon our having to say that there was any evidence—I am speaking for myself in putting it as strongly as that—any reasonable evidence to be submitted to the jury, that there was an absence of compliance with the statutory requirements in that respect.

It is well settled that evidence of persons who were in a situation to hear sounds who testify that they did not hear them, is evidence to go to the jury, and that such a case made by the plaintiff cannot be withdrawn from the jury.

What I understand "situation" to mean is that it means not only situation with regard to locality, but includes conditions which would make it likely that the person who deposes would have heard the sounds if they had been made.

Now the evidence in this case was very unsatisfactory. There was on the part of the appellants a very large body of evidence to shew that the statutory signals were given. Three or four witnesses were called by the respondent, they said they did not hear the whistle sounded or the bell rung at the place where it was the duty of the appellants to have done that. One of the witnesses said that he heard the whistle while the train was approaching, but that it was a whistle for a crossing some distance further away than the crossing at which the accident happened. That witness, however, while he said that his hearing was good and that there was nothing to prevent his having heard the sound, qualified his statement by saying, "unless it was because he was engaged in conversation with the persons with whom he was driving." A similar observation is applicable, I think, to the evidence of the other two persons who were driving with him.

Then a farmer who was living some forty rods distant from the railway track in his house, deposed that he did not hear the sound, but I think the fair effect of his evidence was that he himself thought it well might be that the signals were given and that he was not paying attention or listening.

It may be that there was some evidence which could not be withdrawn from the jury, but the case seems to me a much stronger one, if, as I have said, it depended upon that issue having been properly found in favour of the plaintiff upon which a new trial ought to have been directed, than the case of the *Dublin and Wicklow Rw. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, and in that case one or two, at all events, of the Law Lords expressed the opinion that that case was one in which the verdict of the jury was clearly against the weight of the evidence, and one of them went so far as to say that it was as strong a case for saying that the verdict was against the weight of evidence as he had seen.

It is possible that if the case had turned solely upon the answer to that question, we might have granted a new trial. We express no opinion as to that. It is sufficient to say that upon the first ground there was evidence upon which the jury might properly have found in favour of the respondent, and that being so, the appeal fails and must be dismissed.

The appeal to the Court of Appeal is reported in 15 O. W. R. 694; 1 O. W. N. 637.

The appeal to the Supreme Court of Canada was heard by HON. MR. JUSTICE GIROUARD, HON. SIR LOUIS DAVIES, J., HON. MR. JUSTICE IDINGTON, HON. MR. JUSTICE DUFF, and HON. MR. JUSTICE ANGLIN, on 22nd and 23rd November, 1910.

Fred. Stone, for the appellants. It is submitted that the Divisional Court was right in holding that, with regard to the second ground of negligence found by the jury, there was no evidence to go to the jury that that in any way caused or contributed to the happening of the accident.

As to the third ground of negligence found by the jury—it is also submitted that there was no reasonable evidence to be submitted to the jury that there was an absence of compliance wih the statutory requirements in that respect and that the case is, as pointed out by His Lordship the Chief

Justice of the Common Pleas, a stronger one than *Dublin and Wicklow Rw. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, in which one or two, at all events, of the Law Lords expressed the opinion that that case was one in which the verdict of the jury was clearly against the weight of the evidence and one of them went so far as to say that it was as strong a case for saying that the verdict was against the weight of the evidence as he had seen.

Of the witnesses called by the plaintiff not one of them would testify that the signals were not given and in each case when the witness did not hear the signal he admitted that the signals might have been given without being heard by him on account of his attention being otherwise engaged.

On the other hand the whole body of evidence called by the defendants shewed compliance with the statutory requirements.

It was however, upon the first ground of negligence found by the jury that the judgment of the Court of Appeal as well that of the Divisional Court turned.

It is disputed that the sign post was not erected as required by the statute but was lying on the side of the road in the position where it had been placed by the contractors for the construction of the Chatham, Wallaceburg and Lake Erie Railway Company.

The appellants submit, however, that there is an absence of any direct evidence or of facts from which an inference may reasonably be drawn that the accident was directly occasioned by the absence of the sign post and that therefore the appellants cannot be held liable.

