

MEREDITH, C.J.C.P.

SEPTEMBER 22ND, 1910.

OATMAN v. GRAND TRUNK R. W. CO.

Railway—Cattle-pass—Agreement with Land-owner—Farm Severed by Railway—Culvert—Water—Drainage—Substitution of Embankment—Easement—Prescription—Dominion Railway Act, sec. 257—Board of Railway Commissioners—Costs.

The plaintiff claimed to be entitled to a cattle-pass under the line of the defendants' railway, which ran through his farm, and his action was brought to recover damages for the filling of it in and substituting for it an embankment with a pipe through it to carry away the water referred to in the judgment, and for a mandatory order requiring the defendants to restore it to its former condition.

C. Millar and J. Carruthers, for the plaintiff.

D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

MEREDITH, C.J.:—The land for the railway was purchased by the predecessors in title of the defendants the Great Western Railway Co., from a predecessor in title of the plaintiff, Thomas Bagot Ronson, and the conveyance of it, which is dated the 6th December, 1870, contains a provision in these words: "The parties of the second part (i.e., the railway company) will provide one railway crossing at grade for farming purposes over the land hereby conveyed for the use of the party of the first part." And a further provision in these words: "It is understood that the parties of the second part will not interfere with the flow of the waters of a certain drain upon the said lot across which the said railway will pass."

The railway was constructed about the year 1871, and the grade crossing mentioned in the conveyance was provided and has ever since been maintained by the railway companies and used by the owners and occupiers of the farm.

For the purposes of drainage across the railway, wooden culverts were built, leaving a space of about eight feet wide and of varying heights depending upon the grade of the railway.

An exception was made in the case of the culvert provided for Ronson's farm. Ronson arranged with the engineer of the railway company that his culvert should be built of stone, the stone being supplied and laid by Ronson, and the company paying him