BRITTON, J. (after setting out the facts and referring to portions of the evidence):—In my opinion, there should have been a railing as a protection against accidents of this kind. . . .

This case comes within the line of decisions fixing liability for injury to children where inducements have been held out to them to go in the way of danger. . . . There are duties to infants where a different degree of care is required than is due to adults: Beven on Negligence, Can ed., p. 165. The boulevard or grassy spot between the cement sidewalk and the retaining wall is a tempting place for a child of tender years, unattended. In walking up the easy incline on Hunter street, a child would, quite naturally and without motive or reason other than childish playfulness, go to the wall and look over, and might, as in this case the child did, walk backwards, not appreciating the danger.

It is against this thoughtless action of children lawfully using the street that care should be taken, and, as it was not taken by having a protecting fence or barrier, there was negligence.

In this case there was that which, had the child been fourteen year of age or over and of the ordinary capacity and intelligence of children of that age, would have precluded recovery for his death. In the present case I am of opinion that the child's conduct does not bar the plaintiff's right to recover.

The work done, of which the erection of the retaining wall was a part, was done by the defendants the railway company, who were and are subject to the Railway Act of Canada. The Act then in force was 51 Vict. ch. 29, sec. 11 (h) of which gave the power to the Railway Committee of the Privy Council to determine upon applications for the construction of railways upon, along, and across highways. The power was exercised in this case, and the Committee approved generally of the plan and profile of the work.

The work was authorised and done under an agreement between the defendants, authenticated by a by-law of the city passed on the 29th October, 1894. . . . Counsel for the city contends that, if there is any liability, it should be borne by the railway company under sec. 7 of the by-law agreement—"The company shall at all times indemnify and save harmless the city corporation from and against all claims for compensation, damages, or costs by reason or on account of the construction of the railway."

I am of opinion that the present claim is not a claim "on account of the construction of the railway," within the meaning of the agreement. The city have the sole jurisdiction and control over that part of the street where the grade is not lowered, and of all the street, subject to the right of the railway company to their tracks and their use of the street for running trains. Holden v.