Not only is there an utter lack of evidence to establish that the accident was directly occasioned by the absence of the sign post as in the preceding paragraph pointed out, but the greater proportion of the plaintiff's evidence was to substantiate her case as originally pleaded, that the accident was occasioned by the derrick of the Chatham, Wallaceburg and Lake Erie Railway Company (which was lying on the roadside a short distance south of the appellants' line of railway) frightening the horses attached to the conveyance carrying the deceased and causing them to stop when they arrived upon the appellants' track.

With all respect, therefore, it is submitted that the whole case should have been withdrawn from the jury and a judgment of nonsuit granted and that the learned trial Judge should have held that there was no evidence or facts from

which an inference could reasonably be drawn that the absence of the sign post or the defective grade caused the accident and that there was no evidence to go to the jury on the question of want of signals.

The onus is on the plaintiff to shew, before she can recover, that there was negligence on the part of the appellants and that such negligence caused the injury.

The view of the appellants' railway is quite unobstructed to persons driving on the highway at any point within, at least, one-half a mile northerly from the railway, for a distance of a mile westerly from the scene of the accident.

The appellants submit that it is impossible to say that the absence of this sign post, which could have been seen by the deceased only if they were looking for it and then only after they had reached a point within only a very few feet of the appellants' railway track, could have contributed to the accident or had any effect at all upon the conduct of the parties where the train itself was (under the circumstances above set out) a much more conspicuous evidence of their proximity to the railway track.

"A railway is a warning in itself," *Grand Trunk Rw. Co.* v. *Beckett*, 16 S. C. R. 713.

In Shearman and Redfield on Negligence, 4th edition, vol. 2, sec. 469 cited with approval by McMahon, J., in *Shoebrink* v. *Canada Atlantic Rw. Co.*, 16 O. R. 515, the law is thus stated: "When a human being is injured at a railway crossing there is a reasonable presumption that the warning conveyed by the sound of a bell or whistle would have been beneficial to him; and therefore, in such a case, it should be presumed that his injury was caused by the omission of such signals, if they were omitted. But if without these signals the injured person knew, or by the exercise of ordinary care would have known, of the proximity and approach of the train this presumption is rebutted; and without further evidence connecting the omission of the signals with the injury, the company is not responsible for it on that ground alone."

In any event the circumstances which are established are as consistent with the appellants' denials as with the plaintiff's allegations of negligence of the appellant being the cause of the accident, and the case falls within the rule laid down in *Wakelin* v. *London and South-Western Rw. Co.*, 12 App. Cas. 41.

"Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions which might possibly have occasioned injury to somebody but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury."

Lord Cairns in delivering his judgment in *Metropolitan Rw. Co.* v. *Jackson,* 3 App. Cas. 193, thus deals with the matter: "The negligence must in some way connect itself or be connected by evidence with the accident. It must be, if I might invent an expression, founded upon a phrase in the Civil Law *incuria dans locum injuriæ.*"

The appellants, upon the argument, referred to the following cases: *Davey* v. *London and South-Western Rw. Co.,* 11 Q. B. D. 213, 12 Q. B. D. 70; *Bird* v. *Great Northern Rw. Co.,* 28 L. J. Ex. 3; *Daniel* v. *Metropolitan Rw. Co.,* L. R. 3 C. P. 222; *Hayes* v. *Michigan Central Rw. Co.,* 111 U. S. (4 Davis), 241; *Metropolitan Rw. Co.* v. *Jackson,* 3 App. Cas. 193; *Blake* v. *Canadian Pacific Rw. Co.,* 17 O. R. 177; *Casey* v. *Canadian Pacific Rw. Co.,* 15 O. R. 574; *Danger* v. *London Street Rw. Co.,* 30 O. R. 493; *O'Hearn* v. *Town of Port Arthur,* 4 O. L. R. 209, 2 Can. Ry. Cas. 173; *Follet* v. *Toronto Street Rw. Co.,* 15 A. R. 346.

L. J. Reycraft, for the respondent. The judgment pronounced by the Common Pleas Division of this honourable Court should be affirmed for the following among other reasons:

1. The jury found as facts in answer to questions submitted to them by the learned trial Judge:—

(*a*) That the appellants were guilty of negligence which caused the death of the plaintiff's husband and daughter.

