

the decisions, I do not think I ought to prevent the appellants from testing their right to appeal, as they undertake to do, under Rule 1 of the Supreme Court, leaving that Court to decide the point involved.

Under sec. 208 of the Railway Act (R. S. C. ch. 37), an appeal from the arbitrators may be taken to a Superior Court in Ontario. The appellants had no choice but to appeal to the Supreme Court of Ontario, and, having chosen a Divisional Court of the Appellate Division, are, therefore, saved from the difficulty pointed out in *Birely v. Toronto Hamilton & Buffalo R.W. Co.* (1898), 25 A. R. 88; *Ottawa Electric R.W. Co. v. Brennan* (1901), 31 S. C. R. 311; *James Bay R.W. Co. v. Armstrong* (1907), 38 S. C. R. 511; C. R. [1909] A. C. 285.

But none of these cases seem to me to involve any negative of the proposition that an appeal lies, under sec. 36 of the present Supreme Court Act, to that Court, from the highest Court of final resort, in any province, where such Court is either a Court of Appeal, or, if of original jurisdiction, is a Superior Court.

The right to revise, if necessary, the decision of the statutory Appellate Court, should exist, in view of the extensive power given to it "to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction."

I therefore approve of the security.

---

HON. MR. JUSTICE MIDDLETON.      NOVEMBER 17TH, 1913.

COOK v. GRAND TRUNK R.W. CO.

5 O. W. N. 347.

*Negligence—Railway — Inquiry to and Death of Brakesman—Improperly Going between Cars while in Motion to Uncouple — Held Accident Direct Result of Deceased's Misconduct — Action Dismissed.*

Action to recover damages under Lord Campbell's Act, tried at Hamilton on the 27th October, 1913.

J. L. Counsell, for plaintiff.

D. L. McCarthy, K.C., for defendants.

HON. MR. JUSTICE MIDDLETON:—The deceased was a brakesman employed upon the railway. A train was being