The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Angus MacMurchy, K.C., and W. N. Tilley, K.C., for the appellants.

G. H. Watson, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the respondent was the owner of land on the west side of Albany avenue, in the city of Toronto, and sued to recover damages for the alleged wrongful interference by the appellants with the grade of the street; for closing up that part of it lying to the north of the respondent's land; and for injury to his house, caused, as he alleged, by the additional vibration occasioned by the running of the trains on tracks which had been elevated; or, in the alternative, for a mandatory order requiring the appellants forthwith to give the necessary notices and to take proceedings under the Railway Act to provide compensation to the respondent, and for payment to him for the injury and loss which he had sustained.

The acts of which the respondent complained were done in the course of elevating the tracks of the railway between Davenport road and Summerhill avenue, and for the purpose of carrying out a plan which had been adopted for getting rid of certain of the grade crossings in that part of the city.

The appellants justified these acts as having been lawfully done, under the authority of the Railway Act (Canada) and of an order made by the Board of Railway Commissioners of Canada; and they contended that, if the respondent's property had been injuriously affected by what had been done, he must seek compensation under the Act.

The Chief Justice referred to and reviewed at some length the decision of the Privy Council in Corporation of Parkdale v. West (1887), 12 App. Cas. 602; and then referred to changes in the legislation since that decision—in 1888, by 51 Vict. ch. 29; in 1903, by 3 Edw. VII. ch. 58; in 1906, by R.S.C. 1906 ch. 37; and in 1909, by 8 & 9 Edw. VII. ch. 32. By the last-named Act, secs. 237 and 238 of R.S.C. 1906 ch. 37 were repealed and new sections bearing the same numbers substituted, and new sections numbered 238A and 239A were added; these provisions are those which affect the question for decision.

Section 238, the Chief Justice said, plainly deals with proceedings in invitum of the railway company, and was passed to facilitate the elimination or diminishing of grade crossings; and it was in furtherance of this object that the Board of Railway Commissioners was empowered to act upon its own motion, as it is provid-