(*b*) That the negligence consisted in: Absence of sign post; that the proper crossing signals were not given; and in defective grade.

(*c*) That the deceased husband and daughter or David Toll could not by the exercise of reasonable care have avoided the collision between the train and the wagon.

As to the appellants being guilty of negligence there is no dispute. It is admitted that the sign post was not erected and maintained as is provided for by section 243 of the Railway Act. It is also admitted that the grade or inclination

of ascent approaching the appellants' right-of-way on the north side of the rail at the crossing where the accident happened was two feet three inches for the first twenty feet of horizontal length in violation of section 242 of the Railway Act.

Where there is conflicting evidence on a question of fact, whatever may be the opinion of the trial Judge as to the value of the evidence, he must leave the consideration of it for the decision of the jury: *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*, 3 App. Cas. 1155.

It has been repeatedly stated by different learned Judges that each case must be looked at from its own surroundings and under the peculiar circumstances attending it. The findings of the jury on this branch were reasonable findings of facts and cannot now be interfered with: *Johnston* v. *Grand Trunk Rw. Co.*, 25 O. L. R. 64, 21 A. R. 408; *Champaigne* v. *Grand Trunk Rw. Co.*, 9 O. L. R. 598, 4 Can. Ry. Cas. 207; *Sims* v. *Grand Trunk Rw. Co.*, 10 O. L. R. 330, 12 O. L. R. 39, 5 Can. Ry. Cas. 82, 352; *Wright* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 114, 5 Can. Ry. Cas. 361.

When a person is injured at a railway crossing there is a reasonable presumption that the warning conveyed by the sound of a bell or whistle or the erection of a sign post or the proper grade approaching the railway track would have been beneficial to him, and therefore in such a case it should be presumed that his injury was caused by the omission to give such signals or the absence of the sign post or the existence of an improper grade: *Shoebrink* v. *Canada Atlantic Rw. Co.*, 16 O. R. 515; *Johnston* v. *Grand Trunk Rw. Co.*, 21 A. R. 408.

It is sufficient evidence to submit to the jury that the deceased were seen approaching the track in a vehicle just before the passing of the train and that immediately after the passing of the train the deceased were found dead and that the statutory signals were not given: *Johnston* v. *Grand Trunk Rw. Co.*, 25 O. R. 64, 21 A. R. 468; *Peart* v. *Grand Trunk Rw. Co.*, 10 A. R. 191. In Privy Council, 10 O. L. R. 753, 5 Can. Ry. Cas. 347.

His Lordship Justice Patterson, in delivering his judgment in the Court of Appeal in *Peart* v. *Grand Trunk Rw. Co.*, 10 A. R. 191, at page 201, says that "if the *Davey Case* was tried here it could not properly be withdrawn from the jury."

The jury can infer from the facts and have a right to make a reasonable inference even though there may not have been precise proof that the negligence of the defendants was the direct cause of the accident: *McArthur* v. *Dominion Cartridge Co.*, 30 S. C. R. 285, [1905] A. C. 72; *Daniel* v. *Metropolitan Rw. Co.*, L. R. 3 C. P. 216, 5 H. L. Cas. 45; *Newell* v. *Canadian Pacific Rw. Co.*, 12 O. L. R. 21, 5 Can. Ry. Cas. 372.

Persons lawfully using the highway are entitled to assume that the statutory signalling will be given by a train crossing the highway, that the sign post will be erected and maintained, and that the lawful grade would exist: *Vallee* v. *Grand Trunk Rw. Co.*, 1 O. L. R. 224, 1 Can. Ry. Cas. 338; *Morrow* v. *Canadian Pacific Rw. Co.*, 21 A. R. 149.

The fact that the deceased persons were to some extent acquainted with the locality, as the learned Judge, Chief Justice of the Divisional Court, said, is only a circumstance to be considered by the jury. See *Peart* v. *Grand Trunk Rw. Co.* (Privy Council), reported in 10 O. L. R. 753, 5 Can. Ry. Cas. 347; *Vallee* v. *Grand Trunk Rw. Co.*, 1 O. L. R. 224, 1 Can. Ry. Cas. 338; *Sims* v. *Grand Trunk Rw. Co.*, 10 O. L. R. 330, 12 O. L. R. 39, 5 Can. Ry. Cas. 82, 352.

The jury found as a fact that the deceased husband and daughter and David Toll could not by the exercising of reasonable care on their part have avoided the accident. The question of contributory negligence is for the jury; *London and Western Trust Company* v. *Lake Erie and Detroit River Rw. Co.*, 12 O. L. R. 28, 5 Can Ry. Cas. 364; *Misener* v. *Wabash Rw. Co.*, 12 O. L. R. 71, 5 Can. Ry. Cas. 356 affirmed *Wabash Rw. Co.* v. *Misener*, 38 S. C. R. 94, 6 Can. Ry. Cas. 70; *Champaigne v. Grand Trunk Rw. Co.*, 9 O. L. R. 598, 4 Can. Ry. Cas. 207; *Peart* v. *Grand Trunk Rw. Co.*, 10 A. R. 191, and 10 O. L. R. 753, 5 Can. Ry. Cas 347; *Vallee* v. *Grand Trunk Rw. Co.*, 1 O. L. R. 224, 1 Can. Ry. Cas. 338; *Wright* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 114, 5 Can. Ry. Cas. 361; *Mackeson* v. *Grand Trunk Rw. Co.*, 16 O. L. R. 516; *Rice* v. *Toronto Rw. Co.*, 22 O. L. R. 446, 12 Can. Ry. Cas. 98; *Jones* v. *Toronto and York Radial Rw. Co.*, 21 O. L. R. 421, 10 Can. Ry. Cas. 361; *Tinsley* v. *Toronto Rw. Co.*, 17 O. L. R. 74, 8 Can. Ry. Cas. 90.

The deceased husband and daughter were passengers only and exercised no control whatever over the vehicle and

horses: *The Bernia,* 12 P. D. 58; *Mills* v. *Armstrong,* 13 App. Cas. 1, referred to in *Flood* v. *Village of London West,* 23 A. R. 530.

The jury are justified in drawing inferences unfavourable to the defendant when the company omitted to call such of their employees as were present at the accident and might throw some light on it: *Wallmann* v. *Canadian Pacilc Rw. Co.,* 16 Man. R. 82, 6 Can. Ry. Cas. 229; *Green* v. *Toronto Rw. Co.,* 26 O. R. 326.

The omission of the company to take any precaution which they are directed by statute to take, would in all cases be evidence of negligence in favour of the person who is injured by the neglect of the company to take the precaution: *Grand Trunk Rw. Co.* v. *Hainer,* 36 S. C. R. 180, 5 Can. Ry. Cas. 59.

HON. MR. JUSTICE GIROUARD (23rd December, 1910):—I think that this appeal should be dismissed for the reasons stated in the Court below.

HON. SIR LOUIS DAVIES, J. (*dissenting*):—The judgment appealed from is based on the negligence found by the jury of the absence of the statutory signboard required to be maintained by the railway company at the level crossing where the accident occurred. I think the weight of evidence is against the jury's finding of the absence of statutory signals, and that the judgment, if sustained at all, must be so on the finding of the absence of the signboard on which the Appeal Court relied.

Owing to the death of all the parties in the waggon, and the darkness which prevented anyone else seeing what occurred, the causal connection between that negligence and the death of the parties in the waggon is a matter of pure inference only.

I have read the evidence carefully through and if the only reasonable inference to be drawn from the facts was that the deaths of the unfortunate parties were caused by the statutory neglect of the defendants in not having maintained these signboards, I would not quarrel with the judgment. But it appears to me that it would be just as reasonable to infer from the proved facts either that the deceased parties, seeing the train approaching as they could hardly have helped doing, attempted to cross in front of it, but through a miscalculation of time and distance on the part of the driver, failed, and were killed, or that at the moment the horses reached the

railway track they baulked at a large derrick improperly placed by the workmen of another company originally joined in the action as a party defendant, along and indeed partly upon the highway, and stopped, with the result that both horses and the parties in the carriage were all killed by the rapidly approaching express. The evidence does not enable anyone to determine which one of several possible causes of the accident was the real one. One inference or conjecture is as reasonable as the other. In fact the baulking of the horses at the derrick when they were on the railway crossing was the one put forward by plaintiff and her witnesses during the early part of the trial. A good deal of evidence was given in support of it, but the trial Judge dismissed the action as against the parties defendant who had improperly placed and kept the derrick where it was and allowed the case to go to the jury as against the appellant railway company. Whether he was right in doing so is not for us to decide. The evidence shewing the derrick to have been a probable cause of the accident remained, and, of course, went to the jury in the trial against the railway company. I am no more able on this evidence than I think the jury was, to decide which inference as to the cause of the accident is most probably the true one or that one is more probable than another. The evidence is insufficient to enable anyone to do more than guess.

In the absence of any direct proof of the negligence charged causing an accident, an inference, if a fair one, can be made from all the proved facts that it was caused by such negligence, but it must be such an inference as excludes another inference equally fair not involving defendant's liability. If it does not so exclude any such other inference, it remains pure conjecture which is not, of course, sufficient. To attribute the deaths of the parties in this case to the absence of the signboard might be supported if that attribution was a fair inference from the proved facts, and the only fair inference, but when there are other inferences equally reasonable which can be drawn, not involving defendants' liability, the cause of death passes away into the region of conjecture only.

McArthur's Case, 1905 A. C., p. 72; *Wakelin's Case,* 12 A. C. 41; and *Hainer's Case,* 36 S. C. R. 180, are good illustrations of these points.

I would allow the appeal and dismiss the action with costs.

HON. MR. JUSTICE IDINGTON:—This is one of these somewhat numerous cases in which all those participating in the attempted crossing of a railway track were killed, and hence no explanation can be given by eye-witnesses of what really caused the accident.

The jury as in all such cases had to draw inferences from the proven attendant conditions and circumstances, and where the evidence relative thereto, or part thereof, conflicted, to decide which set of witnesses spoke the truth on the point.

There never was such a case where it was not urged with more or less plausibility that any conclusion deducible from the conditions and circumstances thus established was met by alternative suggestions, alleged to be equally possible or nearly so, and the whole matter thus reduced to the field of mere conjecture.

The acceptance of any of such alternative theories would generally speaking have rendered any recovery impossible. Yet such has not been the result.

The Courts and juries have generally assumed those thus fatally injured to have acted as reasonable human beings.

Starting with such presumption there is generally found some reason, in the neglect of the duties of the defendant as a probable cause, for such persons not having exercised that reason and common sense possessed by them.

Here we have people who knew the road, but by reason of the construction works going on alongside the beaten highway, were not so likely to readily observe exactly where they were, and especially so in face of the removal of the sign post they had previously had for their accustomed guide at the railway crossing. Let us also add to that the weather conditions proven to have prevailed.

Can we, under the circumstances, impute contributory negligence, in face of the finding of the jury to the contrary?

Assume, as found, there was none, and observe that their carriage or waggon was struck at right angles on the track attempted to be crossed. The jury find it may have been impeded by a grade not conformable to the statutory requirements, that the crossing sign post required by statute and usually to be seen, was, and had been, removed for some time, and that the signals of ringing of bell and blowing of whistle had been disregarded.

The learned trial Judge refused to nonsuit.

The Divisional Court of three Judges, on appeal to it, unanimously refused to interfere, and on appeal to the Court of Appeal for Ontario, that Court of five Judges with only one dissenting, refused to interfere.

We are asked to reverse all this because some ingenious persons have suggested one thing and some another of which the most plausible possibility suggests the ordinary farm horses, not shewn to be of bad habits, may have boggled at a derrick somewhere near at hand, though not a particle of evidence (such as might have existed on the road, or tracks to indicate such a thing) or otherwise shewn to support the suggestion, if having foundation.

I cannot do so. I think the case of *Peart* v. *Grand Trunk Rw. Co.*, 10 A. R. 191, and in the Privy Council, reported in 10 O. L. R. 753, is most instructive, both as regards similarity of facts and circumstances, and how at this stage there should be some respect paid to the mass of judicial opinion to be overthrown by a reversal, such as asked here.

I think the appeal should be dismissed with costs.

HON. MR. JUSTICE DUFF:—I think there was evidence to support the finding of the jury that one of the statutory signals (the sounding of the whistle), was not given, and that this was the cause of the collision in which plaintiff's husband and daughter lost their lives.

There was a flag station situated about ten rods west of the crossing at which the train had usually to stop for trains advancing from the west. The practice was to give warning of the approach of the train to the station by a single blast of the whistle; and to give the statutory warning of the approach to the crossing by sounding four blasts at a point considerably nearer the highway. One witness when on the highway half a mile from the crossing heard a single blast proceeding as he thought from a point about a mile from the road. He heard no other signal from the train although he saw the train approaching and cross the highway. He says there was no reason why he should not have heard the whistle if it had sounded except that he was engaged in talking and not directing his attention to the train. This he says would equally apply to the whistle he did hear.

Another witness who at the time the train passed was at the station heard a single blast of the whistle, but cannot fix the place where it was blown. He says his attention was not specially directed to the train. Three other witnesses

were called, all of whom said they heard no whistle whatever. One of them (who was in a house a short distance from the line) heard nothing except the reversing of the engine after the accident. The other two who were driving with the witness first mentioned said they had good hearing and knew no reason why they should not have heard the signals if they had been given. The sum of the evidence appears to be that all persons within hearing distance except the station agent were called, and while three of them heard no signals whatever, the remaining two heard the station signal, but did not hear any crossing signal, and that while their attention was not directed to the train, there appears to have been no reason why they should have heard the earlier and missed the later, if the later was given. I think the jury might reasonably have thought that these two witnesses were so circumstanced as to hear the whistle if it had been sounded, and consequently the finding negativing that cannot be successfully impugned as without support. I do not think, either, that the finding can be got rid of as against the weight of evidence. Especially in view of the fact that the station agent (who was on the station platform when the train passed) was not called at the trial. I do not think we can hold that the jury was bound to accept the evidence of the company's employees as decisive upon the point in dispute.

The jury having reached the conclusion that the statutory warning of the approach of the train to the highway was not given might properly think the most probable explanation in the circumstances of the presence of the waggon on the track was that the absence of warning led the driver into error respecting the distance to be traversed by the train before reaching the crossing or indeed into thinking the train would stop at the station. It is not necessary that the minds of the jury should be carried further than that.

"In the affairs of life," said Lord Loreburn in a recent case, "where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff . . . must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man may act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude in fact that this man fell into the water by accident and so was drowned then the case is proved."

Nothing, of course, is better settled; but it is perhaps advisable to emphasise the circumstance that grounds upon which a jury may proceed need not be such as will stand the test of a rigorous application of the canons of scientific inference. In the circumstances proved might a reasonable man conclude that the defendants' failure of duty was the cause of the accident? That is the question.

Nobody suggested that given the absence of the signal there is anything in itself unlikely in either of the hypothesis suggested. Is there any other equally probable explanation suggested by the evidence? We may eliminate a rash attempt to hurry across the front of a near approaching train. The evidence is that Toll was a sober man and an exceptionally careful driver. Then there is the suggestion that the deceased persons reached the track in ample time to cross but that the horses baulked at the sight of a derrick lying on the side of the road and that this delay brought about the disaster. The suggestion must, I think, be rejected for this reason: The position of the derrick is not fixed with any certainty. The utmost that can be said is that it was observable from the track and that on some occasions it has caused horses to swerve when passing over the rails in daylight. There was no evidence requiring the jury to take the view and they may very well have rejected the view that it would be sufficiently distinguishable to affect horses crossing the track at night. It had been exposed to the weather for six months, was unpainted, and probably at that season of the year covered with snow. It was for the jury to weigh the probability of such an object so affecting the horses as to make it impossible for the passengers to extricate themselves in time to escape the train—assuming as the jury did doubtless assume and as they were justified on the evidence in assuming—that they were proceeding carefully and prudently past a dangerous place. This explanation indeed involves the assumption of an attempt by the driver to cross the line without leaving himself sufficient margin of time to get his horses under control in the event of any unforeseen misadventure such as that suggested. The jury were entitled to think and probably did think such an assumption not consistent with the character of the driver as exhibited by the testimony. The jury in a word may very well have thought that assuming careful driving (and rejecting the hypothesis of the driver being misled by the absence of the statutory signals), there was no likelihood that the object

mentioned could have had any such effect upon the horses as to make the driver powerless to get away from the track in sufficient time to avoid a collision. It was quite within their province to take this view and having done so they would naturally regard the proved neglect of the company in the matter of the statutory signals as accounting for the accident.

HON. MR. JUSTICE ANGLIN (*dissenting*):—The jury in this case found the appellants liable for the death of the plaintiff's husband and daughter, who were killed at a highway crossing of the railway, on the following grounds:—

1. Absence of the warning signboard required by the Railway Act at highway crossings.

2. Excessive grade in the highway approaching the crossing.

3. Failure to give statutory signals.

In the provincial Courts the verdict for the plaintiff has been upheld, but on the first ground only. In the judgment of the Court of Appeal the other grounds are not noticed. In the Divisional Court, the finding of absence of statutory signals seems to have been deemed so greatly against the weight of evidence that, had the verdict for the plaintiff depended upon it, a new trial must have been ordered; and it was held that there was no evidence upon which the jury could find that the excessive grade "in any way caused or contributed to the happening of the accident."

With great respect I think this latter remark might, with at least equal justice, be applied to the absence of the sign post. No one saw the unfortunate occurrence. The speed at which the waggon was driven is not known. It is, and must remain, purely a matter of conjecture whether the driver and the occupants of the waggon were unaware of the proximity of the crossing until they were actually upon it, or whether they drove up to and upon it with full knowledge of its existence and proximity, and relying upon effecting a safe crossing, their expectation being disappointed either because they had miscalculated the distance or speed of the train, or because the horses failed them at a critical moment. Indeed, unless the unfortunate persons who were killed were peculiarly unobservant (the evidence is that they were particularly careful persons and very well acquainted with the locality) it is difficult to understand how the approaching train could have escaped their attention; and if they saw it, the inference would be irresistible that they must have been

aware of their proximity to the crossing—the very knowledge which the signboard was meant to give.

The evidence of the plaintiff and her witnesses who were questioned upon the point is, that, knowing them as they did, they cannot understand how it could be possible that the deceased Crouch and Toll could have come upon the crossing unawares, or have failed to notice the approaching train. The plaintiff's witnesses also depose to the presence of a large derrick lying about twenty feet south of the track on one side of the highway, but extending out to the travelled portion of the road. They say that horses coming to the crossing from the north would first see this derrick when at the top of the crossing, *i.e.*, upon the rails, when it would loom up almost directly in front of them as an apparent obstacle in the highway, presenting a surface about four feet square. This object had frightened many horses, including that of the plaintiff herself. Several of the witnesses who were accustomed to driving horses say that it would very possibly cause them to baulk and stand still, and the plaintiff herself expressed the opinion that the accident in question was probably due to this cause. The admissibility and evidentiary value of this latter opinion may be questionable, but it must not be forgotten that it was offered by the plaintiff as part of her case, the Electric Railway Company who was said to be responsible for the presence of the derrick being then also defendants. Upon the evidence, I rather incline to think that the proper conclusion would be that it is probable that the presence of the derrick caused the accident rather than any of the negligence found against the appellants. But it suffices that the evidence is equally consistent with the one view or the other. If so, to draw either conclusion, a jury must indulge in pure and unwarrantable conjecture.

I am, therefore, with the utmost respect, of the opinion that there was no evidence to go to the jury upon which they could reasonably conclude that any of the grounds of negligence found against the defendants—or all of them combined, assuming them all to exist—really contributed to the killing of Samuel Crouch and his daughter.

If the travellers knew of the proximity of the crossing—and it must be a pure guess to say that they did not, when it is proved that they were careful people, familiar with the locality, and there is such a body of evidence of another cause sufficiently accounting for the accident—the absence

of the warning signboard has no connection with the occurrence.

With regard to the finding that the excessive grade was a cause, the argument for the respondents is that as the engine struck the waggon about the point where the seat was, an extra second or two would have taken it clear of the tracks. The excessive grade, it is urged, caused the loss of at least that second or two. But if the risk of crossing before a rapidly advancing train, with only a second or two to spare, was knowingly taken, the conclusion of contributory negligence would seem to be inevitable. The jury have negatived this, and without assuming it, or assuming that the approaching of the train was not known to those in the waggon—which I find it very difficult to conceive in the circumstances of this case—it is impossible to support the finding that the defective grade materially contributed to the accident.

I agree in the view of the learned Chief Justice of the Common Pleas, that the finding that the statutory signals were not given is so greatly against the weight of evidence that it probably could not be sustained. But assuming that these signals were not given, if the deceased persons knew of the approach of the train before going upon the crossing, the lack of signals was not the cause of their being there when run down. The evidence for the plaintiff renders it almost impossible to suppose that they did not know that they were approaching the railway crossing. If they looked at all, they could not have failed to see the train, which was brightly lighted, and would have been clearly visible when nearly a mile up the track from any point on the highway within at least a quarter of a mile of the crossing. Neither can it be found, without guessing, that the persons killed were led, by failure to give the crossing signal, to expect that the train would stop at the nearby station before crossing the highway.

Whatever inferences might have been justifiable had the position of the derrick not afforded a sufficient explanation of the unfortunate occurrence, I am, with respect, of the opinion that to attribute it to the negligence of the defendants upon the evidence before us involves indulging in unjustifiable conjecture.

While two breaches of statutory duty by the defendants has undoubtedly been established, it must be the merest guess that either had any causal connection with the deaths in respect of which the plaintiff claims damages.

In my opinion the appeal should be allowed and this action dismissed.

HON. SIR JOHN BOYD, C. JUNE 7TH, 1912.

CANADIAN GAS POWER & LAUNCHES v. ORR BROS.

3 O. W. N. 1362.

Sale of Goods—Contract—Implied Warranty—Intention of Parties—Skill and Judgment of Sellers—Rescission of Contract—Purchaser's Right to Lien for Amount Paid—Right to Enforce Lien by Sale—Possession of Goods—Costs.

An action to recover possession of an engine and other articles and to recover damages for their detention.

A previous action between the same parties was tried by HON. MR. JUSTICE CLUTE, whose judgment was affirmed by the Court of Appeal, 19 O. W. R. 235, 23 O. L. R. 616, 2 O. W. N. 1070, and by the Supreme Court of Canada, O. W. R. ; S. C. R.

The present action was tried before HON. SIR JOHN BOYD, C., without a jury.

G. H. Watson, K.C., for the plaintiffs.

R. McKay, K.C., for the defendants.

HON. SIR JOHN BOYD, C.:—The sale of the engine, etc., was rescinded by the Court because of the default of the vendors. At the date of the action to enforce the contract, part of the price had been paid by the purchaser to the extent of $500, and it was found by Mr. Justice Clute, that the vendors had made default and had no *locus standi* to sue for the balance of the price, and the action was dismissed. Judgment was given for the return of the purchase money already paid and also for damages and costs. This judgment has been affirmed after two successive appeals to the higher Courts. At the trial the Judge said that the engine should be returned; but, as he tells me, this was on the supposition that the judgment against the vendors would be paid. The vendors had pending action and before the trial and judgment gone into liquidation, but the liquidator, *quoad* this contract, stands in the shoes of the insolvents, the vendors.

Had the learned trial Judge then been asked to frame his judgment so that the re-delivery of the engine should be

conditional on the repayment of the $500 paid as part of the price, he would (as he informs me), have so ordered. This is based upon the assumption that the purchaser had a lien for the purchase-money paid, the contract having gone off through no default of the purchaser; which is, I think, well settled law even in the case of chattels, and it is not displaced or disturbed by the mere recovery of judgment: see in addition to the cases cited *Swanston* v. *Clay*, 3 DeG. J. & S. 558. In the case of *Scrivener* v. *Great Northern Rw. Co.*, 19 W. R. 388, the Judge says that the lien may be displaced by proving in bankruptcy after judgment has been recovered, but his remark applies to cases where the creditor has come in and proved, not disclosing the lien. There is no such complication in this case, and the mere recovery of judgment does not extinguish the lien. The defendant is still entitled to hold his lien and to have it realized by sale of the property after due notice.

That relief may be given now, to end further applications to the Court: this relief should have been sought and would have been provided for by Mr. Justice Clute.

This new action is misconceived; but, as no objection was taken to the method in the defence, and as relief is not given to the purchaser, I think the best course is to give no costs of this action to either party.